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COURT OF CHANCERY, AND SUPREME AND PREROGATIVE
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(11 R. I. 347)

LANSING et al. v. CAMPBELL. (No. 374.)

(Supreme Court of Rhode Island. June 12, 1917. On Motion for Rehearing, June 28, 1917.)

MORTGAGES §151(3) — **PRIORITY OF LIEN** — **MECHANIC'S LIEN.**

Mechanics' liens for material are superior to a mortgage on a building executed after the excavation of the cellar had been started, where the building was constructed according to the original plans, although the property changed ownership between the cellar excavation and construction of the building proper.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 332-336.]

Appeal from Superior Court, Kent County; John W. Sweeney, Judge.

Mechanics' lien petition by George D. Lansing and others against Lena Campbell. From a decree establishing a prior mortgage lien, petitioners appeal. Decree reversed.

Gardner, Pirce & Thornley, of Providence (Charles R. Haslam, of Providence, of counsel), for appellants. Mumford, Huddy & Emerson, George H. Huddy, Jr., and E. Butler Moulton, all of Providence, for appellee.

PER CURIAM. The justice before whom the above-entitled lien petition was tried in the superior court has found as a matter of fact in his decree entered on the 10th day of November, 1916, that the petitioners did at the time of foreclosure of the mortgage held by George M. Hamlen have a mechanics' lien upon the premises described in the petition to the extent of \$224.49 for materials furnished for the construction of a house on said premises. The decree also finds that George M. Hamlen, at the time of foreclosing the mortgage, was not chargeable with notice of said mechanics' lien, and that the mortgage owned by Hamlen constitutes a prior lien or claim against the property described and takes precedence of the petitioners' claim. From this decree the petitioners have taken their appeal and duly prosecuted it to this court. No appeal was taken by any other party.

The petitioners' reasons of appeal simply raise the question of priority as between the mechanic's lien and the mortgage lien, and that is the only question now before this court.

The trial judge found as a matter of fact that the excavation of the cellar, upon which the house was afterwards built, was made in September, 1912, while the property was owned by C. E. Barney Company; that the stone work was not done until the following spring; and there was evidence from which he could so find, and no evidence to the contrary was introduced. It further appears that after the excavation for the cellar was made, to wit, on the 15th day of October, 1912, the C. E. Barney Company sold the lot to Lena Campbell; that she executed a mortgage thereon on the same day to C. Edward Barney; that on November 4, 1912, the said mortgage was transferred to George M. Hamlen; and that said deed and mortgage were recorded November 6, 1912. It thus appears that the mortgage lien originated subsequent to the excavation of the cellar which was the beginning of the work of construction which was afterward carried out in the building of the house with materials furnished by the petitioner. Gen. Laws R. I. 1909, c. 257, § 1.

The case is ruled by the case of *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352. The excavation of the cellar was "constructive notice to all persons who may purchase the property, or may acquire any interest in it, that liens for labor and materials to be used in the construction of the building may attach and become entitled to priority." *Bassett v. Swarts*, supra, 17 R. I. page 218, 21 Atl. page 353.

There was no evidence of any abandonment of the work of construction; there was simply a delay in the final completion of the foundation after the excavation of the cellar had been made; it is a fair inference from the testimony that the C. E. Barney Company, in 1912-13, through C. Edward Barney as its agent, was engaged in the sale and development of lots upon the plat in Norwood, Warwick, R. I., entitled "Commonwealth Plateau," and that the cellar which was excavated on the lot herein referred to, before it was sold to Lena Campbell, was one of a number of such operations upon said plat then being carried on with a view to sale of lots and building houses thereon for purchasers; for it appears that the first delivery of materials for the building of the house on this lot was made January 16, 1913, by the

petitioners at the order of C. Edward Barney who was acting as agent for the owner of the lot in building the house thereon after the sale of the lot to her, and that delivery of materials for use on this lot by the petitioners upon Barney's order was continued through January, February, March, and April, 1913, and up to May 2, 1913, and that notice of petitioners' lien claims was duly filed and notice given May 14 or 15, 1913. It appears therefore that there was no change of plan as to construction of the house upon the cellar which was excavated in September, 1912, and no abandonment of the work which was commenced by said excavation.

We are of the opinion that the trial judge was clearly in error, under the case of *Bassett v. Swarts*, supra, in his decree that George M. Hamlen was not chargeable with notice at the time of purchasing said mortgage, and in decreeing priority to the mortgage lien.

The petitioners' appeal is sustained; the decree of the superior court appealed from, so far as it decrees priority to the mortgage lien and awards costs to the said Fred M. Hamlen, executor, is reversed; the petitioners are entitled to have a decree in their favor for the sum of \$224.49, as found by the decree, with interest from May 15, 1913, and for costs; and also that their lien is entitled to priority.

A decree in accordance herewith may be submitted for our approval on Monday, June 18, 1917, at 10 o'clock in the forenoon.

On Motion for Rehearing.

Upon motion of intervener, Fred M. Hamlen, for rehearing. Counsel in this motion seems to intimate that this court has overlooked or ignored, in its rescript formerly filed, the case of *Chace v. Pidge*, 21 R. I. 70, 41 Atl. 1015, and that we have virtually overruled that case. That case was neither overlooked nor overruled. It does not concern any question properly raised in the case at bar. The case of *Chace v. Pidge*, supra, simply relates to the question whether the notice of lien should not have named a party respondent, who had become the owner of the land after the time when the lienor furnished the materials for which the lien was claimed, and before the lien proceedings were commenced. There was no question of priority of lien as between lienor and mortgagee, but simply a question whether proper notice had been given, under our statute. We are of the opinion that the case of *Chace v. Pidge* has no bearing upon the question here involved.

All of the matters now stated in the motion were carefully considered by the court before its rescript herein was prepared and filed. We are still of the opinion that the case of *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352, governs the case at bar. We call

the attention of counsel to the cases cited therein, and particularly to *American Fire Ins. Co. v. Pringle*, 2 Serg. & R. (Pa.) 138, *Nelson v. Iowa Eastern R. Co.*, 44 Iowa, 71, and *Pennock v. Hoover*, 5 Rawle (Pa.) 291. In the last two cases it appears that the excavation for the foundation is held to be the commencement of the building; and the rule to be deduced from the first two cases is that, although such commencement be made by a former owner and the building carried out by a subsequent purchaser, nevertheless the lienors for work done or materials furnished to the purchaser after the date of the mortgage are entitled to priority, where the mortgage is given after the commencement of the building. See, also, *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Manhattan Life Ins. Co. v. Paulison*, 28 N. J. Eq. 304.

We find no reason for granting a rehearing in this case, and the intervener's motion for such rehearing is denied. The parties may be heard on the form of decree to be ordered by this court on Monday, July 2, 1917, at 10 o'clock in the forenoon.

(40 R. I. 338)

TABER v. TALCOTT et al. (No. 398.)

(Supreme Court of Rhode Island. June 13, 1917.)

1. WILLS §629—CONSTRUCTION IN FAVOR OF VESTING OF ESTATE—TESTATOR'S INTENTION.

The construction in favor of the vesting of estates immediately upon the testator's death, and which does not regard the remainder as being contingent, in the absence of a clear intent on testator's part to that effect, is subordinate to the fundamental principle of construction that the written expression of the testator, taken in its natural sense and use and applied to existing facts, must control.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1461, 1462.]

2. WILLS §524(6)—CONSTRUCTION—VESTED OR CONTINGENT REMAINDER.

A will directing trustees to convey property in fee to "heirs" upon death of the survivor of children, or upon the death of the wife in case she survived all of the children, after providing for payment of income to widow and children during their lives, held to give contingent equitable interests in fee to those persons answering description of heirs at the time of death of the last survivor of wife and children if he had just then died intestate and without issue, and not to grant vested equitable interests in fee to persons who answered description of heirs at testator's death.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1122.]

3. WILLS §687(6)—TRUST ESTATE—DIVISION OF PROPERTY.

Where a will provided for no difference in the disposition of real and personal trust property on termination of trust estate, it was the trustee's duty to divide personality among the persons entitled in accordance with the statute of descent and distribution.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1643.]

4. EVIDENCE ~~§~~80(1) — PRESUMPTION — FOREIGN LAW.

In the absence of evidence to the contrary, it will be assumed that there is no difference between foreign and domestic law upon the subject of descent and distribution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101.]

Certified from Superior Court, Providence and Bristol Counties.

Bill in equity by William E. Taber, sole trustee under the will of Hezekiah Allen, against Charles H. Talcott and others. Certified from superior court in accordance with Gen. Laws, c. 289, § 35, submitting questions to Supreme Court. Questions answered and decree directed.

Edward A. Stockwell, of Providence, for complainant Gardner, Pirce & Thornley and Murdock & Tillinghast, all of Providence (William W. Moss and John A. Tillinghast, both of Providence, of counsel), for respondents Talcott and others. Swan & Keeney, of Providence (Francis B. Keeney, of Providence, of counsel), for respondents Ida J. Clark, and William D., Sarah L., C. Osgood, and C. Elnora Swan.

STEARNS, J. This is a bill in equity brought by William E. Taber, sole trustee under the will of Hezekiah Allen, praying for a construction of the will and other relief incident to a distribution of the trust estate created thereunder, and a discharge of the trustee. By a decree of the superior court the cause was certified to this court, in accordance with chapter 289, § 35, Gen. Laws R. I., and the following questions are submitted to this court:

"(1) Did the said will of Hezekiah Allen give to the persons who answered the description of his heirs at law at his death vested equitable interests in fee in the trust property, or did it give contingent or executory equitable interests in fee to those persons who would answer the description of his heirs at law at the time of the death of the last survivor of his wife and children, if he had just then died intestate and without issue?

"(2) To what class or classes of persons and in what proportions, was it the duty of the trustee under said will on May 8, 1912, to convey the part of the personal property in his possession that represented the personal property that was left by said Hezekiah Allen to the trustees under his will?

"(3) To what class or classes of persons, and in what proportions, was it the duty of said trustee on said date to convey the part of the personal property in his possession that represented the proceeds of the above-mentioned sales of real estate?

"(4) To what class or classes of persons was it the duty of said trustee on said date to convey the said wood lot in the town of Enfield, Conn.?"

The first question is the principal one, and the others are only subsidiary.

Hezekiah Allen, a resident of Cranston, R. I., died in 1872 leaving surviving a widow, Emeline Allen, and three children, Hezekiah Allen, Emily H. Allen, and Elvira E. Allen, five brothers and sisters, and the descend-

ants of two deceased brothers. The widow died intestate in 1879, and each of the children died subsequently, intestate and without issue; Elvira E. Allen, the survivor of the children died May 8, 1912.

The respondents, Charles H. Talcott et al., are the persons, or in some cases the successors in interest of the persons, who, being descendants of brothers and sisters of Hezekiah Allen, answered the description of his heirs at law on May 8, 1912, and as such claim that the equitable estate in remainder to the heirs at law was contingent and did not become vested until the death of the last surviving child, and that they are entitled to a conveyance of all the trust property as it existed at that date. The opposing respondents, C. Osgood Swan et al., claim solely as successors in interest to the three children of Hezekiah Allen, and assert that an equitable remainder in fee vested in these three children at his death. They are mainly the heirs and next of kin of Elvira E. Allen on her mother's side.

The second clause of the will is as follows:

"Second, I give, devise and bequeath all the rest, residue and remainder of my estate both real and personal of which I shall die seised and possessed and wherever the same may be situate, to Henry J. Spooner, John D. Thurston and Jesse P. Eddy, all of the city of Providence. To have and to hold the same to them and to the survivors and survivor of them and to their successors and assigns. In special trust nevertheless, for the purposes following. The said trustees and their successors in said trust shall receive the rents, profits, issues and income of the property vested in them as aforesaid and therewith make all necessary repairs and improvements and pay all taxes and other necessary charges and expenses in and about the same and after all such payments and reservations are deducted, shall at such times and places annually and in such proportions as they may deem expedient, pay over the residue of such rents, profits, issues and income to my wife, Emeline Allen, for and during the term of her natural life, and this provision I make for her in lieu of her dower in my estate. After the decease of my said wife I direct my trustees above named and their successors in said trust to pay over in manner aforesaid, said rents, profits, issues and income (after the deductions therefrom as above provided for) to my three children, Hezekiah Allen, Elvira E. Allen and Emily H. Allen, and upon the decease of one or more of them, to the survivors and survivor of them, equally, and upon the death of the survivor of them or upon the death of my said wife in case she shall survive all my said children, I direct my said trustees and their successors in said trust to discharge themselves of the trust herein created by making full and absolute conveyance of such property and estate as they shall at that time hold in trust under this will, to my heirs at law and to their heirs, executors, administrators and assigns forever."

The trustees, in their discretion, under the advice and direction of the probate court, were authorized to sell any portion of the trust estate, either real or personal, and to reinvest the proceeds in such manner as the trustees should deem most for the interest of said cestui que trust, the reinvested estate to

be held by them subject to the same trust. Two of the parcels of real estate located in this state were sold by the trustees by authority of acts of the General Assembly, which provided that the proceeds of the sales should form a part of the trust estate and "be finally disposed of as directed in said will and as if no such sale * * * had been made." A part of the personal property now held in trust represents the proceeds of the sale of these two parcels of land. The third parcel which is mentioned in the will and which is located in Enfield, Conn., still forms a part of said trust estate.

[1] Question 1 presents this issue: Are the heirs of Hezekiah Allen to be determined as of the time of his death in 1872, or as of the time of the death of the surviving life beneficiary, Elvira E. Allen, in 1912? While it is true, as stated by Tillinghast, J., in *Ross v. Nettleton*, 24 R. I. 127, 52 Atl. 677, "that the law favors the vesting of estates immediately upon the death of the testator, and will not regard the remainder as being contingent, in the absence of a clear intent on the part of the testator to that effect," nevertheless it has been uniformly held that this preference of the law is subordinate to the fundamental principle of construction that:

"The written expression of the testator, taken in its natural sense and use, and applied to existing facts, must control." *Ogden, Petition of*, 25 R. I. 373, at page 374, 55 Atl. 933.

For the respondents, *Swan et al.*, the case in Rhode Island principally relied upon is *Kenyon, Petitioner*, 17 R. I. 149, 20 Atl. 294. In regard to cases from other jurisdictions cited, this court, in the case of *Melcher, Petr.*, 24 R. I. 575, at page 578, 54 Atl. 379, 380, made the following comment, which is as applicable now as at the time when it was made:

"Cases upon the construction of wills and upon vested and contingent remainders have been too numerous and conflicting for an attempt to review or to reconcile them."

This difference in the authorities arises not so much in regard to the rules of interpretation, but more in regard to the relative importance to be given to the different rules, and the law is well settled in this state that it is the expressed intention of the testator, if that can be clearly discerned, which is to govern.

In the case at bar although there are many points of similarity to the *Kenyon* Case supra, yet there are certain differences which clearly distinguish the two cases. In that case A. devised and bequeathed his entire estate to B. and his heirs for the life of C., A.'s son, in trust for C., and then gave and bequeathed after the death of C. "all the property affected by the above trust, which shall then remain, to my own right heirs." It was held that B., the trustee, took an estate for the life of C., and that C., who was sole heir of A., at A.'s death took a vested remainder in fee. In the *Kenyon* Case, as in the one at bar, it was urged that the language used was

such as showed an intent to give the son C. only an estate for life, and also that C. could not take a vested remainder under the second clause, because the clause was not intended to take effect until after his death, and that C. was given not "the remainder of the estate," but "all the property affected by the above trust which shall then remain"; and, although *Durfee, C. J.*, recognized the force of the argument in favor of holding the remainder to be contingent, he thought that the precedents were against it, and decided that the remainder was vested. In reaching this conclusion it is apparent that the learned judge gave great weight to the words "I give and bequeath," as used in the last clause which carried the remainder. The court says (17 R. I. 159, 20 Atl. 296):

"The words 'I give and bequeath' in a testamentary paper," says Chief Justice Shaw in *Eldridge, Adm'r, v. Eldridge, Ex'r*, 9 Cush. (Mass.) 516, 519, "import a benefit in point of right, to take effect upon the decease of the testator and the proof of his will, unless it is made in terms to depend on some contingency or condition precedent."

The court (17 R. I. 163, 20 Atl. 297) reaffirms the established rule of construction "that the intention of the testator must govern, and that, when that appears, it overrides all rules and precedents, making its own law. This is generally so, but the intention that has this effect is the intention testatorially expressed; and when the testator uses familiar legal words, he must be presumed to have used them in their ordinary meaning till the contrary clearly appears." In the case at bar, however, the words "I give and bequeath" are not used to carry the remainder, but the following language is used:

"I direct my said trustees and their successors in said trust to discharge themselves of the trust herein created by making full and absolute conveyance of such property and estate as they shall at that time hold in trust under this will, to my heirs at law."

[2] The primary object in the testator's mind was to protect his widow and children during their lives; they were to have the income only of the estate, with no power to touch the principal. By giving to the trustees the power to sell and reinvest the proceeds for the benefit of the cestui, the testator must have had in mind the possibility of loss or gain in the trust fund, but, whatever the result, the share of each child in the income was dependent on two contingencies: First, that such child should survive the widow only; second, that the child or children who survived took the share of the income of any child who should die after the death of the widow. Having thus protected the widow and children during their lives, the mind of the testator is then directed to the time of the decease of the last survivor, and, his main object accomplished, he then has in mind the closing of the trust, and directs that what is left (either more or less) shall be conveyed to his heirs, whoever they may be,

at the time of the closing of the trust. The use of the word "heirs" in connection with the direction to the trustees to convey what remained of the trust property at the death of the last survivor of the testator's wife and children would seem naturally to show that his mind was directed to that particular time, and not to the time of his own death, and that his intention was that his heirs should be ascertained at the time of the distribution of the trust estate and not before; in other words, that the prima facie meaning of the word "heirs" should yield to the real intention of the testator as manifested in the words of his whole will.

The question as to the time for ascertaining the members of a class described as the testator's "heirs" was before this court in *De Wolf v. Middleton*, 18 R. I. 810, 814, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146 (1893), where a testator devised land to his daughters, their heirs and assigns, and, "on both their deceases" without issue, to his heirs, and it was held that the heirs were to be determined as of the date of the death of the surviving daughter, and not as of the date of the testator's decease. *Stiness, J.*, said (18 R. I. 815, 31 Atl. 271, 31 L. R. A. 146);

"While the general rule is that the heirs of a testator are to be taken from the time of his death, yet the rule gives way to a contrary intent to be found in the will."

Again in *Tyler*, 30 R. I. 590, 76 Atl. 661 (1910). In that case the testator devised to his granddaughter, C., the residue of his estate, "to her, her heirs and assigns forever"; "if said C. should die without leaving * * * issue born of her own body, then in that case I give, devise and bequeath my said estate to my heirs at law." C. died intestate without leaving living issue. Held that the heirs of the testator were to be determined as of the date of the death of C.

In the case of *Branch, Trustee, v. De Wolf*, 38 R. I. 395, 95 Atl. 857, decided in 1915, the testator devised his house to his wife for life, then to his niece for life, then to a grandnephew on condition of his taking and bearing the name of the testator, but if he rejected the condition, the house was to be sold, and "the proceeds are then to be thrown with the personal property, and the whole is to be divided between my sisters if alive; or their heirs, if dead, in equal proportions." The grandnephew declined to take testator's name and rejected the conditional gift. It was held that the word "heirs" as used in this will meant the heirs of testator's two sisters who were in being at the time when the gift came into effect, upon the rejection of the devise by the grandnephew, the will showing the intent of the testator to fix that time for ascertaining the "heirs" who would then be entitled to distribution of the fund; that the word "heirs" was not used in its technical sense, but as the estate to be divided was in the form of personalty, it would be

construed to mean those entitled to succeed to personal property in case of intestacy.

In *Luttgen, Trustee, v. Tiffany et al.*, 37 R. I. 416, 93 Atl. 182, decided in 1915, the testator by his will bequeathed his estate in trust, to pay over the income to the widow during her life, with bequest over of—

"all of my estate which may be remaining in the hands of my said trustee at the time of the decease of my said wife, to my children, share and share alike, and should any of my children die, previous to their mother having child or children my will is, that the issue of such deceased child, shall take from my estate the share its parent would have taken had that parent survived its mother, and that subject to these provisions my estate shall vest in my children aforesaid in fee simple."

The court held that the intention of the testator was not to give any present estate or interest to the children at the time of his death, but to postpone the gift to them until the decease of the widow, and that during the lifetime of the widow the children had only a future possibility contingent upon their survival.

It is to be noted that, although the words "I give, devise and bequeath" were used to convey the remainder, and that the testator specifically provided that "subject to these provisions my estate shall vest in my children aforesaid in fee simple," the court held that the gift in remainder, was contingent both as to the time of vesting and as to the persons in whom it would vest.

For the reasons stated our answer to the first question submitted to us is that the will of Hezekiah Allen did not give to the persons who answered the description of his heirs at law at his death vested equitable interests in fee in the trust property, but that it did give contingent equitable interests in fee to those persons who would answer the description of his heirs at law at the time of the death of the last survivor of his wife and children, if he had just then died intestate and without issue.

[3] As the will provides for no difference in the disposition of real and personal property, our answer to questions 2 and 3 is the same, namely, that it was the duty of the trustee, on May 8, 1912, to convey all of the personal property of the trust estate in his possession at that time to the persons who on that date answered the description of the heirs of Hezekiah Allen, the same to be divided among them in accordance with the statute of descent and distribution.

[4] As to the fourth question relating to land in Connecticut, our answer is the same as to the preceding questions. This piece of property is of comparatively small value, and at the hearing of this cause no claim was made by counsel that there was any difference in the law of Connecticut as to descent from the law of this state; and, in the absence of any evidence on this point, we as-

sume that there is no difference in the laws of the two jurisdictions.

The parties may present to the court a decree in accordance with this opinion on or before the 18th day of June, 1917.

(40 R. I. 320)

WELLS v. GREAT EASTERN CASUALTY CO. (No. 4991.)

(Supreme Court of Rhode Island. June 13, 1917.)

INSURANCE §141(4)—ACCEPTANCE OF LIFE POLICY—ESTOPPEL TO DENY APPLICATION.

Where insured accepted a life policy issued "in consideration of the agreements and statements in the application, a copy of which is indorsed hereon and made a part hereof, which the insured makes and warrants to be true and material by the acceptance of this policy," both he and the beneficiary were bound by statements therein and estopped from denying the making of the application, although it was not signed, especially so where defendant insurer had attached to its plea a copy of the policy showing a signed application which was not objected to by plaintiff beneficiary in replication thereto but was treated throughout the case as a true copy of the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 262.]

On motion for reargument. Motion denied. For former opinion, see 100 Atl. 395.

Walter P. Suesman, of Providence, and Asa B. Suesman, of Springfield, Mass., for plaintiff. Boss & Barnedfeld, of Providence, for defendant.

SWEETLAND, J. The case is before us upon the plaintiff's motion for a reargument. In said motion for the first time appears the plaintiff's claim that according to the evidence the insured never signed the application, a copy of which is indorsed on the policy, and that consequently the insured made no statement or warranty of any kind in obtaining the policy. At the trial, as part of her proof, the plaintiff introduced what she stated was the policy upon which she based her suit, and the same is among the papers of the case and is marked, "Plff.'s Ex. 1." On the back of said exhibit is a "Copy of Application." She now calls the court's attention to the fact that in said copy of application the space for the signature of the applicant is blank. In our opinion this claim should not avail the plaintiff.

A portion of said copy of application is as follows:

"I hereby apply for a policy to be based upon the following statement of facts, all of which I warrant to be true, complete and material and binding on me, whether written by me or any other person. * * * (1) My full name is Winfield Scott Wells, M. D."

Then follow 22 distinct statements of fact, including the one marked "12," which is in controversy in the case and has been considered in the former opinion of the court.

100 Atl. 395. By its terms the policy is issued "in consideration of the agreements and statements in the application, a copy of which is indorsed hereon and made a part hereof, which the insured makes and warrants to be true and material by the acceptance of this policy." Among the "agreements" contained in the policy is the following:

"(11) This policy with the copy of application and any riders or indorsements signed by an officer at the home office and indorsed hereon or attached hereto shall constitute the entire contract of insurance."

It is plain from the terms of the policy, accepted by the insured, that the existence of an application by the insured and the truth of the statements therein contained have been made by the parties matters material to the acceptance of the risk. The obligation of the insurer is based upon the existence of an application binding upon the insured. If no application existed, containing the agreements and statements referred to in the policy, that consideration upon which the policy was issued was lacking, and the plaintiff's action based upon the policy should fail.

In our opinion, if the insured accepted said policy, he would be precluded by estoppel from denying that he made the application, a copy of which was indorsed on the policy; and both he and the beneficiary would be bound by the statements and warranties contained in such copy of application, although the insured had neglected to sign his name at the foot of the application. It further appears by reference to the pleadings in the case that the defendant in its second plea alleged that before it issued said policy it required the insured in his application to warrant as true said statement numbered 12. With this plea the defendant filed a copy of the policy having the copy of application indorsed thereon, and in said copy of application the blank for the signature of applicant is filled with the name of "Winfield Scott Wells, M. D." In her replication to this plea the plaintiff alleges:

"That she ought not to be barred from having and maintaining her aforesaid action against said defendant because she says that the statement contained in the original application that no accident, sickness, or life insurance policy issued to the said Winfield Scott Wells had even been canceled or renewal refused, was true when said statement was made, and was true at the date of each renewal of the said contract of insurance."

The plaintiff in said replication and throughout the travel of the case has treated said copy as a copy of application made by Winfield Scott Wells and binding upon him and upon her.

The other matters contained in the plaintiff's motion for reargument have been fully considered by the court before filing its former opinion in the case.

The motion for reargument is denied.

FAGUE v. LEE, City Treasurer. (No. 5017.)
(Supreme Court of Rhode Island. June 19, 1917.)

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge. Bill by Mary E. Fague against William M. Lee, City Treasurer. On defendant's exceptions from the superior court. Exceptions overruled, and case remitted, with directions.

Washington R. Prescott and Edward H. Ziegler, both of Providence, for plaintiff. Frank H. Wildes, City Sol., of Cranston, for defendant.

PER CURIAM. Upon due consideration of the briefs and arguments of counsel, and of the evidence in this case, which was conflicting, we find that there was ample evidence to sustain the verdict of the jury in favor of the plaintiff, both as to the liability of the defendant and as to the amount of the damages awarded. There was no error in the denial of the defendant's motion for a new trial.

We have examined the several exceptions urged in behalf of defendant on its brief, based upon admission and exclusion of testimony, and we do not find reversible error in any of such admissions or exclusions; nor do we find any of such exceptions of sufficient importance to warrant extended discussion.

The defendant's exceptions are all overruled, and the case is remitted to the superior court, sitting in Providence county, with direction to enter its judgment for the plaintiff upon the verdict.

McNEILL v. FREY. (No. 341.)
(Supreme Court of Rhode Island. June 19, 1917.)

Appeal from Superior Court, Kent County; Chester W. Barrows, Judge.

Action by William McNeill against Charles T. Frey. From a decree dismissing the bill, plaintiff appeals. Appeal dismissed, decree affirmed, and cause remanded.

Philip S. Knauer and George Hurley, both of Providence, for complainant. William R. Champlin, of Providence, for respondent.

PER CURIAM. This is an appeal from a final decree of the superior court dismissing the complainant's bill of complaint. At the hearing before the superior court certain issues of fact were framed by the judge presiding therein, after a consultation with counsel, and the issues of fact, as finally settled by the court, were assented to by the counsel, and no exception to the settlement of such issue was taken by either party. The superior court has decided the questions of fact in issue, and it is apparent, from a consideration of the decision of the court on file in this case, that the case was carefully considered by the court. After consideration of the arguments and briefs of counsel, and of the testimony in the cause, we are of the opinion that there is ample testimony to sustain the decision of the superior court, and we find no error in the decision appealed from.

Appeal of complainant dismissed, decree of superior court appealed from affirmed, and cause remanded to superior court for further proceedings.

SOMMERS v. ADELMAN.

(91 Conn. 596)

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

NEW TRIAL § 72—SETTING ASIDE VERDICT—EVIDENCE.

Where plaintiff's evidence that he was exercising ordinary care was flatly contradicted by the only witnesses who saw the accident, two of whom were produced by plaintiff and two by defendant, the judge was justified in setting aside the verdict for the plaintiff.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148.]

Appeal from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge.

Action by Charles Sommers against Max Adelman. From an order setting aside a verdict for plaintiff, plaintiff appeals. No error.

See, also, 90 Conn. 713, 99 Atl. 50.

Robert J. Woodruff, of New Haven, for appellant. Philip Pond, of New Haven, for appellee.

PER CURIAM. The trial judge set aside the verdict rendered for the plaintiff for the reason that he had failed to present evidence from which the jury reasonably could have reached the conclusion that he was free from contributory negligence. The testimony given by the plaintiff, if accepted as true, furnished a reasonable basis for the finding that he was in the exercise of due care. That of the only other witnesses, who profess to have been present upon the scene of the accident and observers of what transpired, while not fully in accord with each other, were alike inconsistent with the plaintiff's story and with the exercise by him of reasonable care. These witnesses were four in number; two produced on behalf of the plaintiff and two on behalf of the defendant. The plaintiff's case, in so far as the element of care on his part is concerned, stands entirely upon his own testimony. That testimony, in so far as it touched the matter of vital importance, bears such marks of improbability, and is so opposed to that of the other witnesses, that the trial judge was justified in holding that it was so overwhelmingly disproved and discredited that the verdict of the jury, based upon an acceptance of it, could not have been arrived at reasonably.

There is no error.

(91 Conn. 661)

MERENESS v. DELEMOS et ux.

(Supreme Court of Errors of Connecticut. June 1, 1917.)

1. COVENANTS \S 108(1)—COVENANT AGAINST INCUMBRANCES—PAROL AGREEMENT AS DEFENSE.

A parol agreement by a grantee to pay taxes as part consideration for the conveyance is a good defense in an action by the grantee on the covenant against incumbrances.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179, 182-185.]

2. ASSIGNMENTS \S 104—EQUITIES.

The claim of an assignee is subject to the equities it would have been subject to had the suit been brought in the name of the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 183.]

3. COVENANTS \S 108(1)—TRUSTS \S 81(2)—RESULTING TRUST.

Where no part of the consideration for a conveyance came from a wife who was grantee in the deed, her husband being the real party in interest, equity will treat her as trustee for her husband, holding the naked legal title, and will permit the grantor or covenantor to make any defense as against her that could be made against her husband.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179, 182-185; Trusts, Cent. Dig. § 116.]

4. ESTOPPEL \S 74(2)—EXCHANGE OF PROPERTY.

Where a husband exchanged his land, and it was agreed that incumbrances on each property should be determined, and that the grantor of the property on which the amount was greater should pay the excess to the other party, and that each party should then pay the incumbrance upon the land received, and the excess was on the husband's property, and he paid the amount to the other parties, who paid the incumbrances on the property they received from the husband, the other parties could invoke the doctrine of equitable estoppel against an action for breach of covenant against incumbrances brought by the assignee of the wife of the husband, the deed having been made to her as grantee at the husband's request, the wife not having been a party to the negotiations leading up to the exchange, and not having been present when the deed to her was made and delivered to her husband, and not knowing of the transaction until later, when she ratified it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 190, 191.]

Appeal from Court of Common Pleas, Fairfield County; John J. Walsh, Judge.

Action by C. A. F. Mereness against Albert Delemos and wife. From a judgment for plaintiff, defendants appeal. Judgment set aside, with direction to render judgment for defendants.

The plaintiff brings this action as an assignee of a claim for damages alleged to have been sustained by one Edna A. Bibbins on account of a breach of warranty in a deed given to her by the defendants. One paragraph of the defendants' answer is that: Edna Bibbins was substituted for Royal E. Bibbins as grantee in this deed and represented and stood in the position of Royal E. Bibbins, and as part consideration for this deed the defendants paid to Royal E. Bibbins

the amount of taxes and liens, and the defendants satisfied all obligations on their part under any covenants against incumbrances in this deed by paying the amount of the taxes and liens to Royal E. Bibbins, acting for himself and Edna A. Bibbins.

The finding shows that prior to July 24, 1897, one Royal E. Bibbins entered into negotiations with the defendants for the exchange of land owned by Bibbins at Bridgeport, Conn., for land owned by the defendants at Mt. Vernon, N. Y. On July 24, 1897, deeds were exchanged between these parties, the defendant giving a warranty deed of the Mt. Vernon property, which deed contained a covenant that the Mt. Vernon property was free from all incumbrances except two mortgages, one for \$1,500, and another on which the sum of \$80 was then due. At the time of making this warranty deed, at the request of Royal E. Bibbins, the name of his wife, Edna A. Bibbins, was inserted in it as the grantee instead of that of Royal E. Bibbins. Edna A. Bibbins was not a party to the negotiations resulting in the conveyance of this land, paid none of the consideration, and was not present when the deed was made and delivered. She learned of the transaction later and ratified the same. At the time of the exchange of these deeds it was agreed between Royal E. Bibbins and the defendants that the equities of the two properties, over and above the mortgages on each, were of equal value, and that the properties would be exchanged on that basis. It was also agreed between them that all other incumbrances on each property, including taxes, assessments, interest, etc., should be figured up and determined, and that the grantor of the property on which the amount of such incumbrance was the greater should pay the excess or difference to the other party or parties, and that each party should then pay the incumbrance on the land which he or they received by the exchange. These incumbrances were then determined. It was ascertained that the amount of such incumbrance, over and above the mortgage, on the property conveyed by Bibbins exceeded the incumbrance on the property deeded by the defendants to the amount of \$48. This sum was then paid by Royal E. Bibbins to the defendants. The defendants paid the incumbrance on the property they received from Royal E. Bibbins. At the date of this conveyance, on July 24, 1897, there were incumbrances on the Mt. Vernon land, deeded by the defendants, over and above the mortgages, consisting of taxes, assessments, and liens amounting to \$259.67. These incumbrances were paid by the plaintiff. On May 23, 1898, Edna A. Bibbins conveyed to the plaintiff the land in Mt. Vernon, N. Y., and warranted the same to be free from incumbrance except the two mortgages. On Oc-

tober 31, 1904, Edna A. Bibbins assigned to the plaintiff herein all right of action she might have against the defendants for a breach of warranty in the deed which they had given to Mrs. R. E. Bibbins. The consideration for this assignment was the promise by the plaintiff not to bring an action against Edna A. Bibbins on the covenants contained in the deed of May 23, 1898.

Thomas M. Cullinan, of Bridgeport, for appellants. Edward K. Nicholson, of Bridgeport, for appellee.

RORABACK, J. (after stating the facts as above). "It has long been an accepted principle that equity will, under proper circumstances, give effect to a parol agreement relating to the sale of lands where the moving party induced by it has pursued its provisions and partly performed it. The soundness of the reasoning underlying this doctrine, and its wisdom, have both been questioned, but it has become too firmly rooted in our jurisprudence to be disregarded." *Verzler et al. v. Convard*, 75 Conn. 6, 52 Atl. 255.

[1] A parol agreement by a grantee to pay taxes as a part of the consideration of the conveyance is a good defense in an action by the grantee on the covenant against incumbrances. *Brackett v. Evans*, 55 Mass. (1 Cush.) 79; *Preble v. Baldwin*, 60 Mass. (6 Cush.) 549.

[2, 3] The plaintiff in the present case represents the rights which Mrs. Edna A. Bibbins had against the defendants. As such assignee his claim is subject to the same equities as it would have been had the suit for damages been brought in the name of Mrs. Bibbins. The question, therefore, is whether Mrs. Bibbins could have recovered for these taxes and assessments if she had paid them. They were adjusted and in fact paid by the defendants in the arrangement made with them by the husband of Mrs. Bibbins. These taxes and assessments entered into and were made a part of the consideration of the deed which was given by the defendants to Mrs. Bibbins. If the deed had been given to the husband by the defendants it could not be seriously claimed that he would not be bound by the arrangement which he had made with the defendants. But it appears that Mr. Bibbins, acting for his wife, directed that this conveyance be made to her, and it was so made. Thus it appears that Mrs. Bibbins was a grantee in name only. She was not a real party to the transaction. No part of the consideration came from her. The husband was the real party in interest. "This being so, equity would treat her as the trustee for her husband, holding the naked legal title, and would permit the covenantor to make any defense as against her that could be made against her husband. * * *" *Reid v. Sycks et al.*, 27 Ohio St. 289. Acting upon this agreement thus made, the defendants

were induced to part with their property by the deed which they gave to Mrs. Bibbins, and to pay the incumbrance upon the property conveyed to them to Bibbins.

[4] They may well invoke the doctrine of equitable estoppel. "The modern estoppel in pais is of equitable origin, though of equal application in courts of law. It is much more than a rule of evidence. It establishes rights; it determines remedies. An equitable estoppel does not so much shut out the truth as let in the truth, and the whole truth. Its office is not to support some strict rule of law, but to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties." *Canfield, Trustee, v. Gregory*, 66 Conn. 17, 33 Atl. 536.

It is of importance to note that the trial court finds that Mrs. Bibbins was not personally a party to the negotiations leading up to the conveyance of this real estate, and was not present when the deed from the defendants was made and delivered, and did not know of this transaction until later, when she ratified the same. "The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification." *Cook v. Tullis*, 18 Wall. (85 U. S.) 322, 21 L. Ed. 936.

In the present case we may lay aside any rights of the plaintiff as a third party. As we have seen he is simply the assignee of what right, title, and interest belonged to Mrs. Bibbins when she made the assignment of this claim to him. His legal rights as assignee were the same and not more than that of Mrs. Bibbins. He took his claim subject to all of the legal and equitable defenses of the defendants.

There is error, the judgment is set aside, and the court of common pleas is directed to render judgment for the defendants. The other Judges concurred.

(91 Conn. 663)

CLARK v. BAKER et al.

(Supreme Court of Errors of Connecticut.

June 1, 1917.)

1. WILLS § 601(1)—CONSTRUCTION—ESTATES CREATED—ABSOLUTE ESTATE WITH QUALIFYING PROVISIONS.

A devise in fee or absolute gift once made in terms may be cut down by a subsequent provision clearly indicating testator's intent to create a lesser interest.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340, 1341.]

2. WILLS § 601(8), 612(4)—CONSTRUCTION—ESTATES CREATED—ABSOLUTE ESTATE WITH QUALIFYING PROVISIONS.

Wife's will devising and bequeathing all her estate to her husband, his heirs and assigns,

"but it is my wish and desire that after his decease so much as is left unused by him be divided," etc., was a devise in fee of realty and an absolute bequest of personalty to husband; as the quoted words were expressive of wife's desire alone, and did not create a trust.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1348, 1391.]

3. **WILLS** § 487(1)—**INTENT OF TESTATRIX—EVIDENCE—BENEFICIARY'S UNDERSTANDING.** Husband's statements to effect that he understood that his wife's will gave him a life estate were not competent evidence of wife's meaning of language used by her in creating the interest of the husband.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1023, 1029, 1031.]

Appeal from Superior Court, Litchfield County; William L. Bennett, Judge.

Suit by Andrew M. Clark, administrator, against Emma J. Baker and others to determine the construction of the will of Mary E. Baker, deceased. From a judgment adverse to her claims, Ethel G. Baker Palmer appeals. No error.

Mary E. Baker died July 7, 1911, leaving a will duly probated by which she made the following disposition of her estate:

"I give, devise and bequeath all of my estate both real and personal to my husband, Jacob Baker, his heirs and assigns, but it is my wish and desire that after his decease so much as is left unused by him be divided equally between our adopted son Roy H. Baker and Ethel G. Baker."

The husband, Jacob Baker, was named executor without bonds. The plaintiff is his successor by appointment of the probate court.

The testatrix and her husband, during their married life, which covered 30 years, and down to her death, occupied a farm in Goshen which, together with the farm implements thereon and the household furniture and appointments, Mrs. Baker had inherited from her parents. They were childless. During the early years of their married life they took to live with them and bring up the defendants Roy H. Baker and his sister Ethel G. Baker Palmer, children of a niece of Mrs. Baker. Ethel, who was born in 1884, was so taken when she was about 3 years of age, and thereafter remained with the Bakers until she was 17 years old, when she married. Roy, who was older than Ethel, had been previously taken, and legally adopted. Ethel was never adopted. The children, whose name at birth was Payne, took the name of Baker, and were brought up by the Bakers as if they were their children. They addressed the Bakers as father and mother, the relation between them and their foster parents was cordial and like that between parents and children, and no distinction between them in that regard was made. After Ethel was married she returned to the Baker home from time to time, and whenever Mrs. Baker was sick Ethel was called for, and always went and took care of her foster mother.

During Mrs. Baker's last illness Ethel returned and cared for her until she died.

Mrs. Baker at her death owned the farm in Goshen together with the personal property thereon and other personal estate. After her death Jacob continued to occupy the farm until September, 1913, when he married the defendant Emma Wilcox, his housekeeper. Thereafter they continued in the occupancy of the farm until Jacob's death, intestate, March 24, 1915. No conveyance of the farm was made.

During the trial there was offered on behalf of Ethel a letter written to her by Jacob in September, 1913, subsequent to his remarriage, containing statements indicative of Jacob's understanding of his former wife's will and of Ethel's rights under it and also of oral statements to the same effect made by Jacob to her subsequent to Mrs. Baker's death. This evidence, under objection, was excluded.

The advice of the superior court was asked in answer to the following questions:

(a) Did Jacob Baker take an estate in fee in the real and an absolute estate in the personal property of said Mary E. Baker by said second clause of her will?

(b) If said Jacob Baker did not take an estate in fee or an absolute estate by said clause of said will, did he take a life estate only?

(c) Are Roy H. Baker and Ethel G. Baker, now Ethel G. Palmer, entitled to all of the estate of said Mary E. Baker at death of said Jacob Baker, and upon the completion of the settlement of her estate?

Walter Holcomb, of Torrington, for appellant. William W. Bierce, of Torrington, for appellees Emma J. and Roy H. Baker. John T. Hubbard, of Litchfield, for plaintiff.

PRENTICE, C. J. (after stating the facts as above). The disposing portion of the will under consideration is confined to a single sentence forming the second paragraph. In the first half of that sentence the testator used language apt for a devise in fee of realty and for an absolute bequest of personalty. If the will had stopped at that point there could be no doubt that Jacob Baker, upon the death of his wife, became vested with the fee in her real estate and with the absolute ownership of her personal property.

[1] A devise in fee or absolute gift once made in terms may, however, be cut down to a lesser estate by subsequent provisions clearly indicating the testator's intent that the devisee or legatee should take by the will some lesser estate. *Plaut v. Plaut*, 80 Conn. 673, 677, 70 Atl. 52. The subsequent language, to have this effect, must not be of doubtful meaning or uncertain in its indication of the testator's intent. *Mansfield v. Shelton*, 67 Conn. 390, 394, 35 Atl. 271, 52 Am.

St. Rep. 285; Strong v. Elliott, 84 Conn. 665, 671, 81 Atl. 1020.

[2] The subsequent words in this paragraph forming the second half of the sentence fail to satisfy these conditions. They are expressive of the testatrix's wish and desire that Roy and Ethel should share that portion of her estate which her husband left unused, but fall far short of indicating a purpose on her part either to make such disposition herself or to impose upon her husband a mandatory direction creative of a trust. It is to be noted that the gift to her husband is made to him, his heirs and assigns. With that fact in view it is especially difficult to say that the will clearly indicates a testamentary intent that the husband should not take a transmissible estate.

The facts concerning the relation of Ethel to the testatrix disclosed by the record are, indeed, very suggestive of the former's deserts, and strongly indicative that the ends of fairness and justice would have been subserved by some testamentary remembrance of her. Apparently Mrs. Baker had it in her heart that Ethel should ultimately profit by receiving some share of her estate should Jacob leave any unused. The difficulty of the situation is that such feeling on her part was not so adequately or clearly expressed that the law with all of its liberality, can give it effect as a testamentary provision.

[3] The testimony offered concerning Jacob's oral and written statements to Ethel evidencing his understanding of his wife's will as giving him only a life estate with the remainder over in any unused portion to Ethel and her brother was properly excluded. It was not competent evidence of Mrs. Baker's understanding of the meaning of her language used in the will or of her intent in using it.

There is no error. The other judges concurred.

(91 Conn. 589)

TOWN OF HAMDEN v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

1. TAXATION \S 217 — EXEMPTION — MUNICIPAL PROPERTY — CONSTRUCTION OF STATUTE.

Gen. St. 1902, \S 2315, exempting municipal property from taxation, exempts all property held by municipalities for public use, although it is located in another town, the devotion of the property to the public use being the sole ground of exemption, and not depending on the benefit accruing to the public from such use.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 355, 356.]

2. TAXATION \S 241(2) — EXEMPTION — MUNICIPAL PROPERTY — LAND USED IN CONNECTION WITH POOR FARM.

Land used for necessary pasturage, growing crops, and keeping stock in connection with a poor farm was exempt from taxation under Gen. St. 1902, \S 2315, providing for exemption of municipal property devoted to public use, the town being authorized to operate a poor farm,

and it was immaterial that the surplus production of the farm was disposed of for profit, such use being a part of the general scheme provided by sections 2476-2492 to prevent persons "under any circumstances from suffering for the necessities of life."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 390.]

3. PAUPERS \S 9 — MAINTENANCE OF POOR FARM.

Under Gen. St. 1902, \S 2476-2492, providing for care of the poor, a municipality in purchasing land for a poor farm is not confined to present immediate needs, but may include reasonable provision for future requirements, may cultivate such farm, and sell the surplus production.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. \S 12, 21.]

4. TAXATION \S 241(2) — POOR FARM — CONSTRUCTION OF STATUTE.

Gen. St. 1902, \S 2416, providing for the non-exemption from school taxes of a poor farm within a school district, indicates that such property is not taxable for any other purpose.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 390.]

5. TAXATION \S 217 — ASSESSMENT — PUBLIC PROPERTY — OWNER'S NAME.

Taxes assessed against property belonging to the town of N. H. could not be recovered where property was actually owned by the city of N. H., in view of Gen. St. 1902, \S 2299, requiring property to be assessed in name of record owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 355, 356.]

6. TAXATION \S 217 — EXEMPTION — MUNICIPAL PROPERTY — ABANDONMENT.

Property purchased by a municipality for public purposes, but which had been abandoned for more than 20 years, and which had not been used for any purpose by the municipality, was not exempt from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 355, 356.]

Appeal from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge.

Action by the Town of Hamden against the City of New Haven under statute to recover taxes. Judgment of Court of Common Pleas for plaintiff, and both parties appeal. No error.

Charles F. Clarke, of New Haven, for plaintiff. Charles Kleiner and Henry H. Townshend, both of New Haven, for defendant.

WHEELER, J. The town of Hamden sues to recover for taxes assessed on three pieces of real estate located in Hamden, just over the dividing line between New Haven and Hamden and adjacent to the Springside farm, which, in connection with the Springside Home, is owned and operated as a town poorhouse and farm for paupers belonging to the town of New Haven.

The first piece, called the Merchant piece, was purchased April 1, 1885, by the town of New Haven, and ever since has been used in connection with Springside farm for the purpose of pasturage, and was reasonably necessary for that purpose. The third, or Martino, piece, was purchased in 1903 by the city

of New Haven, and has ever since been used for pasturage and for growing crops for the use of the inmates of the poorhouse, and for stock kept on the farm, and it was reasonably necessary for that purpose. The second, or Thomas, piece, was purchased in 1892 by the town of New Haven for the purpose of providing a water supply for the poorhouse and farm, but, this purpose proving impracticable, it was abandoned, and for 20 years this piece has not been used for any purpose and has remained rocky woodland, covered with scrub oaks.

The city of New Haven by consolidation with the town of New Haven became vested with its property prior to December 7, 1897, and liable for all debts which were enforceable against the town of New Haven.

All of the products raised on the farm were consumed upon the farm except a small quantity of hay which was used by the department of public works of the city. Some of the live stock raised in excess of the needs of the farm was sold. Upon the farm was conducted a piggery supported by the city of New Haven and maintained for the purpose of consuming the garbage collected in the city. The products of the piggery amounted to \$18,000 annually, and about two-thirds of these were consumed by the inmates of the poorhouse and one-third sold in the market.

The defendant claims that all of these pieces of land were exempt from taxation because used for public purposes only. The plaintiff claims that none of these pieces were exempt, because their use was not for a public purpose and could be of no benefit to the town of Hamden, and in effect would compel Hamden to share the support of New Haven's paupers. The trial court held that the first, or Merchant, piece, and the third, or Martino, piece, were exempt from taxation, and the second, or Thomas, piece, was not exempt.

[1] General Statutes, § 2315, as construed by our court in *West Hartford v. Water Commissioners*, 44 Conn. 368, exempts from taxation all property held by municipalities for public use. And this rule obtains, although the property belonging to one town is located in another town which claimed the right to tax it. In either case the property will be exempt when it is used for, or employed in a public use. The devotion of the property to a public use is the sole ground of the exemption. *West Hartford v. Water Commissioners*, supra; *New London v. Perkins*, 87 Conn. 233, 87 Atl. 724.

Counsel for the town of Hamden advance the theory that the principle behind an exemption from taxation of the property of one town located in another town is a benefit accruing to the public from the public use to which the land is put, and that the absence of such benefit removes the foundation for such exemption. With us this theory has never had a foothold. The main reliance of the plaintiff is upon the case of *Newport v.*

Unity, 68 N. H. 593, 44 Atl. 704, 73 Am. St. Rep. 628. The point decided related to the statute of New Hampshire. The argument of the opinion supports the principle contended for, but the court expressly notes that our decision in *West Hartford v. Commissioners* holds that the property is exempt from taxation "because it is used for public purposes." This is the principle of our decisions and it conflicts directly with the New Hampshire doctrine.

[2, 3] The plaintiff's appeal is to be decided by ascertaining whether the uses of the Merchant and Martino pieces were for a public purpose. Our statutes providing for the care of the poor were framed in the humane purpose "to prevent as far as possible any person, under any circumstances, from suffering for the necessities of life." G. S. §§ 2476-2492. Charter of New Haven, § 202, fulfills a similar purpose. Beyond question this is a public purpose and a legitimate exercise of governmental power. The statutes (section 2490) expressly authorize the maintenance of poorhouses for the poor and the charter of New Haven expressly makes all statutory provisions concerning town poorhouses applicable to the city of New Haven. The town of Hamden contends that New Haven is without authority to own or operate a town farm, and that such operation is consequently not for a public purpose.

Assuming that this question is open for consideration in a proceeding to collect a tax, we find ample warrant in the provision of Charter, § 204:

"Said board shall have power to employ and discharge a manager of Springside farm and home," etc.

Here is an implied authority to maintain this farm. Town farms have been operated in connection with our poorhouses from an early day. The inmates of the poorhouses have worked upon these for the production of food for themselves. This not only gave the inmates healthy work, but it helped make them self-supporting, and thus far relieved the town of its burden of support.

To provide food for the poor in this way is as much a public purpose as to provide shelter in the poorhouse. The duty of caring for the poor imposed by our statute upon our towns may be performed in every reasonable way and by the use of every reasonable means. The town farm is a reasonable way and means for furnishing support for the poor. The sale of some of the produce of the farm and of the products of the piggery were incidents to the main purpose, the support of the poor. The town and city were not intent on conducting a business for profit. They were merely disposing of their surplus production. What was sold in no way changed the public purpose of the undertaking. It made production cheaper and cultivated and used the farm more than it would otherwise have been used. The extent of the land which the town might purchase for a farm is

not to be confined to present immediate needs, but may include reasonable provision for future requirements, and whatever the town may reasonably own for a farm it may cultivate; and whatever products it raises thereon beyond its needs it may dispose of. *White v. Stamford*, 37 Conn. 578; *County of Camden v. Collins Coll.*, 60 N. J. Law, 367, 37 Atl. 623.

The use of the Merchant and Martino pieces as a part of the farm for pasturage was necessary for pasturage for the farm, and the use of the Martino piece for growing crops for the inmates of the poorhouse and for the stock kept upon the poor farm are found to have been reasonably necessary for these purposes. This finding settles the question of their public use.

We cannot anticipate disaster to the towns, as the plaintiff does, by such withdrawal of property from taxation. Experience has shown that the property owned by one town and located in another town and devoted to a public use is limited. If it were otherwise the General Assembly could, and no doubt would, restrict such ownership. And if in any instance the exempt property unreasonably reduced the area of property available for taxation, no doubt the General Assembly would correct the public injustice. And so too the character of the public use might lead the lawmaking power to expressly provide for the taxation of land subject to this use in another town.

Chapter 247 of the Public Acts of 1907 is an instance where land in one town devoted to sewage disposal for a municipality is made taxable in the town of its location. For one purpose only have we expressly subjected any town almshouse and farm to taxation.

[4] G. S. § 2416, provides:

"When any school district having within its boundaries any town almshouse and farm, shall impose any tax for the purpose of building or repairing its schoolhouse, said real estate owned by the town shall not be exempt from such taxation."

The express limitation of taxation of any town almshouse and farm for one purpose is a plain indication that it is not taxable for any other purpose. No statutory indication of an intent to tax land devoted to the public uses of a town poorhouse and farm appearing, the ordinary rule of tax exemption is to be applied.

[5] The Merchant and Martino pieces are within the rule of exemption. The taxes upon the Martino piece are not collectible for another reason. This property was transferred directly to the city of New Haven. It was never owned by the town of New Haven. These were independent municipal entities. The taxes sought to be recovered were assessed in the name of the town of New Haven. Real estate must be "set by the assessors in the list of the party in whose name the title thereof" stood on the land records.

G. S. § 2299. The assessment against the town of New Haven of land owned by the city of New Haven was void. *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *Meyer v. Trubee*, 59 Conn. 422, 22 Atl. 424.

[6] The defendant appeals from the judgment for taxes accrued upon the second, or Thomas, piece. This piece was purchased for a public purpose, but this purpose was soon abandoned, and, so far as the record shows, the city of New Haven has never contemplated any past, present, or future use of this piece. "For more than 20 years," the finding recites, "prior to the bringing of this action said second piece of land had not been used for any purpose by said Springside Home, or Springside farm, or by the city and town of New Haven." Since the abandonment of the purpose for which it was purchased this piece of land has not been devoted to a public use, nor during any of the years covered by the taxes whose recovery is sought did the city have or contemplate its devotion to a public use. The trial court was clearly right in holding that this piece was not exempt from taxation during this period.

There is no error on either appeal. The other Judges concurred.

(91 Conn. 608)

PETTIS v. PETTIS.

(Supreme Court of Errors of Connecticut.

June 1, 1917.)

1. DIVORCE \S 40—SEPARATION AGREEMENT—EFFECT.

After the wife's desertion of the husband their mutual agreement by which the husband paid the wife certain moneys for support of the child, and she released her right to his property so long as she lived apart from him, and by which he stated that he did not waive his rights arising from her desertion, was not such an agreement on his part that the wife might live apart from him as to bar his suit for divorce for the desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 161.]

2. DIVORCE \S 326—FOREIGN DECREE—COMITY.

A New York decree of divorce a mensa et thoro against a nonappearing, nonresident husband is not enforceable in Connecticut, the state of the husband's residence, as a matter of strict constitutional or private international law.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840.]

3. DIVORCE \S 326—MATRIMONIAL DOMICILE.

Where the parties were married in New York, but the husband had always resided in Connecticut, a decree of New York divorcing the parties a mensa et thoro cannot claim recognition as a decree of the court of matrimonial domicile.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840.]

4. DIVORCE \S 328—FOREIGN DIVORCE—PROCESS—COMITY.

A personal judgment against a nonresident, nonappearing husband, not served with process, is wholly void and entitled to no consideration legally or on account of comity or public policy.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831-834.]

5. DIVORCE \Leftrightarrow 330—FOREIGN DIVORCE—COMITY.

A decree for judicial separation, when issued by a competent court having jurisdiction in personam over both spouses, is entitled to full faith and credit in every state, and will operate there as a bar to a subsequent action for divorce on the ground of desertion, brought while the decree for separation remains in full force.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 839.]

6. DIVORCE \Leftrightarrow 326—JUDGMENT OF OTHER STATES—COMITY.

A New York decree of divorce a mensa et thoro in favor of the wife who had deserted her husband and left the Connecticut matrimonial domicile, which decree did not affect the status of the parties and was not final, being terminable at any time by reconciliation, was entitled to no effect in Connecticut by way of comity or otherwise.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840.]

Wheeler, J., dissenting.

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Action for divorce by Clinton M. Pettis on the ground of desertion, and cross-action by Helen C. Pettis on the ground of cruelty. From a judgment rendered granting a divorce to the husband on the ground of desertion, defendant appeals. No error.

Charles S. Hamilton, of New Haven, and John M. Gardner, of New York City, for appellant. David E. Fitzgerald, Eli Mix, and George W. R. Hughes, all of New Haven, for appellee.

BEACH, J. The parties intermarried in New York in June, 1912, the husband being then and now a citizen of Connecticut. They lived together in Connecticut until May 23, 1913, when the wife left her home and went to New York, where she has since remained, refusing to live again with her husband. They have one child, between three and four years old. On May 24, 1916, the plaintiff husband brought this action for divorce on the ground of desertion, describing his wife as a resident of Tarrytown, in the state of New York, and alleging that the desertion began on or before May 23, 1913. The defendant appeared, denied the desertion, and filed a cross-complaint for a divorce on the ground of intolerable cruelty. From a judgment awarding the husband a divorce on the ground of desertion, the wife appeals.

The finding of facts, which is not excepted to, disposes of all the controverted questions of fact as to desertion and cruelty in the husband's favor, and the only reasons of appeal which are pursued on the brief relate to the effect which ought to have been given to an agreement in writing entered into between the parties in December, 1913, and to a judgment of separation and for alimony made by the Supreme Court of New York in February, 1915, in an action brought by the wife, in which the husband did not appear.

The alleged agreement of separation is

contained in a writing, Exhibit D, signed by the plaintiff and defendant, which recites that Helen C. Pettis has left her husband and resolved that she will not thereafter live with him; that Clinton M. Pettis desires the companionship of his child, but recognizes that it needs a mother's care and is unwilling to support it, except in his own home, any longer than is necessary for its physical well-being; and that, for the best interest of all concerned, the parties have agreed: (a) that Helen C. Pettis, in consideration of \$800 to be used for the support of the child, will support it and make no demand whereby her husband is to be chargeable with its support, and will not pledge the husband's credit for her or its support, so long as she shall refuse to live with her husband and refuse to allow the child to live with him; (b) that Clinton M. Pettis will allow the wife to have the exclusive custody of the child during its tender years and so long as she will support the child and keep her agreements, it being understood that he is willing to support the child in his own home, and that the child, when it reaches a suitable age, shall elect whether to live with its father or its mother; (c) that nothing therein contained shall be construed as a condonation on the part of Clinton M. Pettis of the willful desertion of his wife. At the same time and as a part of the same transaction Helen C. Pettis gave to her husband a quitclaim deed, Exhibit E, of all her interest as wife and widow in any property owned by him or of which he might die possessed.

The appellant's claim is that this agreement conclusively shows that the husband consented that his wife might live apart from him, and that therefore he cannot charge her with willful desertion from and after the date of the agreement. *Tirrell v. Tirrell*, 72 Conn. 567, 45 Atl. 153, 47 L. R. A. 750; *Bennett v. Bennett*, 43 Conn. 313; *Todd v. Todd*, 84 Conn. 591, 80 Atl. 717.

[1] Manifestly this contract does not on its face express any agreement on the husband's part that the wife may live apart. On the contrary, it attempts, at least, to exclude the possibility of a construction embodying such an agreement; and in that respect it resembles the agreement printed in the margin of the decision in *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. Taken at its face value, the contract is quite capable of the construction that the husband recognized the fact that his wife had definitely determined not to live with him again and was attempting to mitigate the consequences of that unfortunate condition of fact by providing, not too liberally, for the temporary support of the child and for the wife's agreement not to pledge his credit so long as she refused to live with him. This is evidently the construction which the trial court put on the Exhibits D and E, after hearing and

observing the parties, for the finding is that the plaintiff husband was always ready and willing to receive the defendant at any time into his home, and that there was no justification for the defendant remaining and living apart from the plaintiff or absenting herself from his home, or for failing to return to cohabitation. These findings negative the existence of any actual agreement for separation, and, as the Exhibits D and E are not necessarily inconsistent with the findings in this regard, the assignments of error founded on that assumption are overruled.

[2] The remaining question is as to the legal effect which ought to have been given in this action to the New York judgment for separation. That judgment was not pleaded either in the defendant's answer, as a bar to the action for divorce on the ground of desertion, or in the defendant's cross-complaint, as a conclusive adjudication of the husband's cruelty. An exemplified copy of the order, the notice, the affidavit on which it was granted, the summons, complaint, judgment, and findings of fact and law was, however, received in evidence without objection. From these papers it appears that the judgment was based upon a complaint charging the husband with cruelty and upon proofs in support thereof; that the judgment in terms decrees that the parties be forever separated from bed and board, and provides for monthly alimony until the further order of the court; and that the husband did not appear in that action and was not otherwise served with process than by publication and by leaving a copy of the summons, complaint, and order of service with him at his home in Connecticut. Upon this state of the record, it is certain that, as against the nonappearing, nonresident husband, the New York judgment is not enforceable as a matter of strict constitutional or private international law. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; *Penny v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

[3] The next question is as to its effect as a justification for the wife's continuing to live apart from her husband from and after this date. The complaint admits that Helen C. Pettis is a resident of New York, which undoubtedly has the right to control the marital status of its own citizens, subject, of course, to the necessary consequence, pointed out in *Haddock v. Haddock*, *supra*, that it cannot control the marital status of a Connecticut citizen who is not brought within its jurisdiction, unless, indeed, the decree is rendered in the matrimonial domicile which is the legal domicile of both the husband and the wife. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. It is certain that New York was not the matrimonial domicile of these spouses, for the domicile of the husband has been in Connecticut from a time antedating the marriage; and so the decree of the New York court cannot claim recogni-

tion as a decree of the court of matrimonial domicile.

Nevertheless the question still remains whether it ought to be received here as a matter of comity or of public policy. In *Gildersleeve v. Gildersleeve*, 88 Conn. 692, 92 Atl. 684, Ann. Cas. 1916B, 920, we held that an ex parte divorce granted in accordance with the laws of South Dakota to a plaintiff domiciled in that state would be given effect in our own courts as against a nonappearing Connecticut defendant. That was a decree of absolute divorce which dissolved the marriage and left the parties free to marry again. It affected the marital status, and in that respect was something more than a mere personal judgment. In most of the states of the Union it is held or assumed that marital status is a thing of which a court may obtain a species of jurisdiction quasi in rem by obtaining jurisdiction in personam of one only of the spouses domiciled in the forum. So that, by virtue of the jurisdiction thus acquired over the marital status common to the husband and wife, it may proceed to render a decree affecting the status of the absent defendant over whom it has no jurisdiction in personam. The Supreme Court of the United States has recognized this theory and limited its application, so far as the constitutional validity of the decree in other states is concerned, to decrees rendered ex parte in the courts of the matrimonial domicile. *Haddock v. Haddock*, *supra*. But, as that opinion points out, the courts of most states, including our own, recognize the validity of such ex parte divorce decrees when duly granted in the plaintiff's domicile, whether that be the matrimonial domicile or not. Perhaps the best reason commonly given for recognizing these ex parte decrees in cases where the spouses have separate domiciles is that, when granted by a competent court in the plaintiff's domicile, according to the local law, they are necessarily valid within that state, because every state has an undoubted right to control the marital status of its own citizens according to its own laws; and, that being so, it is better that the state of which the other spouse is a citizen should waive its sovereign right and recognize the validity of the decree in order to avoid the harsh consequences of a refusal to do so.

As was said in *Gildersleeve v. Gildersleeve*, *supra* (88 Conn. on page 698, 92 Atl. on page 687 [Ann. Cas. 1916B, 920]):

"It is no light matter, as affecting individual, social, or civic interest and good morals, that, through the attitude of the courts in refusing recognition of the judicial action of sister states, a condition should be created where legitimacy becomes dependent upon state lines, where wives in one state become concubines when they pass into another, where husband or wife living in lawful wedlock in one jurisdiction is converted into a bigamist by change of location, where persons capable of inheritance in one part of our country are incapable in another, where certainty of status may readily give place to uncertainty and property rights be thrown into confusion. * * * For the present we may not

have uniform divorce legislation, but we may contribute to a uniform treatment of divorced persons and their children, and property and property rights, by obeying the dictates of comity, and thus avoiding the unwholesome and harsh consequences which are the natural fruits of the opposite course."

[4] It is apparent from the foregoing that the effect to be given to the New York decree of separation depends upon whether it is a judgment purely in personam, or whether it is a judgment affecting the marital status. In the former case, it is, as against the nonresident, nonappearing husband not served with process, wholly void and entitled to no consideration legally or for reasons of comity or public policy. If, however, it affects the marital status, comity and consistency would require us to recognize it as valid in this state.

[5] A decree for judicial separation, when issued by a competent court having jurisdiction in personam over both spouses, is entitled to full faith and credit in every state, and will operate there as a bar to a subsequent action for divorce on the ground of desertion, brought while the decree for separation remains in full force. *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066.

We are not, however, referred to any authority as to the extraterritorial effect of a decree for judicial separation in a case where the court which granted the decree, not being a court of the matrimonial domicile, had jurisdiction in personam of one spouse only. Hence we examine the question on principle.

Historically the divorce *a mensa et thoro* was an ancient subject of ecclesiastical jurisdiction in England, and the divorce *a vinculo*, which the church did not grant at all, was a much later remedy granted by act of Parliament. In 1858 the Episcopal jurisdiction in matrimonial causes was transferred to the crown, the name of divorce *a mensa et thoro* was changed to judicial separation, and the procedure for divorce *a vinculo* was transferred from Parliament to a regular court. *Westlake*, *Private International Law* (5th Ed.) p. 89.

In *Le Mesurier v. Le Mesurier*, 1895 Appeal Cases, p. 517, the House of Lords formally confirmed the principle that jurisdiction to dissolve a marriage was dependent on the legal domicile of the parties, and that residence abroad, however prolonged, when not accompanied by a change of legal domicile, would not give jurisdiction to the local courts to grant a divorce *a vinculo*. Speaking of this case, *Westlake* says (pages 90, 91):

"But after a period of uncertainty the opinion that divorce *a vinculo*, which affects the status, is so different from the old ecclesiastical divorce *a mensa et thoro*, which was administered for the health of the soul and did not affect status, that it must be subject to rules of its own, and the novelty of the action in England must be availed of to establish those rules on the soundest principle, triumphed in *Le Mesurier v. Le Mesurier*."

On the other hand, it was said in *Armitage v. Armitage* (1898 Probate, p. 178), that jurisdiction in a suit for judicial separation need not be referred to the legal domicile of the parties, but that the action might be maintained in and a decree of separation granted by the courts of the place where the parties resided, though that was not their legal domicile. Incidentally the question whether the decree of separation affects the status was discussed. And in speaking of the ecclesiastical divorce *a mensa et thoro*, the court said:

"A woman divorced from her husband *a mensa et thoro* and living separate and apart from her husband remained a *feme covert*. The effect of the sentence was to leave the legal status of the parties unchanged."

The court then discusses the question of whether the act of 1857, which had the further effect of placing a wife, after a decree of judicial separation, in the position of a *feme sole* in certain respects, had changed the situation so that a decree of separation did affect status, and reaches the conclusion that the decree of separation does not affect status in the sense that it can only be granted in the courts of the legal domicile. In the present case it does not appear that the New York sentence of separation produced any change at all in the wife's legal capacity or property rights, and so, according to the English view, it stands on the same basis as the old ecclesiastical divorce *a mensa et thoro*, and does not affect status.

In this country there has been some conflict of opinion upon the point, which in England was covered by the act of Parliament, as to whether a divorce *a mensa et thoro* relieved the wife, temporarily, from the disabilities of coverture; but, with the possible exception of West Virginia, where a peculiar force and effect is apparently given to such divorces by the special provisions of their Code, the reported cases seem to agree that a decree of separation does not affect the marital status.

"In our mind the judgment of separation from bed and board is not a final proceeding. The relation of husband and wife still exists. A reconciliation may put an end to the judgment." *State v. Ellis*, 50 La. Ann. 559, 23 South. 445.

"Such a divorce does not dissolve the marriage, though it separates the parties and establishes separate interests between them. * * * The divorce is only a legal separation terminable at the will of the parties, the marriage continuing in regard to everything not necessarily withdrawn from its operation by the divorce." *Dean v. Richmond*, 22 Mass. 461.

"The decree of divorce *a mensa et thoro* between the parties did not affect their status of marriage; it simply justified their separation." *Drum v. Drum*, 69 N. J. Law. 557, 55 Atl. 86.

"The parties still remained husband and wife in the eye of the law. * * * An action for limited divorce is really an appeal to a court of equity by one of the parties to a marriage contract for a modification of the marriage relations, duties and obligations as they exist at common law." *People v. Cullen*, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420.

"The relation of husband and wife is not dissolved. It only undergoes a very inconvenient suspension and which is intended to operate as a continual invitation to the parties to return to their first love." Chancellor Kent, *Barrere v. Barrere*, 4 Johns. Ch. (N. Y.) 187-197.

Independently of authority, a decree that simply creates a terminable abnormal relation between husband and wife cannot be said to affect the underlying marital status. At any rate, we give to this decree of separation all the effect the New York courts claim for it when we treat it as a temporary or at least a terminable modification of the personal rights and obligations of the parties arising out of the marriage contract, without the slightest intention of rescinding the contract itself. It leaves the contract and the permanent contractual relation untouched, and it excuses one of the parties from the obligation of cohabitation, while still holding the other party to the performance of his other contractual duties. Such a decree must rest on the jurisdiction of a court of equity to regulate the conduct of the parties before it. From the wife's standpoint it is a personal license to refuse to live with her husband. In theory, a court of equity intervenes to protect her against the assertion of a legal right on the part of the husband on the ground that it is unsafe and improper to require her to submit to cohabitation. From the husband's standpoint, he is, in effect, prevented from exercising his right to cohabitation, although, as Chancellor Kent says, the right of cohabitation is not destroyed, but is merely suspended; and in theory a court of equity assumes the right to control his conduct for the time being for the protection of his wife.

Such being the nature and effect of the decree when both of the parties are before the court, it is difficult to see upon what theory any extraterritorial effect can be claimed for the decree as against a nonresident, nonappearing defendant not served with process.

When both parties are before the court, the decree is conclusive as to the issues of fact upon which it is based. *Harding v. Harding*, supra. But, in so far as it attempts to regulate the future conduct of the parties, an ex parte decree for judicial separation is necessarily local in its operation on the nonappearing defendant.

The state of New York has no right to regulate, and we do not suppose this decree attempts to regulate, the manner in which the nonresident, nonappearing husband should conduct himself toward his wife in Connecticut. The decree does not purport to authorize or require Mr. and Mrs. Pettis to live in Connecticut in a state of marital celibacy unknown to our law. It merely purports to afford the wife a local protection against the assertion by her husband of his right of cohabitation. And, if we assume that in spite of its ex parte character it accomplishes that

purpose, we give it all the effect, so far as Mr. Pettis is concerned, which can be claimed for it.

[6] We have thus shown that a decree of judicial separation does not affect status; that it is not a final decree, but is terminable at any time by the reconciliation of the parties; that it rests upon the jurisdiction of equity to control the conduct of parties before it, and that, in so far as it purports to regulate the conduct of a defendant not within its jurisdiction, it is necessarily local in its operation. Such a decree has no resemblance to a judgment in rem. It is purely personal, and therefore, as against a nonresident, nonappearing defendant, entitled to no extraterritorial effect, by way of comity or otherwise.

There is no error. The other Judges concurred, except WHEELER, J., who dissented.

(81 Conn. 667)

BURR v. ELLIS.

(Supreme Court of Errors of Connecticut, June 1, 1917.)

1. CONTRACTS \S 305(1)—BUILDING CONTRACT—TAKING POSSESSION OF HOUSE—WAIVER OF STIPULATION.

The mere fact that the owner took possession of a house built for him and made a payment for extras did not necessarily amount to a waiver of the stipulations of his contract, as a payment made on a contract may or may not affect the contractual relations of the parties according to the circumstances of the case.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398-1400, 1467-1475.]

2. CONTRACTS \S 304(2)—BUILDING CONTRACT—ACCEPTANCE.

In view of the facts, where a contract for the construction of a house provided that final payment was to be made when the work was completed to the owner's satisfaction, the owner's act in taking possession of the house and making a payment of \$150 for extras was not such an acceptance as to relieve the builder from the performance of his work in a proper manner before he was entitled to payment of the balance due him for his extra work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1458-1464.]

3. COSTS \S 32(5) — COURTS \S 188(1) — CITY COURT—DOUBLE JURISDICTION.

Under the act creating the city court of Danbury (10 Sp. Laws, p. 990), the court has not two jurisdictions, a justice and a common pleas jurisdiction, though the act provides that the court shall have civil jurisdiction in all cases where the demand does not exceed \$500, and shall have the same powers to proceed to try, etc., and enforce judgment in all cases within its jurisdiction as the court of common pleas, and shall have concurrent jurisdiction with, and all powers by law conferred upon, justices of the peace, and that the same fees and costs shall be taxed, where the damages alleged, etc., are \$100 or less, as are taxed by justices of the peace, and, where the damages amount to more than \$100, the same fees and costs shall be taxed in the city court as are taxed and paid in the court of common pleas, etc., and in an action for less than \$100, where the counterclaim was for from \$100 to \$500, the court properly allowed

defendant such costs as are taxed in court of common pleas.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 114.]

4. PROCESS \Leftrightarrow 166—WAIVER OF OBJECTION.

Where the cause of action and the parties were clearly within the jurisdiction of the city court of Danbury, and plaintiff appeared and joined issue on defendant's counterclaim, and trial was had on the merits of such branch of the case, any objection that plaintiff might have taken to the process was waived.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 250-255.]

Appeal from City Court of Danbury; John R. Booth, Judge.

Action by Stephen M. Burr against John Q. Ellis. From a judgment for plaintiff on four counts of the complaint, and for defendant on his counterclaim, plaintiff appeals. No error.

Action upon a building contract and to recover the reasonable value of extra work and materials, brought to the city court of Danbury and tried by Booth, J. Judgment for the plaintiff upon four counts of his complaint for \$11.75, and for the defendant upon his counterclaim of \$50, awarding the defendant \$38.25 and costs, from which the plaintiff appealed.

Aaron T. Bates, of Danbury, for appellant.
Robert S. Alexander, of Danbury, for appellee.

RORABACK, J. The plaintiff brought his action alleging a full performance of his contract and claimed a balance due of \$37.96 for extra work and materials. The defendant in his answer denied full performance upon the part of the plaintiff and several of the claims for extra work and materials described in the plaintiff's complaint. It was also averred by the defendant in his answer that the plaintiff had failed and neglected to perform several items of work called for in his agreement. In his counterclaim, filed with his answer, the defendant alleged that:

"During the progress of said work, the plaintiff and defendant agreed that a canvas roofing should be placed on the rear balcony roof. The plaintiff so negligently and unskillfully performed said work that said roof has always leaked."

An answer to this paragraph of the counterclaim was filed by the plaintiff which stated, among other things, that the plaintiff on or before October 1, 1911, duly completed his contract and delivered the house into the possession of the defendant, who accepted the same and paid the plaintiff in full for the original contract. The allegations as to the improper performance of the work connected with the canvas roof were denied. A reply was filed by the defendant which denied the acceptance of the house by him. These allegations and denials put in issue all the facts necessary to raise the question

of the acceptance of the house by the defendant. Upon this question the trial court found for the defendant.

The reasons of appeal impute error to the court below upon the question of acceptance upon the ground that it was not put in issue in the pleadings, and further that the finding shows that the defendant accepted his house and paid the plaintiff for building the same and thereby waived any claim for damages which he has set forth in his counterclaim.

[1] In this connection, the record discloses that the court below found that when the defendant paid the balance of the contract price on August 5, 1911, he was well aware of the omission of the plaintiff to perform his work, but nevertheless waived the same and accepted his house as then completed, except in so far as a canvas roof hereinafter described was concerned. During the progress of the work, the plaintiff and the defendant agreed that a canvass roofing should be placed on the rear balcony of the defendant's house in lieu of the tin roof specified in the contract. This canvas roofing was placed on the roof in such an improper and unskillful manner that it has leaked whenever rain has since occurred. The defendant was not aware of the defects in this roof at the time of final payment on August 5, 1911, not having learned of them until afterwards, and he did not accept his house in so far as this canvas roof was concerned. After the defects in this roofing were discovered by the defendant and before the payment of \$150 on March 9, 1912, for extras he made several requests to the plaintiff to remedy the same; but the plaintiff at all times neglected to do so. The mere fact that the defendant took possession of his house does not necessarily amount to a waiver of the stipulations of the plaintiff's contract. 9 C. J. 761, and cases cited in note 6; 15 A. O. 970, and cases cited in notes 972, 973, 974. A payment made upon a contract may or may not affect the contractual relations of the parties, according to the circumstances of the case. Pratt v. Dunlap, 85 Conn. 180, 185, 82 Atl. 195; Flannery v. Rohrmayer, 46 Conn. 558, 559, 560, 33 Am. Rep. 36.

[2] The contract in the present case provides that final payment is to be made when the work is completed to the satisfaction of the owner. Under the facts disclosed by the finding, the action of the defendant in taking possession of the house and in making the payment of \$150 was not such an acceptance as to relieve the plaintiff from the performance of his work in a proper manner before he was entitled to the payment of the balance due to him for his extra work.

The trial court has found the issues for the defendant upon his counterclaim and that there is \$50 due thereon. The finding sets forth the subordinate facts upon which it

bases this conclusion. An examination of the finding shows that this conclusion is not legally inconsistent with the subordinate facts found, and the decision of the court below is not controlled by any erroneous view of the law. Therefore we have reached the conclusion that there is no error upon this branch of the case.

The plaintiff in the present case alleges a cause of action wherein the matter in demand is less than \$100. The counterclaim filed by the defendant alleges a cause of action wherein the matter in demand is over \$100 and less than \$500. An act creating the city court of Danbury (10 Sp. Laws, p. 1019, § 83) provides that:

"Said city court shall have civil jurisdiction, in all cases in law and equity where the matter in demand does not exceed five hundred dollars, * * * and shall have the same powers to proceed to try, decide, and enforce judgment and execution in all cases within its jurisdiction, as the court of common pleas, and said city court shall have concurrent jurisdiction with, and all the powers now by law conferred upon justices of the peace. * * * The same fees and costs shall be taxed where the damages alleged, or the value of property or matter in controversy are one hundred dollars or less, as are taxed by justices of the peace, and where said damages or value amount to more than one hundred dollars, the same fees and costs shall be taxed in said city court as are taxed and paid in the court of common pleas. * * * In the trial of all cases before the city court, wherein the matter in dispute exceeds one hundred dollars, the rules of practice in the court of common pleas, so far as the same may be applicable, shall govern."

The court below in the judgment rendered allowed the defendant such costs "as are taxed and paid in the court of common pleas." In this the plaintiff contends there was error.

[3] The plaintiff claims that this case, when it was tried, was within the justice of the peace jurisdiction of the city court, and that the trial court erred in holding that it was within the common pleas jurisdiction of this court and in taxing such costs as are taxed and allowed as costs in the court of common pleas. The plaintiff's contention, as we understand it, is that the city court of Danbury has two jurisdictions, a justice and a common pleas one; and that the defendant, by his counterclaim, in effect accomplished the removal from one jurisdiction to another in the same manner as he might have removed the case to the court of common pleas. In other words, he conceives the city court of Danbury as two courts and not one. We are not prepared to accept such a proposition. If we assume, however, that the plaintiff is right as to the dual form of the city court of Danbury, we cannot acquiesce in his conclusion as to costs.

This counterclaim is, in substance, an action wherein affirmative relief is sought by the defendant against the plaintiff. In effect, it was an action brought by the defendant against the plaintiff. In this connection, our statutes,

permitting the interposition of counterclaims, should be construed in connection with the statutes limiting the amount over which our different courts have jurisdiction. This limitation of jurisdiction necessarily applies to both of the parties to a case.

[4] In the present case, the cause of action and the parties were clearly within the jurisdiction of the city court of Danbury. The plaintiff appeared and joined issue with the allegations of the defendant's counterclaim, and the trial was had thereon upon the merits of this branch of the case. Any objection that might have been taken to the process or to its service was waived. *Hotchkiss' Appeal*, 32 Conn. 355. It follows therefore that there was no error in holding and in taxing the same costs as are allowed in the court of common pleas.

There is no error. The other Judges concurred.

(91 Conn. 630)

BUTLER v. FLINT et al.

(Supreme Court of Errors of Connecticut.

June 1, 1917.)

1. WILLS ~~§~~476 — CONSTRUCTION OF WILL AND CODICIL—INTENTION OF TESTATOR.

Where language used in a codicil is ambiguous, construction thereof will depend upon the testator's intent, to be gathered from the will and codicil, read together in the light of circumstances at time of execution.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 997.]

2. WILLS ~~§~~538—CONSTRUCTION—DEATH OF DEVISEE CONTIGUOUS—TIME OF DEATH.

Where there is a devise to A., and in case of his death to B., the time of death referred to, in the absence of qualifying words or indications of a contrary intent, is death before testator's death.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1162, 1302-1309.]

3. WILLS ~~§~~538—CONSTRUCTION—DEATH OF DEVISEE CONTIGUOUS—TIME OF DEATH.

A codicil making a gift over to testator's nephews in case his wife's niece, a devisee under the will, "should die without children or issue at the time of" her death, held to refer to the devisee's death, either before or after testator's death, since at the time of the execution of the will the devisee was a minor not related by blood to testator, and in the event of her death before the testator the gift would have lapsed as provided in Comp. 1813, tit. 31, c. 1, § 4, while, in the event of her death after testator's death, the property would have passed by inheritance to her heirs, who were strangers to testator's blood, who presumably occupied a different position in his regard from that occupied by his next of kin, all of which were remembered in his will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1162, 1302-1309.]

4. WILLS ~~§~~476—CONSTRUCTION OF CODICIL AND WILL.

A codicil making a gift over to testator's nephews, in case of death of his wife's niece, "in respect to the property and estate which in said will I have given" a devisee, the codicil provision referred to all will provisions in favor of devisee.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 997.]

5. PERPETUITIES §4(7)—LIMITATION OF LIFE ESTATE.

A gift over to children of testator's brother, in case of a devisee's death without issue, did not contravene the statute against perpetuities, where the brother and all of his children were then living, and all survived the testator, since the donees were competent to take whenever the contingency might happen, and consideration of the contingency of devisee dying without issue was unimportant, since it did not happen.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 12.]

Case Reserved from Superior Court, New Haven County; William S. Case, Judge.

Action by George L. Butler, executrix of Sarah V. H. Butler, against Albert F. Flint and others, administrators of the estate of children of Horace Hotchkiss. Plaintiff appealed to the superior court in New Haven county from orders and decrees of the court of probate for district of New Haven determining distributees of testamentary funds, and directing distribution, and case reserved upon agreed statement of facts. Superior court advised to affirm order and decree of probate court.

Samuel R. Hotchkiss, of New Haven, died October 30, 1844, without issue. He was survived by his widow, Sarah Hotchkiss, and his next of kin and heirs at law were his brother Horace R. Hotchkiss, now deceased, and Harriet E. H. Keep, daughter of a deceased sister. At the time of Samuel's death his brother Horace had four living children, Charles S., James B., Emma, and Harriet E. No child was subsequently born to him. They are now deceased, and the administrators of their several estates are the parties defendant.

Samuel left real and personal estate and a will, duly probated, executed October 19, 1844, and a codicil thereto executed October 26, 1844. By the first paragraph of his will he gave \$2,000 absolutely and the use of all the balance of his property to his widow for life or during widowhood. By the six following paragraphs he made various bequests, subject to the interest of the widow, to sundry persons and charitable institutions. By the eighth and tenth paragraphs he gave the remainder over in sundry pieces of real estate to his niece Harriet E. H. Keep. The ninth paragraph reads as follows:

"I give and devise to Sarah V. H. Butler, the niece of my wife, and to her heirs, all my right and interest in the house and land, where my mother now lives; and also the east half of my garden lying next west of and adjoining said house, except a small undivided piece of land at the northeast corner; and I direct my said executors to purchase for said Sarah V. H. Butler the remaining rights and interest in said house and land, with the property of my estate, provided it can be bought at a price which they think reasonable, which, when purchased, I devise to said Sarah V. H. Butler and to her heirs; and in case they cannot purchase said right as above, then I direct them to purchase or build for the said Sarah a suitable and comfortable house and lot of land, for which they are

to pay from two to three thousand dollars from my estate at their discretion, which last-mentioned house and land I devise to said Sarah V. H. Butler and to her heirs; and in that case she is not to have my interest in the house and land where my mother lives, and said east half of my garden, but the same shall belong to the residue of my estate hereinafter disposed of."

The eleventh and final disposing paragraph is as follows:

"All the rest and remainder of my property, of every kind and nature, after the above legacies and devises are fully paid and satisfied, I give and devise to the said Harriet E. H. Keep, and to the said Sarah V. H. Butler, and to their heirs, to be equally divided between them, share and share alike."

The codicil, after republishing and reaffirming the will except as therein altered, provides for the payment to his mother of \$100 annually during her life, and then proceeds as follows:

"With respect to the property and estate which in said will I have given to Harriet E. H. Keep and to Sarah V. H. Butler, it is my will that in case either of them should die without leaving children or issue at the time of their respective deaths, that then the property and estate given in said will to the one so dying without children or issue should go to the children of my brother Horace and their heirs, and in such case I hereby give and devise the same to the children of my brother Horace and to their heirs, to be equally divided among them."

The real estate, which is the subject-matter of the provisions of the ninth paragraph, has been sold under the authority of a resolution of the General Assembly of 1848. A portion of the proceeds of that sale, determined upon and set apart by the court of probate, forms the fund now in the hands of the Union & New Haven Trust Company, as trustee, and is one of the two funds now in controversy. The other fund in its hands as administrator represents one-half of the rest and residue given by the eleventh paragraph.

Sarah Hotchkiss died in 1845. Sarah V. H. Butler, who was her niece, survived until June 11, 1915. George L. Butler, as executrix of her will, is the plaintiff herein. She claims that the two funds in the hands of the trust company form a part of Sarah Butler's estate, which she, in her capacity as executrix, is entitled to receive. The defendants, as administrators of the estates of the several children of Horace Hotchkiss, claim to be entitled to these funds in equal shares between them. The court of probate decided in favor of the latter contention, and passed its order of distribution accordingly. Other facts appearing of record are sufficiently stated in the opinion.

George E. Beers, of New Haven, and Noah H. Browning, of Hudson, N. Y., for plaintiff. Albert F. Flint, of Boston, Mass., and Thomas Hooker, Jr., of New Haven, for defendants.

PRENTICE, C. J. (after stating the facts as above). The property now in the hands of the trust company, as administrator and

trustee, in the form of cash awaiting distribution to its ultimate owners, represents that given to Sarah V. H. Butler by the ninth and eleventh paragraphs of the will, and confessedly is to be distributed as the property so given would have been if it had not been converted.

The gifts made in these paragraphs in Sarah Butler's favor are undeniably absolute or in fee, subject to the use of the testator's widow, long since terminated by her death. Were there no codicil, the two funds now involved, standing as they do in the place of the original property bequeathed and devised would belong to her estate, since she survived him.

By the codicil provision is made for a different disposition should Sarah Butler die without leaving a child or issue at the time of her death, to wit, to the children of the testator's brother Horace and their heirs. By force of this provision, and by reason of the fact that Sarah Butler died without issue, the administrators of Horace's four children, all of whom survived the testator, claim to be entitled to the two funds, and the court of probate, in passing the order appealed from, accepted that view.

The issues presented by the conflicting claims of the parties involve three controlling inquiries:

(1) Does the language of the codicil, descriptive of the contingency upon the happening of which the gift to the children of Horace is made to become operative, refer to the death of Sarah Butler at any time or only to her death before the testator?

(2) If Sarah Butler's death at any time is the contingency specified in the codicil, is the subject-matter of the gift over to the children of Horace comprehensive of that included in the gifts in favor of Sarah Butler contained in both paragraphs 9 and 11 or only in one of them?

(3) If the gift to the children of Horace, as made, was one to take effect in the contingency of Sarah Butler's death whenever occurring, was it a valid or void one, in view of the statute against perpetuities in force at the time the will was executed?

It is evident that the testator, when he determined to make a codicil to his will, executed only seven days previously, was influenced by some purpose to change his provisions in respect to some matter which he regarded of sufficient importance to justify him in that act. That he intended to make a change in his dispositions previously made in favor of Harriet Keep and Sarah Butler is clear. The only question is as to the nature and extent of that change. Unfortunately the language used by him to express his purpose is susceptible of two constructions.

[1] The question, therefore, like all others where the construction of testamentary provisions is concerned, is one whose answer

is to be found in the testator's intent, to be gathered as best it can from the will and codicil themselves when read together, and in the light of the circumstances surrounding him at the time of their execution.

[2] Certain artificial rules are found in the books designed to aid in the search for testamentary intent. One of these has had our repeated approval, to wit, that where there is a devise to A., and in case of his death to B., the time of death referred to, in the absence of qualifying words or other indication of a contrary intent, is death before the testator's. *Chesebro v. Palmer*, 68 Conn. 207, 211, 36 Atl. 42; *Webb v. Lines*, 57 Conn. 154, 156, 17 Atl. 90; *Johnes v. Beers*, 57 Conn. 295, 303, 18 Atl. 100, 14 Am. St. Rep. 101. In *Lawlor v. Holohan*, 70 Conn. 87, 90, 38 Atl. 903, this rule of presumption was extended so as to be inclusive of cases where the devise to A., and in the event of his death without issue to B., and the statement was made that the rule so broadly applied is the well-settled one of this jurisdiction. This statement of principle is invoked by the plaintiff. An examination of the eight cases cited in support of the assertion made in *Lawlor v. Holohan* shows scant basis for it. Some of them are cases of the first class above referred to, and no broader rule of presumptive construction is either applied or stated than one pertinent to such a situation. Nearly all the others were disposed of upon the strength of the affirmative evidence of intent disclosed by the will, and without appeal to any rule of presumption whatsoever. The last one of the eight cases is *Chesebro v. Palmer*, with its strong assertion of a doctrine quite contrary to that of *Lawlor v. Holohan*. In the former case the general subject involved had a full and exhaustive discussion. The conclusion was reached that cases where the gift over is made in the contingency of the death of the first devisee without issue are to be distinguished from those where the contingency is the death of the first devisee merely; and that the rule of presumption to be applied in the former class of cases, in the absence of other indication of testamentary intent, is that the death without issue of the first devisee has reference to his death under all circumstances. Page 213. The essential difference between the two classes of the cases, pointed out in *Chesebro v. Palmer*, needs only to be called to one's attention to be appreciated, and the difference in the pertinent rule of construction applicable to each follows as a logical consequence.

In the present case, however, we are not driven to rely upon a rule of presumption. Such rules are helpful when the intent of the testator is not otherwise disclosed, but shorn of importance when it is. *Chesebro v. Palmer*, 68 Conn. 207, 213, 36 Atl. 42; *Lawlor v. Holohan*, 70 Conn. 87, 90, 38 Atl. 903; *St. John v. Dann*, 66 Conn. 401, 409, 34 Atl. 110.

[3] The present record is not as informing as it might be of facts pertinent to an inquiry as to the testator's intent, but they are by no means wanting. The will was executed only eleven days before the testator's death, and the codicil four. Whether or not its execution was in anticipation of the early death, which so soon followed, we have no knowledge save as the facts stated may furnish an indication. Both Sarah Butler and Harriet Keep, whose name is associated with hers in the residuary gift and in the codicil provision, were, at the time the will was made, minors neither of them over seventeen years of age. Sarah Butler was not more than eleven. The latter young woman was not related by blood to the testator, but was a niece of his wife. Harriet Keep was his niece and one of his two heirs at law, the other being Horace Hotchkiss, whose children were made beneficiaries of the limitation over in the codicil.

It will be noted that, under the will and the statute then in force (Compilation of 1839, tit. 31, c. 1, § 4), the gifts to Sarah Butler, in the event of her decease before the testator, would have lapsed, and the property given to her have passed to his next of kin as intestate estate. In the event of her death after his, the property would have passed by inheritance to her heirs, who were strangers to his blood, and presumably occupied a very different position in his regard from that occupied by his next of kin, all remembered in his will. That was a result which he might well have desired to avoid. By the terms of the codicil interpreted as a provision for the contingency of Sarah Butler's decease whenever occurring, it would have been avoided, and the property given to her secured in that event to persons of his blood.

Reading the will and codicil in the light furnished by these facts, we are unable to escape the conclusion that the testator's intent in the making of his codicil was to provide for the contingency of Sarah Butler's death, whether before or after his own, and especially in the latter event, and that such intent is sufficiently apparent to call for that construction of his language.

[4] The language of the codicil is too definite and distinct to admit of doubt or uncertainty as to the comprehension of the subject-matter of both the gifts in favor of Sarah Butler contained in the ninth and eleventh paragraphs of the will, within the scope and operation of the codicil. When the testator makes provision "in respect to the property and estate which in said will I have given to Sarah V. H. Butler," there is neither ambiguity nor lack of precision in his language, and there is nothing to indicate that it was used to convey any other than its ordinary and natural meaning.

[5] The only gift expressed in that portion of the codicil under review is one to the children of the testator's brother Horace. Hor-

ace was then living; so were all of his children, and he and they all survived the testator. That gift in itself certainly did not contravene the statute against perpetuities. The donees were competent to take whenever the time should come, if it ever should, when their right to do so had become fixed by the happening of the contingency specified. In so far as the gift to these children cut down or changed the character of those in favor of Sarah Butler contained in the will so that the will, when read in connection with the codicil was made to bestow something less than a fee in lands and absolute estate in personalty, it appears that any possible invalidity attached to the title thus attempted to be bestowed could not reach the estate given to Sarah Butler. Whether or not the language of the will is capable of a construction by which an alternative gift was made to the "heirs" of Horace's children in the event that the children should die not having taken a vested estate and whether or not such gift, if made, would be a valid one, are wholly unimportant questions. Horace's children, having survived the testator, lived to take a vested interest, which, upon Sarah Butler's death without issue, became an indefeasible absolute estate.

The superior court is advised to render judgment affirming the order and decree of the court of probate.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other Judges concurred.

(81 Conn. 598)

PASCUCCI v. ROSSI et al.

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

BILLS AND NOTES ~~§~~ 489(7)—PLEADING AND PROOF—VARIANCE.

There is no variance between a complaint alleging that defendant made his note payable to the order of another as attorney and agent of plaintiff and proof that the note was made simply to such other person, since the words in the complaint "attorney and agent for the plaintiff" should be construed as descriptive only.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1617-1642.]

Appeal from City Court of New Haven; John R. Booth, Judge.

Action by Vincenzo Pascucci against Antonio T. Rossi and others on a note. Facts found and judgment rendered for the plaintiff for \$392.73, and the defendant named appeals. No error.

Robert J. Woodruff, of New Haven, for appellant. Philip Pond, of New Haven, for appellee.

RORABACK, J. The plaintiff's cause of action is described in his complaint as follows:

"On February 1, 1916, the defendant A. T. Rossi made his note dated on that day and thereby promised to pay to the order of one

Isadore W. Resnik, attorney and agent of the plaintiff, the sum of \$380, three months after date, at the Mechanics' Bank, New Haven."

The language of the note which was introduced in evidence against the objection of the defendant was that:

"\$380.00 New Haven, Conn., Feb. 1, 1916.

"Three months after date I promise to pay to the order of Isadore W. Resnik, three hundred and eighty (\$380.00) dollars, at the Mechanics' Bank, New Haven, Connecticut.

"A. T. Rossi."

The defendant contends that the allegation of the complaint was that the defendant promised to pay to the order of one Isadore W. Resnik, attorney and agent of the plaintiff, the sum of \$380. The proof offered by the plaintiff was a note drawn to Isadore W. Resnik alone, and indorsed by him to the plaintiff, whose name did not appear thereon. It is claimed that the allegations in the complaint were not supported by the proof, and that the variance was fatal.

The plaintiff's complaint does not purport to contain an accurate description of the note. The words "attorney and agent for the plaintiff" should be construed as descriptive of the capacity in which Resnik was acting for the plaintiff.

These words fully apprised the defendant of the facts upon which the plaintiff undertook to rely. This was good pleading.

Acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove. An act or promise by a principal (other than a corporation), if in fact proceeding from an agent known to the pleader, should be so stated. See *Jacobson v. Hendricks*, 83 Conn. 120, 127, 75 Atl. 85; *Clark v. Wooster*, 79 Conn. 126, 131, 64 Atl. 10. That being so it necessarily follows that the plaintiff's cause of action was properly stated in his complaint, and that there was no variance between allegation and proof.

The finding of the court below fully disposes of the defendant's claim that the note in question was never indorsed by the plaintiff as alleged in the complaint.

There is no error. The other Judges concurred.

(81 Conn. 600)

ESPOSITO v. TAMMARO.

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

APPEAL AND ERROR §169—RESERVATION OF GROUNDS OF REVIEW — CONSIDERATION OF QUESTIONS NOT MADE BELOW.

Where the questions of law attempted to be raised in the assignments of error were not made in the court below, the assignments will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034.]

Appeal from Superior Court, New Haven County; Joseph P. Tuttle, Judge.

Action by Vincenzo Esposito against Julia Tammaro. From a judgment for plaintiff, defendant appeals. No error.

Robert J. Woodruff, of New Haven, for appellant. Charles L. Brooks and Harry L. Brooks, both of New Haven, for appellee.

PER CURIAM. The assignments of error do not merit consideration; as it appears that the questions of law which are attempted to be raised therein were not made in the court below.

There is no error.

(91 Conn. 731)

OSTMAN v. LEE.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. SALES §178(3)—ACCEPTANCE—EVIDENCE—SUFFICIENCY.

Assuming that defendant agreed to store a car for plaintiff, and to purchase it, if found suitable, within a few months, his retaining the car for over a year without requiring plaintiff to remove it, and his advertising it for sale with property of his own, constituted in law an acceptance, which he could not afterwards withdraw.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 453.]

2. COURTS §190(2) — SCOPE OF REVIEW — JUDGMENTS APPEALABLE.

11 Sp. Laws 1893, p. 166, establishing a court for the town of Stonington, and section 24 thereof, as to trials and appeals, give a right of appeal identical with that existing in the case of a decision in a related matter by a judge of the superior court.

Appeal from Town Court of Stonington; Lorenzo D. Fairbrother, Judge.

Action by Frederick Ostman against Harry P. Lee. From an order setting aside a verdict for defendant, defendant appeals. No error.

Benjamin H. Hewitt, of New London, for appellant. Herbert W. Rathbun, of Mystic, for appellee.

PER CURIAM. The motion to erase the appeal because of its failure to contain a prayer for relief is not well taken. We have recently passed upon the precise point, and the reasons there stated are equally applicable here. *Douthwright v. Champlin*, 81 Conn. 524, 100 Atl. 97. The motion to set aside the verdict was properly granted.

The plaintiff offered evidence to prove that the defendant, after examination, on May 5, 1915, agreed to purchase an old automobile belonging to him for \$150, payable in two weeks; that the defendant took the automobile into his possession on the same afternoon, and still retains it, and has paid no part of the purchase price. The defendant

offered evidence to prove that he agreed with the plaintiff to store the automobile until fall, free of charge, and if, upon examination, it was then found to be in good condition, and he could use it, he would purchase it, and pay for it \$150, and that in November, 1915, he found the automobile was not what he could use. If the decision of the case depended exclusively upon the weighing of these respective claims in the light of the probabilities, and of the character and quality of the testimony, we should hold that these were considerations for the jury, and that the trial court was without authority to substitute its judgment for that of the jury. But the defendant's own testimony was that he had kept possession of the automobile from May 5, 1915, to the trial, January 2, 1917, and had neither returned it to the plaintiff, nor told him to take it away, and that, although he had frequently passed the plaintiff's place of business, he had not called upon him or told him the automobile was unsatisfactory, but had advertised it for sale together with other property of his own.

[1] Assuming that the jury found the agreement of sale as the defendant claimed, his subsequent conduct in not informing the plaintiff, in the fall of 1915, that the automobile was not in good condition, and that he could not use it, and in assuming ownership over it by keeping possession of it down to the trial, and by advertising it for sale as his own, constituted in law an acceptance of the automobile by the defendant. He cannot now be permitted to withdraw from a sale long since consummated. The ground of the decision of the trial court would be difficult to justify; the decision itself was right.

[2] Upon the argument the plaintiff claimed that the act establishing a town court of Stonington, approved April 5, 1893 (Special Laws, volume 11, p. 166), does not provide for an appeal from the decision granting a motion to set aside a verdict. As we read section 24 of this act, we think that it intended to give and did give a right of appeal identical with that existing in the case of a decision in a related matter by a judge of the superior court.

There is no error.

(116 Me. 237)

ZOBES v. INTERNATIONAL PAPER CO.

(Supreme Judicial Court of Maine. June 20, 1917.)

1. MASTER AND SERVANT ¶281(9)—CONTRIBUTORY NEGLIGENCE—WHAT CONSTITUTES.

Evidence that a Russian laborer, unable to read English, entered an elevator shaft four days after entering defendant paper company's employment and was crushed by a descending

elevator, does not sustain a finding of contributory negligence, although there was a warning sign in English at the shaft's entrance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 993, 996.]

2. MASTER AND SERVANT ¶121(7), 157—NEGLECT OF MASTER—WHAT CONSTITUTES.

Defendant paper company employing a large number of illiterate foreigners held negligent in maintaining an unlighted elevator shaft opening guarded only by a warning sign in English, which an injured employé could not read.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 230, 303.]

3. DAMAGES ¶132(1)—PERSONAL INJURIES.

\$4,000 damages is not excessive for injuries causing a laborer to be confined seven months in the hospital, to undergo a serious surgical operation costing \$400 or \$500, and for impairment of earning ability in the future due to practical loss of use of both legs.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372.]

Exceptions from Supreme Judicial Court, Oxford County, at Law.

Action by Tones Zobes against the International Paper Company. From an order of nonsuit, plaintiff excepts. Exceptions sustained, and judgment for plaintiff in the sum of \$4,000.

Argued before CORNISH, BIRD, HALEY, HANSON, and MADIGAN, JJ.

William A. Connellan and Wilbur C. Whelden, both of Portland, for plaintiff. William H. Gulliver and Arthur L. Robinson, both of Portland, for defendant.

MADIGAN, J. A laborer in the employ of the defendant in March, 1915, entered the bottom of an open elevator well in the defendant's mill at Rumford to urinate, and was injured by a descending elevator. Coming to this country from a small rural town in Russia, he had worked for eight months piling boards in the Pullman yards in Chicago, after which he worked on a farm until entering the defendant's employ, where he had been four days at the time of the accident; his work with the defendant consisting in loading and unloading pulp wood in the yard and in the mill. He was 25 years of age, unable to read English, and speaking it very slightly.

The stoneroom, so called, in the basement of the mill, contained a number of lockers in which employés kept their clothes and lunch boxes. While this room had four outlets for electric lights, and one before the shaft, but one light was in commission at the time of the accident. The well was seven feet wide and thirteen feet long, and opened directly into the stoneroom, from which came its only light. There were no wheels or machinery in the lower part of the well, the floor of which was clay, covered to a certain extent with waste and paper scraps, and

some inches lower than the concrete floor of the stoneroom to the level of which the floor of the elevator could be brought. This elevator was little used at night and was kept locked, so that when needed it was necessary to procure the key.

The plaintiff was working on two consecutive eight-hour shifts, from 3 in the afternoon until 11 at night, and from that hour until 7 in the morning. We do not understand that any special time was set apart for meals, but the laborers with whom he worked were accustomed to take certain time out for lunch. Having eaten at 11, at 5 in the morning he went to the stoneroom to eat again. There were no toilets in the stoneroom, but in another part of the mill there were toilets, or troughs, of the existence of which the plaintiff testifies he had no knowledge. Not having had occasion to do more than urinate during the four days he had been at work, he never had searched or inquired for toilets. Having seen one of his fellows go to the well to urinate the day before, as it had a soft, stinky bottom, he supposed it was not improper for him to do likewise. There was no gate or barrier across the opening into the well, but above the door or on one side of it was a sign printed in English, "Elevator, employés not allowed to use," signed by the corporate name of the defendant. Having finished his lunch, he entered the well for the purpose above stated, and the man who removed chips, needing the elevator, started it downward from the floor next above, crushing the plaintiff so seriously as to make necessary a serious operation to the spine, and leaving him thereafter in such a condition that his legs are practically useless for hard labor for the balance of his life.

[1] Under the conditions disclosed by the evidence, we do not feel that this foreigner, with no knowledge of mills and machinery, knowing nothing of the existence of the elevator, ignorant of the language in which the warning sign was written, fitted by his life and training to be a mere hewer of wood and drawer of water, was guilty of contributory negligence. He would not, as suggested, hear the doors at the various floors opening as the elevator descended, since, as shown by the testimony of the operator, the elevator started from the floor next above, so there would be no doors to open; neither does it seem probable that he would retire to such a damp, ill-smelling place to slumber.

[2] The defendant was at fault. For its roughest work it employed many illiterate laborers, of no high order of intelligence or refinement, of all nations and all tongues, needing for this work brawn and muscle and not brains. Their habits, customs, and training should be taken into account, and their safety provided for. The shaft opening,

though containing a serious hidden peril, was unguarded and unlighted. Located near the stoneroom, which was the only rest room of the plaintiff, and in which the plaintiff was properly at the time, the well was a trap against the danger of which the plaintiff should have been guarded. The plaintiff's exceptions to the order of nonsuit are therefore sustained.

[3] According to the stipulation agreed to by the parties, the law court is to assess the damages. For seven months in the hospital, a serious surgical operation costing \$400 or \$500, from which he received much benefit, and for the impairment of his ability to labor in the future because of the loss practically of all the use of his legs, we feel that \$4,000 damages are not excessive.

Exceptions sustained. Judgment for plaintiff. Damages assessed at \$4,000.

(116 Me. 241)

WOODMAN v. BUTTERFIELD.

(Supreme Judicial Court of Maine. June 21, 1917.)

1. APPEAL AND ERROR ⇐895(1)—SCOPE OF REVIEW.

Where the Supreme Court is to direct such a decree as the record requires, appellee may urge matters presented in the record, but not sustained by the decree below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3645, 3646.]

2. CORPORATIONS ⇐545(2) — INSOLVENCY — PREFERENCES TO DIRECTORS.

An insolvent corporation cannot prefer a creditor who is also a director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2170.]

3. CORPORATIONS ⇐342 — DIRECTORS — LIABILITY.

Defendant's election as a corporation's director did not make him such until he had notice, or was chargeable with notice, of that fact, and until that time he was not liable for payments received while the corporation was insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1486-1488.]

4. CORPORATIONS ⇐361 — INSOLVENCY—SUFFICIENCY OF EVIDENCE.

Defendant's testimony that he was notified of his election as a corporate director some time during February warrants a finding that he was so notified at the beginning of February, but does not sustain a finding of his notification at an earlier date.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1506.]

5. BANKRUPTCY ⇐184(1) — PREFERENCES — FRAUDULENT CONVEYANCES—STATE LAWS.

In an action by bankruptcy trustee to avoid fraudulent corporate transfers under Bankruptcy Act July 1, 1898, c. 541, § 70, cl. e, 30 Stat. 565 (U. S. Comp. St. 1916, § 9654), authorizing him to avoid transfers which any creditor might have avoided, whether the transfers were fraudulent depends, not upon the Bankruptcy

Act, but upon the laws of the state where the transfers were made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275.]

6. **INSOLVENCY** ¶24—**DEFINITION.**

The term "insolvent," when applied to a person or corporation engaged in trade, means inability to pay debts as they fall due in the usual course of business.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 29.]

For other definitions, see Words and Phrases, First and Second Series, Insolvency; Insolvent.]

7. **CORPORATIONS** ¶538 — **SUFFICIENCY OF EVIDENCE—"INSOLVENCY."**

Evidence that a corporation assumed the debts of its constituent companies, mortgaged the property for a large amount and issued bonds under the mortgage, that defendant director loaned it money to meet its pay roll, and that its bonds were authorized to be used as collateral at a rate not to exceed two for one, etc., held to sustain a finding that the corporation was insolvent to defendant's knowledge in the sense that it could not pay its debts as they became due.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2151.]

8. **CORPORATIONS** ¶542(3)—**INSOLVENCY—DIRECTOR'S LIABILITY.**

A corporate director receiving payments on notes executed by the corporation to himself after the corporation was insolvent to his knowledge, is liable to the corporation's trustee in bankruptcy for the money so received.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156.]

9. **CORPORATIONS** ¶542(3)—**INSOLVENCY—DIRECTOR'S LIABILITY.**

Evidence that an insolvent corporation's president offered to give defendant director bonds owned by the president individually and that the receipt for such bonds was given to the president as an individual held to sustain a finding that defendant received the bonds from the president individually, and not from the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156.]

10. **CORPORATIONS** ¶542(3) — **INSOLVENCY — DIRECTOR'S LIABILITY.**

Evidence held to sustain a finding that bonds received by a corporate director after the corporation became insolvent were not merely an exchange of bonds, but constituted a payment on indebtedness due him by the corporation, where such indebtedness would be substantially discharged on such a theory, and no satisfactory reason for reducing it was given.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156.]

11. **CORPORATIONS** ¶542(3) — **INSOLVENCY — DIRECTOR'S LIABILITY.**

A corporate director is not liable to the corporation's trustee in bankruptcy for payments made by the corporation while insolvent on notes on which the director was an indorser, where such payments were not procured or urged by the director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156.]

Appeal from Supreme Judicial Court, Kennebec County, in Equity.

Bill by Walter I. Woodman, trustee in bankruptcy of the National Boat & Engine Company, against William W. Butterfield.

Decree for plaintiff, and defendant appeals. Affirmed as modified.

Argued before SAVAGE, C. J., and CORNISH, KING, BIRD, HALEY, HANSON, PHILBROOK, and MADIGAN, JJ.

Williamson, Burleigh & McLean, of Augusta, Wm. D. Washburn, of Chicago, Ill., and William Carpenter, of Muskegon, Mich., for appellant. Woodman & Whitehouse, of Portland, for appellee.

KING, J. Bill in equity wherein the plaintiff, as trustee in bankruptcy of the National Boat & Engine Company, seeks to recover of the defendant the amount of certain payments and the value of certain bonds alleged to have been obtained by him for his benefit from the corporation while he was a director thereof and when it was insolvent. The ground for recovery is alleged to be that the obtaining and acceptance of said payments and bonds by said defendant or for his benefit were in violation of his fiduciary duty as a director of said bankrupt corporation and in fraud of the rights of its creditors and stockholders. The case is before us upon an appeal by the defendant from the decree of the sitting justice.

No special finding of facts or summary of the issues involved was filed with the decree. The record is voluminous. It contains many uncontroverted facts and circumstances which are material to a clear understanding of the particular issues between the parties and important to be considered in the determination of those issues. We will therefore at the outset briefly state some of those unquestioned facts and circumstances.

In 1907 the defendant became connected with the Racine Boat-Manufacturing Company, a corporation doing business at Muskegon, Mich. He was a large stockholder, a director, and the secretary of that company. The other directors were Walter J. Reynolds, his wife, Rose E. Reynolds, Paul B. McCracken, and Frank A. Wilson. Reynolds was its president. The capital stock of the company was ultimately \$200,000, substantially all owned by the directors. The defendant, together with Reynolds and McCracken, indorsed notes of the company to a large amount. January 8, 1909, that corporation made and delivered to Butterfield a trust deed or mortgage of its property to secure him for his then existing indorsements as he should make for it, and for any notes given to him by the company. That trust deed was never recorded, and it was withheld from record for the reason that, if recorded, it would impair the credit of the company; but there was an understanding between the other directors and Butterfield that the trust deed was to be recorded whenever Butterfield should determine that the company "was on its last legs."

In September, 1910, the National Boat &

Engine Company was organized under the laws of Maine for the purpose of taking over the property and business of the Racine Company and of various other companies and concerns carrying on a similar business. The plan of consolidation was for the new corporation to take over all the assets of the constituent companies and concerns at an appraisal to be made, and to assume all the liabilities of each. The difference between the assets and liabilities of each constituent was to be paid to it, or to its stockholders, in the bonds, the preferred stock, and the common stock of the new company in such proportions as the plan of consolidation provided for.

J. Q. Ross, attorney for the Racine Company, Reynolds, its president, and H. S. Beardsley, of New York, appear to have been active promoters of the consolidation, and Butterfield was fully informed as to the plans and purposes of the consolidation from the beginning of the negotiations. He says that it was agreed at the outset between Ross, Beardsley, Reynolds, and himself that no mention should be made in carrying out the consolidation of the unrecorded trust deed which he held of the Racine Company's property, and that it was further understood between them that after the new corporation had issued its bonds the trust deed was to be exchanged for enough of those bonds, to be held in escrow, to cover all his contingent liability on notes of the Racine Company and all of its direct liability to him. The consolidation was carried out as planned. Reynolds became president, Beardsley treasurer, and Ross secretary of the new corporation, and each was a member of its board of directors. All the assets of the Racine Company were transferred to the new or National Company by conveyances warranting the title thereto, and without mention of the unrecorded trust deed held by Butterfield. At the time of the transfer Butterfield was liable as indorser or guarantor of the Racine Company's paper to the amount of about \$100,000, according to his testimony, and that company was also indebted to him for about \$24,500 on notes given by it to him.

The National Company authorized an issue of not exceeding \$3,000,000 of first mortgage bonds, to bear date October 1, 1910, and to be secured by a trust mortgage to the Astor Trust Company, of New York City, as trustee, covering all its property real and personal, present and future. The mortgage was executed, and on January 18, 1911, was accepted by the trustee. Some of the bonds were sold, and others were used as collateral.

The National Company used the same office as the Racine Company, in Muskegon, Mich., until December, 1910, or January, 1911, when it changed its general office from Muskegon to Chicago. At a special meeting of the board of directors of the National Company

held at the Congress Hotel in Chicago on the 21st day of December, 1910, Butterfield was elected a director of the corporation. He attended the next meeting of the board of directors held at Chicago on March 13, 1911. At that meeting the business affairs and the financial status of the corporation were presented and discussed, and a resolve was passed that, when necessary to borrow money in order to obtain funds to meet bills or accounts payable, or to extend the time of payment on notes payable, the officers of the company might use the bonds of the company as collateral at a rate not to exceed two for one.

At the time of the consolidation Butterfield held two notes of the Racine Company, one for \$14,500, dated August 4, 1910, maturing February 4, 1911, with interest paid to its maturity, and the other for \$10,000, dated September 6, 1910, maturing December 6, 1910, with interest paid to its maturity. Various payments were made to him and for his benefit on account of those notes prior to April 6, 1911. On that day Butterfield received \$6,750, at par value of the bonds of the National Company. He admits that he received those bonds in full settlement of the balance then due on his two notes against the company, as then adjusted between him and Reynolds, its president. And on or about the same date he received \$3,650 at par value of the bonds of the National Company.

It has already been mentioned that there was an understanding between Butterfield, Reynolds, Ross, and Beardsley that, after the consolidation was completed, a sufficient amount of the bonds of the new company should be exchanged for that unrecorded mortgage which Butterfield held covering the Racine Company's property. In furtherance of that understanding, and in May, 1911, bonds of the National Company to the amount of \$88,000, were placed in the hands of Cross, Vanderwerp, Foote & Ross, as trustees, to secure Butterfield on his indorsements of the notes of the Racine Company, then amounting to about \$44,000, and which indebtedness the National Company had assumed.

At a meeting of the board of directors of the National Company held August 25, 1911, a resolve was passed directing the president to admit in writing, for the company and in its name, its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground; and the petition in bankruptcy was filed against it August 28, 1911.

It appears that Butterfield, having paid the notes of the Racine Company on which he was liable as indorser or guarantor, sought to have the \$88,000 of bonds held by Cross, Vanderwerp, Foote & Ross proved as a claim against the bankrupt estate. The claim was disallowed on the ground that the trust deed for which the bonds were exchanged, not having been disclosed in the consolidation proceedings, was invalid as against the bankrupt corporation, and its

surrender did not constitute a valid consideration for the delivery of the bonds in exchange for it, and that such delivery was voidable for the further reason that it constituted a fraudulent preference of a director at a time when the bankrupt was insolvent, and known to be so by the claimant. *Butterfield v. Woodman* (D. C.) 216 Fed. 208, affirmed as to that part of the decision in *Butterfield v. Woodman*, 223 Fed. 956, 139 C. C. A. 436.

The plaintiff's claims presented by the record may be thus briefly stated:

First. That Butterfield became a director of the National Boat & Engine Company on December 21, 1910, when he was elected to that office; that the company was then, and thereafter continued to be, insolvent, and that he, as a director of the company, should have known that fact, and did know it; that between December 21, 1910, and April 6, 1911, various payments were made by the company to him directly, or for his benefit, in reduction of the two notes which he held against the company; and that the plaintiff is entitled to recover of him in this action those payments, with interest thereon, upon the ground that they were fraudulent transfers of the company's property to him.

Second. That the \$6,750 of bonds received by Butterfield on April 6, 1911, in settlement of the balance due him on his two notes of the company were the property of the company, and that the value of those bonds at the time they were converted by him, with interest thereon, is recoverable of him in this action upon the same ground of an unlawful and fraudulent transfer of the company's property to him.

Third. That the \$3,650 of bonds received by Butterfield on or about April 6, 1911, belonged to the company, and that their value at the time he converted them, with interest, is recoverable of him in this action for the same reason.

Fourth. That divers sums of money were paid by the National Company after December 21, 1910, in reduction of the amounts of various notes which that company had assumed and upon which Butterfield was liable as indorser or guarantor, and that the amount of those payments with interest is recoverable in this action upon the same ground that they constituted fraudulent transfers of the company's property for the benefit of Butterfield while a director of the company, and when it was insolvent.

After hearing the sitting justice decreed:

(1) The bill is sustained as to the bonds of the National Boat & Engine Company delivered to the defendant of the par value of \$3,650.

(2) The bill is sustained as to \$3,500 received by the defendant from the National Boat & Engine Company between December, 1910, and February, 1911, as payments to him on his liability on certain promissory notes of said company.

(3) The bill is not sustained as to the bonds of the National Boat & Engine Company, delivered to the defendant by Reynolds, of the par value of \$6,750, these bonds becoming the property of Butterfield on delivery.

(4) If the bonds specified in item 1 cannot be delivered in specie to the trustee in bankruptcy, a master may be appointed to ascertain their market value at the time they were demanded, for which sum only Butterfield is hereby made liable to the trustee.

[1] The plaintiff now claims, in accordance with the principles affirmed in *Trask v. Chase*, 107 Me. 137, 77 Atl. 698, and in *Pride v. Pride Lumber Co.*, 109 Me. 452, 457, 84 Atl. 989, that, inasmuch as all questions presented by the record are open for consideration under the appeal, and such decree is to be directed by this court as the whole record requires, he is free to urge before this court his contention in regard to those claims on his part, which the record presents, but which the decree below did not sustain. We think he has that right.

[2] In support of each and all of his claims contended for in this action the plaintiff invokes the rule, which rests in the soundest wisdom and is supported by the great weight of authorities, that an insolvent corporation is not permitted to prefer a creditor who is also a director of the corporation. The rule is sustainable upon the principle that it is inequitable for a director, whose position gives him an advantage in obtaining inside information of the affairs of the corporation, to protect his own claims against it to the detriment of its other creditors. That rule is the settled doctrine of this state where this action is pending, and where the bankrupt corporation was created (*Symonds v. Lewis*, 94 Me. 501, 48 Atl. 121, and *Pride v. Pride Lumber Co.*, supra), and it is also adopted and enforced by the highest court of Illinois, the state where the alleged transfers were made (*Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291). That rule therefore must be applied in this case in deciding whether or not the alleged payments by the corporation to the defendant constituted fraudulent transfer of its property to him as one of its creditors.

We will consider the plaintiff's claims in the order in which we have hereinbefore stated them.

1. The alleged payments made on account of the two notes which the defendant held against the corporation, exclusive of the bonds which he received in the final settlement of those notes.

[3] When did the defendant become a director of the National Boat & Engine Company? He was elected as such at a meeting of the directors held December 21, 1910. He admits that he had previously expressed to Reynolds his wish to become a director of that company, because of his interest in its affairs, but he claims that he had no knowl-

edge that he had been elected a director until some time in February, when Reynolds notified him of his election. He said:

"It was the first part or the middle of February. I couldn't remember. * * * Q. You think it was the first part of February? A. Possibly. * * * Q. So that from the early part of February on you admit that you did know it? A. Some time in February I knew that I had been elected."

The mere fact of the election of a person as a director of a corporation does not constitute him a director unless he has notice, or is chargeable with notice, of that fact. In addition to the election there must be an acceptance of the office, express or implied. Cook on Corporations (7th Ed.) § 624.

[4] The sitting justice sustained the plaintiff's bill as to \$3,500 received by the defendant from the National Boat & Engine Company "between December, 1910, and February, 1911," as payments to him on his notes against the company. That decision implies that he found that the defendant was a director of the corporation from December, 1900, presumably from the time of his election to that office on the 21st of December. His decision as to questions of fact necessarily involved in the case is not to be reversed unless it clearly appears that such decision was erroneous. We are unable to find any evidence in the case tending to show that the defendant had any knowledge prior to February, 1911, that he had been elected a director of the corporation. He testified that he had no information of that fact until some time in February, there was no testimony to the contrary, and it was not shown that he did anything prior to February from which it could be inferred that he considered that he was a director of the corporation. We are therefore constrained to the conclusion that the sitting justice erred in finding that the defendant was a director of the corporation prior to February, 1911, and therefore chargeable with those obligations and duties which arise out of the fiduciary relations which the law regards as existing between a director of a corporation and its stockholders and creditors. He admits that he was informed of his election as director some time in February, 1911, and that it may have been in the first part of that month. We think it may be reasonably held that he knew as early as the beginning of February, 1911, that he had been elected a director, and that from and after that time he was chargeable with the duties and obligations of a director of the corporation.

[5, 6] Was the corporation insolvent during the time the defendant was a director of it, and did he know or have reason to know that it was insolvent? In the decision of that question as involved in this case we are not controlled by the definition of insolvency contained in the Bankruptcy Act. This bill in equity is brought under the provisions of clause "e" of section 70 of that act. That clause of the Bankruptcy Act cre-

ates no new right of the trustee to avoid transfers of property made by the bankrupt, but merely gives to the trustee authority to avoid any fraudulent transfers of his property by the bankrupt "which any creditor" might have avoided; and therefore the question whether a particular transfer was or was not fraudulent as to creditors does not depend upon the Bankruptcy Act, but upon the laws of the state where the alleged transfers were made. *Holbrook v. International Trust Co.*, 220 Mass. 150, 154, 107 N. E. 665; *In re Mullen* (D. C.) 101 Fed. 413; *Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393.

The alleged fraudulent payments and transfers by the bankrupt to the defendant, the value of which the trustee here seeks to recover, were made in the state of Illinois. It follows, therefore, that in deciding whether the corporation was insolvent at the time the alleged transfers were made, we must accord to the term "insolvent" the meaning ascribed to it by the courts of Illinois. And in *Atwater v. Bank*, 152 Ill. 605, 38 N. E. 1017, 1018, that court said:

"'Insolvency,' when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due, in the usual course of business."

And that is the meaning ascribed to the term "insolvent" by common-law courts and courts of equity. *Clay v. Towle*, 78 Me. 86, 2 Atl. 852; *Morey v. Milliken*, 86 Me. 464, 30 Atl. 102.

[7] The history of the National Boat & Engine Company and a consideration of its financial condition, as disclosed by the record, shows that from its beginning it was practically insolvent in the sense of that term which makes the test the inability of the corporation to meet its existing obligations in the usual course of business as they become due. According to the report of the appraisers, the new company assumed at the outset of its brief existence the combined liabilities of all the constituent companies and concerns amounting to an indebtedness of \$345,724.22. That indebtedness was immediately pressing for payment, and naturally so, because the holders thereof discovered that the property of their principal debtors had been transferred. But the new company immediately conveyed "all its property, real and personal, present and future," to secure an issue of bonds many of which were at once actually issued. It seems plain, therefore, that the new corporation became at once financially embarrassed. Its immediate and pressing obligations were more than a third of a million dollars, it had no available assets, and it must have been without credit. Its condition was helpless and hopeless. As early as December, 1910, it was in need of funds to meet its pay roll, and Butterfield then came to its aid by borrowing for it, on his own collateral, \$1,000 for that

purpose. We entertain no doubt that the sitting justice was amply justified by the evidence in finding that the corporation was insolvent during all the time Butterfield was a director of it. But his learned counsel urge that he did not know or have reason to know its condition. We think otherwise. He was perfectly familiar with the whole plan of the consolidation. He knew that the new company had assumed the debts of the constituents, and he knew that all the assets which the new company took over were immediately conveyed to secure a \$3,000,000 issue of bonds, and that many of them were issued at once. In December, not long after the corporation was organized, he responded to its call for aid in meeting its pay roll. He secured frequent and material payments in reduction of his two notes which the company had assumed, and he requested with urgency, culminating in a threat of legal proceedings, that his indirect liability as indorser on paper which the company had assumed should be secured by a deposit of bonds of the company as collateral. He was present and took part in the meeting of the directors of the company on March 13, 1911, when the resolve was passed "that when necessary to borrow money in order to obtain funds to meet bills or accounts payable, or to extend the time of payment on notes payable," the officers were authorized to use the bonds of the company as collateral at a rate not to exceed two for one. And on April 6, 1911, he accepted at their par value at least \$6,750 worth of the company's bonds in settlement of the balance of his notes for which the company was liable, and he did so with full knowledge that the company had found it very difficult to sell its bonds and at much less than par. Considering the facts and circumstances disclosed, we are of opinion that the defendant knew or ought to have known, during all the time he was a director of the company, that it was insolvent.

[8] He admits that he received on account of his notes a payment of \$1,200 on February 3, 1911, and another payment of \$1,500 on February 6, 1911. For these, with interest thereon from the dates of payment, we think he is liable in this action, upon the ground that they constituted unlawful transfers of the company's property to him as a director creditor of the corporation. We do not find from the evidence sufficient proof that he received any other payments thereon between February 1, 1911, and April 6, 1911, when a final settlement of the balance due on the notes was made.

[9] 2. The transfer to him of the \$6,750 of bonds on April 6, 1911.

He claims that these bonds were the property of Mr. Reynolds from whom he received them. We have had considerable doubt as to that. But the sitting justice so found, and we think it has not been shown that his finding is clearly erroneous. On April 4, 1911, Reynolds wrote the defendant in reference to

a settlement of the latter's claim against the Racine Company, which the National Company had assumed, and in that letter said, "but for the sake of good fellowship I am willing to sacrifice my own securities for the purpose of getting this entire matter adjusted without litigation," and he therein offered to turn over to the defendant \$5,000 of his bonds and \$1,000 of his preferred stock. Butterfield did not accept that offer. He testified that on April 6, 1911, he and Reynolds reached an adjustment of the balance due him, in settlement of which he received the \$6,750 of bonds at par, supposing that they were Reynolds' bonds. Reynolds did not testify in this case. There may be some significance in the language of the receipts which the defendant gave on April 6th for both lots of bonds. As to the \$6,750 worth, the receipt reads, "Received from W. J. Reynolds the following National Boat & Engine Company Bonds: [describing them]." But as to the \$3,650 worth it reads, "Received of W. J. Reynolds, President of the National Boat and Engine Company, the following securities: [describing those bonds]." We therefore think the decree as to the bonds of the par value of \$6,750 should not be reversed.

[10] 3. The transfer of the \$3,650 of bonds on or about April 6, 1911, as represented by the defendant's receipt of that date.

When first inquired of in respect to receiving those bonds, the defendant said he had no distinct memory about it, but was inclined to think that after the settlement Reynolds borrowed that amount of bonds of him, and that the receipt represented the return of them, saying, "Whatever it was, it was on an exchange basis, and didn't multiply or increase the \$6,750 bonds." The plaintiff filed a petition to reopen the hearing to introduce evidence that the defendant had and retained both lots of bonds, and in his affidavit in answer to that petition, which affidavit is made a part of the record, the defendant states that he was mistaken in his testimony as to the \$3,650 of bonds, but that he is now satisfied that the bonds were delivered to him as being those to which he was entitled on the purchase by the National Company of the assets of the Racine Company, of which he was a stockholder. And he further says in his affidavit that according to his best recollection the \$3,650 of bonds was "the exact amount" that he received as a stockholder of the Racine Company under the plan of consolidation. We note in the report of the appraisers as to the Racine Company that they show the net worth of that company, the excess of assets over liabilities, to be \$808,146.42, and they state: "Plan of purchase: Bonds, \$90,350; preferred stock, \$361,510; common stock, \$356,290—total, \$808,150." If that was the plan of purchase of the net worth of the Racine Company, then it would seem that \$3,650 would not be "the exact amount" of the

defendant's share of bonds coming from the consolidation, since it appears from his own testimony that he owned at least a quarter of the capital stock of the Racine Company. We strongly suspect, after a careful study of the evidence, that both lots of bonds were received as payment of the real balance found due Butterfield in the adjustment between him and Reynolds on April 6, 1911. According to a statement put into the case, which both parties seem to concede is substantially correct so far as it shows payments to Butterfield on his notes, there was due Butterfield, after the February payments of \$2,500 were credited, \$11,937.89. The defendant did not satisfactorily explain how that was reduced to \$6,750. He said it was "a final settlement of give and take of all differences to that date," but he could not recall any particular items or matters that reduced the balance of \$11,937.89 to \$6,750. We find in the record evidence of an entry on the books of the company under date of January 25, 1911, tending to show a payment of \$1,500 on "notes payable W. W. B." That payment was not on the aforesaid statement, which was prepared by some official of the company and sent to Butterfield prior to the February payments; for he put those February payments on the bottom of the statement in pencil. The last of the other payments listed on the statement is "1-20-11, 1,000." If that payment of January 25, 1911, be deducted from the \$11,937.89, there will be a balance of \$10,437.89, which might be changed somewhat by interest accrued on the one side and the other up to April 6, 1911. And the total of the two lots of bonds is \$10,400, a significant fact in this connection, we think. In our opinion, no error is shown in holding the defendant liable for the value of the \$3,650 of bonds at the time he converted them, with interest thereon. He received them from the company, and his explanation of the transaction is not convincing.

[11] 4. Such payments as were made by the National Boat & Engine Company, while the defendant was a director thereof, on notes the payment of which the company had assumed, and upon which the defendant was liable as indorser or guarantor.

There is evidence that some such payments were made to the holders of the notes, but not to Mr. Butterfield, and it is not contended that the holders of the notes had any knowledge that the National Company was insolvent when the payments were made. It is true that those payments reduced the defendant's contingent liability for debts which the company had assumed. But the evidence does not show that he procured the payments to be made. Neither does it satisfactorily appear that he knew when the payments were made, or even that they were to be made.

We think it would be going too far to

hold that a director of a bankrupt corporation is liable to pay to its receiver, or to its trustee in bankruptcy, an amount equal to the payments which the corporation may have made in its usual course of business, although while it was in fact insolvent, to its outside creditors direct who had no knowledge of its insolvency, but upon indebtedness for which the director is secondarily liable as indorser or guarantor, when it does not appear that such payments were brought about by the procurement of the director, or that he knew they were to be made, or when they were made, and even though it appears that the director ought to have known that the corporation was insolvent during the period when such payments were made. See *Butterfield v. Woodman*, 223 Fed. 956, 961, 139 C. C. A. 436. And we are therefore of opinion in this case that the plaintiff is not entitled to recover the amounts of alleged payments made by the corporation to the holders of notes for which the corporation was liable and upon which the defendant was indorser or guarantor.

Let the decree below be modified in accordance with this opinion.

So ordered.

(78 N. H. 353)

STEARNS v. O'DOWD.

(Supreme Court of New Hampshire. Hillsborough. March 30, 1917.)

1. OFFICERS ⇐83—ACTIONS TO TRY TITLE—NATURE AND FORM OF REMEDY.

A proceeding in equity does not lie to determine the title to an office, since there is an adequate remedy at law by quo warranto.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 115-123.]

2. QUO WARRANTO ⇐29—TITLE TO OFFICE—TIME FOR BRINGING ACTION.

Quo warranto cannot be brought to determine title to an office until there has been a usurpation of the office, which cannot take place before the commencement of the term of office.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. §§ 31-33.]

3. ELECTIONS ⇐285(1)—CONTESTS—FORM OF REMEDY—STATUTE.

Under Laws 1893, c. 66, a contest over a county office may be determined upon the petition or application of any candidate interested before the beginning of the term of such office, and a pleading filed thereunder is a petition or application, although labeled a bill in equity.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 266-268, 275, 276.]

4. ELECTIONS ⇐180(1) — BALLOTS — SPLIT BALLOTS.

Split or double-marked ballots, being votes for both candidates, cannot be counted for either.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 151.]

5. CONSTITUTIONAL LAW ⇐55—INVASION OF JUDICIAL POWER.

The fact that the statutory provision giving greater weight to the cross in the circle on a ballot as the evidence of a voter's intention, which was repealed after judicial decision that split ballots could not be counted for either can-

didate was later re-enacted, cannot affect the construction heretofore given the provision as an unconstitutional invasion of the judicial power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58-69, 71, 80, 81, 83.]

6. ELECTIONS ⇨180(4)—BALLOTS—MARKING.

When a cross is not within the circle on a ballot, but near it, it may, in the absence of other marks, be interpreted as indicating an intention to vote a straight ticket.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 154.]

7. ELECTIONS ⇨180(5)—BALLOTS—MARKING.

Where a ballot contains heavy crosses opposite the names of the candidate for each office on the ticket, including one against the plaintiff's name, with none against defendant's name, and there is no cross in either circle, but a light cross just above the column of defendant's party, it was a vote for the plaintiff.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 155.]

8. ELECTIONS ⇨300—BALLOTS—DEFINITION.

A ballot is a written document, and the ascertainment of its meaning is a judicial function and a question for the law court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 308-313.]

9. ELECTIONS ⇨300—BALLOTS—QUESTION OF FACT.

Whether certain papers offered as ballots were actually cast as such is a question of fact for the trial court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 308-313.]

10. ELECTIONS ⇨294—CONTESTS—EVIDENCE—ADMISSIBILITY.

In an election contest, evidence, offered before a master that many of the ballots marked "defective," "canceled," "void," "no good," or "spoilt" were actually cast and counted by the election officers, was competent, and should have been considered by the master.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 288-296.]

11. APPEAL AND ERROR ⇨1010(2)—REVIEW—FINDINGS.

The appellate court cannot weigh the evidence to decide a question of fact, but a finding of fact cannot stand if there was no evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3982.]

12. ELECTIONS ⇨295(1)—BALLOTS—MARKING—STATUTE.

Under Laws 1897, c. 78, § 18, providing that all ballots not counted, in whole or in part, on account of defects, shall be marked "defective" on the back thereof by the moderator, and shall be sealed with the other ballots cast, and returned to the city or town clerks, the entry "defective" made on a ballot, instead of authorizing the inference that the paper was not cast as a ballot, in the absence of other evidence conclusively establishes its status as a ballot; hence a finding by a master that ballots so marked were not cast as ballots was erroneous.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297.]

13. ELECTIONS ⇨239—BALLOTS—MARKING—STATUTE—CONSTRUCTION—"NO GOOD"—"VOID"—"SPOILED"—"CANCELED."

Under Laws 1897, c. 78, § 16, providing that, if a voter spoils a ballot, he may successively receive three others, one at a time, not exceeding three in all, upon returning each spoiled one, and the ballots thus returned shall be immediately marked "canceled" by the ballot clerk, and, together with those not distributed

to the voters, shall be preserved, the words "no good," "void," "spoiled," may mean "canceled," the word the statute required to be placed on the spoiled ballots; hence ballots so marked cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 218.]

For other definitions, see Words and Phrases, First and Second Series, Cancel—Cancellation; Void.]

Transferred from Superior Court, Hillsborough County.

Proceeding by George L. Stearns against John T. O'Dowd to determine a title to office of sheriff of Hillsborough county, to which defendant was declared elected. Judgment for defendant subject to exception, and questions raised by the proceedings reserved and transferred. Exceptions sustained.

Petition under section 1, c. 66, Laws 1893, to determine the title to the office of sheriff of the county of Hillsborough, to which the defendant was declared elected. The petition alleged that, upon a correct count of the ballots cast, the petitioner received a plurality of the votes for the office of sheriff and was elected. The petition was referred to a master, who found on the ballots cast that Stearns received 10,025 votes, and O'Dowd 10,043, and that there was controversy as to the proper counting of 120 ballots, which, numbered and fully described, were returned as a part of the report. Forty-nine ballots were marked with a cross in the circle of one party and with a cross opposite the name of the nominee of the opposing party for sheriff, without erasure of the name of the candidate in the column under the circle which was marked. The master counted these according to the cross in the circle—31 for O'Dowd and 18 for Stearns. There were 16 ballots marked "defective," and 11 marked "canceled," "void," "no good," or "spoilt," none of which were included in the master's count. Upon the return of the master's report, each party claimed election and moved for a certificate. Subject to exception, the court found the defendant, O'Dowd, elected, and ordered a certificate of election to be issued to him, March 31, 1917. All questions of law raised by the proceeding were reserved and transferred by Branch, J.

Jones, Warren, Wilson & Manning and Harry T. Lord, all of Manchester, for plaintiff. Thomas H. Madigan, Jr., of Manchester, for defendant.

PARSONS, C. J. [1, 2] In the record sent to this court the proceeding is labeled "Bill in Equity." The defendant objects that a bill in equity cannot be maintained to determine the title to an office. The objection is well taken. A proceeding in equity does not lie because there is an adequate remedy at law by quo warranto, which, however, cannot be brought until there has been a usurpation of the office, which cannot take place

before the commencement of the term of the office in dispute. *Attorney General v. Megin*, 63 N. H. 378; *Osgood v. Jones*, 60 N. H. 543; *Osgood v. Jones*, 60 N. H. 282. County officers are chosen biennially on the Tuesday next following the first Monday in November. The returns are canvassed and the result declared on the first Tuesday of December, but generally, if not in all cases up to the present time, the officers-elect do not enter upon their offices until the first of the following April. Until 1893 controversy over an election could not be litigated until the term of office began, practically six months after the election. In that year it was provided that a contest over a county office might be determined, upon the petition or application of any candidate interested, as well before the term of such office began as after. Laws 1893, c. 66.

[3-5] The present proceeding is a petition, or application, under the statute by one of the candidates for the office, and in no sense a "Bill in Equity." The decision in *Murchie v. Clifford*, 76 N. H. 99, 79 Atl. 901, which was followed in *Dinsmore v. Mayor*, 76 N. H. 187, 81 Atl. 533, settles the proper construction of the split or double-marked ballots; being votes for both candidates, they can be counted for neither. The fact that the statutory provision giving greater weight to the cross in the circle as evidence of the voter's intention, repealed shortly after the decision in *Murchie v. Clifford* (Laws 1911, c. 188), was later re-enacted (Laws 1915, c. 119), cannot affect the construction heretofore given the provision as an unconstitutional invasion of judicial power. If it be conceded that the judicial view of the legislation was in mind when the provision was re-enacted, it would follow that it was then understood the provision would be disregarded in a judicial interpretation of the ballot. The double-marked ballots cannot be counted. One of these, however, No. 27, though counted for O'Dowd on the ground of a cross in the Democratic circle, was not so marked.

[6] There are heavy crosses opposite the names of a candidate for each office on the ticket, including one against Stearns' name, with none opposite O'Dowd's. There is no cross in either circle, but a light cross just above the Democratic column. When a cross is not within the circle, but near it, it may, in the absence of other marks, be interpreted as an attempt to vote a straight ticket. In this case the voter, by marking every candidate and dividing his marking between the parties, furnished competent evidence of his intention not to vote a straight ticket. A cross in the circle would have indicated an intention to vote the whole ticket of the party to which the circle belonged, and it would then be impossible to determine his actual intent. On this ballot the voter clearly expressed an intent to vote a mixed ticket—to vote for Stearns, and not to vote for O'Dowd.

101 A.—3

The most that can be said of the stray cross at the top is that it is evidence of an imperfectly executed intent to vote a straight ticket. The direction of the statute printed upon the ballot requires for a straight vote a cross in the circle. The voter made no cross there, and, in view of the direct evidence of his purpose elsewhere expressed on the ballot, it cannot be found that he intended a cross not in the circle as indicating his preference. If this cross were the only one on the ballot, the interpretation would be aided by the presumption that the voter intended the paper prepared by him as a ballot, and to prevent loss of his vote his main purpose would be carried out by giving to the mark made by him the only interpretation possible.

[7] But the vote he attempted to give by properly executed crosses cannot be destroyed by an unexecuted intention to vote a straight ticket. The statute, after providing that a cross in the circle is a vote for a straight ticket, continues, "Provided, however, that a voter may omit to mark in any circle and may vote for one or more candidates by marking a cross (X) opposite the names * * * of the candidates of his choice." The voter in this case followed the statute; he did not mark in any circle, but made a cross opposite Stearns' name and none against O'Dowd's. The ballot is a vote for Stearns. Eleven ballots were claimed as votes for O'Dowd which contained no cross opposite O'Dowd's name and none in any circle. There are on them one or more crosses in the space opposite the Democratic electors, and not in the square provided for voting for the electors by a single cross. It cannot be said that marks so situated indicate an attempt to mark a cross within the circle, the only method by which an intent to vote a straight ticket can be expressed by a single cross.

[8, 9] "The ballot is a written document, and the ascertainment of its meaning is a judicial function." *Murchie v. Clifford*, 76 N. H. 99, 104, 79 Atl. 901, 903. And is a question for the law court. *State v. Railroad*, 70 N. H. 421, 434, 48 Atl. 1103. Whether certain papers offered as ballots were actually cast as such is a question of fact for the trial court. *Murchie v. Clifford*, 76 N. H. 99, 101, 102, 79 Atl. 901.

[10, 11] Twenty-seven papers, apparently ballots, returned with the others, were rejected by the master upon the ground that they were not cast as ballots. Sixteen of these were marked "defective," and eleven either "canceled," "void," "no good," or "spoilt." The plaintiff offered evidence as to many of these that they were ballots actually cast and counted by the election officers. The master heard and reported the evidence, but refused to consider it. The evidence was competent and should have been considered. The question of fact so presented cannot be here decided. This court cannot weigh the

evidence. The finding of fact, however, cannot stand if there was no evidence to sustain it. The only evidence relied upon to overturn the presumption from the presence of the papers among the returned ballots is the entries above recited, found on the papers apparently made by the election officers. The statute provides, in the directions for counting ballots by the election officers: "All ballots not counted, in whole or in part, on account of defects, shall be marked 'defective' on the back thereof by the moderator, and shall be sealed with the other ballots cast and returned to the city or town clerks." Laws 1897, c. 78, § 18. There is no requirement that the particulars in which the ballot is considered defective should be noted on the ballot.

[12] The entry "defective" made on a ballot under this provision, instead of authorizing the inference that the paper was not cast as a ballot, in the absence of other evidence conclusively establishes its status as a ballot. The finding as to these ballots, being without evidence to sustain it, is set aside.

A person wishing to vote is given one ballot only, which he takes with him into the voting booth. "If any voter spoils a ballot, he may successively receive three others, one at a time, not exceeding three in all, upon returning each spoiled one. The ballots thus returned shall be immediately marked 'canceled' by the ballot clerk, and, together with those not distributed to the voters, shall be preserved." Laws 1897, c. 78, § 16.

[13] If the statute is followed, ballots marked "defective" are ballots that have been cast and are returned with the others cast. Ballots marked "canceled" are ballots not cast, and are to be preserved with others not cast. The words "no good," "void," "spoiled," may mean "canceled," the word the statute requires to be placed on the spoiled ballots. There was therefore evidence to sustain the finding made as to the eleven. Evidence was offered tending to show that two of these, Nos. 30 and 81, were cast as ballots, and the marking "no good" placed upon them by direction of the moderator after they were taken from the ballot box. If, upon consideration of the evidence, the master's conclusion should be reversed, one of the ballots, and possibly the other, would be counted for Stearns. There was no evidence tending to establish the verity of the other "canceled" ballots. None of the eleven can now be counted. Of the ballots marked "defective," and not counted, two are votes for O'Dowd and seven for Stearns.

Objection is made by both parties to the conclusion of the master as to many of the ballots, but a careful examination of each disputed ballot does not disclose other error in their interpretation by him which would affect the result. As the matter now stands, without delaying for a finding of fact as to

the ballots Nos. 30 and 81, O'Dowd has 19,014 votes and Stearns 10,015.

The master's count gave O'Dowd 10,043. To this should be added the two "defective" ballots, and subtracting from this total the thirty-one "split ballots" gives the above result.

Similarly the correct count for Stearns is reached by adding to the master's count the seven "defective" and ballot "No. 27," eight in all, and subtracting the eighteen "splits" counted for him. As Stearns received, upon a correct count of the ballots, a plurality of the votes cast, he was elected, and is entitled to a certificate of election.

Exception sustained. All concurred.

(78 N. H. 387)

BROWNE v. PARK CEMETERY.

(Supreme Court of New Hampshire. Belknap. May 1, 1917.)

1. EMINENT DOMAIN — "PUBLIC USE" — CONSTITUTION — STATUTE.

Laws 1913, c. 311, § 1, providing that all proceedings of the Park Cemetery corporation in the town of Tilton are ratified and made legal, and that the cemetery shall have all the rights and powers, and be subject to all liabilities, which towns by statute possess concerning cemeteries by P. S. c. 40, § 4, and section 6, authorizing towns to take land in invitum for public use, is not violative of Const. pt. 1, art. 12, as authorizing the taking of private property in invitum for a private use, since the use of land for the establishment and maintenance of a cemetery for the burial of the dead may be a "public use" justifying its condemnation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 89.

For other definitions, see Words and Phrases, First and Second Series, Public Use.]

2. CEMETERIES — DUTY TO AFFORD SERVICE.

Having invoked the power of eminent domain to acquire rights in the lands of others, a cemetery corporation can be compelled, at least to the extent of the rights acquired, to afford reasonable service to the public, in the public business it has undertaken, at reasonable rates.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 1.]

Transferred from Superior Court, Belknap County; Kivel, Judge.

Proceeding for the laying out of land for the Park Cemetery by the selectmen of the town of Tilton, wherein Belle P. Browne objected. From the laying out, Browne appealed. On transfer without a ruling. Case discharged.

The defendant is a voluntary corporation organized July 8, 1851, for the purposes of providing, holding, and keeping in repair suitable grounds and other conveniences for the burial of the dead, and claims the right to take the plaintiff's land under the following statute passed March 6, 1913:

"All the acts and proceedings of an association called and known as Park Cemetery located in the town of Tilton (formerly in Sanbornton),

be, and the same are hereby ratified and made legal, and the said Park Cemetery as now organized shall have all the rights and powers, and be subject to all the liabilities which towns by statute possess concerning cemeteries, by and under sections 4 and 6 of chapter 40 of the Public Statutes, and shall be called and known as Park Cemetery." Laws 1913, c. 311, § 1.

Stephen S. Jewett, of Laconia, for plaintiff.
Charles C. Rogers, of Tilton, Robert Jackson, of Concord, and Branch & Branch, of Manchester, for defendant.

PARSONS, C. J. [1] By section 6, c. 40, P. S., towns are authorized to take land in invitum for public use. The use of land for the establishment and maintenance of a cemetery for the burial of the dead may be a public use. *Rockingham Light & Power Co. v. Hobbs*, 72 N. H. 531, 533, 58 Atl. 46, 66 L. R. A. 581; *Crowell v. Londonderry*, 63 N. H. 42; *Evergreen Cemetery Association v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643.

"The burial or other safe disposition of the dead is a necessity essential to the preservation of the health of the living. The private use of land for this purpose by a private corporation may be of public convenience and necessity, as that term is sometimes used, although not strictly a public use justifying condemnation of land for that purpose. * * * But where land is appropriated * * * by a town or other municipal corporation, or by the owners of the land, being a voluntary association or private corporation, and the land so appropriated is open, under reasonable regulations, to the use of the public for the burial of the dead, it may become a public burial ground and its use a public use, and the Legislature may lawfully condemn land for that public use." *Starr Burying Ground Ass'n v. Association*, 77 Conn. 83, 58 Atl. 467.

The plaintiff bases her objection to the constitutionality of the statute invoked by the defendant upon the elementary principle that private property cannot be taken in invitum for private use. Const. pt. 1, art. 12; *Concord Railroad v. Greely*, 17 N. H. 47; *Underwood v. Bailey*, 59 N. H. 480. If this were the purpose of the statute, the objection would be fatal. But the power conferred upon towns by section 6, c. 40, P. S., which the act of 1913 gives the defendant is only to take land for a public use.

As the plaintiff's land can under the statute be taken only for a public use, there is no constitutional objection to the statute. Whatever title the association may have to land previously acquired by treaty, all land it may acquire under this statute will be affected by the public use.

"If the right in the old ground is not public in every sense of the term, it will not affect the public right in regard to that part of the ground which is added to it by this enlargement. The part added will be public, subject to such regulations and restrictions as the by-laws of the association may make; and that is enough to answer the material part of this claim, viz. its being subject to the objection of taking private property for private use only." *Edwards v. Stonington Cemetery Ass'n*, 20 Conn. 466, 479.

[2] Having invoked the power of eminent domain for the acquisition of rights in the lands of others, the defendant can be com-

pelled, at least to the extent of the rights so acquired, to afford reasonable service to the public in the public business they have undertaken at reasonable rates.

"It is in fact a public agent exercising powers for the public advantage which are subject to legislative control and enforcement." *McMillan v. Noyes*, 75 N. H. 258, 263, 72 Atl. 759, 762.

Case discharged. All concurred.

(78 N. H. 408)

STATE v. WEEKS.

(Supreme Court of New Hampshire. Cheshire. May 1, 1917.)

1. COUNTIES \S 139 — CRIMINAL TRIAL — EXPENSES.

The power of the courts to grant a person charged with crime assistance in his defense at public expense is wholly statutory.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 203-207.]

2. COUNTIES \S 139 — EXPENSES — PREPARATION FOR TRIAL.

There is no statutory authority under which the public may be charged with expenses incurred by defendant in preparing for trial or in employing experts to conduct an examination as to his sanity except so far as counsel and those for travel and attendance of witnesses are concerned.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 203-207.]

3. COUNTIES \S 139 — EXPENSES — PREPARATION FOR TRIAL.

Pub. St. 1901, c. 256, § 9, providing that all legal costs attending the arrest, examination, or conveyance of an offender, except when directed or approved in writing by the counsel of the state or county commissioners, shall be paid by the complainant, is not applicable to a claim for the fees of experts incurred in examining a defendant as to sanity in preparation for trial for murder.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 203-207.]

Exceptions from Superior Court, Cheshire County; Branch, Judge.

Eugene A. Weeks was indicted for murder. On disallowance of a claim against the county, for fees of experts, defendant excepts. Exceptions overruled.

Indictment for murder. The defense of insanity was suggested, and bills were presented by counsel for the defendant for the fees of experts employed to examine the defendant. No authority had been given to employ them at the expense of the county. At the October term, 1916, the superior court disallowed the claim, allowed the defendant's exception to the order, and transferred the question of authority to allow the bills against the county.

James P. Tuttle, Atty. Gen., Philip H. Faulkner, Co. Sol., of Keene, and James A. Moynihan, of Manchester, for the State. Joseph Madden, of Keene, for defendant.

PEASLEE, J. It does not directly appear upon what ground the order excepted to was made; but as the case states that the question of authority is transferred, it is assum-

ed that allowance of the claim was refused upon the ground that the court had no power to take such action.

The case appears to be one of new impression. No precedent has been found for the course here urged in behalf of the defendant. The proposition is that the public shall pay the expenses incurred by the defendant outside of court in the preparation of his defense. Of course there can be no common-law authority for such an order. By that law the defendant—

"was denied compulsory process for his witnesses, and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law." *United States v. Reid*, 12 How. 361, 364, 13 L. Ed. 1023.

[1] It required legislative action to give the defendant the rights he would have in a civil cause. 4 Blk. Com. 360. It is manifest that a right so acquired cannot be extended so as to include a privilege or right never known to the common law, and in no way created by any statute. The right to the state's process to compel the attendance of the defendant's witnesses in certain cases (Laws 1907, c. 136, § 1) originated in this state with the act of 1829. Laws (Ed. 1830) p. 149. The changes which have, from time to time, been made in the statute show a continuing legislative understanding that the power of the court to grant a person charged with crime assistance in his defense at the public expense is wholly statutory. R. S. c. 225, § 3; Laws 1859, c. 2221, §§ 1, 5; Laws 1862, c. 2608, §§ 1, 3; G. S. c. 243, §§ 1, 4; Laws 1873, c. 47; G. L. c. 261, §§ 1, 4. See, also, *State v. Arlin*, 39 N. H. 179, and *State v. Archer*, 54 N. H. 465, where it seems to be assumed that authority to act must be found in the statute.

[2] The statute governing the rights of persons charged with the more serious crimes (P. S. c. 254) was revised in 1901 (Laws 1901, c. 104), and again amended in 1907. Laws 1907, c. 136. By the latest amendment the requisites for obtaining state process to compel the attendance of witnesses for the defendant are given in detail. It must appear that the defendant is poor and unable to defray the expense, and that injustice may be done if provision therefor is not made at the public expense. The subject has evidently received careful legislative consideration, and there is nothing in any of the statutes which have been enacted which gives color to the idea that authority has been conferred to charge the public with the expenses incurred by the defendant in preparing for trial, except so far as counsel fees and those for travel and attendance of witnesses are concerned.

[3] It was urged by the state in argument that the statute, providing that:

"All legal costs attending the arrest, examination, or conveyance of an offender, except when directed or approved in writing by the counsel of the state, or county commissioners,

shall be paid by the complainant" (P. S. c. 256, § 9)

—was applicable to this claim, and that it must be disallowed because its incurrence had not been previously authorized by the state's counsel. But that statute has no application to the claim here presented. It relates solely to expenses incurred in prosecutions for alleged crimes, and has nothing to do with the regulation of allowances to or on behalf of defendants.

The state's contention that the court has no power to allow this claim is sound. But the reason for this result is that no such authority has been conferred upon the court, and not that the consent of the state's counsel is essential.

Exception overruled. All concurred.

(31 Vt. 340)

LAFOUNTAIN & WOOLSON CO. v. BROWN.
(Supreme Court of Vermont. Windsor. May 1, 1917.)

1. FRAUDS, STATUTE OF \S 139(6)—**EXECUTED AGREEMENT—SALE OF CORPORATE STOCK.**

The rights of the parties under an unconditional contract for the sale and purchase of corporate stock are determined independently of the statute of frauds, where the stock certificate has been delivered and payment made, though the agreement, while it remained executory, would have been unenforceable because of such statute.

2. CORPORATIONS \S 155(2) — **TRANSFER OF STOCK—RIGHT TO DIVIDEND.**

The dividend on stock sold ordinarily belongs to the one who was the owner thereof when the dividend was actually declared.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 561.]

3. CORPORATIONS \S 155(3) — **TRANSFER OF STOCK—UNDIVIDED SURPLUS.**

The surplus of a corporation is a part of the stock until separated from the capital by the declaration of a dividend, and while undivided will pass with the stock in a transfer thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 563.]

4. CORPORATIONS \S 119 — **SALE OF STOCK — EQUITABLE INTEREST OF BUYER.**

The purchaser of corporate stock acquires an equitable interest before completion of the transfer where the contract of sale is binding between the parties, and as between them such interest will be enforced and protected as a trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 499-503.]

5. CORPORATIONS \S 116 — **SALE OF STOCK — CONSTRUCTION OF CONTRACT.**

In construing a contract to sell corporate stock, it will be presumed that the parties intended, nothing to the contrary appearing, that the shares were to be transferred in their condition at the time of the bargain.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496.]

6. CORPORATIONS \S 155(3) — **SALE OF STOCK — RIGHT TO DIVIDEND.**

Where a dividend was declared after the execution of a valid contract for the sale of corporate stock, but before arrival of the time for delivery and payment, the buyer, on complying with the contract, was entitled to the dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 563.]

Exceptions from Windsor County Court; Leighton P. Slack, Presiding Judge.

Action by the Lafountain & Woolson Company against Walter W. Brown. From a judgment for plaintiff, defendant brings exceptions. Affirmed.

Argued before WATSON, C. J., and HASSETTON, POWERS, TAYLOR, and MILES, JJ.

Stickney, Sargent & Skeels, of Ludlow, for plaintiff. Blanchard & Tupper, of Springfield, for defendant.

TAYLOR, J. The action is contract for money had and received. The plaintiff seeks to recover the amount of a dividend on stock purchased by it from the defendant. The case was tried by the court on an agreed statement of facts, and the plaintiff had judgment.

The defendant was the owner of the major part of the capital stock of the Brown Hotel Company, a corporation, operating a hotel at Springfield, Vt., and one of the three directors of the corporation. On March 24, 1916, he had negotiations with plaintiff's representative regarding the sale of the capital stock of the hotel company. Later the same day the defendant's agent called plaintiff's representative by telephone and told him that the defendant would sell his stock to the plaintiff at a certain price per share. Plaintiff's representative replied that the plaintiff would take the stock at the price named and pay for it the following morning, to which defendant's agent assented. No part of the stock was then delivered nor any part of the purchase money paid; neither was any written memorandum of the bargain made. On the following morning the defendant and plaintiff's representative met and the transaction was completed by delivery of the certificate of stock and payment of the purchase price. During the negotiations nothing was said about cash in the treasury of the hotel company.

On March 24, 1916, after the above telephone conversation, the defendant called a meeting of the directors of the hotel company, and a dividend of \$1.50 per share was declared, which was immediately paid by the treasurer of the corporation. The defendant received as the dividend on the stock bargained to the plaintiff \$499.50. The plaintiff first learned of the dividend when the books of the hotel company were turned over after the delivery of the stock. Thereupon it made demand upon the defendant; and, payment being refused, this suit was brought.

To maintain this action the plaintiff must establish that it was entitled to the dividend as the purchaser of the defendant's stock; and its right to receive the dividend depends upon its relation to the stock at the time the dividend was declared. It is held that in case of options and sales of stock for future delivery the right to dividends depends upon the question at what time with reference to

the declaration of the dividend the title passes. 7 R. O. L. 293. This transaction was not an option. It culminated in an unconditional agreement for the sale and purchase of the stock before the dividend was declared. All that remained to be done was the delivery of the certificate and the payment therefor at the time fixed in the agreement.

[1] The defendant contends that the agreement of March 24th was invalid because within the statute of frauds, so that no rights could accrue under it. Conceding that, while the agreement remained wholly executory, it was not enforceable because of the statute, the subsequent delivery and payment took the transaction out of the statute, leaving the rights of the parties to be determined independently of it. *Patterson v. Sargent*, 83 Vt. 516, 77 Atl. 338, 138 Am. St. Rep. 1102; *Strong v. Dodds*, 47 Vt. 348; *Fay v. Wheeler*, 44 Vt. 292; 2 Cook on Cor. 1045.

[2, 3] The defendant claims further that title to the stock did not pass until payment and delivery; and so, as the stock belonged to him at the time the dividend was declared, the dividend was payable to him. There is no disagreement as to the general rule that a dividend belongs to the one who was the owner of the stock when the dividend was actually declared. See *King v. Follett*, 3 Vt. 385. It is also well settled that the surplus of a corporation is a part of the stock itself until separated from the capital by the declaration of a dividend. See *In re Heaton's Estate*, 89 Vt. 550, 96 Atl. 21, L. R. A. 1916D, 201. Such undivided surplus will pass with the stock under that name in a transfer thereof. The purchaser takes the stock with all its incidents, one of which is the right to receive its proportionate share of undivided profits. *Harris v. Stevens*, 7 N. H. 454; *March v. Eastern Railroad Co.*, 43 N. H. 520; 7 R. O. L. 292; 10 Cyc. 558.

[4] The defendant recognizes this fact and bases his right to the dividend upon the claim of legal title to the stock at the time it was declared. But the question does not depend alone upon legal title. The principle of equitable assignments applies. The purchaser of shares of corporate stock is held to acquire an equitable interest in the stock before the transfer is completed, if the agreement of purchase and sale is binding between the parties. As between them such interest will be enforced and protected as a trust. 1 Morawitz on Pr. Cor. § 174.

[5] In construing an agreement for the sale of shares of stock it will be taken to be the intention of the parties, nothing to the contrary appearing, that the shares are to be transferred in their condition at the time of the bargain. 1 Morawitz on Pr. Cor. § 175. Thus the law imputes to the seller an intention to deal fairly with the purchaser, and in doing so requires him to deliver only what entered into the value and price at which the stock was sold. While it permits him to retain the "fallen fruit," it does not accord to

him the additional privilege of "shaking the tree" after the bargain is closed.

[6] It follows from what we have said that if, after a valid contract for the sale of shares of stock is made, but before the time for delivery and payment arrives, a dividend is declared, the purchaser is entitled to the dividend on complying with the contract. *Phinlzy v. Murray*, 83 Ga. 747, 10 S. E. 358, 6 L. R. A. 426, 20 Am. St. Rep. 342; *Currie v. White*, 45 N. Y. 822; *Harris v. Stevens*, 7 N. H. 454; *Conant v. Reed*, 1 Ohio St. 298; *Beach v. Hamersham*, L. R. 4 Ex. D. 24; 7 R. C. L. 293; 2 Addison on Con. § 661; Cook on Stocks & Stockholders, § 543; 2 Cook on Cor. § 539; 1 Morawitz on Pr. Cor. §§ 174-178.

The result is that under the agreement in this case the dividend belongs to the plaintiff. Judgment affirmed.

(91 Vt. 412)

CORRY et al. v. BARRE GRANITE & QUARRY CO. et al.

(Supreme Court of Vermont. Washington. May 8, 1917.)

1. CORPORATIONS ⇨665(3) — FOREIGN CORPORATIONS—INTERNAL AFFAIRS—JURISDICTION.

A court of chancery may, where all the necessary parties are before it, and where the relief sought is within the jurisdiction of a court of chancery, award a stockholder relief against a foreign corporation expressly chartered to do business in the state and having its property and business here, although it involves an interference with its internal affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2600.]

2. PLEADING ⇨214(1)—DEMURRER—MATTERS ADMITTED — ALLEGATIONS ON INFORMATION AND BELIEF.

A demurrer to allegations on information and belief admits only the belief and information, and not the facts pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529.]

3. CORPORATIONS ⇨401—DIRECTORS—RIGHTS.

The directors of a corporation cannot represent it in transactions with another corporation in which they are shareholders if their interest in the latter company might induce them to favor it at the expense of the company whose interests have been entrusted to their care.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364, 1595.]

Appeal in Chancery, Washington County; Fred M. Butler, Chancellor.

Action by Frank M. Corry, trustee, and another against the Barre Granite & Quarry Company and others. From a decree sustaining a demurrer to the complaint, complainants appeal. Decree affirmed, and cause remanded, with leave to amend.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Edward H. Deavitt, of Montpelier, for appellants. John W. Gordon and S. Hollister Jackson, both of Barre, for appellees.

MUNSON, C. J. This complaint is prosecuted by Frank M. Corry, trustee of the Wetmore & Morse Granite Company, against the Barre Granite & Quarry Company and certain of its stockholders, in behalf of himself as trustee and all stockholders of the Barre Company not made parties defendant. The complaint was demurred to for want of equity and on several grounds specially assigned, and was adjudged insufficient and dismissed.

The Wetmore & Morse Granite Company, hereinafter referred to as the Wetmore Company, is a corporation organized and existing under the laws of this state. The Barre Granite & Quarry Company, herein referred to as the Barre Company, is a corporation organized and doing business under the laws of Maine and having its principal offices at Portland in that state, and at Barre city in this state. It was incorporated for the purpose of carrying on the business of quarrying granite in the town of Barre in this state.

The complaint alleges that the capital stock of the defendant corporation is \$200,000, divided in 20,000 shares, of the par value of \$10 each; that the plaintiff trustee was, on the 7th day of August, 1916, and ever since has been, the owner of 105 shares of said stock; that ever since that date a majority of the stock of the defendant corporation has been owned and controlled by defendants Donald Smith, Angus A. Smith, H. Nelson Jackson, and S. Hollister Jackson.

The matters alleged as the ground for relief are these: On the 10th day of August, 1916, a special meeting of the stockholders of the defendant company was held in Portland pursuant to a notice which specified as the business of the meeting the filling of vacancies in the board of directors, and to see what the corporation would do "to settle its indebtedness, whether by sale of its properties or otherwise; and if by sale, to empower an agent to make proper transfers and to wind up its affairs." At this meeting, the four stockholders above named were elected directors to fill vacancies in the board, which as now constituted consists of five. The following resolution was then offered:

"That it is the sense of this meeting that it will be to the advantage of the stockholders to sell all the assets of the corporation, settle the outstanding bills and dissolve the corporation; the directors are therefore instructed to endeavor to find a customer or customers for the property, and whenever they find a customer or customers who are ready and willing to purchase the whole or any part of said property at a price which in their judgment is advantageous to the stockholders, they are authorized to complete said sale and as agents of said corporation to execute and deliver * * * such instruments of sale as may be necessary. * * *

Mr. Deavitt, who was present as proxy for the plaintiff and another stockholder originally a party plaintiff, offered an amendment which provided that any sale should

be at public auction. This amendment was rejected by a vote of 5,601 shares to 106 shares, and the resolution was then adopted by the same vote. The plaintiff's shares were voted in favor of the amendment and against the adoption of the resolution. Deavitt orally objected to the voting on these questions of the 5,599 shares owned by Donald Smith and H. Nelson Jackson, on the ground that they held the stock in behalf of the E. L. Smith Company, a corporation organized under the laws of Vermont, and that it was a fraud on the other stockholders to thus vote the stock, the E. L. Smith Company being engaged in a business similar to that of the Barre Company, and there being other quarry companies and individuals who were ready to purchase this property at auction. The assets of the Barre Company, other than book accounts and bills receivable, consist of land in the town of Barre upon which are located granite quarries, together with buildings, machinery, and personal property thereon, and on which the Barre Company has been for the past 10 years, and now is, engaged in quarrying granite, having no quarrying or other business in any other place. Surrounding this land are lands owned severally by the E. L. Smith Company, the Wells-Lampson Quarry Company, and the Wetmore & Morse Granite Company, all going Vermont corporations, engaged in the business of quarrying granite, and each having its principal office in this state. The land of the Barre Company is particularly valuable to these companies because of its location. The complaint avers upon information and belief that the individual defendants, being four of the five directors of the defendant company, have conspired together to operate said corporation and control a sale of its assets for their own personal benefit to the detriment of the plaintiff and other minority stockholders, and with intent to deprive the minority stockholders of their property are arranging to turn over the assets of the corporation to the E. L. Smith Company, or some person for it, at a sum much less than its true value. It is alleged that the plaintiff Corry is the president of the Wetmore Company; and that if the real and personal property of the defendant corporation is put up at auction, he will start the bidding on account of the Wetmore Company at \$120,000; and that the property is worth \$150,000 or more.

The defendants invoke the rule that a court will not take jurisdiction of the internal affairs of a foreign corporation; and contend that the relief sought here would be an interference with the internal affairs of the defendant company. It is doubtless well settled that the general rule is as above stated; but there is some disagreement as to what constitutes the affairs thus designated, and courts have had difficulty in formulating a rule to serve as a test in all cases, as will

appear from an examination of the decisions. See *North Star, etc., Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 71; *State v. De Groat*, 109 Minn. 168, 123 N. W. 417, 134 Am. St. Rep. 764; *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Madden v. Penn.*, etc., *Light Co.*, 181 Pa. 617, 37 Atl. 817, 38 L. R. A. 638. Except in cases involving the exercise of visitatorial powers, the question presented by applications for relief in cases of this character "is not strictly one of jurisdiction, but rather of discretion in the exercise of jurisdiction." The refusal to take jurisdiction is often put upon the ground of policy and expediency; on a want of power to enforce a decree rather than on a lack of jurisdiction to make it. *Babcock v. Farwell*; *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308; *State v. No. Am. Land Co.*, 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309; *Chicago Title, etc., Co. v. Newman*, 187 Fed. 573, 109 O. C. A. 263; *Beard v. Beard*, 68 Or. 512, 133 Pac. 797, 134 Pac. 1196; note, 19 Ann. Cas. 84; note, Ann. Cas. 1913E, 457.

Irrespective of the question as to the proper test to be applied in determining what are the "internal affairs" of a corporation, it may safely be said that when a corporation is nonresident only in that it is the creation of another state—its officers, agents, stockholders, business and property all being within the jurisdiction of the court—policy and expediency do not require the court to deny relief in a proper case on the ground that the internal affairs of the corporation will be affected. Where the relief sought is within the general jurisdiction of a court of chancery, and all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require an exercise of the visitatorial power of the government, the court should determine the controversy, instead of remitting suitors to a foreign jurisdiction. *Babcock v. Farwell*; *Edwards v. Schillinger*; *State v. No. Am. Land Co.*; *Wineburgh v. U. S. Steam, etc., Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Richardson v. Clinton, etc., Co.*, 181 Mass. 580, 64 N. E. 400; *Andrews v. Miner's Corporation*, 205 Mass. 123, 91 N. E. 122, 137 Am. St. Rep. 428; *Travis v. Knox Terpezzone Co.*, 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387, 12 R. C. L. 33. It was decided in *Richardson v. Clinton, etc., Co.*, that a stockholder's suit brought to obtain relief from the fraudulent acts of the corporate officers is in the nature of a suit by the corporation against wrongdoers, and may be brought in the state where the corporate officers and property are located. See, also, *Wilson Am. Palace Car Co.*, 64 N. J. Eq. 534, 54 Atl. 415.

[1] It is clear that the general subject-matter of this complaint is within the jurisdiction of the court of chancery. The defendant company, although a foreign corporation, was chartered expressly for the purpose of doing business in this state. Four of its five directors, its business and its property, are within the territorial jurisdiction of the court. The corporation and these directors have been duly served and are before the court. There is no obstacle to prevent the court's enforcement of its decree. In these circumstances, the classification of the affairs of the corporation which are involved in this proceeding, whether internal or otherwise, is of little or no consequence. If the case stated in the bill is one which entitles the complainant to equitable relief, the relief may properly be given, even if it involves an interference with the internal affairs of the corporation.

The charge as it stands, upon allegations adequately made, is that the individual defendants, who are a majority of the directors, and own or control a majority of the stock, have conspired to so operate the corporation as to effect a sale of its assets for their own personal benefit and to the detriment of the minority stockholders; and to this end have passed a vote to dispose of the property at private sale, and are arranging to transfer it to the E. L. Smith Company, or some person for it, at a sum much less than its true value. These, and other allegations before stated, present the case of a corporation whose property is so located as to give it the advantage of competing offers, which refuses to sell at public auction, and proposes to sell to a certain party for an inadequate consideration. The letter set up in the bill, in which the directors of the defendant company invite the Wetmore Company to send them in writing its best price for the property, does not meet the situation.

[2] There are several matters stated in the bill which stand solely on an allegation that the complainant is informed and believes. These cannot be considered; for as to these the demurrer admits nothing more than that the complainant is so informed and believes. *Bancroft v. Vall*, 90 Vt. —, 99 Atl. 1014. If one of the allegations thus defectively inserted was made good by an amendment adding the words "and therefore avers," it would appear that nearly all the stock of the E. L. Smith Company, the proposed transferee, is owned by the four directors whom the resolution of the defendant company empowers to make the sale. Upon the case as thus presented there could be no room to doubt. The directors of the defendant company would, in effect, be selling the property to themselves. The right to do this is denied to all persons acting in a fiduciary capacity.

[3] The directors of a corporation cannot represent it in transactions with another

corporation in which they are shareholders, if their interest in the latter company might induce them to favor it at the expense of the company whose interests have been intrusted to their care. 1 Mor. Pri. Corp. § 520.

The defect in the allegations pointed out renders the bill demurrable, and so the demurrer was properly sustained.

Decree affirmed, and cause remanded, with leave to apply.

(91 Vt. 419)

SANDERSON v. BOSTON & M. R. R.

(Supreme Court of Vermont. Caledonia. May 8, 1917.)

1. MASTER AND SERVANT ⇨276(7)—INJURIES TO SERVANT—SAFE PLACE TO WORK—EVIDENCE.

Where a railroad brakeman testified that he was swept from a side car ladder by an unusually large car on the adjacent track, and that the car was not far enough away from the one upon which he was riding, it was unnecessary that the size of the car and its distance from the other be determined by exact measurements.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

2. MASTER AND SERVANT ⇨246(2)—INJURIES TO SERVANT—DUTIES OF SERVANT.

A railroad brakeman, accustomed to cars of a certain width, who, while riding on a side ladder, saw that his own car was approaching a car of unusual size and width, which would probably strike him, and endeavored to escape, is not responsible for the exercise of the coolest judgment while in such dangerous situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 791.]

3. EVIDENCE ⇨20(2)—JUDICIAL NOTICE.

That congestion in large cities requires that many railroad tracks be laid close together, and that it is therefore not negligence so to lay them, is not a matter resting in judicial knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24.]

4. MASTER AND SERVANT ⇨112(1)—DUTIES OF MASTER—SAFE PLACE TO WORK.

It is the duty of a railroad to provide such tracks and cars, and such supervision of their use, as would afford its servants a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218.]

5. MASTER AND SERVANT ⇨103(1)—NEGLECT OF MASTER—LIABILITY.

Negligence of a railroad, in making its tracks unnecessarily hazardous, is chargeable to it, without inquiring as to the officers, agents, or servants by whose instructions or conduct the dangerous situation is created.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175.]

6. MASTER AND SERVANT ⇨213(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A railroad brakeman does not assume the risk of the extraordinary hazard of the presence of an unusually large car on the adjacent track, which was so placed as to sweep any person from the side ladder of another car, unless the risk was so obvious that the servant ought to have known of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 561.]

7. MASTER AND SERVANT §150(3)—DUTIES OF MASTER—WARNING.

If the master maintains, as to his places of work, a risk of which the servants are excusably ignorant, it is the master's duty to instruct and caution them regarding the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 305.]

8. MASTER AND SERVANT §247(1)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a railroad permitted an unusually large car to be hauled, and negligently allowed it to stand, so that it would sweep any person from the side ladder of a car on an adjacent track, a brakeman's contributory negligence would not bar his recovery for injuries, since it could not be said to be the sole cause of his injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 795.]

Exceptions from Caledonia County Court; Zed S. Stanton, Judge.

Action by Percy D. Sanderson against the Boston & Maine Railroad. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Porter, Witters & Harvey, of St. Johnsbury, for plaintiff. George B. Young and Walter H. Cleary, both of Newport, for defendant.

MUNSON, C. J. The plaintiff, a brakeman employed by the defendant, was injured in the defendant's freight yard at Lowell, Mass., while upon the upper rounds of the side ladder of a moving freight car, by striking against the corner of one of several freight cars which were standing together on another track. The suit is brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), and seeks to recover on account of the negligence of the defendant as alleged in a declaration and amendment thereof containing 17 counts. The only exception argued is one taken to the overruling of the defendant's motion for a directed verdict. The grounds of the motion as therein stated present the claims that there is no evidence tending to show negligence on the part of the defendant; that on the evidence presented the sole cause of the accident was the plaintiff's negligence; that the risk was one naturally incident to the plaintiff's employment and therefore an assumed risk; that the risk was due to a permanent condition, of which the plaintiff had or ought to have had knowledge, and was therefore assumed by his continuing in the work without objection. The testimony of the plaintiff is all the evidence we have regarding the location of the tracks and the manner in which he received his injury.

The plaintiff had worked for the defendant as a brakeman over three years, first irregularly as a spare hand, and afterwards

continuously on a regular extra train. His runs during this time were on different lines, some of which passed through the Lowell yards, where there was frequently some shifting of cars by the crew. At the time of the accident, which occurred just before dark, the plaintiff was the flagman and had the care of the lamps, and these he had ready for lighting before going to the work in which he was injured. He testified that he was sometimes called upon to assist the conductor, and that it was his duty when his own work was done to help get the train over the road. On this occasion he had been helping the conductor check up some cars, and had afterwards gone forward on the top of the rear cars letting off some brakes. In thus passing up the train he came to the car on which he was injured, and started to go down the side ladder to set a switch. As he was beginning to descend he glanced ahead, and saw, some 35 feet away, among the cars standing on the next track, one which stood out further than the rest, which he thought would not clear him. He attempted to get back upon the roof of the car, but was hit by the projecting car and thrown to the ground. The plaintiff testified that no one asked him to set this switch, but that there was no one else there to do it; that the middle man sometimes set the switch; and that he thought he was then on that section of the train.

The plaintiff testified that he had occasionally helped in making shifts in this yard, but was not very familiar with the tracks; that he had never known of a brakeman being knocked off a side ladder by a car on another track; that he had never been told or cautioned regarding such a risk, and had never known but what, between tracks, there was room enough to ride on the ladder; that he had seen cars that were not set in to clear, where a man riding on the side would get hit; that the rule was to set cars in far enough so that they would clear, and that he always supposed that that was the practice, but that he did not know as he had observed enough to know what the practice was; that cars could not be left on a curve, but must be on where the track was straight, and that all that was necessary was to have them far enough on to clear everything on the next track; that where he had testified about clearing the cars he meant clearing the car and a person on the side of it.

In one place the plaintiff testified that he 'did not know whether the car he struck stood on a cross-over or not; but he stated elsewhere that they had passed cars before coming to this one, and that there were cars beyond this, and these statements indicate that the car was not on a cross-over. Defendant comments upon the answers which the plaintiff gave in stating what he understood the requirement to be as regards ade-

quate provision for the "clearing" of the cars, and calls attention to the fact that it was not until after plaintiff's counsel had had an opportunity to confer with him that he changed his testimony to include the clearing of a person on the car, and insists that this change is not sufficient to do away with the effect of his previous testimony. But it was manifestly for the jury to say what the plaintiff intended by his earlier answers, and what fact his evidence on this point as a whole tended to establish.

[1] It is said there was no evidence as to the exact distance between the tracks, nor as to the distance necessary to make them safe, and no evidence as to the size of the car which struck the plaintiff, nor that it was a large car. It was not necessary that these matters should be determined by measurement. The plaintiff's description of the car as he saw it was evidence tending to show that it was a large car. This car, standing on a parallel track, struck the plaintiff while he was on the side ladder of a car. This was evidence tending to show one of two things—either that the tracks were too close to one another, or that the car was too wide to be used where cars were equipped with side ladders. It is said that the plaintiff's injury resulted from a fixed and unchanged condition which extended throughout his period of service. But this condition, ordinarily safe, was made dangerous by the introduction of a car not adapted to it. It is argued that the sole cause of the accident was the plaintiff's failure to select for his descent a car which had an end ladder. There is no evidence that any of the cars had such a ladder. It is said that the plaintiff was working as a volunteer. The plaintiff testified that after his special work was done it was his duty to assist in getting the train along; that he was then doing the work on the rear end of the train; and that he was going down to set a switch to enable it to back out on another track. This was evidence tending to show that his injury was received while in the line of his duty.

[2] It is argued that the risk which the plaintiff encountered was open and obvious, and must have become known to him during his employment. The danger arose from the unusual width of the car standing on the parallel track, in connection with an allowance of space between the tracks sufficient only for cars of ordinary width. A trainman riding on the top of a freight car could hardly be expected to judge accurately of the sufficiency of such a space to answer an unusual and unexpected requirement. The plaintiff prudently acted on the supposition that the tracks were not far enough apart to permit him to clear a car of unusual width, and endeavored to avoid the danger, as soon as he discovered it. It is said, however, that he saw and appreciated the danger before he reached the car, and

that he could have seen and appreciated it in time to avoid all risk, if he had looked ahead carefully before starting to descend, and that in undertaking to escape from the danger he did not act with prudence and promptness. But it cannot be said as matter of law that he ought to have seen the car sooner, and a servant who suddenly finds himself in a dangerous situation, for which he is not responsible, is not held to an exercise of the coolest judgment.

[3] It is said that in large freight yards in cities it is absolutely essential that there be many tracks close together, and that it is not negligence to have them so arranged. This statement, as applied to the situation presented here, cannot be accepted as asserting a fact resting in judicial knowledge. The language is evidently based on what was said in the opinion in *Randall v. B. & O. R. R. Co.*, 109 U. S. 478, 8 Sup. Ct. 322, 27 L. Ed. 1003, where the plaintiff was struck by an engine while standing in an unnecessarily exposed position to throw a ground switch, which was required, instead of an upright one, because of the nearness of the tracks. The reference in this connection to the necessity of a great number of tracks and switches close to one another cannot properly be applied to the sections of parallel tracks existing between the diverging and approaching sections connected with the switches. If there was a necessity for the proximity of these tracks which could afford a basis for the claim that the risk of such a collision as occurred here was assumed by the plaintiff, it was a fact for the defendant to establish by evidence.

[4-8] The inquiry is whether the evidence shows a case for the plaintiff under the federal Employers' Liability Act. It was the duty of the defendant to provide such tracks and cars, and such supervision and regulation of their use, as would afford the plaintiff a reasonably safe place in which to do his work. The evidence of the plaintiff discloses a negligence in this respect which made his place of work unnecessarily hazardous; and this negligence is chargeable to the defendant, without inquiring as to the officers, agents, or servants by whose instructions or conduct the dangerous situation was created. The situation being due to the defendant's negligence, it was not an ordinary, but an extraordinary, risk, and therefore a risk not assumed by the plaintiff, unless he knew and comprehended it, or unless it was so obvious that he ought to have known and comprehended it. If it was a risk of which the plaintiff was excusably ignorant, it was the duty of the defendant to instruct and caution him regarding it. There was evidence tending to show that the risk was not obvious, and that the plaintiff had no knowledge of it, and that no instruction or caution regarding it had been given. If the plaintiff himself was negligent in any particular, this will not bar his recovery, for

it cannot be said that his negligence was the sole cause of his injury.

The claim that there was no evidence tending to support the charge of negligence as presented in any single count is sufficiently met by the views already expressed. See generally *Lynch v. Central Vt. Ry. Co.*, 89 Vt. 363, 95 Atl. 683; *White v. Central Vt. Ry. Co.*, 87 Vt. 330, 89 Atl. 618; *Central Vt. Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Carleton v. Fairbanks Co.*, 88 Vt. 537, 93 Atl. 462; *Morrisette v. Canadian Pac. R. R. Co.*, 74 Vt. 232, 52 Atl. 520; *McDuffee v. Boston & Maine Rd.*, 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019.

Judgment affirmed.

(91 Vt. 348)

COLLINS et al. v. CITY OF BARRE.

(Supreme Court of Vermont. Washington. May 1, 1917.)

1. MUNICIPAL CORPORATIONS \S 292(1), 293(4), —STREETS—CHANGE OF GRADE—NOTICE.

Under P. S. 3878 providing that the roadbed of a highway shall not be cut down or raised more than 3 feet without notice having been first given to the owners of the time and place of a hearing in respect thereto and section 3879, providing that on determination that a roadbed should be altered by lowering or raising the same more than three feet, such change may be ordered and the damages, if any, to the owners, be determined and awarded, street commissioners were without jurisdiction to act on the question of raising a roadbed more than 3 feet, where the petition presented to them asked merely for a resurvey and a relocation of a portion of the street, and the notice published and given to abutting landowners of a hearing on the petition did not show that any question pertaining to the raising of the roadbed was to be considered and no person interested in the property was present on the hearing of the petition or consented to the raising of the roadbed or waived any rights relating thereto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 775.]

2. VENDOR AND PURCHASER \S 229(8)—CONSTRUCTIVE NOTICE—CHANGE OF GRADE OF STREET.

The record of proceedings of street commissioners, wherein they changed the grade of a street by raising the roadbed more than 3 feet, was not constructive notice of such action to a subsequent purchaser, where the commissioners were without jurisdiction in the matter.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 488.]

3. MUNICIPAL CORPORATIONS \S 404(1) —CHANGE OF GRADE—RIGHT TO RELIEF—ADEQUATE REMEDY AT LAW.

Where the roadbed of a street is raised by the street commissioners without legal authority, it cannot be urged against a bill in equity for relief that there was an adequate remedy at law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 989.]

4. EQUITY \S 219—LACHES—DEMURRER.

The defense of laches cannot be raised by demurrer to a bill in equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 496, 498–500.]

Appeal in Chancery, Washington County; E. L. Waterman, Chancellor.

Suit by Kate L. Collins and others against the City of Barre. From a pro forma decree dismissing the bill for want of equity, plaintiffs appeal. Reversed and remanded.

The bill in this case was, pro forma, held insufficient on demurrer, and dismissed for want of equity. The cause is here on plaintiffs' appeal. The facts stated below appear from the allegations in the bill.

The premises in question, being a dwelling house and lot situated on Warren street in the city of Barre, were conveyed to the plaintiff Kate L. Collins on March 31, 1908, by George F. Lackey and Nettie E. Lackey, by their deed of that date, recorded in the land records of the city of Barre. The plaintiff O. R. Collins is the husband of Kate L. The plaintiff Capital Savings Bank & Trust Company holds a mortgage on the premises, given by Kate L. and her husband, on May 17, 1909, which is unpaid. At the time this mortgage was given the premises were worth \$1,500 or \$1,600. At the time of the aforementioned conveyances, the grade of Warren street (which was in front of and the only means of access to said premises) was about on a level with the bottom of the underpinning resting on the foundation supporting the dwelling house. Since those conveyances the city has raised the roadbed of Warren street opposite and in front of these premises, so that the street as now traveled and used is about on a level with the eaves of the dwelling house, or about 12 feet above the street as it was traveled and used at the time of the aforementioned conveyances. By reason of this change in the grade of the street, the premises have been rendered of little value, being worth less than \$500.

On the 18th day of July, 1903, when one Cora E. Churchill and her husband, C. A. Churchill, were the owners of the premises in question, and residents of the city of Barre, a petition signed by certain landowners on Warren street, and addressed to the board of street commissioners, city of Barre, was presented to the city council, requesting a resurvey and a relocation of the southeasterly end of Warren street for about 285 feet, representing that the public good and the convenience and necessity of individuals demanded that such resurvey and relocation should be made, and waiving all claims for damages which the petitioners might be, by law, entitled to receive. This petition was referred by the city council to the board of street commissioners, with instructions to have said portions of Warren street resurveyed and relocated in accordance with the petition if the same could be done without expense to the city. On July 24th the street commissioners issued a notice, stating that such a petition had been pre-

sented to them, "asking that the easterly end of Warren street for about 200 feet should be resurveyed and relocated," and further stating that the city council had, by vote, decided "that said portions of said street should be resurveyed and relocated if in the judgment of said commissioners after a public hearing it should appear that the public good and convenience and necessity demand that said resurvey and relocation should be made, and if said relocation can be made without expense to the said city." The notice then stated the time when, and the place where, the street commissioners would hear "all those interested in said resurvey and relocation of said portion of Warren street," etc. This notice was published in the Barre Daily Times, and a typewritten copy thereof was served on the city attorney and on Mrs. C. A. Churchill and Mrs. H. M. Dillingham personally, and on C. A. Churchill, James Baigries, and F. N. Braley, by leaving copy at residence. The record of the report of the proceedings upon the petition (set forth in the bill) states that the commissioners met at the time and place set forth in the notice, "and did hear all those who were present, and who were interested in the resurvey and relocation of said portion of said street," and viewed the premises; and "thereafter adjudged that the public good and the convenience and necessity of individuals did demand that said street should be resurveyed and relocated according to plans which accompany the report and which have been prepared by" the city engineer, bearing date of December 2, 1903, "now on file in the office of said engineer." The report then proceeds as follows:

"We have also established the grade of said portion of said street as shown on plans which accompany the report, and which bear date of December 3d and which were prepared by said city engineer."

The report also states that the commissioners have awarded no one any damages, as no one claimed damage, and that in their "judgment all received benefits equal to any damage which they received by reason of said resurvey and relocation and grade established." This report was dated December 3, 1903, signed by the street commissioners, and received for record in the city clerk's office on the same day.

Neither Cora E. Churchill nor her husband was present at the hearing had pursuant to the aforementioned notice, and they never had any notice from the city council, the street commissioners, or any other city official that any change in the grade of Warren street in front of their said premises was contemplated or for consideration. Neither the Churchills nor any other of the plaintiffs' predecessors in title were ever notified of any time when the city council or any other officials of the city would hear the owner or owners of the premises now owned

by the plaintiffs, upon the question of making any alteration or change in the grade of Warren street in front of the same and in front of the dwelling house thereon, and none of them ever attended any hearing upon the question of damages occasioned by reason of any such alteration or change of grade. The plaintiffs aver that the action of the city council and street commissioners, in so far as it pertained to an alteration or change of grade of Warren street in front of the dwelling house mentioned, was without legal authority or justification, and was of no legal effect so far as those premises are concerned.

No change was made in the grade of that street in front of the premises in question after the proceedings upon the petition in 1903, until after the plaintiff Kate L. Collins had become the owner of said premises; but since that time the roadbed of that street in front of the dwelling house on the plaintiffs' premises has been raised more than 3 feet by the city, there being a continuous depositing of earth and stone there, covering a period of 2 or 3 years, which had the effect of raising the roadbed at that point about 12 feet. All this was done by the city without any notice to, or permission of, the plaintiffs, and the latter have never been tendered any damages caused thereby. The plaintiffs' premises have been damaged by this alleged unlawful action on the part of the city to an amount exceeding \$1,000, the house thereon being rendered uninhabitable; and the present condition of Warren street in this respect constitutes a continuing injury to the plaintiffs, and an unwarranted and unlawful act by the city. The plaintiffs further aver that the action of the city in raising the roadbed in front of their premises in the way and manner described was an invasion of their constitutional rights, in that it deprived them of their property without due process of law.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Frank J. Marshall, of Montpelier, for appellants. Edward H. Deavitt, of Montpelier, for appellant Capital Savings Bank & Trust Co. William Wishart, of Barre, for appellee.

WATSON, J. [1] Section 3878 of the Public Statutes provides:

"A selectman or road commissioner shall not alter a highway, by cutting down or raising the roadbed in front of a dwelling house or other building standing upon the line of such highway, more than three feet, without first giving notice to the owners thereof, of a time when the selectmen will examine the premises, hear them upon the question of making such alteration and damages by reason of such alteration; at which time, the selectmen shall attend and hear said owners, if they desire to be heard."

By section 3879, if it shall be determined that the public good, or the necessity or convenience of individuals requires that such roadbed be altered by lowering or raising the same more than 3 feet, such change may

be ordered, and the damages, if any, to the owners shall be determined and awarded. The interpretation of the law of these sections was before this court in *Fairbanks v. Rockingham*, 75 Vt. 221, 54 Atl. 186, and it was there held that an alteration in the roadbed in the sense of the statute begins when the lowering or raising of the roadbed exceeds 3 feet; that a change in this respect of not more than 3 feet is regarded by the statute as in the nature of ordinary repairs, and not as an alteration of the highway. So the case before us rests upon the allegations showing the raising of the roadbed in question to the extent of about 9 feet in excess of that considered as of ordinary repairs. Such an alteration was not within the scope of the petition to the street commissioners, asking for a resurvey and a relocation of that portion of Warren street, nor did the notice published and given to abutting landowners of a hearing on the petition show that any question pertaining to the raising of the roadbed was involved or to be considered. The matter of grade is not mentioned in the record of those proceedings until that part of the report of the street commissioners which shows their doings and conclusions reached. No one interested in the property here in question was present at the hearing had on the petition, nor consented to raising the roadbed, nor waived any rights relating thereto. On the question of making such alteration, as well as on the question of damages, the owner of the property in question was entitled to notice and an opportunity to be heard. This was required by the statute, and was essential to the jurisdiction of the street commissioners of the subject-matter of those questions. Without compliance with the statute in this regard, the commissioners were without jurisdiction to act on any question of raising the roadbed more than 3 feet, and their actions in this respect were void so far as the owners of the property in question are concerned. *La Farrier v. Hardy*, 66 Vt. 200, 28 Atl. 1030; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. 1015; *Barber v. Vinton*, 82 Vt. 327, 73 Atl. 881; *Wheeler v. St. Johnsbury*, 87 Vt. 46, 87 Atl. 349.

[2] It is urged that at the time of the purchase by Mrs. Collins of the premises in question she knew, or should have known, that the records of Warren street then on file in the city clerk's office provided for the grade that was subsequently established. No notice of this kind in fact is shown; and since the action of the street commissioners in establishing a grade of more than 3 feet raise of the roadbed was without jurisdiction of the subject-matter, as against the owners of the property in question, the record of the doings of the commissioners in this respect was not constructive notice to Mrs. Collins when she took the property by purchase.

[3] It is further urged that the plaintiffs have an adequate remedy at law, and therefore this bill in equity will not lie. But the case of *Wheeler v. St. Johnsbury*, cited above, is full authority to the contrary. There, in a case sufficiently like the one at bar as to equity jurisdiction to make it controlling here, it was held that equity had jurisdiction on two grounds, namely, for want of an adequate remedy at law, and the prevention of a multiplicity of suits.

[4] And, finally, it is said that the plaintiffs are guilty of laches even if they were ever entitled to damages. But this defense cannot be raised by demurrer. *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427; *Gleason v. Carpenter*, 74 Vt. 899, 52 Atl. 986; *Wilder's Ex'r v. Wilder*, 82 Vt. 123, 72 Atl. 203.

Pro forma decree reversed, bill adjudged sufficient, and cause remanded.

(91 Vt. 486)

HOWE v. CENTRAL VERMONT RY. CO.
(Supreme Court of Vermont. Windham. May 24, 1917.)

1. RAILROADS — 314 — CROSSING ACCIDENTS — CONDITION OF RIGHT OF WAY.

P. S. 4478, provides that every railroad corporation in the state shall cause all trees, shrubs, and bushes to be cut within the surveyed boundaries of their lots for a distance of 80 rods in each direction from all public grade crossings. Section 4479 provides that on neglect so to do, after 60 days' notice in writing, the selectmen of the town shall cause the same to be cut each year, and the railroad shall be liable for all damages occasioned thereby. *Held*, that no action for personal injuries can be maintained on the basis of such failure to clear the right of way in the absence of the written notice by the selectmen.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 965.]

2. RAILROADS — 348(4) — CROSSING ACCIDENTS — SIGNALS.

In an action for personal injuries incurred in a collision between a locomotive and the automobile in which plaintiff was riding at a railroad crossing, evidence held to sustain a finding that the locomotive whistle was blown at a distance of 80 rods from the crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1141, 1142.]

3. RAILROADS — 350(7) — RAILROAD CROSSINGS — SIGNALS — QUESTION OF FACT.

Under P. S. 4431, requiring signals at a crossing, and section 4432, providing for a fine for neglect to give required signals, the question as to the company's liability for an injury caused by failure to give signals is for the jury upon evidence as to whether the omission to give the signal was reasonable and prudent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1161.]

4. NEGLIGENCE — 93(3) — IMPUTED NEGLIGENCE.

Where a child about 2½ years old was injured in an automobile driven by her grandparents, in a collision on a railroad crossing, the contributory negligence of the grandparents could not prevent a recovery if defendant railroad company was guilty of negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 150.]

5. NEGLIGENCE ¶8(3) — IMPUTED NEGLIGENCE.

Where a child taken for a ride by her parents in an automobile was injured in a collision at a railroad crossing, recovery could not be denied on the ground that plaintiff was engaged in a common enterprise with the others in the car, and that their negligence was imputable to her.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 150.]

Exceptions from Windham County Court; Willard W. Miles, Judge.

Action by Marion Howe against the Central Vermont Railway Company. Verdict for plaintiff, and defendant excepts. Reversed and remanded.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Herbert G. Barber and F. E. Barber, both of Brattleboro, for plaintiff. J. W. Redmond, of Newport, and Charles F. Black, of St. Albans, for defendant.

WATSON, J. In this action the plaintiff sues by her next friend to recover for injuries received by her on September 10, 1915, at the defendant's grade crossing known as "Parks Siding," in the town of Townshend, this state, by reason of the defendant's locomotive colliding with the automobile in which she was riding. The automobile came upon the crossing from the east, going towards the west. The plaintiff was then two years and seven months of age, and lived with her parents in the town of Newfane, about two miles from the home of her grandparents, Herbert G. Howe and his wife, Nora L. Howe, who lived in the town of Brookline. On the morning in question, pursuant to an arrangement previously made between the grandfather and the plaintiff's parents, the plaintiff went with her parents to the house of her grandfather to go to the Londonderry fair in the latter's automobile. The party, consisting of the grandfather, the grandmother, their son, Glen Howe, the plaintiff, her father, and her mother, started in the automobile at 7 o'clock and 20 minutes for Londonderry. The grandfather was the driver of the car, and with him sat Glen. The grandmother was seated on the extreme right of the rear seat, holding the plaintiff in her lap. The plaintiff's mother and her father sat at the left of the grandmother, in the order named. Seven miles from the place of starting was the crossing in question, with which the plaintiff's grandfather and her father were well acquainted, and had often been over it in both directions in an automobile. They both knew the time the morning train from Londonderry was due at the crossing, and understood it was due to leave West Townshend, about 2 miles north of the crossing, at 7:45 a. m. The accident occurred a little before 8 o'clock. The driver threw the car into low gear about opposite the crossing

signal post, which was about 50 or 60 feet from the last rail, and kept it in low gear thereafter. While the car was in low gear, it proceeded at a speed of not more than 4 to 6 miles an hour, with no attempt to increase the speed before it was struck by the locomotive. When the car was almost over the crossing, it was struck by the west end of the breast beam of the locomotive six inches from the rear of the body of the car, throwing the occupants out, injuring the plaintiff and wrecking the car.

The declaration states two grounds of negligence upon which the action is founded: (1) That the defendant did not give the required warning signal when its train was approaching the crossing in question either by ringing the bell or sounding the whistle; and (2) that defendant allowed trees, shrubs, and bushes to grow and remain within the boundaries of its right of way within a distance of 80 rods in each direction from said crossing, the plaintiff's view, as the automobile neared the crossing, being thereby obstructed.

At the close of the evidence the defendant moved for a directed verdict on several grounds which may be condensed and adequately stated for the purposes of the case, as follows: (1) There is no evidence in the case tending to show any negligence on the part of the defendant that was the proximate cause of the injury; (2) on all the evidence, the proximate cause of the injury complained of was the negligence of the driver of the automobile, or of the father of the plaintiff, or of the mother of the plaintiff, or of some or all of them; (3) on all the evidence, the driver of the automobile and the father of the plaintiff were jointly or severally guilty of contributory negligence, which contributory negligence is imputable to the plaintiff; (4) on all the evidence, the occupants of the automobile were engaged in a common enterprise, and therefore the contributory negligence of the driver is imputable to the plaintiff; and (5) there is no evidence tending to show any actionable negligence on the part of the defendant because of the growth of shrubbery or trees upon its right of way. To the overruling of the motion defendant excepted.

[1] The action, as to the second ground of negligence stated above, was treated by the court and by counsel on both sides throughout the trial below, as based upon section 4478 of the Public Statutes, which reads:

"A person or corporation operating a railroad in this state shall cause all trees, shrubs and bushes to be cut within the surveyed boundaries of their lands, for a distance of eighty rods in each direction from all public grade crossings."

By section 4479:

"If said person or corporation neglects or refuses to remove the trees, shrubs and bushes, as required by the preceding section, after sixty days' notice in writing, given by the selectmen of the town in which such trees, shrubs and bushes are located, and cause the same to be cut

in the month of October each year thereafter, said person or corporation shall be liable for all damages occasioned thereby."

The law of these two sections was enacted in sections 1 and 2 of No. 93, Acts of 1904, and related to the same subject-matter. It is a prerequisite to liability under it that notice be given as specified in section 4479. The evidence did not show, and it is not claimed, that any such notice was ever given to the defendant. Therefore the action cannot be maintained on the basis of such statutory negligence. Although this is not determinative of the motion for a directed verdict, there being questions to be considered thereon in connection with the other alleged ground of defendant's negligence, yet it follows that the exceptions to the submission to the jury of the question of defendant's liability for failure to keep the shrubbery cut within the limits of its roadway must be sustained, as must also the exception to the rendering of judgment against the defendant on the special finding of the jury that the shrubbery in said roadway was the proximate cause of the injury.

[2] There was the negative testimony of several of plaintiff's witnesses to the effect that they did not hear any bell ring nor whistle blow before the accident; while the testimony of other witnesses was that they heard the whistle blow back some distance from the crossing in question, which, fairly construed, may be said to warrant a finding that the whistle was blown in the vicinity of 80 rods back from the crossing. There was no evidence that the bell was rung at that place or between there and the crossing. For the purposes of the case on the motion for a verdict, we consider the evidence as showing that the bell was not rung at all when the train was approaching the crossing, and that the whistle was blown 80 rods from the crossing, but not afterwards and before the accident.

[3] It is said on the part of the defendant that thus blowing the whistle was a compliance with the provisions of section 4431 of the Public Statutes, requiring signals when a train is approaching a public highway crossing at grade; while the plaintiff contends that this is not so, for that to constitute a compliance with the statute by blowing the whistle the blowing must begin back at least 80 rods from the place of the crossing and continue until the crossing has been passed. The statute reads:

"A bell * * * shall be placed on each locomotive engine, and be rung at the distance of at least eighty rods from the place where the railroad crosses a road or street at grade, and be kept ringing until it has crossed such road or street; or the steam whistle may be blown instead of ringing such bell."

The next section (4432) provides that, if a person or corporation owning or operating a railroad unreasonably neglects or refuses to comply with the foregoing provisions, it shall be fined, etc. The law of these sections

was first enacted in 1849, and has hitherto remained in force without any change in words or substance material to be noticed here. Its construction came before this court as early as 1864, in an action on the case for damages to horses and harnesses on a public highway railroad crossing. It was there held, in effect, that the two sections should be construed together; that by the first section it is required that the bell shall be rung or the steam whistle blown at least 80 rods from the place of the crossing on the same grade, and that "the ringing or blowing shall be continued until the engine shall have passed such crossing"; that, though in that section the requirement is affirmative and unconditional, yet by the law of the second section, if any railroad corporation shall unreasonably neglect or refuse to comply with such requisitions, they shall forfeit, for every such neglect or refusal, a sum not exceeding, etc.; that the fact that the corporation cannot be subjected to the penalty unless such neglect or refusal be shown to have been unreasonable clearly implies that in the contemplation of the law there may be cases in which such neglect or refusal would be reasonable, and, if reasonable, the penalty would not be incurred; that the provision of the first section was designed to operate more stringently than the common law, "and while it was not designed to subject the corporation to civil liability, entirely regardless of the circumstances and occasion of the omission to ring the bell or blow the whistle in all cases of injury caused by such omission, still it was designed to require, as the general rule, that the bell should be rung or the whistle blown in all cases, and, in case of injury by reason of an omission so to do, to impose the burden on the corporation of showing that such omission, in the exercise of a sound judgment by the engineer, in view of the condition of things as they existed at the time, was reasonable and prudent; when therefore, in a case like the present, the plaintiff should show that the alleged injury was caused by such omission, it would not be necessary to his right of recovery that he should take the burden of showing affirmatively that such omission was unreasonable and imprudent, but it would rest upon the defendant, as a matter of defense, to show that it was reasonable and prudent;" and that "the liability of the corporation should be left to stand upon this, viz., whether, in the judgment of the jury, upon all the evidence, the omission in the given case, in view of the actual condition of things, was reasonable and prudent." *Wakefield v. Conn. & Pass. R. R. Co.*, 37 Vt. 330, 86 Am. Dec. 711. The holdings in that case have stood as the law of the subject for more than half a century without criticism; and upon a careful examination of the statute, in view of the arguments of counsel in the present case, we see no rea-

son for doubting the soundness of the conclusions there reached, or of their controlling effect in the matter before us. The meaning of this statute being by judicial construction thus made clear in the case noticed, no subsequent practice inconsistent with that meaning can have any effect. *United States v. Alger*, 152 U. S. 384, 14 Sup. Ct. 635, 38 L. Ed. 488; *Fairbanks v. United States*, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862. The above holding is determinative of the fact that the case, on the question of defendant's negligence in failing to give the required warning signal when the train was approaching the crossing at the time in question, was for the jury; and therefrom it is evident that the plaintiff's exception to the part of the charge pertaining to the blowing of the whistle, on the ground that the jury should have been instructed that, if the bell was not rung, the whistle should have been blown at intervals and kept blowing until the crossing was passed, was well taken. It is not claimed that there was any evidence affirmatively tending to show that the omission so to do in the existing circumstances was reasonable and prudent, a question on which, as before seen, the burden was with the defendant. Had the jury been properly instructed in this respect, they might not have found, as they did specially, that the defendant's neglect to blow the whistle or ring the bell was not proximate cause of the plaintiff's injury.

[4] The question of contributory negligence is yet to be considered on the motion for a verdict, if it is in the case. The plaintiff was of such tender years at the time of her injury as to be incapable of exercising care. But we assume, as counsel for defendant argue, that her grandfather (driver of the automobile) and her father were guilty of negligence contributing to the accident. The question then is: Is their negligence imputable to the plaintiff? In *Robinson v. Cone*, 22 Vt. 218, 54 Am. Dec. 67, the plaintiff, a child three years and nine months old, was severely injured when sliding on a sled in a public highway by being caught by one of the runners of defendant's loaded sleigh drawn by two horses. The plaintiff at the time was attending school. The question of contributory negligence by the plaintiff was raised in defense; also the question of such negligence by the plaintiff's parents in allowing him to attend school at the age and in the manner they did. The court said it was "satisfied that, although a child, or idiot, or lunatic, may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress." In *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 109, the court said the case of *Robinson v. Cone* had become a leading case

against the doctrine of imputed negligence, and its doctrine was quite generally followed by courts of last resort, and indorsed by eminent writers, and that this court was content to abide by the decision of that case on the doctrine of imputed negligence. The foregoing is the established doctrine in this state, and is known in some other jurisdictions as the "Vermont rule" (distinguishing it from the contrary doctrine, known as the "New York rule"), and it is supported by the great weight of authority.

[5] Nor did the fact that the persons with whom the plaintiff was riding in the automobile were engaged in a common enterprise, make any difference in this respect. The theory of the law which makes each of persons engaged in a common purpose at the time of an injury suffered by him, by reason of the neglect of some outside person, responsible for the negligence of any of his associates, contributing to the injury, is that each was the agent of the others, and therefore that each was responsible for the consequences resulting from the acts of the others, or any of them. *Boyden v. Fitchburg Railroad Co.*, 72 Vt. 89, 47 Atl. 409; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334. Both in law and in fact the plaintiff was incapable of entering into any such common enterprise. She was in the automobile because her father, who by law was the custodian of her person, took her with him. Yet his status as such custodian was not as agent of the child, but as agent of the law; and he could not surrender or impair any property right that was vested in the child, nor impose any legal burden upon it. *Ferguson v. Phoenix Mut. Life Ins. Co.*, 84 Vt. 350, 79 Atl. 997, 85 L. R. A. (N. S.) 844; *Newman v. Phillipsburgh Horse Car Co.*, 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842. It follows that the relation of common purpose, as such, of the persons with whom the plaintiff was riding at the time of her injury does not affect her rights against the defendant. This being so, the question of the imputability of the contributory negligence of the driver or of the plaintiff's father is in any aspect of the case reduced to the simple form in which it has been considered and ruled above.

The question of contributory negligence therefore is not in the case, and the only question is whether the defendant exercised the degree of care required by law. The motion for a directed verdict was properly overruled. This holding shows defendant's exceptions to the failure of the court to charge as requested touching the question of contributory negligence to be without merit.

Since substantial exceptions of both parties are sustained, neither party should be allowed to recover costs in this court.

Judgment reversed, and cause remanded, without costs to either party in this court.

(90 N. J. Law, 690)

IRESON v. CUNNINGHAM. (No. 2.)

(Court of Errors and Appeals of New Jersey.
May 8, 1917.)

1. MUNICIPAL CORPORATIONS ¶705(4)—AUTOMOBILE ACCIDENT—DRIVING WITHOUT LIGHT.

Where the driver of a wagon was without a light on the wagon more than half an hour after sunset, in violation of statute, he could recover for injuries received in collision with an automobile if the driver of the car could have seen him, since if the automobile driver could have seen him, his unlawful act in driving without a light did not contribute to the accident.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1516.]

2. MUNICIPAL CORPORATIONS ¶706(7)—AUTOMOBILE ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against an automobile driver for injuries to the driver of a horse and wagon, where the facts from which contributory negligence was to be deduced were in dispute, it was a jury question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

Appeal from Circuit Court, Cumberland County.

Suit by George Ireson against George Cunningham. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry S. Alvord, of Vineland, for appellant. S. Webster Hurd and Royal P. Tuller, both of Vineland, for appellee.

PER CURIAM. Plaintiff brought suit to recover damages for injuries sustained by reason of a head-on collision, in a public highway, of an automobile driven by the defendant and a horse and wagon driven by the plaintiff. The plaintiff was driving his vehicle without a light, and the defendant was driving his automobile with lights, the time being 7 p. m. of March 19, 1914, on which day the sun set at 6:11 p. m. The statute required plaintiff to carry a light on his wagon from one-half hour after sunset. The jury returned a verdict for the plaintiff. The judgment entered on the verdict has been brought to this court by appeal. The questions presented by the grounds of appeal are the propriety of a denial of motions to nonsuit and to direct a verdict for defendant, and also objections to the charge of the trial judge in certain respects.

Testimony offered by the plaintiff established that the collision occurred in a roadway wide enough for two vehicles to pass, and that the plaintiff was as far over on the right-hand side as he could get at the time he was run into; that as the automobile approached it wobbled or zigzagged in the road, and plaintiff shouted to warn the driver of his presence before the horse was struck; that the time was one of sufficient light to see a wagon or a machine several hundred feet away; that the horse of the plaintiff had to be killed as a result of the injury; that

the wagon was somewhat broken; and that plaintiff suffered injury.

The testimony justified the jury in believing that the defendant, in violation of the law of the road, failed to turn to the right in order to allow the plaintiff to pass him when they met in the highway. And the jury was justified in believing it was light enough for the defendant to see the plaintiff, and that it was his duty to turn out for him; and if, on the contrary, it was too dark for him to see, they could find that it was his duty to be on the right-hand side of the road in the direction in which he was going, so as not to take the chance of running into any one approaching him from the opposite direction.

[1] Although the plaintiff was driving without a light on his wagon in violation of the statute, that fact does not operate to prevent his recovery if the defendant could see him, and, if he could, the unlawful act of the plaintiff in no way contributed to the accident. The testimony was certainly susceptible of the construction that the defendant either saw, or by the exercise of due care could have seen, the plaintiff.

[2] The defendant urged before the trial court, and argues here, that the plaintiff was guilty of contributory negligence. If contributory negligence was present in the case, the facts from which it was to be deduced were in dispute, and it was therefore a jury, and not a court, question. The defendant excepted to the charge of the court in several respects, but argues them very meagerly and without citation of any authority. We have examined them, and find they are entirely without substance.

The judgment will be affirmed, with costs.

(90 N. J. Law, 422)

NEW YORK, S. & W. R. CO. v. BOARD OF PUBLIC UTILITY COM'RS et al.

(Supreme Court of New Jersey. June 6, 1917.)

1. DEDICATION ¶19(1) — PROMISE TO DEDICATE.

A dedication of a street is not shown by a map showing such a street and containing a declaration by the owner's husband that, if he ever opens the street, the opening will conform to the map, because it is more promise to dedicate, not made by the owner.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 37.]

2. PUBLIC SERVICE COMMISSIONS ¶6—PUBLIC UTILITY COMMISSIONERS—JURISDICTION OF—POWERS.

The board of public utility commissioners has no jurisdiction to determine whether the location of buildings along the lines of a street as actually used and the practical use of a street as such justify an inference that continued use has accorded it the status of a public highway.

3. RAILROADS ¶94(2)—GRADE CROSSINGS — PUBLIC CONVENIENCE.

Under the statute, an order of the board of public utility commissioners, compelling a railroad to construct a crossing at grade over its right of way, is erroneous, where it would result in increasing the hazards of the public in

the use of the streets in question, and its convenience can be served by slightly changing the lines of the streets.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 266½.]

Certiorari by the New York, Susquehanna & Western Railroad Company against the Board of Public Utility Commissioners and the City of Paterson to review an order of the Commissioners relative to a grade crossing. Order vacated.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Collins & Corbin, of Jersey City, for prosecutor. L. Edward Hermann, of Jersey City, for commissioners. Randal B. Lewis, of Paterson, for city of Paterson.

MINTURN, J. The certiorari in this case removes an order made by the board of public utility commissioners, granting permission to the city of Paterson to construct a crossing at grade over the railroad right of way at Seventeenth avenue and Twenty-Fourth street, where the two streets come together. A crossing is arranged for Seventeenth avenue, but none is arranged for East Twenty-Fourth street, and the proposal is to compel such construction by the railroad.

[1] The railroad contests the right of the city to require it, on the ground that the street is not in fact a public highway. It was never laid out as such, and the city relies upon a map made in 1868 to evidence the dedication. We think the map does not show a dedication of the locus in quo. It contains a declaration by the husband of the then owner that, if he ever opened the streets, the opening would conform to the map. This lacks the essentials of a legal dedication: First, because it is not made by the owner of the locus; and, secondly, because at most it is but a promise or agreement to dedicate in futuro.

[2] The buildings along the lines of the street, as actually used, and the actual practical use of the street as a dirt or cinder road, seems to be shown; and that fact would justify an inference that continued use has accorded to it the status of a public highway. That question, however, is not before us for decision, nor was it a subject for the determination of the public utility commissioners, under the legislation prescribing their powers.

[3] The fact is quite apparent that in opening up these two streets, as proposed, so that the railroad may cross them diagonally, a crossing involving serious danger to the public will be thereby created. The commissioners seem to have dealt with the situation as though it presented a question of the construction of appurtenances to the railroad. The declared object of the statute is to protect the public from the danger inci-

dent to grade crossings, and the inquiry before the commissioners was whether such a crossing as that in question would result in increasing the danger and hazards of the public in the use of it, and, if it would increase the public dangers, then whether, in view of the situation thus presented, it was still necessary and desirable as a public crossing; for manifestly a public crossing at grade might be highly desirable as a public convenience, but if its existence and continued use might serve in actual practice as a standing menace to the lives of the community, it would not comport with a proper exercise of wisdom, nor accord with the declared legislative policy and intent, to authorize or compel such construction.

These important considerations seem not to have been discussed or determined by the board; and, as we have intimated, they present the distinctive and vital inquiry in the case. We think it was made quite clear by the railroad that the difficulty presented here could be obviated by a slight change in the lines of the streets, at the corner where Seventeenth avenue and Twenty-Fourth street intersect; and if such a change in existing conditions can be made to practically serve the public use and convenience, the adoption of such a plan would seem to present a satisfactory substitute, and a reasonable solution of the situation, rather than a proposed construction which is menaced with the very difficulties and dangers which it is the avowed purpose of this legislation to eliminate.

We think the testimony before the board was not sufficient, nor of a character, to warrant or reasonably support the conclusion reached by the board, and for that reason we have concluded that the permission granted should be vacated. *Erie R. R. Co. v. Board of Utility Commissioners*, 98 Atl. 13; *Potter v. Board of Public Utility Com'rs*, 98 Atl. 30.

(90 N. J. Law, 709)

NELL et al. v. GODSTREY. (No. 46.)

(Court of Errors and Appeals of New Jersey. May 8, 1917.)

1. CARRIERS ⇨320(31) — CARRIAGE OF PASSENGERS—INJURIES—JURY CASE.

In an action by a taxicab passenger for injuries, where there was evidence tending to show that the taxicab belonged to defendant, and that the chauffeur was his agent and negligent, the case was for the jury, though it was claimed by defendant that the chauffeur exceeded his authority in doing what he did.

2. APPEAL AND ERROR ⇨1195(1)—DIRECTION OF VERDICT AT SECOND TRIAL.

Where new trial is granted because the verdict is against the weight of the evidence, the direction of verdict at second trial on the same or similar evidence, where a substantial conflict of testimony is present, is not justified; conflicting testimony being always for the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4661.]

Appeal from Circuit Court, Bergen County. Action by Harriet Nell and another against William C. Godstreya. From a judgment for defendant, plaintiffs appeal. Reversed, and venire de novo awarded.

Nathaniel Kent, of Paterson, and Gilbert, Collins, of Jersey City, for appellants. Wendell J. Wright, of Hackensack, for appellee.

PER CURIAM. This case presents an appeal from a judgment entered in the Bergen county circuit court, founded upon a verdict for the defendant directed by the trial judge, to which direction exception was duly taken.

The action was brought by Harriet Nell and her husband, John J. Nell, for injuries alleged to have been sustained by her while a passenger in a taxicab said to have been owned by the defendant and operated and controlled by his agent.

The facts relating to the accident, which was the subject-matter of the suit, were substantially as follows: The plaintiff Mrs. Harriet Nell on Saturday, January 15, 1916, and her sister, Miss Josephine McGintee went from Bogota, N. J., where Mrs. Nell lived, to Hackensack and thence to New York, for the purpose of doing some shopping and visiting the family of one of her husband's employes. They left the home of the persons whom they were visiting at about 1:30 Sunday morning to catch the ferry going to Edgewater, N. J. They missed the 2 o'clock boat, and were compelled to take the next boat at 2.45 a. m. When they arrived in Edgewater they found that there would be no car leaving until 5 o'clock. Mrs. Nell telephoned to her husband, and he instructed her to hire a taxicab to take them home. She then asked an officer to get her a taxicab, and he said he would. Within 10 or 15 minutes thereafter Patrick Dowdell came with a taxicab from the Edgewater Garage, and agreed to take them to Bogota for \$3. The plaintiff and her sister then entered the taxicab and were driven along the river edge for about 15 minutes until they came to a hill called the Ft. Lee Hill. When near the top of the hill the car stalled and commenced coasting backwards whereupon the chauffeur turned his wheel to make the car turn sideways towards the curb, and thus backed the car up against the south curb. After stopping the car he turned the front wheels facing down hill, so as to aid the gasoline, which was low, to run into the carbureter, and started to crank the machine. This he continued doing for about 10 or 12 minutes when Mrs. Nell opened the window and asked him what the trouble was, and he said that the gasoline had run low, and that the radiator was hot. While trying to crank the car it suddenly started down hill with no one at the wheel, the chauffeur trying to hold it back with his hands around the radiator. As it rapidly increased its speed, the chauffeur called to the plaintiff

and her sister to jump for their lives. After the car had gone some considerable distance, the plaintiff jumped. Her head struck on the street and she was rendered unconscious, receiving more or less serious injuries.

At the conclusion of the whole case a motion was made to direct a verdict for the defendant upon several grounds, namely, that no negligence had been proved on the part of the defendant; that the negligence specified in the complaint had not been proved; that if any negligence at all appeared in the case, it was not that of the defendant; that Dowdell was not the agent of the defendant; that under the evidence, as it appeared, Dowdell was acting as the agent of the plaintiff; and that the defendant, Godstreya, was not the owner or operator of the car, or in any circumstances, under the evidence, liable for the alleged accident. Whereupon the court made the following observation:

"The point that has been troubling me all through the case is the question as to whether this driver has been acting within the scope of his authority in such a manner as to bind the defendant. That is the situation as I find it now. The burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that the driver was the agent of the defendant, and, at the same time, the act performed was within the scope of his authority. That burden is upon the plaintiff to prove. That is without taking into consideration the other questions involved, of ownership or negligence. If that is disposed of in a manner negative to the plaintiff's case, all the others would fall with it."

Then, after argument by counsel for plaintiff, the court said, "The motion to direct a verdict will be granted," not putting the decision upon any particular ground. The plaintiff noted an exception.

[1] We think it unnecessary to review the testimony. It is sufficient to say that we are of opinion that the case should have been submitted to the jury, as there was evidence tending to show that the taxicab belonged to the defendant, that the chauffeur, Dowdell, was his agent and that he, the chauffeur, was negligent. It was claimed on behalf of the defendant that Dowdell exceeded his authority as an employe. If he did, if he violated his instructions, his authority and instructions were not known to the plaintiff. He was apparently the agent of the defendant with authority to drive his taxicab for hire.

These observations dispose of the grounds upon which the motion for the direction of a verdict for the defendant was rested, and the point suggested by the trial judge.

It ought, perhaps, to be stated that in the argument on the motion to direct a verdict counsel for the plaintiff (citing, but not quoting literally from, *Bennett v. Busch*, 75 N. J. Law, 240, 67 Atl. 188) said:

"If there is any evidence in the case upon any proposition upon which reasonable men might differ, or any honest man could have a difference of opinion therefrom, then the element must be submitted to the jury."

To which the judge replied:

"I don't think so. If that was the case, why, then, we have nothing in the rule that a verdict is against the weight of the evidence."

[2] It is obvious that the trial judge failed to perceive the distinction between court questions and jury questions arising from evidence. In cases where a new trial is granted because the verdict is against the weight of the evidence, the direction of a verdict at a second trial on the same or similar evidence, where a substantial conflict of testimony is present, is not justified. Conflicting testimony is always for the jury. *Dickinson v. Erie R. R. Co.*, 85 N. J. Law, 586, 90 Atl. 305. See, also, *Tilton v. Penna. R. R. Co.*, 86 N. J. Law, 709, 94 Atl. 304; *Keeney v. D., L. & W. R. R. Co.*, 87 N. J. Law, 505, 94 Atl. 604; *Tonsellito v. N. Y. C. & H. R. R. R. Co.*, 87 N. J. Law, 651, 94 Atl. 804; *McCormack v. Williams*, 88 N. J. Law, 170, 95 Atl. 978.

The judgment under review will be reversed to the end that a venire de novo may be awarded.

(87 N. J. Eq. 307)

In re ADRIAN et al. (No. 3673.)

(Prerogative Court of New Jersey. March 21, 1917.)

WILLS §684(3) — CONSTRUCTION — RESIDUE — INCOME FROM TRUST LEGACIES.

Testator's will made numerous pecuniary requests, some outright, and others to his executors in trust for various beneficiaries. The rest, residue, and remainder of his estate he gave to the executors, in trust to pay the income to his widow during her lifetime, and upon her decease to pay the income to his children until a given time, when the principal was to be distributed. Four of the trust legacies, aggregating \$395,000, were for the benefit of nondependents, and consequently not payable for a year after the death of testator. The income of the estate for the year upon a sum equal to these trust funds amounted to over \$16,000. *Held*, that the income passed into the residue as principal, and not as income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1616-1618, 1620.]

Appeal from Orphans' Court, Somerset County.

In the matter of the appeal from the first intermediate account of Jennie R. Adrian and others, surviving trustees under the will of William Rowland, deceased. Decree affirmed.

August C. Streitwolf, of New Brunswick, for appellant. Hugh K. Gaston, of Somerville, and John R. Hardin, of Newark, for respondents.

BACKES, Vice Ordinary. A brief statement will develop the single question presented for decision. William Rowland by his will made numerous pecuniary bequests, some outright, and others to his executors in trust for various beneficiaries. The rest, residue, and remainder of his estate he gave to the executors, in trust to pay the income

to his widow during her lifetime, and upon her decease to pay the income to his children until a given time, when the principal was to be distributed. Four of the trust legacies, aggregating \$395,000, were for the benefit of nondependents, and consequently not payable for a year after the death of the testator. The income of the estate for the year, upon a sum equal to these trust funds, amounted to \$16,131.26. This sum the appellant contends should be treated as income of the residue, while, on the other hand, the trustees claim and have charged themselves with it as principal of the residuary estate. From so much of the decree sustaining the trustees in this respect, this appeal was taken.

Doubtless this precise question has been often before our courts, but it seems that the decision is not recorded in any of our reported cases. Elsewhere may be found an abundance of authorities upholding the course pursued by the court below. *Lewin on Trusts* (8th Ed.) a. p. 301, states the established and guiding rule thus:

"The tenant for life of a residue is not entitled to the income accruing during the delay allowed for the payment of legacies on so much of the testator's property as is subsequently applied in paying them. Executors, as between themselves and the persons interested in the residue, are at liberty to have recourse to any funds they please for payment of debts and legacies; but, in adjusting the accounts between the tenant for life and the remainderman, they must be taken to have paid the debts and legacies not out of capital only or out of income only, but with such portion of the capital as, together with the income of that portion for one year from the testator's death, was sufficient for the purpose."

See, also, *Perry on Trusts* (6th Ed.) § 551.

In *Allhusen v. Whittell*, L. R. 4 Eq. 295, the testator, Whittell, gave his estate, which was subject to the payment of legacies, to trustees to pay the income to his father for life, with remainder over in four equal parts. Vice Chancellor Wood, in illustrating the rule, said that, supposing a testator has a large sum, say £50,000 or £60,000, in the funds, and has only £10,000 worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. Until the debts and legacies were paid, there would have been no interest from the death of the testator which could by possibility have come to the tenant for life. What I apprehend to be the true principle is that, in the bookkeeping which the court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of

debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever. In *Holgate v. Jennings*, 24 Beav. 623 (53 Eng. Reprint, 498), the testator, whose estate consisted of stocks, gave £16,000 in legacies, payable within six months, and the rest and residue in trust to pay the annual proceeds to his wife for life. On a contest between the life right holder and the remainderman, it was held that dividends accruing within six months after the testator's death on stock equal to the amount of the legacies formed no part of the income of the residuary estate, but fell into the residue and formed a part of the corpus. In *Lambert v. Lambert*, L. R. 16 Eq. 320, Vice Chancellor Bacon followed the principle enunciated in *Allhusen v. Whittell*, as did the court in *In re Whitehead*, *Peacock v. Lucas*, 1 Chancery, 678.

In New York we find the same rule adopted. In *Williamson v. Williamson*, 6 Paige, 298, the testator's will contained pecuniary legacies, and the income on the residuary estate he gave to his wife for life, with the remainder over to his three sons. In determining the right as between the life tenant and the remainderman to the income of the estate for one year on the amount of the legacies, Chancellor Wadworth said that it was not the intention of the testator to give his wife the interest or income of his whole personal estate, until the debts and legacies should be paid, or for the term of one year, and then the interest upon the residuary estate after that time; but it was his intention to give her the use or income of the same residuary fund, the capital of which was to be distributed to his three sons upon her death or remarriage. He cited the case of *Covenhoven v. Shuler*, 2 Paige, 132, 21 Am. Dec. 73, and the authorities there referred to, as settling the principle that where there is a general bequest of a residue of the testator's personal estate for life, with a remainder over after the death of the first taker, the whole residuary fund is to be invested for the benefit of the remainderman, and the tenant for life is only entitled to the interest or income of that fund, and to ascertain the amount of such residuary fund, so as to apportion the capital and the income properly between the remainderman and the tenant for life, the executor, upon settling the estate at the end of the year, must estimate the whole estate, at what is then ascertained to have been its cash value, at the testator's death, after paying all debts, legacies, expenses of administration, and other proper charges and commissions. But in making such deduction for

legacies payable at a future day, and which do not draw interest, the whole amount of the legacies is not to be deducted, but only such a sum as, if properly invested, would, at the time when the legacies become payable, have produced the requisite sum exclusive of all expenses and risk of loss. To the same effect is *Matter of Accounting of Benson*, et al., 96 N. Y. 499, 48 Am. Rep. 646.

It is therefore quite clear, both upon principle and authority, that the income on the legacies under consideration passed into the residue as principal, and not as income thereof. A clear distinction, however, is drawn between the application of income on a fund applied to the payment of a vested legacy and accumulations on the principal of an estate from which contingent legacies, or those payable at an indeterminate time in the future, may be payable. In the latter instances the income falls into the residue as income of the residue. The reason for this is the uncertainty as to whether the estate will ever be called upon to pay such legacies, and until it is the whole of the principal is "residue until wanted," and the income thereof is, of course, income of residue. See *Sandford v. Blake*, 45 N. J. Eq. 248, 17 Atl. 812, where Justice Depue discussed the principle and cited the English authorities, including *Allhusen v. Whittell*, supra.

Counsel for the appellant, upon the argument and in his brief, cited *Corle v. Monkhouse*, 47 N. J. Eq. 73, 20 Atl. 367, as upholding his contention. That case is authority for one of the exceptions to the general rule that interest on legacies does not begin to run until one year after the death of the testator, viz. where a gift is made of the interest or income, either of the whole of the residue, or a particular part of it, to one person for life, and the principal is given over to others on the death of the life tenant, the life tenant is entitled to interest from the date of the death of the testator. This doctrine has been laid down time and again by our courts, and is not at this day even debatable, but manifestly it does not involve the point of law raised on this appeal.

The decree below will be affirmed, with costs.

(90 N. J. Law, 724)

STATE v. STANFORD (two cases).

(Nos. 82, 83.)

(Court of Errors and Appeals of New Jersey. May 8, 1917.)

1. CRIMINAL LAW § 906(7)—RECEPTION OF EVIDENCE—OBJECTION.

Where, in a prosecution for keeping disorderly houses, the testimony given by defendant on the trial of an indictment against a third person was admissible, an application to exclude in toto the testimony given by defendant and his codefendant at such trial was properly refused; the protection which defendant was entitled to have against the previous testimony of his codefendant being an instruction that it

should not be considered in passing on his guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1643.]

2. CRIMINAL LAW ¶824(8)—INSTRUCTIONS—FAILURE TO REQUEST.

Where accused failed to request an instruction that testimony given by his codefendant at a prior trial of a third person could not be considered in passing on the guilt or innocence of accused, he could not complain, on appeal, of the trial court's failure to give such an instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999.]

3. CRIMINAL LAW ¶393(1)—PREVIOUS TESTIMONY—ADMISSIBILITY.

In a prosecution for keeping disorderly houses, it was no objection to the admission of testimony, given by defendant at the trial of a third person, that the state had no right to make defendant testify against himself, and that it had not been first shown that the admissions contained in such testimony were voluntary, and that defendant was cautioned that what he said might be used against him on some other occasion, where it appeared that the previous testimony of defendant had been elicited, not by the state, but by counsel for the person then on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 871.]

Error to Supreme Court.

Albert Stanford was convicted of keeping disorderly houses, and brings error. Affirmed.

Garrison & Voorhees and Isaac H. Nutter, all of Atlantic City, for plaintiff in error. Charles S. Moore, of Atlantic City, for the State.

PER CURIAM. Albert Stanford and Albert Jackson were convicted at the January term, 1916, of the Atlantic county court of quarter sessions, each under two separate indictments for the common-law crime of keeping disorderly houses at two separate places in Atlantic City. The four indictments were tried together, verdicts of guilty found, and from separate judgments in each case writs of error were taken to the Supreme Court. The cases were there argued together, and the convictions affirmed by that court. From the judgments of affirmance entered in the Supreme Court Albert Stanford took two writs of error, which are now before this court. The testimony and assignments being identical, the cases were presented and argued together by consent of counsel.

The opinion in the four cases in the Supreme Court was rendered in one of the Jackson Cases and is as follows:

"Per Curiam. The defendant was indicted for, and convicted of, the crime of keeping a disorderly house, the gravamen of the charge being the assisting in carrying on a gambling establishment at Chalfonte avenue, in the City of Atlantic City. A similar indictment was found against one Albert Stanford, and a conviction was had in his case also. The cases were tried together in the quarter sessions, and were argued together before this court.

[1, 2] "Numerous errors were assigned by each

defendant, but all of them were abandoned on the argument, except three. These three are each of them directed at an alleged error of the trial court in permitting the official stenographer to read the entire testimony given by Stanford, and also that given by Jackson, on a trial theretofore had on an indictment presented against one Andrew Terry, who was the proprietor of the gambling establishment at which the present defendants acted as assistants. The pith of the contention is that the prior testimony given by each of them, and permitted to be read to the jury, was evidential only against himself, and not against his codefendant, and that its admission was improper for this reason. It is conceded that Jackson's previous testimony, if voluntarily given, was properly admitted as evidential against himself, and that Stanford's also was admissible against himself. It follows, therefore, that an application to exclude this evidence in toto was properly refused. The protection which each defendant was entitled to have against the previous testimony of his codefendant was an instruction that it should not be considered by the jury in passing upon his guilt or innocence. *Perry v. Levy*, 87 N. J. Law, 670, 94 Atl. 569. But as no request for such an instruction was proffered, and as the testimony was admissible to the extent indicated, the defendants cannot now complain of the failure of the trial court to thus limit the effect of the evidence.

[3] Moreover, the objection to the admission of this testimony was not based upon its lack of evidential value, but upon the sole ground that it could not be introduced until it was first shown that the admissions contained in it were voluntary, and that the party making them was cautioned that what he said might be used against him on some other occasion; and, further, that the state had no right to make a defendant testify against himself. These grounds of objection were, under the circumstances, entirely without merit, and have not been urged before us. It is proper to say, however, that the previous testimony of these defendants on the trial of the Terry indictment had been elicited, not by the state, but by Terry's counsel; and, under these conditions, there was, of course, no obligation on the part of the prosecutor of the pleas to warn the witnesses that what they might say could be used against them if it indicated criminality on their part. The suggestion that the state, by submitting the previous admissions of the defendants, was compelling them to testify against themselves is, of course, entirely without substance.

"The judgment under review will be affirmed."

The other judgments were affirmed for the reasons given in the above opinion, a memorandum to that effect being filed.

PER CURIAM. The two judgments under review on the writs of error sued out by Stanford in this court are affirmed for the reasons given in the above opinion of the Supreme Court.

(90 N. J. Law, 377)

STATE v. PULLIS.

(Supreme Court of New Jersey. June 6, 1917.)

1. INDICTMENT AND INFORMATION ¶137(2)—MOTION TO QUASH INDICTMENT—DISQUALIFICATION OF GRAND JUROR.

That the foreman of the grand jury when a candidate for the office of freeholder had stated in his canvass that he stood for efficiency and economy in county government, and that the remedy was in the hands of voters even if war-

ranting the inference that the members of the existing board of which the defendant was one were not to be trusted with the management of the county government, would not justify quashing the indictment where no malice or ill will is averred, and the defendant was not even the rival of the foreman of the grand jury for the office he sought.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 481.]

2. COUNTIES \Leftrightarrow 102—MISCONDUCT IN OFFICE—INDICTMENT—SUFFICIENCY.

In a prosecution of a freeholder for misconduct in office, an indictment averring that the defendant was an officer of a county having been duly elected chosen freeholder by the qualified voters of a township named and having taken upon himself the said office was sufficient without specifically averring that he took the oath of office.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 160.]

Read Pullis was indicted for an offense. On motion to quash indictment. Motion denied.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Egbert Rosecrans, of Blairstown, and Harlan Besson, of Hoboken, for the motion. William A. Stryker, of Washington, N. J., opposed.

SWAYZE, J. [1] The most important objection to the indictment is that the foreman of the grand jury which found it was at the time a candidate for the office of freeholder and in his canvass had suggested that the members of the existing board, of whom the defendant was one, were not to be trusted with the management of the county government. If we draw this inference from the fact that he stated that he stood for efficiency and economy in county government, and that the remedy was in the hands of the voters, we think it fails to justify us in quashing the indictment. The case differs from *State v. McCarthy*, 76 N. J. Law, 295, 69 Atl. 1075, where the proof showed partiality on the part of the sheriff in selecting the grand jury, as was possible under the law as it then stood. The present charge is in the nature of a challenge to the favor of a single grand juror, and goes no further. No malice or ill will is averred, and the present defendant was not even the rival of the foreman of the grand jury for the office he sought. The case is within the rule of *State v. Turner*, 72 N. J. Law, 404, 60 Atl. 1112; *State v. Rickey*, 10 N. J. Law, 83.

[2] The objection to the form of the indictment is unsubstantial. It follows that approved by this court in *State v. Codington*, 80 N. J. Law, 496, 78 Atl. 743, affirmed 82 N. J. Law, 728, 85 Atl. 1135. We do not understand the suggestion of the brief that the question was not squarely discussed in the opinion in that case. We think it enough to aver that the defendant was an officer of the county, having been duly elected chosen

freeholder by the qualified electors of the township of Blairstown, and having taken upon himself the said office, without specifically averring that he took the oath of office.

The motion is denied. Let the record be remitted for trial to the quarter sessions.

(90 N. J. Law, 358)

FREEMAN v. VAN WAGENEN et al.

(Supreme Court of New Jersey. June 6, 1917.)

1. BROKERS \Leftrightarrow 85(1) — ACTION FOR COMMISSION—EVIDENCE—ADMISSIBILITY.

In a broker's action for commissions for the sale of real estate, evidence for the purpose of showing that the defendant sought to vary the terms of the written agreement between the parties by making it applicable only in the case of a sale to a railroad was not admissible.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 108-110, 113, 115.]

2. BROKERS \Leftrightarrow 88(4) — ACTION FOR COMMISSIONS—JURY QUESTION.

Whether the written agreement between the parties had been given up by the plaintiff so as to render it of no effect held for the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129.]

3. BROKERS \Leftrightarrow 43(3)—CONTRACT—STATUTE OF FRAUDS—SIGNATURE BY ONE OF TENANTS IN COMMON.

Under statute of frauds (2 Comp. St. 1910, p. 2617) § 10, providing that a broker selling lands is not entitled to commissions unless employed in writing, where a contract for the employment of a broker to sell land which complied with the statute was signed by one of several tenants in common, such authority and a subsequent agreement for a conveyance by all of the cotenants was sufficient, since it was a necessary inference, either that such cotenant was the agent of the others in signing the authority to the broker, or that they adopted his act.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44.]

4. BROKERS \Leftrightarrow 54 — CONTRACTS — CONSTRUCTION—"SALE"—"SELL."

Where a broker was employed in writing to sell real estate, all that he was bound to do was to bring the parties together and get them to make a binding agreement, and it was not necessary that he produce one able to perform the contract, since the words "sale" and "sell" in agreements between the owners of lands and real estate brokers mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81.

For other definitions, see Words and Phrases, First and Second Series, Sale; Sell.]

Appeal from Circuit Court, Essex County.

Action by Bart J. Freeman against George A. Van Wagenen and others. Judgment for plaintiff, and defendants appeal. Affirmed.

William K. Flanagan, of Newark, for appellants. Edwin C. Caffrey, of Newark, for respondent.

SWAYZE, J. [1, 2] This is an action by a broker to recover commissions on a sale of real estate. On October 22, 1913, John B. Van Wagenen, one of the defendants and tenants in common signed a written agreement

to pay the plaintiff a commission of 2½ per cent. for the sale of the property. The defendants claim that this agreement was meant to apply only to a proposed sale to the Pennsylvania Railroad Company; that no such sale was made; that thereupon, in December, 1913, the agreement for commissions was returned by Freeman to Van Wagenen and abandoned. In fact the agreement was not produced at the trial; the plaintiff relied on what was said to be a copy which had been retained by his lawyer. The point in this respect was that the agreement had been abandoned by consent, although there are suggestions in the case and in the briefs that the defendant sought to vary the terms of the agreement by making it applicable only in case of a sale to the railroad. The learned trial judge rightly held that the evidence was not admissible for that purpose, and put to the jury the real question whether the written authority was given up by the plaintiff, so as to render it of no effect.

[3, 4] Whether the authority was given up or not, the plaintiff continued his efforts to sell the property. He claims, of course, that he was acting under the written authority. The defendants claim that he was acting only under a verbal authority from John B. Van Wagenen, whose agency for all the tenants in common is not disputed. As a result of the plaintiff's efforts, a prospective purchaser was procured in the person of Cobb. Pending the actual execution of a contract for sale with Cobb, the plaintiff produced in March, 1914, another purchaser, Scherer, who offered a higher price. With him the defendants made a formal written contract on March 14, 1914, for the conveyance of the land, and received \$1,000 on account of the purchase price. This contract did not, however, result in a conveyance. Scherer sought to rescind and recover his thousand dollars, but failed. Meantime the defendants actually conveyed the property to Cobb for a lower price than that at which they had authorized the plaintiff to sell. The claim of the plaintiff for commissions on the sale and conveyance to Cobb is not important for the present purposes, since the jury found in favor of the defendants on that issue and the plaintiff does not appeal. The question for us is whether there was any error in submitting the case to the jury as to the claim for commissions on the sale to Scherer. Assuming as we must, in view of the jury's finding in favor of the plaintiff on this issue, that the authority of October 22d had not been given up, we think it was right to hold, as the judge did, that the authority and the subsequent agreement for a conveyance to Scherer by the defendants satisfied the requirements of the tenth section of our statute of frauds (2 Comp. St. 1910, p. 2617). There was an agreement signed by one of the defendants which complied with the statute.

From the fact that the other defendants joined him in the contract to convey to Scherer, it was a necessary inference, either that he was in fact their agent in signing the authority to Freeman, or that they had adopted his act. Under either view, actual present agency or subsequent adoption, he was entitled to recover if he had performed on his part. As to this, the defendants claim that, although the plaintiff had produced a ready and willing purchaser in the person of Scherer, he had not produced one able to perform the contract. The judge charged that all the plaintiff was bound to do was to bring the parties together and get them to make a binding agreement. This was a correct statement of the law. It is a mistake to think that we decided in *Hinds v. Henry*, 36 N. J. Law, 328, that the broker could never recover unless he procured an able and willing purchaser. We said that the general rule was that when he had done that, his right to commission was complete. We did not deny that other facts also might make his right complete. A clear distinction is made in our cases between a sale and a conveyance of land. We agree with what was said in *Lindley et al. v. Keim et al.*, 54 N. J. Eq. 418, at page 423, quoting the opinion of Vice Chancellor Pitney, to be found in 34 Atl. 1073, that the words "sale" and "sell" in agreements between the owners of land and real estate brokers mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms. This the plaintiff did, the defendants actually accepted Scherer as satisfactory, and the only question so far as the Scherer transaction is concerned was that put by the judge to the jury, whether the written authority had been abandoned by the plaintiff as the defendants claimed.

We find no error; the judgment is affirmed, with costs.

(98 N. J. Law, 387)

PRANTL v. JUNK.

(Court of Errors and Appeals of New Jersey.
May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR §428(2) — NOTICE OF APPEAL — PERFECTING APPEAL — STATUTES AND RULES OF COURT.

Appeals were substituted for writs of error by the practice act of 1912 (P. L. p. 377, § 25), and by rule 77 (100 Atl. xxiii) annexed to that act, and rule 137 (100 Atl. xxx) of the Supreme Court (1913), an appeal may be taken by notice served on the adverse party and filed within the time limited for bringing writs of error (now superseded by appeals in civil suits). Such an appeal is perfected, so as to remove the cause from the court below to the court above, by serving a notice on the adverse party and filing the same within the time so limited, which is one year in the class of cases in which that at bar is one. The provision is in the conjunctive, namely, the service and filing of the notice. The provision is not that the notice shall be filed immediately after the service or within any time

prescribed thereafter, except that limited for the taking of an appeal, so that, after serving a notice of appeal at an early date after judgment, the appellant may delay perfecting the appeal, so far as the notice perfects it, until the last day on which an appeal will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2167.]

Appeal from Supreme Court.

Action by Henry Prantl against Daniel J. Junk. Judgment for plaintiff, and defendant appeals. Motion to dismiss denied.

Garrison & Voorhees and Clarence L. Goldenberg, all of Atlantic City, for the motion. Ulysses G. Styron, of Atlantic City, opposed.

WALKER, Chancellor. On May 15, 1916, the plaintiff recovered a judgment against the defendant in the Supreme Court in a suit for malicious prosecution, and on June 14, 1916, the defendant served a notice of appeal upon the plaintiff. Motion is now made, March 6, 1917, to dismiss the appeal, for the following reasons: (1) Because no reasons for reversal were served upon the respondent or his attorneys within 30 days from service of notice of appeal; (2) because no state of the case has ever been prepared or served; (3) because the said cause was not noticed for argument in the Court of Errors and Appeals by the appellant at either June or November terms, 1916, or the March term, 1917; (4) because the appellant has not prosecuted his appeal other than serving notice of appeal in June, 1916, and has failed to cause his notice of appeal, then served, to be filed with the clerk of this court; (5) because the appellant has heretofore abandoned his appeal.

Appeals were substituted for writs of error by the practice act of 1912 (P. L. p. 377, § 25). In rule 77 (xxiii) annexed to that act it is provided that appeals shall be taken by notice, which shall be served on the adverse party and filed within the time limited for bringing writs of error, which at the time of the passage of that act was one year in the class of cases in which that at bar is one. Comp. Stat. p. 2208, § 2. Rule 137 (100 Atl. xxx) of the Supreme Court (1913) in its first paragraph is a literal transcription of rule 77 annexed to the practice act of 1912. The remaining portion of rule 137 concerns matters of practice and procedure not involved in this motion.

It is to be remembered that the limitation of time in which an appeal may be taken is one year after the judgment is entered, which time has not yet expired in this case. If the defendant had not appealed, he might still do so. An appeal is a matter of right, subject to practice regulations, and, in order to entitle himself to be heard in this court, the defendant is only required to serve his notice of appeal and file the same within the prescribed time. The provision is not that he shall file it immediately after service or

within any prescribed time thereafter except that limited for taking an appeal, so that, having served a notice of appeal at an early date after the judgment, the appellant may, if he chooses, delay perfecting the appeal, so far as the notice perfects it, until the last day on which an appeal will lie. The respondent is not harmed by such a procedure, for, as we have seen, the combined action necessary to remove the cause from the court of first instance to the appellate tribunal, namely, the serving and filing of the notice, may both be done on the last day. That limitation in this case has not yet been reached.

In rule 77 annexed to the practice act and also rule 137 of the Supreme Court there is a provision that the serving and filing of the notice of appeal shall be at least 30 days before the appeal is argued. This, as yet, has no application to the matter sub judice.

The specific grounds upon which the motion to dismiss is based relates to matters of practice in the prosecution of the appeal after it has been perfected so as to remove the cause from the court below to the court above, except the last one, which is that the appellant has abandoned the appeal; but this, so far as it purports to be the result of the inaction complained of, is non sequitur, and, so far as it involves a statement of an extraneous fact, was not proved.

The motion to dismiss the appeal will be denied.

(90 N. J. Law, 517)

GODFREY et al. v. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY et al.

(Court of Errors and Appeals of New Jersey. April 27, 1917.)

HIGHWAYS § 105(1)—SCOPE OF AUTHORITY TO RECONSTRUCT—"RECONSTRUCT."

Laws 1914, p. 203, authorizing the board of chosen freeholders of any county to repair or "reconstruct" county roads and issue bonds therefor, expressly limits the meaning of the word "reconstruction" to the "reconstruction contemplated under the provisions of" Laws 1912, p. 809, providing for the permanent improvement and maintenance of public roads; that is, a reconstruction that is on the one hand closely associated with the idea of repairs, and, upon the other, sharply contrasted with the idea of construction, and is not a grant of power to reconstruct county roads in the broad sense of the term "reconstruction."

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-327, 329, 330.

For other definitions, see Words and Phrases, First and Second Series, Reconstruct; Reconstruction.]

Appeal from Supreme Court.

On certiorari to the Supreme Court (99 Atl. 843) by Carlton Godfrey and another to review a resolution of the Board of Chosen Freeholders of Atlantic County, Liddle & Pfeiffer, contractors, being additional respondents, the resolution was set aside, and respondents appeal. Affirmed.

Emerson L. Richards, of Atlantic City, and Louis Hood and Riker & Riker, all of Newark, for appellants. Theo. W. Schimpf and C. L. Cole, both of Atlantic City, for appellees.

GARRISON, J. The facts of this case are fully stated in the opinion of Mr. Justice Black, who set aside the award of a contract for the improvement of certain public roads. *Godfrey v. Chosen Freeholders*, 99 Atl. 843.

We agree that the contract was not legally awarded, but find it unnecessary to lay down any rule as to conditional awards generally.

In the present case the conditional award made on November 8, 1916, was by its own terms rendered void by the election to which it referred. There was therefore, on November 24, 1916, no award and no power to make one, since the meeting held on that date was not an adjourned meeting or one to which the matter had been continued; moreover, all bids but one had been rejected, and none of the statutory safeguards thrown around the awarding of such a contract was or could have been complied with. The award made at that meeting had not even the semblance of legality. Our affirmation of the judgment of the Supreme Court might well rest upon this ground alone, were it not for the fact that there is a more fundamental question that has been fully argued by counsel, and that ought, in the interests of the public, to be decided before any further action is taken by the board of chosen freeholders under chapter 122 of the Laws of 1914, which admittedly is the authority upon which the right to make the proposed improvement rests. That statute is not a grant of power to reconstruct county roads in the broad sense of the term "reconstruction," nor does it leave it to the courts to give such broad meaning to it. The statute itself defines the word by limiting it to the "reconstruction contemplated under the provisions of an act entitled,

'An act to provide for the permanent improvement and maintenance of public roads in this state (Revision of 1912),' approved April 15, 1912."

We are thrown back therefore upon the act of 1912 in order to ascertain the sense in which the word "reconstruction" is used in that act, and when such sense is ascertained such meaning and none other must be given to it in the act of 1914. Turning, then, to the act of 1912 (P. L. 1912, p. 809), we find it to be a Revision of the Public Roads Act dealing, as its title imports, with the permanent improvement of public roads and their maintenance. The improvement of a public road is described generally by the act to be its construction as a macadamized, Telford, stone, gravel, or other sort of road; and the maintenance of such an improved road includes a provision for any

extraordinary repairs or reconstruction of which such road may be in need.

This is the sort of reconstruction that is contemplated by the act of 1912, a reconstruction that is, upon the one hand, closely associated with the idea of repairs, and, upon the other, sharply contrasted with the idea of construction. So that upon comparing the provisions of that act with the provisions of the present contract, the latter could, by no stretch of the imagination, be brought within the provision for reconstruction of the act of 1912.

This being so, it follows imperatively that such contract provisions cannot be brought within the authority to reconstruct granted by the act of 1914, which in express terms applies to such reconstruction only as was contemplated by the act of 1912.

The award of the contract, therefore, was not only invalid because not legally made, but also because the board of chosen freeholders were without authority to make the proposed improvement.

The judgment of the Supreme Court is affirmed.

(87 N. J. Eq. 633)

FRASER v. FRASER.

(Court of Errors and Appeals of New Jersey.
March 20, 1917.)

(Syllabus by the Court.)

1. DIVORCE \S 37(15)—GROUNDS—DESERTION—"WILLFUL DESERTION"—"OBSTINATE DESERTION."

It is the duty of a husband to provide a home for his wife, in which she is recognized by its inmates as the household mistress, and when the husband subjects his wife in the management of her household affairs to the interference of his mother, who manifests an enmity towards the wife, and by words and acts assails her conduct and reputation to such an extent that she cannot endure it, and leaves the home for that reason, her desertion may be willful, but it does not become obstinate, so long as the husband makes no effort to induce her to return to a home freed from the contentious element.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 122.

For other definitions, see Words and Phrases, First and Second Series, Willful Desertion; Obstinate Desertion.]

2. DIVORCE \S 133(3)—DESERTION—WIFE'S RETURN—BONA FIDES.

A wife left her husband's home, after notifying him that she would do so unless he provided a home apart from his mother, whose conduct she claimed humiliated her, and who had charged her with being a bad, wicked woman. This the husband refused, saying, "That is up to you." When she left her husband was present, made no protest, and did not ask her to stay.

She took with her their only child, three weeks old, and the husband never attempted to see his wife or the child, although they lived in the same city. After two years the husband decided to move to this state in order to obtain a divorce for desertion. Shortly before coming to this state he wrote a letter to his wife, and the day after he moved he wrote her another; the contents of these letters being the only proof of an

attempt to induce his wife to return. Neither letter contained any request or invitation, but a mere statement that the home was open for her return under old conditions, including the presence of his mother. *Held*, that these letters were not proof of a bona fide effort to induce the wife to return, for there was no promise to remove the real cause of the separation, which the husband recognized when he permitted his wife to leave without protest. Nor did they invite the wife to return, and were evidently written as a basis for the intended divorce proceedings, embodying terms which he knew the wife could not accept.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 448.]

Appeal from Court of Chancery.

Action for divorce by William J. Fraser against Mary M. Fraser. Decree for plaintiff, and defendant appeals. Reversed, and cause remanded to the Court of Chancery, so that the petition might be dismissed.

Edward Maxson, of Jersey City, for appellant. James A. Sullivan, of Passaic, for appellee.

BERGEN, J. From a decree of divorce, based upon the petition of the husband, alleging desertion by the wife, she has appealed.

[1] They were married in the city of Brooklyn, N. Y., where both resided, July 10, 1910; a child was born April 24, 1911; the defendant left petitioner's house with the child May 13, 1911; and since that date the parties have lived in separate homes. The reason which the wife gives for leaving her husband's house is that the conduct of the husband's mother, who was an inmate of the home, made her life intolerable by constant quarrels, charged her with being a bad woman, estranged her husband's affection, who espoused the cause of the mother, and in many ways manifested her ill will towards the wife by acts and speech, so that her position as mistress of the home was depreciated, and she humiliated and deprived of the comfort and happiness she had a right to enjoy. That there were many disagreements and quarrels between the women is not disputed; the testimony showing that the husband was aware of the condition, and that as early as November, 1910, his wife complained to him that, unless he provided her a home separate from his mother, she would have to leave him. There is no doubt that it was a contentious household, for which the mother was at least partly to blame, so that, if her conduct was not modified, there could be no happiness; and this the husband did not undertake to accomplish, for he testified that he heard both sides and remained neutral, even when told by his wife that his mother had written a letter to a fortune teller, in which the wife was described as "a bad, wicked woman." This attitude on the part of the husband is not, perhaps, such legal cruelty that it would justify a wife in leaving the home; but there is a species of cruelty which cuts deeper than a blow or the lash, and that

is the weakening of a husband's love and affection through the disparagement of the wife by the husband's mother, and when not resented by him, but apparently sustained, is bound to destroy the happiness of the home. Under such circumstances it is his duty to remove the cause, and if he refuses it is a potent element in the consideration of the questions whether he did not consent to the separation, and whether he made a bona fide effort to induce his wife to return. The animus of the mother is further manifested by the fact that, although an inmate of the house when the child was born, she never made any effort to see the child, and, so far as the testimony shows, never did.

This cause illustrates the futility of attempting to establish such a home as a husband should provide for his wife, when one of the component parts is his mother, who up to the time of the introduction of the wife is its head, and who is not willing to graciously accord to the wife her rightful position as mistress, and where the husband, in all disagreements between his mother and wife, either supports the mother or remains neutral between the contending forces. It is the duty of the husband to provide a home for his wife, where she is recognized by its inmates as the household mistress, and when the husband subjects his wife in the management of her household affairs to the interference of his mother, who manifests an enmity towards the wife, and by words and acts assails her conduct and reputation to such an extent that she cannot endure it, and leaves the home for that reason, her desertion may be willful; but it does not become obstinate so long as the husband makes no effort to induce her to return to a home freed from the contentious element. Shortly before the wife left, she again told her husband that, unless he provided a home apart from his mother, she would leave, and he admits that his reply was, "That is up to you," and on the day she moved he was present cutting the lawn, but paid no attention to the moving, nor did he say a word to her of protest, or request her to remain.

The fair inference from this record is that he tacitly consented to the separation, preferring to retain his mother, rather than his wife and child. Under these circumstances the husband was not without fault, and, assuming that the desertion by the wife was willful, it is not obstinate unless, after a bona fide effort to effect a reconciliation, the wife refused to return, and we must therefore consider and determine whether such an effort has been made. It was manifest to the husband that no permanent reconciliation could be effected if the same conditions remained, and the wife required to accept a home with his mother, who considered her "a bad, wicked woman." This was a humiliation he knew she would not submit to. In our opinion the record fails to show any such bona fide effort as the law requires. In Van

Wart v. Van Wart, 57 N. J. Eq. 598, 41 Atl. 965, the husband, when the wife was leaving, as in this case, "stood by without asking her to stay," and it was held that it was his duty to make a bona fide effort to induce her to return. "Desertion cannot be considered as obstinate on the part of one, when the separation is acquiesced in by and entirely satisfactory to the other, who neither entertains nor manifests any desire that the separation, nor the causes which brought it about, should cease." *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588, affirmed on opinion below 49 N. J. Eq. 594, 26 Atl. 468.

[2] What has the petitioner done in this case to manifest a sincere desire that the separation, and the causes which brought it about, should cease; the cause being a contentious mother-in-law unkindly disposed towards the wife? We have his admission that he has never visited his wife or child, although they lived in the same city, and he testifies that he has no affection for the child. He does not claim that he would not have been allowed to see either his wife or child, or that he made any effort to do so; he sulked in his tent until he wished to obtain a divorce. In March, 1913, he removed to New Jersey for, as he testified, the express purpose of obtaining a divorce for desertion, and his only effort to induce his wife to return was sending her two letters, one dated February 1, 1913, and the other April 1, 1913. The first letter was written shortly before he moved to this state, and when, presumably, he had decided to do so for the purpose of obtaining a divorce, and it should be read from that viewpoint. He asks whether she expects to live in the present manner for the rest of her life, whether she intends to return to his home, or whether she is going to get a divorce, and then adds, "The home is just the same as it always was; I never told you to go, or debarred you from returning, and you can return under the same conditions as you originally came to it," and that, if she wished a divorce, "you can have a divorce from me at any time without any contest." It is not difficult to read between the lines that this was not a bona fide attempt to remove the cause and end the separation. It contains no word of affection, no request to return; all that he offers is a place to live under the old conditions, and it was evidently written to lay the basis for a divorce in this state after removal thereto; besides this, an offer not to contest a divorce suit instituted by her is hardly consistent with a bona fide desire to induce a reconciliation, but rather an invitation to join with him in making it permanent by a divorce.

The second letter contains a notification that he has removed to New Jersey, and that his house was still open to her, "the same as prior to the time you left me and your home at Brooklyn." Neither letter contains any

invitation or request to return, and the last was written immediately after he moved to this state in order that he might secure a divorce; and it is not credible that the petitioner, having just moved to the state with the intention of obtaining a divorce, really intended that it should induce his wife to accept, and thus prevent the accomplishment of the purpose he had in view. He knew that so long as the original cause remained he was in no danger of acceptance; he does not invite, but informs her that she may return under old conditions; and it was manifestly not his intention to ask her to come, for he carefully avoids doing so, but at the same time notifies her that, if she comes, she must do so with the cause of separation still present. To this letter defendant replied, expressing her desire and willingness to return if the mother was not a part of the family. The petitioner, having, in effect, consented to the separation, and failed to show that he has made a bona fide attempt to end the separation, is not entitled to a decree for divorce for desertion.

The decree appealed from will be reversed, and the record remanded to the Court of Chancery, so that the petition may be dismissed.

(30 N. J. Law, 461)

ROSS et ux. v. COMMISSIONERS OF PALISADES INTERSTATE PARK.

(Supreme Court of New Jersey. June 6, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §971(2)—EVIDENCE §546—EXPERT ON VALUE OF LAND—DISCRETION OF TRIAL COURT—REVIEW.

Who is an expert on the value of land under our decisions must be left very much to the discretion of the trial judge. His decision is conclusive, unless clearly shown to be erroneous in matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3853; Evidence, Cent. Dig. § 2363.]

2. EVIDENCE §543(3)—EXPERTS—LAND VALUES—QUALIFICATION.

The dominant circumstances forming the qualification of expert witnesses as to land values consist of the fact either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question within recent periods, or that they have knowledge of such sales by others.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357.]

3. EVIDENCE §543(3) — EXPERT WITNESS—VALUE OF LAND.

The mere fact that a witness owns the land, but has no special knowledge of values, does not qualify him as an expert, so as to give an opinion as to the value of the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357.]

4. EMINENT DOMAIN §131—VALUATION OF LAND—UNDERLYING STONE.

Valuing land taken under condemnation underlain with stone, the stone should not be valued separately and apart from the land, but it may be shown to what extent the land is

enhanced in value by the stone. The stone is a component part of the land.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 353.]

5. EVIDENCE \S 142(1)—CONDEMNATION PROCEEDING—VALUE OF LAND.

It is not error to admit evidence of prices paid by the condemning party for similar lands in the vicinity.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 416, 417, 423.]

6. EVIDENCE \S 142(1)—VALUE OF LAND.

The price paid for land in the neighborhood of that being condemned, to be evidential, the land must be substantially similar.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 416, 417, 423.]

7. EMINENT DOMAIN \S 124—VALUATION OF LAND—TIME.

The land is to be valued in the condition in which it was on the date of filing the petition and order, fixing the time and place for the condemnation proceedings. Act March 20, 1900 (P. L. p. 81) § 6.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 332-344.]

Appeal from Circuit Court, Bergen County. Action by P. Sanford Ross and wife against the Commissioners of the Palisades Interstate Park. From a verdict of a jury in a condemnation proceeding, plaintiffs appeal. Affirmed.

Argued before TRENCHARD and BLACK, JJ.

Bedle & Kellogg, of Jersey City, and Alonzo Church, of Newark, for appellants. Josiah Stryker, of Trenton, and John W. Wescott, Atty. Gen., for respondent.

BLACK, J. This case is an appeal from the verdict of a jury rendered in a condemnation proceeding tried at the Bergen circuit. The verdict of the jury was \$8,000. The award of the commissioners was, \$6,600. The amount of land sought to be taken was 3.6 acres.

The land under condemnation is situate in the extreme northerly part of the borough of Ft. Lee, Bergen county, and lies between a line drawn parallel with the Hudson river 150 feet west of the high-water line of the Hudson river and the steep cliffs of the Palisades. The tract extends about 980 feet along this line, while the distance from the line to the cliffs is 170 feet at the northerly end and 155 feet at the southerly end. Access to the land on the west is shut off by the steep cliffs. The surface of the land is a steep slope from the base of the cliffs to the easterly boundary. The land is bounded on the east by other lands of the appellant, which extend easterly 150 feet to the high-water line of the Hudson river and from there to the exterior line for solid filling.

The land in question and the remainder of the same tract is wild, unoccupied land, the upland being covered with small trees, underbrush, and stones, the whole tract being underlaid with slate and sandstone, and at the westerly end, at an elevation of 123 feet,

with trap rock. There is no communication with the land by railroad, trolley, or wagon road, none of the land under the Palisades north of the tract has ever been used for industrial purposes, and the nearest land under industrial development is 2.6 miles southerly in the adjoining borough of Edgewater.

The grounds of appeal are 38 in number. They are argued, however, under eight heads in the appellants' brief. They all challenge the rulings of the trial court and allege trial errors as grounds for a reversal of the judgment. The principal ones, however, relate to the court's exclusion of the opinion of appellants' experts as to the value of the land taken. The witnesses offered by the appellants for this purpose were Mr. Frederick Dunham, civil engineer, Mr. Floyd S. Corbin, a real estate broker of water front and dock properties in the harbor of New York, Mr. John H. Ehrehardt, a consulting engineer, Mr. Edlow W. Harrison, a distinguished civil and consulting engineer (Mr. Harrison has had long and varied experience in valuing railroad lands in New Jersey for taxation since 1884, particularly as to the value of the railroad terminal lands in Hudson county; he has been called as an expert on many features of the litigation involving the taxation of railroad property since the passage of the railroad tax act of 1884), Mr. Joseph E. Snell, a civil engineer of Newark, and Mr. P. Sanford Ross, the appellant and owner of the property under condemnation, who is an engineer and contractor. Mr. Dunham testified that he had no familiarity with sales of property under the Palisades in the vicinity of the Ross property; that he had made no effort to keep in touch with sales of land under the Palisades in the borough of Ft. Lee. Mr. Corbin had no familiarity with the sale of any water front property in the borough of Ft. Lee or with the sale of any property anywhere which had the same physical characteristics and the same lack of any means of communication as the property under condemnation or the tract of land of which it formed a part. Mr. Ehrehardt had not bought or sold property in Bergen county; he had no knowledge of any sale of any land lying along the Hudson river anywhere in Bergen county. Mr. Harrison testified, that the nearest property to the Ross tract of which he had any knowledge was the Koch property, which was located one mile south of the Ross property, his familiarity with this property being acquired by appraising it. He had no familiarity with values of land in the borough of Ft. Lee, except this one appraisal of the Koch property. He knew of no sales of any property similar or like the Ross property. Furthermore the record does not show any question overruled by the trial court put to him as to the value, but it does show that the trial judge said he would sustain the objection. Mr. Snell testified that he had never purchased or sold any land in

the vicinity of the tract under condemnation; that he had no familiarity with the sale price of any land in that vicinity. Mr. Ross testified that he had no knowledge of sales of water front property under the Palisades north of the land under condemnation; that he had made no effort to learn the sale prices of such property; he had no knowledge of either values or purchase prices of any property in the borough of Ft. Lee, except the piece under condemnation and the tract of which it was a part, which he purchased in 1882.

[1] The primary question in this case for solution then is whether, under our cases, it was error to reject the opinion of these witnesses on the value of the land under condemnation. Who is an expert under our decisions must be left very much to the discretion of the trial judge. His decision is conclusive, unless clearly shown to be erroneous in the matter of law. *Manda v. Delaware, Lackawanna & Western R. R. Co.*, 89 N. J. Law, 327, 98 Atl. 467; *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. Law, 194, 35 Atl. 915; *Elvins v. Delaware, etc., Tel. Co.*, 63 N. J. Law, 247, 43 Atl. 903, 76 Am. St. Rep. 217; *State v. Arthur*, 70 N. J. Law, 427, 57 Atl. 156.

[2] Our Court of Errors and Appeals, speaking on this precise point, said:

"Evidently, in the view of these authorities, the most material circumstance forming this qualification of expert witnesses as to land values consists of the fact either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question within recent periods, or that they have knowledge of such sales by others. How recent the occurrence of such sales, in point of time, and how near in location, and how nearly similar in comparison must, of course, vary with the circumstances of each case, and it is therefore impossible to define a general rule applicable to all cases." *Brown v. New Jersey Short Line R. R. Co.*, 76 N. J. Law, 797, 71 Atl. 271.

[3] So the court in speaking of a former owner of land for six or seven years said:

"Hence, to say nothing of personal capacity or of study or practice, there was shown on his part no opportunity to observe, and no actual observation, in the locality of the land which fitted him to speak of its value. The witness had no special knowledge of values which, being imparted to the jurors, could aid them in the discharge of their duty." *Walsh v. Board of Education of Newark*, 73 N. J. Law, 647, 64 Atl. 1083.

The witness must have some special knowledge of the subject about which he is called upon to express an opinion. *Crosby v. City of East Orange*, 84 N. J. Law, 708, 710, 87 Atl. 341; *Elvins v. Delaware, etc., Tel. Co.*, 63 N. J. Law, 247, 43 Atl. 903, 76 Am. St. Rep. 217.

A witness to be an expert must have more than a general knowledge of the subject under investigation. Authorities from other jurisdictions applying a different rule are not binding on this court. It is sufficient to say, in the language of Mr. Justice Dixon:

That, if in other states a more liberal rule is applied respecting the opinion of witnesses, as to

the value of real estate, "the worthlessness of such testimony is hardly a stronger reason for its rejection than the practically limitless amount of it that might be produced." *Laing v. United New Jersey R. R., etc., Co.*, 54 N. J. Law, 578, 25 Atl. 403, 33 Am. St. Rep. 682.

In our reports the rule has been applied in the following illustrative instances to the opinion of witnesses on the valuation and damage to land: A witness has qualified as an expert who has a knowledge of sales of lots and portions of lands similar to and in the immediate neighborhood of the condemned land. The land so sold was within a radius of two miles from the land in question and within a period of three years from the date of the giving of the testimony. *Brown v. New Jersey Short Line R. R. Co.*, 76 N. J. Law, 797, 71 Atl. 271.

A farmer is not an expert as to the damage done to a farm by the building of a railroad other than for farming purposes. *Pennsylvania R. R. Co. v. Root*, 53 N. J. Law, 253, 21 Atl. 285. Real estate agents residing six miles distant from the property who had nothing to do with property in the vicinity or anywhere near it are not on the question of rents. *Haulenbeck v. Cronkright*, 23 N. J. Eq. 413, affirmed 25 N. J. Eq. 513. Ordinary real estate agent is not, as to the value of the private title in a strip of land lying on a public highway, separated by the street from private property, nor as to damages done to the owner of the abutting property, by appropriating that strip to railroad purposes. *Laing v. United N. J. R. R., etc., Co.*, 54 N. J. Law, 576, 25 Atl. 409, 33 Am. St. Rep. 682. Real estate agent not an expert to give his opinion on difference between value of the property either to rent or sell estimated with the railroad in the street and the value without the railroad (*Thompson v. Pennsylvania R. R. Co.*, 51 N. J. Law, 42, 15 Atl. 833), not simply because witness resided on the property or because the witness owned and resided upon adjoining property (*Riley v. Camden, etc., Ry. Co.*, 70 N. J. Law, 289, 57 Atl. 445). A real estate agent is not an expert as to the amount of depreciation caused by the existence of a sanitary sewer running through the premises. *Morrell v. Preiskel*, 74 Atl. 994. Nor is a real estate agent an expert who is familiar with prices of property in the neighborhood as to the value of land after the construction of a tunnel with its present value. *Pennsylvania R. R. Co. v. Schwarz*, 75 N. J. Law, 801, 70 Atl. 134. The fact that a real estate agent on one occasion was able to lease a farm having a water supply in preference to one which had not affords no basis for an opinion concerning the difference in rental value between the two. *Crosby v. City of East Orange*, 84 N. J. Law, 710, 87 Atl. 341.

Knowledge of real estate values in the locality does not qualify witness to testify to the diminution in value of property by reason of the destruction of shade trees

standing in the highway in front of it (*Borough v. New Jersey Gas Co.*, 88 N. J. Law, 643, 96 Atl. 895), or such knowledge in a township (*Van Ness v. New York, etc., Tel. Co.*, 78 N. J. Law, 511, 74 Atl. 456). Valuation of adjoining railroad terminals is a basis of qualification of members of Board of Assessors making the valuation. *Long Dock Co. v. State Board of Assessors*, 89 N. J. Law, 108, 97 Atl. 900. An experienced real estate man of large experience not an expert on the question as to the fair value of the connection and use of a sewer condemned. *Park Land Corporation v. Mayor, etc., of Baltimore*, 128 Md. 611, 98 Atl. 157. A witness with some knowledge of real estate is not an expert on the value of shade trees. *Elvins v. Delaware, etc., Tel. Co.*, 63 N. J. Law, 243, 43 Atl. 903, 76 Am. St. Rep. 217.

From the rule thus stated and its application made by our courts it was not error for the trial court to exclude the opinion of these witnesses on the value of the land under condemnation.

[4] Nor was it error to admit the opinion of the witness William O. Allison. He had bought and sold property in the borough of Ft. Lee of the same peculiar quality. He qualified as an expert under the cases above cited. *Brown v. New Jersey Short Line R. Co.*, 76 N. J. Law, 797, 71 Atl. 271. Nor was it error to exclude evidence as to the value of the stone in place, under the case of *Manda v. Delaware, etc., R. R. Co.*, 89 N. J. Law, 327, 98 Atl. 467. The stone in place is a part of the land. It cannot be valued separately and apart from the land. To what extent, if any, the value of the land is enhanced by the stone may be shown. The value of the land as stone land suitable for quarrying is a proper subject of consideration both by the witnesses and the jury in fixing the amount of just compensation to be awarded, but not the value of the stone separately and apart from the land. The value of the land is not measured by such facts. The stone is a component part of the land. *Reading, etc., R. R. Co. v. Balthaser*, 119 Pa. 472, 482, 13 Atl. 294, 126 Pa. 1, 10, 17 Atl. 518; *Norfolk, etc., Ry. Co. v. Davis*, 58 W. Va. 620, 626, 52 S. E. 724; *St. Louis, etc., Ry. Co. v. Cartan Real Estate Co.*, 204 Mo. 565, 575, 103 S. W. 519; *Gardner v. Inhabitants of Brookline*, 127 Mass. 358; *Tri-State Tel., etc., Co. v. Cosgriff*, 19 N. D. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171; 10 R. C. L. p. 129, § 112; *Lewis on Eminent Domain* (3d Ed.) pars. 724, 725; 15 Cyc. 758. The cases cited as supporting a different principle are not in point. *Dewey v. Great Lakes Coal Co.*, 236 Pa. 498, 500, 84 Atl. 913; *Cole v. Ellwood Power Co.*, 216 Pa. 283, 290, 65 Atl. 678; *Seattle, etc., R. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864. Nor was it error to admit the testimony of Frank Clark whether the stone in question would make concrete.

[5, 6] So it was not error to admit in evidence the prices paid by the condemning party for similar lands in the vicinity. *Curley v. Mayor, etc., Jersey City*, 83 N. J. Law, 760, 85 Atl. 197, 43 L. R. A. (N. S.) 985; *Hadley v. Freeholders of Passaic*, 73 N. J. Law, 197, 62 Atl. 1132. So it was not error to exclude the purchase price of the Carpenter tract. It was not substantially similar land or of the same peculiar quality. The purchase price included the quarry, machinery, and good will of a quarry plant in operation. *Manda v. Delaware, etc., R. R. Co.*, 89 N. J. Law, 327, 98 Atl. 467; *Brown v. New Jersey Short Line R. R. Co.*, 76 N. J. Law, 798, 71 Atl. 271; *Manda v. City of East Orange*, 82 N. J. Law, 687, 82 Atl. 869, Ann. Cas. 1913D, 581. Nor was it error to admit the opinion of Dr. Henry B. Kuemmel, state geologist of New Jersey, with regard to the danger of stones falling from the cliffs along the Palisades at the Ross property. Nor was it error on cross-examination to permit the witness Charles W. Stanisforth to testify as to the specifications of the dock department of New York City. It was admissible to test his knowledge of the various specifications which he said he had prepared. Nor was it error to exclude Joseph E. Snell from answering the question, "In your opinion does the taking of the 3.6 acres from Mr. Ross' property injure the remaining?" when the witness was permitted to answer the following question: "Does the taking of the 3.6 acres render this property less available for commercial purposes?" Under the third ground of appeal to the witness Frederick Dunham this question was asked: "Do you know whether the railroad has been laid out further up the river?" This was overruled on the ground that the best evidence as to whether a railroad had been laid out would be the papers, if any, in the secretary of state's office. This was not error, but under this head counsel for the appellants argued at some length that the trial court excluded relevant evidence tending to show the adaptability of the land for commercial purposes. It is sufficient to say, in answer to this, that the record, so far as we have been able to find, does not in fact show any such evidence excluded by the trial court. Nor do we find any error in the charge of the court to which error is assigned. This is contained in the thirty-first to the thirty-eighth grounds of appeal. The precise point of alleged error in the charge of the trial court is not made clear, and it hardly needs any extended discussion. The charge is in conformity to the cases in our reports on the points excepted to. *Packard v. Bergen Neck Ry. Co.*, 54 N. J. Law, 553, 25 Atl. 506; *Manda v. City of Orange*, 82 N. J. Law, 696, 82 Atl. 869, Ann. Cas. 1913D, 581; *Manda v. Delaware, etc., R. R. Co.*, 89 N. J. Law, 327, 98 Atl. 467.

[7] The charge of the court that the jury were obliged to value the land in the condition in which it was on the 12th day of Jan-

uary, 1914, which was the date of the filing of the petition and order thereon fixing the time and place for commencing the condemnation proceedings was correct, as required by statute (P. L. 1900, p. 81, § 6; 2 Comp. St. p. 2184, § 6). *Manda v. Delaware, etc., R. R. Co.*, 89 N. J. Law, 327, 98 Atl. 467.

Finding no error in the record, the judgment of the Bergen county circuit court is affirmed, with costs.

(90 N. J. Law, 353)

ATLANTIC COAST ELECTRIC RY. CO. v. STATE BOARD OF TAXES AND ASSESSMENTS.

(Supreme Court of New Jersey. June 6, 1917.)

TAXATION — 394 — CORPORATION FRANCHISE TAX — STATUTE.

Acts 1906 (P. L. p. 644) requiring an annual franchise tax upon the annual gross receipts of any street railway corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, etc., bears to the length of its whole line, was intended to impose a franchise tax upon the total of the gross receipts of such companies, including receipts from current and power sold, in accordance with its precise language, and not upon gross receipts for transportation, as was the rule under P. L. 1903, p. 232, since the act of 1906 was intended to provide a specific scheme for the taxation of street railway corporations and to differentiate such corporations from those liable to a franchise tax under the act of 1903.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 609.]

Certiorari by the Atlantic Coast Electric Railway Company against the State Board of Taxes and Assessments to review the assessment of a franchise tax. Tax affirmed.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Durand, Ivins & Carton, of Asbury Park, for prosecutor. John W. Wescott, Atty. Gen., for the State.

SWAYZE, J. The prosecutor was taxed under the act of 1906 (P. L. 644) upon gross receipts amounting to \$363,742.35. Of this amount \$67,752.55 was receipts from current and power delivered to the Atlantic Coast Electric Light Company. The prosecutor claims that this last amount should not be included in the gross receipts upon which the franchise tax is to be estimated. The language of the statute plainly requires an annual franchise tax upon the annual gross receipts of any street railway corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, highway, road, lane, or other public place bears to the length of its whole line. The argument of the prosecutor is that, although this language is clear, the tax should be computed only upon the gross receipts for transportation, because this was the rule under the act of 1903 (P. L. 232). The answer is that the act of 1906 was intended to provide a specific scheme for the

taxation of the street railway corporations and to differentiate such corporations from corporations liable to the franchise tax under the act of 1903. The Legislature had before them the latter act, and carefully omitted the words indicating that the tax should be calculated on receipts for transportation. No inference can be drawn from this omission except that the Legislature meant that the tax should be imposed upon the total of the gross receipts in accordance with its precise language, which cannot be explained away by a mere guess at the possible intent to the contrary. This is borne out by the fact that under the act of 1900 (page 502), which was the original franchise tax act for corporations of this character, a distinction was made between oil and pipe line corporations which were required to report gross receipts for transportation of oil and petroleum, and other corporations which were required only to report gross receipts. The act of 1900 was before this court in *Paterson & Passaic Gas Company v. Board of Assessors*, 69 N. J. Law, 116, 54 Atl. 246, and it was held that gross receipts included all gross receipts.

The tax is affirmed, with costs.

(87 N. J. Eq. 303)

In re CHRISTIE'S ESTATE (No. 3879.)

(Prerogative Court of New Jersey. April 30, 1917.)

1. TAXATION — 895(6) — INHERITANCE TAX — RIGHT TAXED — STATUTE.

The tax imposed by Transfer of Property Tax Act April 20, 1909 (P. L. p. 325), is on the right of inheritance, on the beneficiary for the privilege of succeeding to the property, and is measured by the clear market value of the property transferred, ascertained by deducting from the gross value of the residue all lawful charges, exemptions, and costs of winding up the estate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1719.]

2. STATUTES — 226 — ADOPTION FROM OTHER STATE — PRESUMPTION.

Where a statute was copied from the statute of another state, it will be presumed that the judicial construction given to the statute in such other state was adopted by the Legislature when it adopted the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 307.]

3. TAXATION — 895(7) — INHERITANCE AND TRANSFER TAXES — SURCHARGING ASSESSMENT WITH TRUSTEE'S COMMISSIONS — STATUTE.

Under Transfer of Property Tax Act, § 4, providing that whenever a decedent appoints executors or trustees and devises property to them in lieu of their commissions or allowances which otherwise would be liable to the tax, or appoints them his residuary legatees, and the bequest, devise, or residuary legacy exceeds what would be reasonable compensation for their services, the excess shall be liable to the tax, the commissions of testamentary trustees diminish the inheritance, and are to be taken into consideration and allowed in fixing the value of the succession, and at the proper time the assess-

ment of the tax may be surcharged with the trustee's commissions.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1719.]

4. TAXATION §895(7) — INHERITANCE AND TRANSFER TAXES — PRACTICE OF COMPTROLLER'S DEPARTMENT — ALLOWANCE OF COSTS OF WINDING UP ESTATES.

The practice in the comptroller's department of approximating and allowing in the assessment of inheritance taxes the costs of winding up estates is unwarranted in law, it being the comptroller's duty to await the final judgment of the proper tribunal.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1719.]

In the matter of the estate of Robert Christie, deceased. From an appraisalment of property transferred by decedent's will and an assessment thereon of a tax under the Transfer of Property Tax Act of 1909, an appeal is taken. Appeal dismissed.

Herbert M. Lloyd, of New York City, for appellants. Herbert Boggs, Asst. Atty. Gen., for the State.

BACKES, Vice Ordinary. This is an appeal from an appraisalment of property transferred by the last will and testament of Robert Christie, deceased, and an assessment thereon of a tax under the Transfer of Property Tax Act of 1909 (P. L. 325).

The decedent died May 12, 1915, a resident of Montclair, leaving a last will and testament, wherein, after pecuniary legacies, he bequeathed the rest of his estate to his executors in trust, to pay one-third of the net income to his wife for life, remainder over absolutely to his next of kin and heirs at law her surviving, and the net income of the remaining two-thirds to his wife so long as she remained his widow, with similar remainder over upon remarriage or death. The taxable interests were appraised at \$60,479.17, of which \$44,386.20 was apportioned to the residuary estate. The contention of the appellants—the executors and trustees—is that the latter sum should be reduced by 5 per cent., the amount of commission they estimate will be allowed to them for their services as trustees.

[1, 2] The tax imposed by the act is on the right of inheritance—on the beneficiary—for the privilege of succeeding to the property (*Sawter v. Shoenthal*, 83 N. J. Law, 499, 83 Atl. 1004; *Carr v. Edwards*, 84 N. J. Law, 667, 87 Atl. 132), and is measured by the "clear market value" of the property transferred; ascertained by deducting from the gross value of the residue all lawful charges, exemptions and costs of winding up the estate. As to remuneration to trustees for administering trusts created by will, inasmuch as the office and duties are separate and distinct from those of executors, and as statutory commissions are allowed in each, although the same person may have acted in both capacities (*Pitney v. Everson*, 42 N. J.

Eq. 361, 7 Atl. 860), if I were to follow my own opinion, my judgment would be that they were to be paid out of the estate for whose benefit the services were rendered. But the New York courts decided otherwise, and have held that the commissions of testamentary trustees diminish the inheritance, and are to be taken into consideration and allowed in fixing the value of the succession, and as our Transfer of Tax Act was copied from the statute of that state, it will be presumed that the judicial construction there given to the latter was adopted by our Legislature. *De Raismes v. De Raismes*, 70 N. J. Law, 15, 56 Atl. 170; *Clay v. Edwards*, 84 N. J. Law, 221, 86 Atl. 548. In the Matter of *Gihon*, 64 App. Div. 504, 68 N. Y. Supp. 381, 72 N. Y. Supp. 1104, the trust was similar to the one in this case, and on an appeal from an assessment which included commissions to which the executors would be entitled as trustees, the surrogate held that:

"The right to commissions as trustees is statutory, and cannot be taken away except for misconduct in office, or as a penalty for relinquishing office. They are a legal and preferential charge against the trust estate. The property passes to the beneficiaries subject to their payment. Bearing in mind the cardinal principle that the transfer tax is to be measured by the amount the legatee is legally entitled to receive, and that the law permits the transfer to legatees through the medium of trusts, I can see no reason why the rule which permits the commissions of executors and administrators to be deducted should not apply equally as well to commissions of trustees."

The Appellate Division of the Supreme Court affirmed the judgment on the opinion of the surrogate, and on an appeal to the Court of Appeals, Judge Cullen, speaking for the court, said:

"There is a distinction that may be made between the commissions of executors or administrators whose appointment is an absolute essential to the lawful liquidation of an estate and those of trustees who are appointed solely for the protection of the property of the beneficiary, and it may be urged that such latter commissions should be considered as an expenditure for his benefit. Whatever force there may be in this view, we think the deduction of the trustees' commissions is justified and required by section 227 of the Tax Law itself, which prescribes that any legacy or devise to trustees in excess of their commissions allowed by law shall be taxable, thus necessarily implying that legal commissions shall be exempt." *Matter of Gihon*, 169 N. Y. 443, 62 N. E. 561.

Section 227 (Transfer Tax Law [Laws 1896, c. 908]) referred to corresponds with section 4 of our act (4 Comp. St. 1910, p. 5305, § 540). See, also, *Matter of Silliman*, 79 App. Div. 98, 80 N. Y. Supp. 336. The *Gihon* Case was decided in 1902, and construed the act of 1896. *Chrystie on Inh. Tax*, 437.

The Attorney General argues that this presumption should not be indulged, because the commissions of testamentary trustees are regulated in New York by statute, whereas in this state they are fixed by the courts. Section 2753 of the Code of Civil Procedure

directs that surrogates "on the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate * * * must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity * * * for receiving and paying out all sums of money * * *" at the rate of 5, 2½, and 1 per cent., according to the amount. Section 128 of our Orphans' Court Act (C. S. 3859) provides that "the allowance of commissions to executors, administrators, guardians or trustees shall be made with reference to their actual pains, trouble and risk in settling such estate, rather than in respect to the quantum of estate," and in the next section limits the rate by a sliding scale. As these enactments simply change the rule of the common law by allowing a reward to executors and trustees (*Warbass v. Armstrong*, 10 N. J. Eq. 263), I am unable to perceive how the difference in methods of arriving at the amount of compensation can influence in the least the application of the established rule of construction that the adoption of a statute of a sister state is presumed to have been had with reference to the previous construction given to such statute by the court of such state, or how it, in any manner, affects the principle involved and the rule laid down in the cases last cited. In the amount of the allowances there is, so far as they may reckon in the assessment, as much uncertainty in the one instance as in the other. In the one the problem encountered is what will be the sums of the corpus passing from the executors to the trustees, and of the accumulations pending the trust, to which the rate applies; and in the other, what amount will the court fix? It must not be overlooked that assessments are made under the respective statutes forthwith after probate, and at a time when these items are wholly problematical and necessarily must be adjusted supplementally. For this purpose New York has correctional facilities, as we have. There the surrogate may modify the assessment from time to time, as the occasion requires. *Matter of Silliman*, *supra*. Here that function is vested in the comptroller by section 15. Under section 2 of our act, the tax assessed upon remainders is not payable until the remainderman becomes entitled to the actual possession or enjoyment of the property, and under section 15 the comptroller may refund any tax erroneously paid, provided that application therefor be made within two years from the date of payment. These remedial provisions obviously furnish ample opportunity to trustees to have their compensation settled, upon accounting, and the assessments revised.

[3] Holding, as I do, that at the proper time the assessment may be surcharged with the trustees' commissions, leads to the conclusion that the appellants were premature

in their demands upon the comptroller, and that their appeal must be dismissed.

[4] A practice prevails in the comptroller's department of approximating, and allowing in the assessment, the cost of winding up estates, which course the appellants contend should have been pursued in this instance. All that need be said is that the practice, notwithstanding its merits in accelerating settlements, is not warranted in law, and resting, as it does, wholly upon conjecture and the merest guesswork, must often work inequities to the state or the party assessed. Strictly speaking, the department has no more the right to anticipate the probate court's action than it has to adjust a claim against an estate for unliquidated damages, which I understand it never undertakes to do. In either event, it is the duty of the comptroller to await the final judgment of the proper tribunal.

The appeal will be dismissed, with costs.

(87 N. J. Eq. 297)

In re DITTMAN'S EX'RS. (No. 3690.)

(Prerogative Court of New Jersey. May 10, 1917.)

(Syllabus by the Court.)

1. TAXATION ⇨900(5)—INHERITANCE TAX—APPEAL TO ORDINARY.

The appeal to the ordinary from an assessment of a transfer tax, under the Inheritance Transfer Tax Act (Act April 20, 1909 [P. L. p. 334]) § 18, is an appeal to the Prerogative Court, because the ordinary is the judge of that court, and the proceedings are in that court.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1722, 1723.]

2. JUDGES ⇨25(1)—NEW JERSEY—JURISDICTION OF VICE ORDINARY.

Although the office of vice ordinary is the creature of statute, the jurisdiction of the vice ordinaries arises from reference to them of matters by the ordinary in virtue of his inherent powers, and their jurisdiction is complete by delegation from him.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 99, 105, 105½, 106.]

3. TAXATION ⇨900(5)—INHERITANCE TAX—APPEAL TO ORDINARY—VALIDITY OF STATUTE.

The giving of an appeal to the ordinary in the inheritance transfer tax act is a valid legislative enactment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1722, 1723.]

4. APPEAL AND ERROR ⇨1—"APPEAL."

An "appeal" is a judicial proceeding cognizable in a court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1-4.

For other definitions, see *Words and Phrases*, First and Second Series, *Appeal*.]

5. APPEAL TO ORDINARY.

Semble, That the appeal to the ordinary provided for in Inheritance Transfer Tax Act, § 18, makes him a statutory tribunal, and that an appeal from a decree of the Prerogative Court in a case under that act is reviewable by certiorari in the Supreme Court instead of by appeal to the Court of Errors and Appeals.

Appeal by the executors of Henry I. Dittman, deceased, to review the inheritance tax on property passing under the will. Jurisdictional question determined, and, on application of counsel, a day to be designated for hearing the facts.

Maximillian T. Rosenberg, of Jersey City, for appellant. Herbert Boggs, Asst. Atty. Gen., for the State.

LEWIS, Vice Ordinary. [1] From an inheritance transfer tax upon the estate passing under the will of the late Henry I. Dittman, deceased, his executors appeal to the ordinary, under section 18 of the Inheritance Transfer Tax Act (P. L. 1909, p. 334). That section provides that any person or corporation dissatisfied with an appraisal or assessment under the act may appeal therefrom to the ordinary.

The appellants, Dittman's executors, contend that constitutionally they could not be compelled to appeal to the ordinary; that they could have recourse to a writ of certiorari to review the assessment of which they complain; that the ordinary is an official to whom they are permitted to resort as an umpire by consent of the state.

The respondent, the comptroller of the treasury, contends that on this appeal the ordinary does not sit as such, exercising the powers and jurisdiction of the ordinary or of the Prerogative Court; that the appeal is not to the Prerogative Court, and that the petition is improperly so entitled; and also that the ordinary cannot refer the matter to a vice ordinary. These contentions are unsound. The ordinary is the judge of the Prerogative Court, and consequently the court itself. The Constitution so provides (article 6, § 4, par. 2).

In England in former times the ordinary and the judge of the Prerogative Court were different functionaries. In 2 Bl. Com. 509, the learned author says:

"If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones; but if the deceased had bona notabilia, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative, whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the Prerogative Courts, and prerogative offices."

And in 3 Bl. Com. 65:

"The Prerogative Court was established for the trial of all testamentary causes, where the deceased hath left bona notabilia within two different dioceses. In which cases the probate of wills belongs, as we have formerly seen, to the archbishop of the province, by way of special prerogative. And all the causes relating to the wills, administrations, or legacies of such persons are originally cognizable herein, before a judge appointed by the archbishop, called the judge of the Prerogative Court."

But in our state the ordinary and judge of the Prerogative Court are, and always

have been, one and the same, and their powers—that is, their jurisdictions—have been blended also. This is expressly stated by Mr. Justice Van Syckel in his concurring opinion in *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 424, at page 447, where he says that:

"The power of the ordinary and the prerogative Court, which existed separately under the English system, have been blended here."

The blending of the ordinary and judge of the Prerogative Court into one and the same functionary, and also their powers into one jurisdiction, in our state resulted from the fact that such of the ecclesiastical jurisdiction in England, which was transmitted to the colony, was confided to the Governor, whose jurisdiction was, of course, state-wide. *Griff. L. R. (N. J.) 1185*, where, in note 1, the learned author states:

"The jurisdiction of the governor as the ordinary of New Jersey, before the Revolution and since, extended throughout the state, and a will, administration, or guardianship proved or granted by himself or a surrogate (and he appointed as many as he chose to do) was valid, without regard to the place where the goods lay. Hence he possessed the prerogative powers of the ecclesiastical jurisdiction in these particulars."

The state, and the colony before it, was divided into counties, and the jurisdiction of the ordinary—there never has been but one at the same time—did, and does, run through all the counties. In colonial times, and later, the surrogates were appointed by the ordinary as his deputies, and they had jurisdiction in all cases submitted to them unless some special restrictions were inserted in their commissions. As already remarked, the doctrine of bona notabilia never had any place here. In *re Coursen's Will*, 4 N. J. Eq. 408, 413. And, although surrogates were later made county officers with probate jurisdiction limited to their respective counties, that in no wise affects the jurisdiction of the ordinary.

The first act of the Legislature concerning the ordinary and the Prerogative Court, passed December 16, 1784 (Pat. Laws, 59), expressly enacted in section 2 that:

"For the more regular hearing and determining of all causes, cognizable before the ordinary, he shall stately hold a Prerogative Court," etc.

See the present act, entitled:

"An act respecting the Prerogative Court and the power and authority of the ordinary (Revision of 1900)." Comp. Stat. p. 1722, § 77 et seq.

The first section defines the authority of the ordinary as to granting probate of wills, etc., and the tenth provides that it shall be the duty of the register of the Prerogative Court to record all wills, etc. That the ordinary holds a court in granting probate is beyond question. The function is judicial, and therefore must be exercised in a court. Even the surrogate holds a court when probating a will. *Mellor v. Kaighn* (Err. & App.) 99 Atl. 207.

[2] The contention that the ordinary is

without power to refer the matter at bar to a vice ordinary is also unsound. The contention is that because the appeal is given in terms to the ordinary, and that no power to refer it is given in the same statute, the right does not exist. This is fallacious, for by act of 1913 (P. L. p. 81) the ordinary is empowered to refer any matter pending in the Prerogative Court to a vice ordinary for hearing and advice, but the jurisdiction which the vice ordinaries exercise, upon reference to them, is not derived from this statute, but by delegation from the ordinary by virtue of his inherent powers.

In an exhaustive review of the powers of the vice chancellors (whose office was likewise created by statute), in *Re Thompson*, 85 N. J. Eq. 221, 96 Atl. 102, Chancellor Walker, at page 257, holds that:

"Their jurisdiction is complete by delegation from the chancellor under the authority inhering in his general power derived from the High Court of Chancery in England and devolved upon our Court of Chancery by the ordinances of Lord Cornbury and Governor Franklin, and ratified by the Constitutions of 1776 and 1844."

And at page 261 of 85 N. J. Eq., 96 Atl. 102, he holds that a perfect analogy exists with reference to the Prerogative Court, in which the Legislature has authorized the appointment of vice ordinaries, the ancient office of surrogate, as deputy or assistant to the ordinary, being the source of power in the vice ordinaries.

It is to be observed that in the act creating the office of vice ordinary (P. L. 1913, p. 81) the Legislature has provided that the ordinary may refer to any vice ordinary any cause or other matter which at any time may be pending in the Prerogative Court, to hear the same for the ordinary and report thereon to him and advise what order or decree should be made therein. Now, if the ordinary is a functionary apart from himself as the judge of the Prerogative Court, it is singular that the lawmaking body did not bestow the power to refer upon the judge of the Prerogative Court, the only functionary who in such case could constitutionally exercise it, instead of casting it upon the ordinary, who could not lawfully do so. In this we have legislative interpretation to the effect that the ordinary and judge of the Prerogative Court, and likewise their jurisdiction, are one and the same.

Enough has been shown, I think, to demonstrate that the act under which this assessment was made, and which gives an appeal to the ordinary, treats the ordinary and the Prerogative Court as one and the same—a single judicial entity.

[3] The giving of an appeal to the ordinary in the inheritance transfer tax act is a valid legislative enactment.

It may be that certiorari in the Supreme Court is a method for the review of an appraisal or tax made or levied under the inheritance transfer tax act, but, considering that an appeal has been provided to the or-

dinary, the Supreme Court would probably deny the allocatur on such a writ before, or even after, the time for appeal to the ordinary had expired, as the allowance of an allocatur is discretionary. *Florenzie v. East Orange*, 88 N. J. Law, 438, 97 Atl. 260.

In *Re Prudential Ins. Co. of America*, 82 N. J. Eq. 335, 88 Atl. 970, the Court of Errors and Appeals held that the statutory scheme providing for the condemnation of the capital stock of a stock life insurance company for certain purposes mentioned was cast by the Legislature upon the chancellor, or the Court of Chancery, a distinction which, if it exists, was of no practical moment to the motion then before the Court of Errors and Appeals, and at page 339 that the statutory proceeding before that court was reviewable by certiorari only, regardless of the fact that one of the agencies that took part in it was the "Court of Chancery."

I hold that the proceeding before me is one in the Prerogative Court, and one which the ordinary could lawfully refer by virtue of the act of 1913 (P. L. p. 81) empowering him to refer to any vice ordinary any cause or other matter which at any time might be pending in the Prerogative Court.

Now, the act of 1909 (P. L. p. 325) provides for taxing the transfer of property of decedents by devise, descent, etc., and section 18, as seen, allows any one dissatisfied with an assessment of such taxes to appeal to the ordinary. The only question raised by such an appeal is as to whether or not the assessment is excessive, and the review of such a question may be devolved upon a court of appeal. *Florenzie v. East Orange*, 88 N. J. Law, 438, 97 Atl. 260. There an appeal from an assessment for benefits for a municipal improvement was confided to the circuit court, and the jurisdiction thus given was upheld. Here an appeal from the assessment of a property transfer tax is confided to the ordinary of the Prerogative Court. The principle is the same. The grant of appellate jurisdiction to this court in tax transfer matters is as valid as that to the circuit courts in assessments for municipal improvements.

[4] The reason that legislation establishing special statutory tribunals for the hearing and determining of appeals theretofore cognizable only in the Supreme Court on certiorari is valid is because a review of the decision of the special tribunal is removable into the Supreme Court by certiorari, and that court's jurisdiction on certiorari is therefore not impaired. Certiorari in such cases is in the nature of an appeal, and an appeal is a judicial proceeding cognizable in a court.

[5] It would appear that the decree of the Prerogative Court on these appeals is reviewable by certiorari in the Supreme Court, instead of by appeal to the Court of Errors and Appeals. In *re Prudential Ins. Co. of America*, 82 N. J. Eq. 335, 88 Atl. 970; *Florenzie v. East Orange*, 88 N. J. Law, 438,

440, 97 Atl. 260. This question is suggested in the briefs, but is not before me for decision.

The jurisdictional question having been determined, I will, upon application of counsel, designate a day for hearing the facts.

(80 N. J. Law, 457)

MATERKA v. ERIE R. CO.

(Supreme Court of New Jersey. June 6, 1917.)

(Syllabus by the Court.)

1 TRIAL \S 139(1)—JURY—WEIGHT OF TESTIMONY.

It is for the jury to say what weight shall be given to the testimony of a witness having an opportunity to hear, standing at or near the crossing where the accident occurred, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, in a grade crossing accident case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338–341.]

2 RAILROADS \S 350(1) — GRADE CROSSING ACCIDENT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It was not error in this case to refuse to direct a verdict in favor of the defendant on the ground there was no proof of negligence on the part of the defendant or because the decedent was guilty of contributory negligence. They were both jury questions. *Holmes v. Pennsylvania R. R. Co.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1031, *Weiss v. Central R. R. Co.*, 76 N. J. Law, 348, 69 Atl. 1087, and *Howe v. Northern R. R. Co.*, 78 N. J. Law, 683, 76 Atl. 979, distinguished.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1152.]

Appeal from Circuit Court, Hudson County.

Action by Mary Materka, administratrix, etc., against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1916, before TRENCHARD and BLACK, JJ.

Collins & Corbin and George S. Hobart, all of Jersey City, for appellant. Alexander Simpson, of Jersey City, for respondent.

BLACK, J. This action was brought by the plaintiff, as administratrix of Ferdinand Materka, to recover damages for the benefit of his widow and next of kin, by reason of his death, on September 6, 1912, by being struck by an east-bound express train, at the Park Avenue grade crossing, in the borough of East Rutherford and Rutherford, Bergen county, while he was crossing the tracks on foot. At that crossing there were four tracks, safety gates, and a watchman. A rule to show cause was allowed, reserving objections and exceptions noted at the trial. The verdict was reduced to the sum of \$4,000. The trial court refused to set aside the verdict on the ground that it was against the weight of evidence. The points argued by the appellant for a reversal of the judgment are: First, there was no proof of negligence on the part of the defendant; second, a ver-

dict should have been directed for the defendant because of contributory negligence of the decedent, Ferdinand Materka; third, error in the charge of the trial judge, and in the refusal to charge as requested, but this latter point involves the same points as are in the first two, except as hereinafter noted. This is the second trial of the case. The judgment recovered in the first trial was reversed by the Supreme Court for trial errors. The judgment of the Supreme Court was affirmed by the Court of Errors and Appeals. In the report of the case the facts are quite fully and satisfactorily stated. *Materka v. Erie R. R. Co.*, 88 N. J. Law, 372, 95 Atl. 612.

[1, 2] The crux of the case is whether there was evidence from which the jury might find that the decedent attempted to make the crossing while the safety gates were up and without receiving any warning from the flagman; that the train which struck the decedent approached the crossing without giving the statutory signals of ringing a bell or sounding a steam whistle. The record shows the following testimony: David Harris, a witness, testified:

"Q. Were the gates up when you crossed over? A. Ye. * * * I crossed into East Rutherford, and I saw this gentleman get off this trolley car and cross the railroad tracks. Q. Were the gates up when he crossed? A. The gates were up on one—yes. Q. On your side? A. The side I crossed the gate was up on, yes. Q. That is the side he entered the tracks from? A. That is the side he entered the tracks on. Q. When he came from the trolley car and went on the tracks the gates were up, I understand? A. That is right, sir. Q. After he got on the tracks what occurred? A. Why, that gate on the Rutherford side went down. Q. Yes? A. And the gate on the East Rutherford side was up. Q. Yes? A. And I passed a remark. Q. You cannot tell what you said, just what you saw. You saw this? A. I saw this man cross the tracks, and there was a train coming down the track, and I said to myself, 'I don't think he will get across,' and with that I saw the man hit. * * * Q. Did you hear any whistle or bell up to the time you saw him hit? A. I did not, sir."

On cross-examination:

"Q. You did not know it was coming? A. No, sir. Q. You were not listening for it? A. No, sir. Q. Not paying any attention to it at all? A. No, sir. Q. I understand you to say, however, that you did see it coming; is that right, you did see the train coming before it struck Mr. Materka? A. Yes. (Witness marks on a photograph, Exhibit P-5, where he was standing at that time.)"

Redirect:

"Q. Now Mr. Hobart asked you if you were listening for the express train. You did not know it was coming until you saw it, did you? A. No, sir. Q. And from the time you started across the crossing up to and until the time you saw the express train had you heard any whistle or bell of any kind? A. No, sir."

Genevieve Ruth Saxly a witness standing at the crossing at the time of the accident, did not hear any whistle before the decedent was struck. She said she was not listening for whistles.

Under the rule laid down in the cases, in

the Court of Errors and Appeals of this state, such as *Danskin v. Pennsylvania R. R. Co.*, 83 N. J. Law, 522, 526, 83 Atl. 1006, *Horandt v. Central R. R. Co.*, 81 N. J. Law, 490, 83 Atl. 511, *Walbel v. West Jersey, etc.*, R. R. Co., 87 N. J. Law, 573, 94 Atl. 951, and *McLean v. Erie R. R. Co.*, 69 N. J. Law, 57, 60, 54 Atl. 238, affirmed 70 N. J. Law, 337, 57 Atl. 1132, this evidence was for the jury, it made a jury question. The point cannot be removed from the domain of the jury.

The cases of *Holmes v. Pennsylvania R. R.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1031, *Weiss v. Central R. R. Co.*, 76 N. J. Law, 348, 69 Atl. 1087, and *Howe v. Northern R. R. Co.*, 78 N. J. Law, 683, 76 Atl. 979, distinguished. So contributory negligence of the decedent was also a jury question under such cases as *Brown v. Erie R. R. Co.*, 87 N. J. Law, 487, 91 Atl. 1023, and *Ferneti v. West Jersey, etc.*, R. R. Co., 87 N. J. Law, 268, 93 Atl. 576.

This disposes of the case, except it is further urged that there was error in the refusal of the trial court to charge each of two specific requests in reference to the statutory signals and the operation of the crossing gates; each request covers separate charges of negligence. The judgment must be reversed, so it is argued, because the trial judge permitted the jury to base a verdict upon either ground, notwithstanding the specific requests submitted by the defendant with respect to each allegation of negligence. The court in the charge to the jury had covered each ground fully, accurately, and clearly. The requests refused were, in effect, to take the case from the jury; hence this was not error, in view of the cases above cited.

The judgment of the Hudson circuit court is affirmed, with costs.

(256 Pa. 608)

WEIL v. MARQUIS.

(Supreme Court of Pennsylvania. Feb. 26, 1917.)

1. EXECUTORS AND ADMINISTRATORS §426—SETTING ASIDE ACTS OF DECEDENT—BENEFIT OF CREDITORS.

An executor or administrator may bring an action to set aside the fraudulent transactions of the deceased for the benefit of creditors, whose trustee he is.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665.]

2. EXECUTORS AND ADMINISTRATORS §426—DEATH OF TRANSFEROR — ADMINISTRATOR'S ACTION FOR BENEFIT OF CREDITORS.

A transfer of property in fraud of creditors is a nullity, and, after the transferor's death, an action is maintainable by his administrator as trustee to recover so much of the property transferred as may be needed to pay just claims of creditors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665.]

3. INSURANCE §586—BENEFICIARIES—VESTED INTEREST.

Where the insured took out life insurance policies payable to his wife and did not exercise his right to change his beneficiary during his lifetime, the widow's interest in the policies on his death became a vested interest.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1470.]

4. INSURANCE §590—BENEFICIARY—LIABILITY OF FUND FOR DEBTS.

Act April 15, 1868 (P. L. 103), providing that insurance money payable to the wife and children of an assured shall be free from the claim of creditors, governed where an intestate who had taken out life insurance policies payable to his wife and died without having exercised the right to change the beneficiary, and where the widow collected the insurance money amounting to less than his debts, so that she was entitled to hold the proceeds as against the insured's administratrix suing for money had and received; Act May 1, 1876 (P. L. 53), Act June 1, 1911 (P. L. 581), and Act May 5, 1915 (P. L. 253), relating to other forms of insurance and to beneficiaries, not applying.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1479, 1482, 1485.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for money had and received by Nita M. Weil, administratrix of the estate of Abraham Marquis, deceased, against Jeanette A. Marquis. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The facts appear in the following opinion by Audenried, P. J., in the court below:

Abraham Marquis died August 14, 1914, intestate and insolvent. He had taken out sundry policies of insurance upon his life, each of which was made payable to the defendant, his wife, subject, however, to the provision that he might change the beneficiary thereunder. He died without having exercised that right, and his widow collected the money payable on these policies, which amounted to much less than his debts. Letters of administration upon the estate of Marquis have been granted to the plaintiff, who has brought this action against his widow to recover what the latter received from the insurance companies.

Upon these facts, which are not denied by the defendant, the plaintiff asks judgment for either the amount of the proceeds collected on the policies or the amount of their surrender value immediately before the death of the insured; both amounts being ascertainable from the affidavit of defense.

[1, 2] As to the first question discussed by counsel, we have no doubt. While an executor or administrator, as the mere personal representative of a decedent, can take no step to set aside for the benefit of heirs, next of kin, legatees, or devisees, the fraudulent transactions of the deceased, his right to do so for the benefit of the creditors, whose trustee he is, has long been recognized in this state. *Chester County Trust Co. v. Pugh*, 241 Pa. 124, 88 Atl. 319, 50 L. R. A. (N. S.) 320, Ann. Cas. 1915B, 211. A transfer of property in fraud of creditors is a nullity as against the interests attempted to be defrauded; and, after the death of the transferor, an action is maintainable by his administrator, as their trustee for the recovery of as much of the property so transferred as may be needed for the payment of their just claims. *Buehler v. Glouinger*, 2 Watts, 226; *Stewart v.*

Kearney, 6 Watts, 453, 81 Am. Dec. 482. While the statement of claim does not allege actual fraud in the dealings of the defendant with her husband in respect to the policies of insurance procured by the latter upon his life, it is argued that the facts above mentioned make out a case of constructive fraud. We think that, if this contention can be sustained, the right of the plaintiff to a recovery against the defendant is clear.

Several acts of assembly have been referred to by counsel as bearing on the matter before the court, and our next inquiry, therefore, is whether these have any application to the case.

The most recent legislation on the subject of life insurance policies such as those referred to in the plaintiff's statement is the Act of May 5, 1915, P. L. 253. By its terms, this statute relates to policies of life insurance "which have heretofore or which shall be hereafter taken out for the benefit of, or assigned to, the wife or children, or any other relative dependent upon" the person whose life is insured. Grammatically, the use of the perfect tense of the verb in the clause "which have heretofore (been) taken out" seems to imply that the policies therein referred to were existing policies that had not, when the act became effective, matured and been paid. If this clause were construed to embrace all policies that had been issued prior to the passage of the act, thus including those with respect to whose proceeds rights had already vested, the act, to that extent, would violate both section 17 of article 1 of the Constitution of Pennsylvania and clause 1 of section 10, art. 1, of the Constitution of the United States, since it would impair the obligation of contract by depriving creditors of their remedy, an impediment, in the shape of an exemption which did not exist when their debts were contracted, being placed in the way of collecting them. *Penrose v. Erie Canal Co.*, 56 Pa. 46; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Kener v. Le Grange Mills*, 231 U. S. 215, 34 Sup. Ct. 83, 58 L. Ed. 189. We are of opinion, therefore, that this act does not affect the case before us.

Nor does section 25 of the Act of May 1, 1876 (P. L. 60) apply. The provisions of that section are expressly confined to policies issued by companies incorporated under the act of which it forms a part. It does not appear, and the court cannot assume, that the insurance companies that issued the policies referred to in this case were so incorporated.

Section 27 of the Act of June 1, 1911, P. L. 581, provides as follows: "A policy of insurance issued by any company, heretofore or hereafter incorporated, on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to their benefit." Unless this enactment is held to be retrospective in its operation, it does not apply to the policies involved in this case. The last of these to be issued was taken out more than nine months before it became a law. But the act is not, in this respect, retroactive. The use of the present tense of the verb in the conditional part of the second sentence of the section quoted plainly indicates that no reference to policies previously issued is intended; and, if its language were otherwise, no effect could be given to it, so far as concerns such policies, for the same constitutional reasons that are referred to above in discussing the Act of May 5, 1915. Moreover, even if it was intended to change the law as to the rights of creditors in respect to policies of life insurance theretofore issued, notice of such an intention is wholly lacking in the title of the act; and the attempt to make such

a change was therefore futile. Section 3, art. 3, Constitution of Pennsylvania. When the subject expressed in the title of an act is not broad enough to cover all its provisions, such parts of the act as are not within the purview of the title are void. *Hatfield v. Com.*, 120 Pa. 395, 14 Atl. 151; *Potter County Water Co. v. Austin Borough*, 206 Pa. 297, 55 Atl. 991.

So far as our examination of the acts of assembly goes, the only legislation that bears upon the question involved in these rules is section 1 of the Act of April 15, 1868 (P. L. 103). This reads as follows: "All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear of all claims of the creditors of such person."

It is conceded by the plaintiff that, if the policies in question were within the scope of this act, judgment must be entered in favor of the defendant. It is contended, however, that they do not fall within either of the two classes of policies which the statute was intended to protect from the creditors of the person who has taken them out and paid their premiums.

From the affidavit of defense it is impossible to determine how the policies whose proceeds are in dispute were originally issued. All that appears is that the defendant was, prior to the death of her husband, the beneficiary thereunder, and that he had the right to appoint another as beneficiary in her place.

It is argued on behalf of the plaintiff that, if the policies when originally issued were made payable to the defendant subject to the condition that her husband should not designate some other person as payee of their proceeds, they were taken out by him for his own benefit and not for hers; and that consequently the case does not fall within the first of the two categories embraced by the act. It is further argued that, if the policies were issued in the name of the insured, they are not within the second class to which the act refers, because the wife took no interest in them under the subsequent assignment thereof to her; the reservation to the insured of the right to change the beneficiary securing full control of the policies to him and leaving him, therefore, their real owner.

Although the policy of the law, even where the rights of creditors may be adversely affected, favors the wife to whom her husband has attempted to secure the benefit of insurance upon his life (*Kulp v. March*, 181 Pa. 627, 37 Atl. 913, 59 Am. St. Rep. 687), the argument of the plaintiff thus summarized is of great weight, and, if the creditors had attempted to reach the policies during the lifetime of the insured, we can see no reason why they should not have been successful (*In re Herr* [No. 2 D. C.] 182 Fed. 716; *In re Jamison Bros. & Co.* [D. C.] 222 Fed. 92; *In re Shoemaker* [D. C.] 225 Fed. 329).

[3, 4] Nevertheless, the facts presented by this case differ in a very important point from those involved in the bankruptcy cases to which reference has been made. Here the insured is no longer living. He had, it is true, reserved to himself under his insurance contracts the option of letting them inure to the benefit of his wife or appointing some other beneficiary in her stead. This he might have exercised whenever he saw fit during his life, but it ended at the very instant of his death. It did not survive him. See *McDonald, Ex'r, v. Columbian National Life Insurance Co.*, 253 Pa. 239, 97 Atl. 1086, L. R. A. 1916F, 1244. The moment he breathed his last, the happening of the condition subsequent which might have divested the defendant's rights in the policies became impossible. If up to that time her interest in the

policies amounted to nothing more than a bare expectancy, that expectancy then ripened, and her interest in the policies and their proceeds immediately became a vested one.

Thus the air was cleared; and the position of the creditors became forthwith what it would have been if, when the policies were originally issued or subsequently assigned to her, no right to change their beneficiary had been reserved by the insured. Setting aside the question of fraud, any right that the creditors of Marquis or their representative had to object to the statute as a bar to the appropriation of the policies of insurance on his life payable to his wife to the discharge of their claims against him rested solely on the ground that he still held a control over them equivalent to ownership. That foundation has slipped away. As the case now stands, the disposition of the proceeds of the policies is governed by the Act of April 15, 1868.

If the defendant's rights as beneficiary resulted from the assignment of the policies to her by her husband, it would, of course, be possible to attack them, under the Act of 13 Eliz. C. S., on the ground of fraud. The Act of 1868 protects such assignments only when bona fide. Although the assignment in this case, if there was an assignment, was made by an insolvent to his wife, with a reservation of power to control the disposition of the policies as he pleased, the court cannot declare the transaction, however suspicious it may be, fraudulent per se. The statement of claim raises no question of fraud in fact; but, if fraud were alleged, the question of the good faith of the defendant and her husband would necessarily take the case to the jury, to whose province such questions peculiarly appertain. *Sebring v. Brickley*, 7 Pa. Super. Ct. 198.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Morris Wolf and Horace Stern, both of Philadelphia, for appellant. Hampton L. Carson and Joseph Carson, both of Philadelphia, for appellee.

PER CURIAM. This appeal is dismissed on the opinion of the learned president judge of the court below discharging the rules for judgment for want of a sufficient affidavit of defense.

(256 Pa. 620)

COMMONWEALTH v. STAUSH.

(Supreme Court of Pennsylvania. Feb. 26, 1917.)

1. CRIMINAL LAW §980(2)—PLEA OF GUILTY—SENTENCE—STATUTE.

Act March 31, 1860 (P. L. 402) § 74, providing that, where a defendant pleads guilty to an indictment for murder, the court shall proceed by examination of witnesses to determine the degree of the crime, must be strictly construed, and thereunder the examination of witnesses by the court means the seeing and hearing of the witnesses, and a mere reading of their testimony by a judge or judges who did not see or hear them is not a compliance with the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2494, 2495.]

2. CRIMINAL LAW §980(2)—PLEA OF GUILTY—SENTENCE—STATUTE.

Under such provision, every member of a court passing upon the degree of guilt must see and hear the witnesses upon whose testimony the degree of homicide is to be determined, and where three of the five judges heard the

testimony and thereafter the president judge who was not present during the examination of witnesses read the evidence, and joined in the deliberations, and wrote the court's opinion fixing the crime as murder in the first degree, the judgment would be reversed, and a procedendo awarded with leave to defendant to renew in the court below a motion to withdraw his plea of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2494, 2495.]

Appeal from Court of Oyer and Terminer, Luzerne County.

John Staush was convicted of murder in the first degree, and he appeals. Reversed, and procedendo awarded with leave to defendant to renew in court below his motion for leave to withdraw his plea of guilty.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

M. J. Torlinski and George Howorth, both of Wilkes-Barre, for appellant. Frank P. Slattery, Dist. Atty. of Luzerne County, and Edwin Shortz, Jr., Asst. Dist. Atty., both of Wilkes-Barre, for the Commonwealth.

BROWN, C. J. [1] John Staush, the appellant, entered a plea of guilty to an indictment charging him with murder, and it thereupon became the duty of the court below, under section 74 of the act of March 31, 1860 (P. L. 402), to "proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly." Three of the five judges of that court met to perform the duty imposed upon it, and witnesses were examined before them. At the examination the commonwealth was represented by the district attorney, and the prisoner, with his counsel, was present. The testimony was taken down by the court stenographer, whose transcript of the same was duly approved by one of the judges and ordered to be filed. After the hearing, and before the three judges had reached any conclusion as to the degree of the prisoner's guilt, they asked the president judge of the court—who had not been present at the examination of the witnesses—to join them in their consideration of the testimony taken, for the purpose of fixing the degree of the crime. After reading the evidence, he took part in their deliberation, and found that the prisoner was guilty of murder of the first degree. Subsequently he wrote the opinion of the court, fixing the degree of guilt, and pronounced the judgment of death. The real error of which the appellant complains—and the only one upon which we need pass—is the action of the court below in having its president judge consult with his three colleagues over a most solemn question, involving life, without his having seen or heard the witnesses upon whose testimony it was to be determined.

A tribunal, specially designated by the Legislature, fixes the degree of guilt, upon

conviction by confession, on an indictment charging murder. Such a case is no longer for a jury, whose province it is to fix the degree of homicide in every case where the accused goes to trial on his plea of not guilty. The Legislature might have provided that, on a plea of guilty, a jury should hear the testimony relating to the crime for the sole purpose of fixing the degree of guilt; but it has not done so. It has committed that duty to the court having jurisdiction of the indictment, and perhaps wisely so, in view of human sympathy to which jurors not infrequently yield when called to pass upon the life or death of a fellow man. To enable it to discharge this duty the court must examine witnesses and hear what they know and are able to truthfully tell of the circumstances attending the admitted felonious killing. As this statutory provision, relating to a criminal procedure, must be strictly construed, the examination of witnesses by the court means its seeing and hearing them, not a mere reading of their testimony by a judge or judges who neither saw nor heard them, and it means that every member of a court passing upon the degree of guilt in a homicide case must see and hear the witnesses upon whose testimony the question is to be determined. If it had been for a jury to determine the degree of the appellant's guilt, and but eight of the jurors had seen and heard the witnesses, a verdict of the twelve condemning him to death would be promptly set aside, if the other four jurors had simply read the testimony of the witnesses from the stenographer's notes; and yet this, in effect, is the situation here presented.

[2] The court below, composed of four of its five members, found the prisoner guilty of murder of the first degree. They were his triers; they deliberated together over what their verdict should be, and, after so deliberating, fixed his crime as the highest known to the law; but one of them had neither seen nor heard a single witness called to sustain the commonwealth in asking for a first degree finding, or the plea of the prisoner that intoxication had reduced the degree of his offense. One of the three judges who heard the witnesses long hesitated in reaching his conclusion, and if the fourth, who heard none of them, had heard them all, he might also not only have long hesitated, but actually refused to concur in the finding of first degree murder. In findings of fact by a judge, sitting as a chancellor, the credibility of witnesses and the weight to be given to their testimony are for him, and their credibility is often sustained or impaired by their appearance on the witness stand and by their manner of testifying. If this is true in civil cases, it is surely true in a proceeding in a criminal court in which a human life is at stake.

We are not to be understood as saying, or even intimating, that on the testimony of the witnesses seen and heard by the three learned judges of the court below they would have erred in adjudging the prisoner guilty of murder of the first degree; for that is not the question before us. All that we now decide is that error was committed in having the president judge take part, under the circumstances stated, in a consultation and deliberation which resulted in a finding necessarily followed by the judgment from which we have this appeal.

Judgment reversed, and procedendo awarded, with leave to the prisoner to renew in the court below his motion for leave to withdraw his plea of guilty.

(257 Pa. 12)

WOOD v. WILLIAM KANE MFG. CO., Inc.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MASTER AND SERVANT §90 — MASTER'S DUTY—EXTENT.

The mere relation of master and servant does not imply an obligation on the master to take more care of the servant than he may reasonably be expected to take of himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139.]

2. MASTER AND SERVANT §265(12)—NEGLIGENCE—EMPLOYMENT OF SERVANTS.

The presumption is that an employer has exercised proper care in the selection of its employees, and one charging negligence in the employment of men must show it by proper evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 891, 906.]

3. MASTER AND SERVANT §150(6) — ACTION FOR INJURY—NEGLIGENCE—EVIDENCE.

Where plaintiff in charge of riveting boilers was supplied by his employer with helpers, and where one of the helpers, not shown to be incompetent, and who was not instructed by plaintiff as to his duties, accidentally let go of the base of a boiler so that it fell upon plaintiff, there was no negligence on the part of defendant, and the court should have directed a verdict for it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 302, 307.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injury by Thomas Wood against the William Kane Manufacturing Company, Incorporated. Verdict for plaintiff for \$2,000 and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Frank P. Prichard, of Philadelphia, for appellant. John J. McDevitt, Jr., and Samuel G. Stem, both of Philadelphia, for appellee.

POTTER, J. This was an action of trespass to recover damages for personal injury.

ries. Plaintiff, who had the management of the boiler making shop of the defendant company, charged his employer with negligence in failing to provide an experienced helper, which, as he alleged, resulted in his injuries. He was supplied with helpers, varying in number from three to six, who received instructions from him. On the day of the accident, plaintiff was engaged in riveting the base of an upright boiler. The base was not a perfect cylinder, but was smaller at the top than at the bottom. It was about 14 inches high, and weighed about 250 pounds. Plaintiff suspended it by two hooks from a crane, and asked two of the helpers to steady it while he applied a pneumatic riveter. In order to secure proper contact it was apparently necessary to tilt the base slightly. The pneumatic riveter was applied under some pressure to the side of the base, and when it was withdrawn, one of the helpers let go of the base, and it slipped from the hooks and fell, injuring plaintiff's hand. It appears from the evidence that Gordon, the helper in question, had been employed in the establishment about a year, but had never been called upon to assist in steadying a base of that particular description. It was, as plaintiff said, "something out of the ordinary" as to shape, and he had made but five of them during a period of three years. Plaintiff gave no instruction to the helper, Gordon, as to steadying the base while the riveting was being done. The service required was not complicated, or difficult to perform. There is nothing in the evidence to show that the young man was incapable. He seems to have been taken by surprise at the effect upon the base of the removal of the pressure, and failed to hold on steadily. A word of caution in advance from the plaintiff, who was standing close by, would, no doubt, have prevented the accident. It cannot justly be charged to any lack of experience, upon the part of the helper, in assisting to steady a piece of metal of that particular size and shape. It may very well be that, for the performance of complicated or difficult work involving danger, an employer would be bound to furnish not only competent, but experienced, men, especially for leadership and supervision. But in the present case the plaintiff himself was supervising the work, and the part which the helper was called upon to perform was of the simplest possible character. He was asked to hold but little weight, and was merely to lay his hand upon the base to help steady it, while supported by the hooks.

[1] If any instruction or warning was needed to aid him in the discharge of this very simple duty, the necessity for it arose upon the instant, and the word of caution should have come from the plaintiff, who was in immediate charge of the operation. The mere relation of master and servant can never imply an obligation upon the part of the master to take more care of the servant than

he may reasonably be expected to take of himself.

[2, 3] The presumption is that the employer has exercised proper care in the selection of employes, and it is incumbent upon one charging negligence, in the employment of men, to show it by proper evidence. The plaintiff here was acquainted with the helper, and knew he had been working in the shop for at least a year. The evidence shows no suggestion that any complaint as to incompetence upon the part of the helper was ever made by the plaintiff, or any one else. The fact that he was employed merely as a helper is in itself an indication that, having proper capacity, he was expected to gain skill in the work and knowledge of its details, under the guidance and instruction of more experienced men, such as plaintiff, with whom he was associated.

We find nothing in this record to justify placing the legal responsibility for the results of the accident upon the defendant.

The first assignment of error is sustained. the judgment is reversed, and is here entered for defendant.

(257 Pa. 22)

**MULHERN et al. v. PHILADELPHIA
HOME-MADE BREAD CO.**

(Supreme Court of Pennsylvania. March 5, 1917.)

**1. MUNICIPAL CORPORATIONS § 705(3)—USE
OF STREET—CARE AS TO CHILDREN.**

Special caution on the part of drivers of vehicles is required for the protection of children congregating in the vicinity of a school-house.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

**2. MUNICIPAL CORPORATIONS § 706(6)—USE
OF STREETS—NEGLIGENCE OF DRIVER OF VE-
HICLE—QUESTION FOR JURY.**

In an action for damages for personal injury to a school child from being run over by a wagon, held, on the evidence, that whether the driver's failure to stop it or turn aside to avoid the injury was negligence was a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injuries by Anna Mulhern, by her father and next friend, William J. Mulhern, and by William J. Mulhern in his own right, against the Philadelphia Home-Made Bread Company. Verdict for plaintiff Anna Mulhern for \$2,000, and for plaintiff William J. Mulhern for \$200, and judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHISKER, and FRAZER, JJ.

William H. Peace, of Philadelphia, for appellant. John Martin Doyle and Eugene Raymond, both of Philadelphia, for appellees.

POTTER, J. These appeals are grounded upon the refusal of the court below to give binding instructions in favor of the defendant, or to enter judgment non obstante veredicto. It appears from the testimony that about noon on February 4, 1909, some school children just released from school were walking and sliding upon the icy sidewalk on the south side of Tasker street near Eighteenth. Anna Mulhern, a child some ten years of age, fell or was pushed over the curb into the edge of the driveway of the street as a wagon driven by an employé of defendant was approaching, the right-hand wheels running near the curb. The horse was turned somewhat aside, but the front wheel of the wagon ran over the little girl's leg and broke it. The question for determination was whether the driver, by the exercise of proper care, should have seen the child after it fell and was lying partly in the street ahead of him in time to stop his wagon, or turn it aside to avoid the accident, and whether his failure to do so was negligence.

A bystander testified that he saw the child lying partly in the gutter when the wagon was some 30 feet distant, and he said that the driver was not then looking ahead, but was at the moment looking backward into the body of his wagon. The jury may well have found that the proximity of a number of children upon the sidewalk at the side of the street upon which he was driving and the well-known tendency of children to make sudden and heedless dashes should have put the driver upon his guard at that particular place, at least to the extent of keeping his horse well in hand.

[1] It is common knowledge that special caution is required for the protection of children who congregate in the vicinity of a schoolhouse. The plaintiff Anna Mulhern testified that after she had fallen down and was lying partly in the gutter she saw the wagon coming along the street some 30 to 50 feet away from her. If this was the fact, the driver could have stopped his wagon or turned it aside before reaching her, if he was moving at a proper rate of speed and had his horse under proper control.

[2] On the other hand, the evidence upon the part of defendant tended to show that the child came so suddenly and unexpectedly from the sidewalk into the line of travel in the street that the accident was unavoidable. If this was the case, defendant should not have been held responsible.

Counsel for appellant has contended with great earnestness that the trial judge should have held as matter of law that the evidence did not justify an inference of negligence upon the part of the driver. But we are unable to agree with his contention in this respect. As we read the evidence, the question was purely one of fact upon conflicting state-

ments by the witnesses. If the jury accepted as credible the evidence offered by the plaintiff, they were justified in inferring negligence upon the part of the driver. Had they accepted as accurate the testimony on behalf of the defendant, they must have concluded that the driver was not at fault in any way, and the verdict would have been for the defendant. We may feel that the jury might very properly have reached another conclusion, but the question of fact in dispute was for them to decide. To the charge of the court in submitting the case no exception was taken.

The judgment is affirmed.

(257 Pa. 42)

HARDIE et ux. v. BARRETT.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. HIGHWAYS \Rightarrow 175(1)—HIRED AUTOMOBILE—INJURY—CONTRIBUTORY NEGLIGENCE.

When the dangers arising from the negligent operation of a hired automobile in which one is riding as an invited guest are manifest to a passenger having an adequate opportunity to control the situation, and he permits himself without protest to be driven to his injury, he is fixed with his own negligence which bars a recovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

2. HIGHWAYS \Rightarrow 175(1)—COLLISION—CONTRIBUTORY NEGLIGENCE.

Where a husband and wife hired an automobile driven by the owner's chauffeur and made no effort to have the chauffeur drive at a proper speed and on the right side of the street, they would be guilty of contributory negligence barring their recovery for injuries from a collision.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

3. HIGHWAYS \Rightarrow 175(1)—PERSONAL INJURY—NEGLIGENCE—PROXIMATE CAUSE.

In an action by a husband and wife for personal injuries when the hired automobile in which they were riding in New Jersey collided with defendant's wagon during a time when the New Jersey law required that it display lights, the fact that there were no lights on defendant's wagon, if not the proximate cause of the accident, even though negligence, would not justify a recovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injuries by James G. Hardie and Olive M. Hardie, his wife, and James G. Hardie against William M. Barrett, as president of the Adams Express Company, a joint-stock association under the laws of New York. Verdict for defendant and judgment thereon, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Sydney Young, of Philadelphia, for appellants. John Lewis Evans and Thomas DeWitt Cuyler, both of Philadelphia, for appellee.

MOSCHZISKER, J. On the evening of August 22, 1913, James G. Hardie, and Olive M., his wife, hired an automobile with its driver, one Louis S. Chester, Jr., to convey them, with two women guests, from Sea Isle City, N. J., to a nearby yacht club. On the way a collision occurred between the car in which they were riding and a one-horse express wagon belonging to the defendant company. Both Mr. Hardie and his wife were injured; they sued for damages, and by express agreement of record their cases were tried together, the issues involved were submitted to the jury, and in each instance the verdict favored the defendant, judgments were entered accordingly, and the plaintiffs have appealed.

The testimony on all the important issues was most conflicting; but, when viewed in the light of the verdicts rendered, the following facts can be found therefrom: The accident happened on a rainy evening, between 8:30 and 9 o'clock. Mr. Hardie occupied a front seat in the automobile, beside the chauffeur, while Mrs. Hardie, her mother and the other woman were in the tonneau. The car was equipped with five lights, "two large acetylene gas lamps on the head, two on the side, and one red light in the rear." The headlights illuminated the road so that one in the car "could see 200 feet in front," and made the way "bright enough to see distinctly the curb." The part of the road upon which the accident happened had a curb on the west side and a single track trolley line on the east, with a space of 22 feet between. The automobile was traveling southward, on the left-hand, or wrong, side of the road, at an estimated speed of 40 miles an hour. The wagon was traveling northward on the right-hand, or proper, side of the road, the horse going at "a very slow trot." The driver of the latter vehicle, in an endeavor to avoid the collision, had his horse "nearly half way over" the trolley track when the accident occurred. The automobile struck the wagon on the near front wheel; both vehicles were badly damaged.

On the foregoing facts, it may be seen that the chauffeur, and not the driver of the horse and wagon, was the one guilty of the negligence which caused the accident; but the plaintiffs complain that the trial judge committed substantial error by the manner in which he submitted certain issues to the jury. In disposing of these complaints, we shall first consider together assignments 1 and 2.

In brief, the trial judge instructed that, if the automobile was being driven with "manifest improper speed," or if the chauffeur

had his car "manifestly on the wrong place in the road," and these faults, or either of them, contributed to the happening of the accident, if the plaintiffs made no effort to "get him to go at a proper rate of speed" or "over on the right side of the road," they would be guilty of contributory negligence, but that they could not be found so guilty unless the before-mentioned alleged faults on the part of the chauffeur were "manifest."

In reviewing these instructions, it must be kept in mind that the plaintiffs did not endeavor to excuse the fact that the chauffeur was on the wrong side of the road by explaining he was temporarily and justifiably out of the regular track; on the contrary, they called him as their witness, and each of them gave testimony to substantiate his story that, at the time of the accident and prior thereto, he had been continually driving on the proper side of the road, at a speed not exceeding 15 miles an hour, which was much lowered immediately before the collision. Both plaintiffs not only stood upon but reiterated this account of the manner in which the automobile was alleged to have been handled; and, of course, ex necessitate, it excluded the possibility of a remonstrance on their part having been made to the chauffeur, by eliminating all possible reasons therefor. Moreover, the plaintiffs' attitude at trial, in a manner, adopted, or set their seal of approval upon, the chauffeur's real conduct, as the jury found it to be.

[1] The rule is well established that, when possible dangers arising out of the negligent operation of a hired vehicle or a conveyance in which one is riding as an invited guest are manifest to a passenger who has any adequate opportunity to control the situation, if he sits by without protest and permits himself to be driven on to his injury, this is negligence which will bar recovery. In other words, the negligence of the driver is not imputed to the passenger, but the latter is fixed with his own negligence when he joins the former in testing manifest dangers. For discussion and, in some instances, application of this rule, see *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 387; *Dean v. Penna. R. R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Winner v. Oakland Township*, 158 Pa. 405, 27 Atl. 1110, 1111; *Dryden v. Penna. R. R. Co.*, 211 Pa. 620, 61 Atl. 249; *Thompson v. Penna. R. R. Co.*, 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351; *Kunkle v. Lancaster County*, 219 Pa. 52, 67 Atl. 918; *Walsh v. Altoona & Logan Val. Elec. Ry. Co.*, 232 Pa. 479, 81 Atl. 551; *Wachsmith v. Balto. & Ohio R. R. Co.*, 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Trumbower v. Lehigh Valley Transit Co.*, 235 Pa. 397, 84 Atl. 403; *Senft v. Western Maryland Railway Co.*, 246 Pa. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.*, 248 Pa. 130, 93 Atl. 873.

[2, 3] Here, the clear, strong, preponderating evidence shows that the chauffeur was seen by numerous disinterested witnesses, some three or four blocks north from the point of the accident, driving in a reckless manner, at an estimated speed of 40 miles an hour, on the wrong side of the road, quite close to the trolley track; furthermore, the admissions of the plaintiffs show that they both were familiar with automobiles and able to appreciate the possible dangers of this highly improper course of conduct. As already indicated, since the story told by the plaintiffs, as to the management of the motor was rejected by the jury, the position assumed by the former at trial left but one conclusion possible; i. e., that they had joined the chauffeur in testing the dangers of the situation created by the way in which the car was in fact being driven. Under the circumstances, we see no error in the instructions complained of.

At this point it is but fair to say that the instructions in question were coupled with a correct and fair presentation of the plaintiffs' side of the case, and the jurors were plainly told that, if they believed the latter's testimony, they should render a verdict accordingly.

One other assignment calls for consideration. There is an act of assembly in New Jersey which requires all vehicles to have lights displayed thereon during specified hours, covering the time when this accident happened; and the defendant admitted there was no light on its wagon. The trial judge directed attention to this state of affairs, and instructed the jurors that, if the absence of a light "contributed to the accident, if that * * * prevented the plaintiffs' chauffeur from seeing the horse and wagon, that may be considered by you as an act of negligence which caused the accident; * * * and, * * * if * * * there was no negligence on the part of the plaintiffs, the plaintiffs would be entitled to your verdict." These instructions were practically the last word to the jury, and we think them as favorable to appellants as they had a right to expect. Had there been a light on the wagon, it might have saved the plaintiffs from the result of their own negligence in permitting the car occupied by them to be driven in the manner in which it was operated on the night of the accident; but even this is hardly probable, since the plaintiffs said the acetylene gaslights on the front of their automobile enabled them to see at least 200 feet ahead. On the other hand, if the absence of a light on the wagon was not the proximate cause of the accident, even though an act of negligence on the part of the defendant, it would not justify recovery by the plaintiffs (*Christner v. Cumberland & Elk Lick Coal Co.*, 146 Pa. 67, 23 Atl.

221); and this in effect is what the trial judge said to the jury.

The assignments of error are overruled, and the judgments affirmed.

(257 Pa. 37)

KUEHNE v. BROWN.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE — NEGLIGENCE — QUESTION FOR JURY.

In an action for injury from the negligent operation of an automobile, where the evidence of defendant's failure to blow his horn was only negative, and there was no positive evidence that he gave such warning, the weight of the negative evidence was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1518.]

2. MUNICIPAL CORPORATIONS \S 705(3)—OPERATION OF AUTOMOBILE — TEST — NEGLIGENCE.

In action for personal injury to a child struck by an automobile while in a highway between crossings, the test of defendant's liability was whether in the exercise of due care he should have seen the child in time to have avoided injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1515.]

3. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE—PERSONAL INJURY —QUESTION FOR JURY.

In such action, *held*, on the evidence, that whether defendant was negligent in not seeing the child in time to have avoided the injury was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1518.]

4. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE— NEGLIGENCE — QUESTION FOR JURY.

In a father's action in his own right for injury to minor child by defendant's automobile, conflicting testimony as to its speed and distance required to come to a stop made a question for jury as to defendant's negligence in operating the car.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1518.]

5. PARENT AND CHILD \S 7(9)—OPERATION OF AUTOMOBILE—INJURY TO CHILD—PARENT'S CONTRIBUTORY NEGLIGENCE.

Where the father of a child, suing jointly with him for personal injury from defendant's automobile, had permitted the child to cross a highway when the automobile was approaching only 75 feet away, notwithstanding his statement that he looked in both directions and saw nothing approaching, he was guilty of contributory negligence barring a recovery in his own right.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. \S 94.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Paul Kuehne, Jr., by his father and next friend, Paul Kuehne, and by Paul Kuehne, in his own right, against George H. Brown, to recover for personal injuries to the minor plaintiff. Compulsory nonsuit entered as to both plaintiffs, which the court subsequently refused to take off,

and plaintiffs appeal. Affirmed as to one plaintiff, and reversed as to the other.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRA-
ZER, JJ.

W. Horace Hepburn, Jr., of Philadelphia,
for appellant.

FRAZER, J. This is an action by a father and his minor child to recover for injuries to the latter sustained by reason of alleged negligence of defendant in operating his automobile. A nonsuit was entered by the court below as to both plaintiffs, and from this action they have appealed.

At the time of the accident, September 6, 1915, the plaintiff, Paul Kuehne, Jr., was five years of age. He and his father, the other plaintiff, were standing on the west side of Rising Sun Lane, near Comly street, in the City of Philadelphia, talking with friends. This is a suburban section of the city, and Rising Sun Lane is about 60 feet in width, with trolley tracks on each side of the street, and a driveway for vehicles in the center; the driveway being of sufficient width to permit three vehicles to stand abreast. The street is without sidewalks, but at the place where plaintiffs were standing is a platform constructed of planks, and extending across the gutter to the car track. The father with his two children were standing on the platform referred to when one of the occupants of an automobile, occupied by the child's mother and others and standing on the opposite side of the street from the platform on which the boy and his father stood, called to the child, Paul, that there was room for him in the car. The boy immediately started to cross the street, and was about midway between the platform and the automobile when he was struck by defendant's car, coming south at a speed estimated by various witnesses at from 8 or 10 to 40 miles an hour. There is no dispute, however, that the horn was not blown, or other warning given of its approach. Another car was standing on the same side of the street as the car in which Mrs. Kuehne was seated, 100 feet down the road in the direction from which defendant's automobile approached, and, to pass this car, defendant was obliged to turn to the left side of the road. There were no obstructions in the street and nothing to prevent defendant from seeing the persons standing on the platform adjoining the railway tracks, or the boy on the street after leaving the platform. The distance from the platform to the point at which the child was injured was estimated, by the witnesses, at from 12 to 20 feet. Witnesses also testified that when the child started to cross the street defendant's automobile was in the neighborhood of 75 or 100 feet away, and that the brakes were not applied to the car until within about 5 feet from the child, and that following the collision the automobile skidded

on the gravel road for a distance of more than 30 feet.

The court below concluded the evidence of negligence on the part of defendant was insufficient to submit to the jury, so far as the rights of the minor were concerned, for the reason that the accident did not happen at a street crossing; that the evidence of defendant's failure to give warning of his approach was negative only; and that there was nothing to impose upon him the duty of blowing his horn at the particular spot where the accident happened.

[1-3] In so far as the question of warning is concerned, while the evidence of failure to blow the horn was negative only, there was no positive evidence that defendant gave such warning, consequently, the weight of the negative evidence was for the jury. Longenecker v. Penna. R. R. Co., 105 Pa. 328; Haverstick v. Penna. R. R. Co., 171 Pa. 101, 32 Atl. 1128. However, to the extent that the rights of the child are concerned, whether or not warning was given was not a vital matter, as there is no question of contributory negligence on his part, the sole question in his case being whether defendant, in the exercise of due care, should have seen the child in time to avoid the accident. The evidence shows defendant's view of the road, and of the child on the platform over the gutter and also in the street, was unobstructed, making the situation before him such as to impose upon him the use of due care to avoid injuring those who were rightfully using the highway, even though there was no crossing at this particular point. There is evidence from which the jury might have found that the child did not suddenly dart in front of the car at a time too late for defendant to avoid the accident, but on the contrary that there was ample opportunity to stop his car had he been looking ahead. If approaching at an extreme rate of speed, as testified to by several witnesses, and as indicated by the skidding of the machine upon endeavoring to stop, it cannot be said, as matter of law, that defendant was performing his full duty toward those who were properly using the highway. Assuming the car was operated at the minimum rate of speed, testified to by other witnesses, no apparent excuse is shown for defendant not seeing the child in time to stop his car and prevent the accident, in view of the testimony as to the distance which he traveled from the time the child started to cross from the platform to the automobile, and the unobstructed condition of the street. Consequently, the question whether he had notice of the presence of the child in the road in time to appreciate the danger and avoid a collision was one for the jury to determine, under proper instructions from the court. Tatarewicz v. United Traction Co., 220 Pa. 560, 69 Atl. 995; Bloom v. Whelan, 56 Pa. Super. Ct. 277.

[4, 5] In so far as the rights of the father

are concerned the conflicting testimony as to the speed of the car, together with the distance required to come to a stop, was sufficient to submit to the jury on the question of defendant's negligence in operating the car. As to the contributory negligence of the father, his testimony was that before permitting the child to start across the street to the automobile in which his wife was seated he looked in both directions and saw no car approaching. Considering there was an unobstructed view of the street for 300 or 400 yards, with the exception of the presence of another automobile, which was about 100 feet distant, and in view of the testimony that defendant's car was approximately 75 feet away when the child was permitted to start across the street, it is useless for plaintiff to say he looked and did not see the automobile when it must have been in plain view at the time; hence his negligence in permitting a child of such tender years to cross the street alone is too apparent to require submission to the jury. To the extent, therefore, that the father is concerned, the nonsuit was proper. *Glassey v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 57 Pa. 172; *Johnson et ux. v. Reading City Pass. Ry.*, 160 Pa. 647, 28 Atl. 1001, 40 Am. St. Rep. 752; *Pollack v. Penna. R. R. Co.* (No. 2) 210 Pa. 634, 60 Atl. 312, 105 Am. St. Rep. 846.

The fourth assignment of error is sustained, the judgment is reversed, and the record remitted with a new venire.

(257 Pa. 33)

In re HUNTER'S ESTATE et al.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MORTGAGES \S 559(3) — MORTGAGEE'S RELEASE OF TITLE—MORTGAGOR'S PERSONAL LIABILITY.

Where a mortgagee has parted with his title to the mortgaged premises, his release of part thereof without the mortgagor's knowledge or consent discharges the mortgagor from personal liability for any loss to the mortgagee from a deficiency in the proceeds in a subsequent sale under foreclosure proceedings, as by such release the mortgagee assumes the risk of the unreleased part of the property.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1592.]

2. MORTGAGES \S 559(3)—PENAL BOND—LIABILITY.

In an audit of the account of a substituted trustee of an assigned estate, it appeared that prior to the assignment the assignor had mortgaged real estate and had given a penal bond to further secure the mortgage debt, and that subsequent to the assignment parts of the realty were released from the lien of the mortgage, without the mortgagor's knowledge or consent, and that the mortgaged premises were afterwards sold for a sum insufficient to pay the mortgage. *Held*, that the mortgagor was discharged of any liability on the bond.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1592.]

Appeal from Court of Common Pleas, Philadelphia.

Henry K. Fox, executor of the estate of Elizabeth M. Lassalle, deceased, appeals from a decree dismissing exceptions to the report of Charles H. Mathews, auditor, in the matter of the estate of James Hunter and John Hunter, individually, and as copartners. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

F. B. Vogel and Henry K. Fox, both of Philadelphia, for appellant. George Sterner and Charles R. Maguire, both of Philadelphia, for appellees.

WALLING, J. This is an appeal from a decree of distribution of an assigned estate. In 1887 John Hunter individually and the firm of James and John Hunter made a general assignment to John Field, for benefit of creditors. Prior thereto in 1878 said James Hunter and John Hunter, being the owners of certain lands, comprising about 32 acres, and situate near Fifty-Fifth street and Lancaster avenue, Philadelphia, executed a mortgage thereon and an accompanying bond to Wm. C. Houston, administrator, etc., to secure a loan of \$27,000, payable in three years, with interest. Some days later John Hunter conveyed his interest in the mortgaged premises to James Hunter, who thereafter and before the assignment executed a second mortgage upon the same property, by virtue of which, subsequent to the assignment, the same was sold by the sheriff and the title thereto, subject to the prior mortgage, became vested in Margaret D. Hunter, who died in May, 1891, intestate. And in December of the same year, by partition among her heirs, such title became vested in Wm. D. Hunter. There then remained unpaid on the first loan the sum of \$10,000. However, such title so vesting in Wm. D. Hunter did not include all the lands embraced in the original mortgage, some having been released meantime as hereinafter stated. On May 26, 1891, the administrator entered judgment on the bond accompanying the first mortgage; and on November 18, 1892, he assigned the bond and mortgage to James M. Connely, the father-in-law of Wm. D. Hunter, for the consideration of \$10,000.

Between the date of the assignment for benefit of creditors and the time of the transfer of the bond and mortgage to Connely, the holder of the first mortgage had released from the lien thereof twelve separate pieces of land; some of which were released for the nominal consideration of \$1 each. And it does not appear that the original mortgagors, or their assignee, consented to such release or had knowledge thereof. On November 23, 1894, at the instance of Connely and on the judgment entered on the bond

as aforesaid, all of the unreleased part of the land included in the first mortgage was sold by the sheriff for \$2,000, at which sale Connely became the purchaser, and on the same day conveyed a portion of the premises so bought by him to James Dunlap for \$15,000. Two months later Connely assigned the mortgage and judgment entered on the bond to his son-in-law, Wm. D. Hunter, for the consideration of \$1; and the latter same day reassessed the damages on the judgment at \$9,281.66. And on February 7, 1895, Connely, also for the consideration of \$1, made a deed to his said son-in-law for the balance of the land included in the sheriff's sale "subject to existing incumbrance." On the 5th of the following June, Wm. D. Hunter sold the land conveyed to him by the said last-named deed to James B. Johnson for \$12,000, "clear of incumbrance"; by various transfers, the first mortgage and judgment on the accompanying bond became vested in appellant in 1907. Since that date the judgment has been twice revived, and on each occasion judgment was entered for want of an appearance, on two returns of "nihil habet." The last of these judgments was entered February 20, 1914, at which time the damages were assessed at \$22,351.22. James Hunter died in 1896, John Field in 1904, and John Hunter in 1910. The assignee filed a partial account in 1899 and a final account in 1897, both being duly audited and confirmed, and no claim being presented on account of the first mortgage and bond at either of the audits.

In 1906 Herman H. Wilson was appointed substituted trustee in place of John Field, then deceased. And in 1911 the substituted trustee filed an account showing a balance in his hands as the proceeds of a private sale of real estate, formerly the property of John Hunter. An auditor was appointed to pass upon exceptions and report distribution of the balance; and before him appellant presented his claim on the revived judgment. Other claims amounting to \$100,976.07 were also presented and proven before the auditor; and to such other claims the net fund for distribution, amounting to \$1,790.79, was distributed by the auditor and court below, to the exclusion of appellant's claim; and this appeal was taken from the final decree of distribution of the fund.

[1] We entirely agree with the conclusion

reached by the court below. Where the mortgagor has parted with his title to the mortgaged premises, a release of a part thereof by the mortgagee, without the knowledge or consent of the mortgagor, will discharge the latter from personal liability for any loss to the mortgagee resulting from a deficiency in the proceeds of a subsequent sale in foreclosure proceedings. *Meigs v. Tunnicliffe*, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. Rep. 769, 6 Ann. Cas. 549. See opinion by Mr. Justice Stewart. By such release the mortgagee assumes the risk of the unreleased portion of the property being of sufficient value to secure his debt. That he was not mistaken in this case appears from the fact that shortly after the sheriff's sale such unreleased property was resold for more than double the amount unpaid on the mortgage. However, in the absence of fraud or collusion at the sheriff's sale, the profits on such resales would not inure to the benefit of the original mortgagors.

[2] The rights of creditors were fixed by the assignment; and while the confession of judgment thereafter upon the bond would as against the mortgaged premises relate back to the recording of the mortgage, it would not give the obligee in such bond any rights superior to those of other creditors as to the balance of the assigned estate. The entry of such judgment did not create a lien on land, aside from the mortgaged premises, which had previously passed from the mortgagors by deed of assignment for benefit of creditors. *Cowan, Casey & Hutkoff v. Penna. Plate Glass Co.*, 184 Pa. 1, 38 Atl. 1075. The act of April 2, 1822 (7 Smith's Laws, 551; *Stewart's Purdon*, vol. 1, p. 1185), to which our attention was called at bar, authorizes the collection of the mortgage debt from the unreleased part of the premises, and provides for the protection of the rights of the respective part owners under such circumstances, but makes no reference to the personal liability of the mortgagor, and is not applicable to this case. As in our opinion the release above stated of parts of the mortgaged premises is a complete answer to appellant's claim on the fund for distribution, it is not deemed necessary to discuss other features of the case.

The assignments of error are overruled, and the decree affirmed at the costs of the appellant.

(91 Conn. 709)

Appeal of SCHELLEN.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

MUNICIPAL CORPORATIONS §514(7)—PUBLIC IMPROVEMENTS—ASSESSMENTS.

Where the city has constructed a sewer improvement, collected all the assessments therefor, and made full payment, it cannot raise an amount in excess of the cost by assessing benefits to one who has subsequently erected a dwelling and made connections with the sewer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1211.]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

In the matter of sewer assessment of the borough of Groton. From a judgment confirming an assessment of benefits for sewer improvement, Pierre L. Schellen, an abutting landowner, appeals. Reversed and remanded.

The borough of Groton is empowered by its charter to lay out and construct a sewer system, to have supervision and control of the same, and to assess against persons whose property is specially benefited thereby such sums as they ought justly and equitably to pay therefor to be determined according to such rule of assessment based upon frontage and area, either or both, as it may adopt as being just and reasonable. Pursuant to this authority, the borough, in 1913 and 1914, laid out and constructed a sewer system, and assessed against the several owners of land abutting on the streets in which it was built the estimated cost of its construction. This assessment was completed in May, 1913. The appellant, as the owner of a tract of land located at the corner of Broad and Ramsdell streets, was one of the persons assessed. He and all others against whom the assessments were made paid the amounts thereof to the borough. Preparatory to making these assessments, the borough, acting under the authority of its charter, adopted a rule for the assessment of benefits which provided that the estimated cost of the work should be assessed on the property specially benefited in the proportion of four-tenths to frontage and six-tenths to area; the area to be calculated to a line parallel with and not more than 100 feet distant from the street frontage. The rule provided for a departure from strict adherence to the above provisions where such adherence would lead to injustice and for a certain frontage exemption in the case of corner lots. It was provided that the rate of assessment should be 50 cents per lineal foot of frontage, and 7½ mills per square foot of area benefited. The assessments of 1913 were made in conformity to this rule. No change in or addition to any of the sewers has been made since their original construction in 1913 and 1914.

Subsequent to May, 1913, the appellant built a house upon his land which was located more than 100 feet from the street

and connected the same with the sewer, and certain others did likewise. A modification of the rule of assessment was then made by the borough so that it was provided that in all cases where a house situated more than 100 feet from the street should be connected with the sewer, a further and additional assessment should be made against the owner on account of the sewer with which connection was made, such additional assessment to be made at the rate of 7½ mills per square foot of area upon so much land not theretofore covered by the existing rule as would be included within a circle having a radius of 50 feet from the center of the house. Following this modification and pursuant to its provisions, an additional assessment was made against the appellant amounting to \$255.16. From that assessment the present appeal was taken.

Other facts not pertinent to the opinion need not be stated.

Jeremiah J. Desmond, of Norwich, and Warren B. Burrows, of New London, for appellant. Arthur T. Keefe, of New London, for appellee.

PRENTICE, C. J. (after stating the facts as above). It is an open question whether the borough's power to assess benefits on account of this public improvement was not exhausted before the attempted assessment appealed from was made in 1916, even though the actual cost of the work exceeded the estimated cost which was originally assessed and some portion of the actual cost remained undistributed over the property specially benefited. *City of Chicago v. People ex rel. Norton*, 56 Ill. 327, 332; *Meech v. City of Buffalo*, 29 N. Y. 198, 215. Doubtless authority to make a supplemental assessment to cover cost not already assessed may be conferred by statute; but there appears to be no such grant of power to the borough of Groton. That question, however, is one which we have no occasion to answer, since it nowhere appears in this record that the actual cost of the sewer system constructed exceeded its estimated cost which, pursuant to the rule adopted by the borough, was assessed on the property specially benefited and by the owners of that property wholly paid in. In so far as appears, the borough has been fully compensated for the cost of construction by the property owners specially benefited and assessed. It is without authority to raise an amount in excess of the cost of a public improvement through the medium of an assessment of benefits, and that for aught that appears is what the borough undertook to do when it made the assessment of 1916 against the appellant.

There is error; the judgment is set aside, and the cause remanded, with direction to vacate the assessment appealed from. The other Judges concurred.

(91 Conn. 690)

PICKETT v. RUICKOLDT.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. INSANE PERSONS — 92 — ACTION BY CONSERVATOR.

Action to recover property of an incapable person would not be defeated because brought in his conservator's own name and not in the ward's name, where the complaint alleged the conservator brought the action as such conservator, since he was the proper person to bring the action, and under Gen. St. 1902, §§ 622, 623, as to nonjoinder and misjoinder and substituting plaintiff, the ward's name might be substituted on motion.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 161, 162.]

2. INSANE PERSONS — 44 — ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON.

Death of an incapable person does not abate action brought for his benefit by his conservator.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

3. INSANE PERSONS — 44 — ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON—SUBSTITUTED PLAINTIFF—ADMINISTRATOR.

Where conservator of an incapable person had sued in his own name for benefit of the ward, on the ward's death his administrator had a right to be substituted as plaintiff under Gen. St. 1902, § 623, as to substituted plaintiff, and Survival Act (Pub. Acts 1903, c. 193) § 1.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

4. INSANE PERSONS — 44 — ACTION BY CONSERVATOR — DEATH OF INCAPABLE PERSON — SURVIVAL OF CAUSE OF ACTION—"RIGHT OF ACTION."

Under the Survival Act, § 1, providing that "no cause or right of action" shall be lost or destroyed by death, etc., survival of actions is the rule and not the exception, and the presumption is that every cause or right of action survives until the contrary is made to appear; the phrase "right of action" including the right to commence and maintain an action and being broad enough to include a right to be admitted to prosecute a pending action either as a co-plaintiff, or substituted plaintiff (citing *Words and Phrases*, Right of Action).

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

5. INSANE PERSONS — 44 — ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON—SUBSTITUTION OF PARTIES — MOTION TO ERASE FROM DOCKET.

Under Gen. St. 1902, § 622, providing that no action shall be defeated by nonjoinder or misjoinder of parties, where administrator of an incapable person after his death entered to prosecute under Survival Act, § 2, an action commenced for such person in his lifetime by his conservator in his own name, instead of applying to be substituted as plaintiff under Gen. St. 1902, § 623, as to substituted plaintiff, defendant's appropriate remedy was not a motion to dismiss and erase from the docket, but a motion to strike from the record the entry to prosecute.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

Appeal from Superior Court, New Haven County; Joseph P. Tuttle, Judge.

Action by Edwin S. Pickett, Conservator, against George W. Ruickoldt. From order erasing case from docket, plaintiff appeals.

Error, and cause remanded, with direction to restore it to docket.

Leonard M. Daggett and Robert J. Woodruff, both of New Haven, for appellant. Philip Pond and Louis M. Rosenbluth, both of New Haven, for appellee.

BEACH, J. This action was brought by the conservator in his own name to recover real and personal property alleged to have been transferred without consideration by the ward to his brother, while under the undue influence of the transferee. Before any answer was filed the ward died, and the Union & New Haven Trust Company, his administrator, entered to prosecute. Ten months afterward the defendant filed a suggestion on the record of the termination of the conservatorship, and moved that the cause be dismissed and erased from the docket. The motion was granted on the ground that the action was originally improperly brought in the name of the conservator, and not in the name of the ward by the conservator acting in his behalf; that as the action never stood in the name of the deceased ward, the statute authorizing the administrator of a deceased plaintiff to enter and prosecute does not apply; and that since no motion was made to substitute one plaintiff for another, the action was without a plaintiff. The old rule was that a conservator could not maintain an action to collect the ward's debts in his own name as conservator. *Treat v. Peck*, 5 Conn. 280; *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622; *Riggs v. Zaleski*, 44 Conn. 120. Even if the rule still prevails, the consequences of a failure to observe it are very different now from what they were when *Riggs v. Zaleski* was decided in 1876.

[1] The conservator was the proper person to bring the action, and in his complaint he alleges that he brings it as the conservator of Arthur Ruickoldt. Under sections 622 and 623 of the General Statutes, the action could not have been defeated, in Ruickoldt's lifetime, because not brought in his name. Being on the face of the complaint beneficially interested, his name might have been entered or substituted as a plaintiff, on motion. In the meantime, the action, even if brought by the wrong plaintiff, was still pending. As was said in *Bowen v. National Life Ass'n*, 63 Conn. 460, 476, 27 Atl. 1059, 1062, the Practice Act has "radically changed the old practice with reference to joinder, admission and dropping of the parties to a suit, and the changes were intentionally and deliberately made."

[2] When Ruickoldt died the action did not abate; nor was the conservator discharged by his ward's death. He still had the estate in his hands and must account for it to the court of probate. Until he was discharged the action was not without a plaintiff and, subject to possible objection

which the defendant did not make, it remained pending in court, with the conservator as the sole nominal plaintiff, until August 7, 1915, when the administrator entered to prosecute. If the administrator then had a right to enter, the action remained in court with two plaintiffs, until the final account of the conservator was accepted and he was discharged by the court of probate. The record does not show when the conservator was discharged, but that fact was not suggested on the record until May, 1916, ten months after the administrator had entered to prosecute.

[3] We think the administrator had a right to be substituted as plaintiff under section 623 of the General Statutes. Ruickoldt was the party for whose benefit the action was brought, and his right to be substituted as a plaintiff in the action was a substantial right which survived to the administrator.

[4] The broad language of section 1 of the Survival Act of 1903 is that:

"No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person."

Under this statute the survival of actions is the rule and not the exception, and the presumption is that every cause or right of action survives until the contrary is made to appear by way of exception to the rule. The phrase "right of action" includes the right to commence and maintain an action. Words and Phrases (vol. 7) p. 6266. It is broad enough to include a right to be admitted to prosecute a pending action either as a coplaintiff, or substituted plaintiff; and under section 623 the administrator had a right to be substituted as plaintiff in place of the conservator. Nobody would doubt that the administrator of a decedent, who ought to have been made a defendant, but was omitted through mistake, could be joined as defendant in an action which survived against the estate, and we see no reason why the administrator of a decedent who ought to have been joined as a plaintiff, but was omitted through mistake, may not be admitted as a coplaintiff, or as substituted plaintiff, if necessary, in a pending action which survives in favor of the estate.

[5] Strictly speaking, the right which survived to the administrator in this case was the very same right which the decedent had in his lifetime; viz. the right to be substituted as plaintiff under section 623 of the General Statutes. It is therefore true, as the memorandum of the superior court suggests, that the administrator ought to have made application under that statute to be substituted as plaintiff, instead of entering to prosecute under section 2 of the Survival Act. Nevertheless he succeeded in making himself a party on the record by entering to prosecute, and the defendant's real grievance was not that the administrator had no right to come into the action, but that he had come in

through the wrong door. That being so, the appropriate remedy was not a motion to dismiss and erase from the docket, but a motion to strike from the record the entry to prosecute. Section 622 of the General Statutes provides that "no action shall be defeated by the nonjoinder or misjoinder of parties"; and this must include the lesser proposition that no action should be defeated because the right party came into it, or attempted to come into it, in the wrong way.

There is error, and the cause is remanded, with direction to restore it to the docket. The other Judges concurred.

(81 Conn. 674)

BLUE RIBBON GARAGE, Inc., v. BALDWIN et al.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. **BILLS AND NOTES** \S 414—NOTICE OF DISHONOR.

Under Negotiable Instruments Law (Pub. Laws 1897, c. 74) as well as the former law merchant, a holder for collection of negotiable paper, which has been dishonored, performs his full duty in respect to notice of its dishonor by giving such notice in due form and time to the party from whom he receives it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1142, 1148-1155.]

2. **BILLS AND NOTES** \S 414—NOTICE OF DISHONOR.

Under Negotiable Instruments Law, as well as former law merchant, where negotiable paper before presentment has passed through several hands, whether of mere holders for collection or of parties beneficially interested therein, notice given by each holder in turn to the prior one from whom it was received is notice sufficiently given to fix the liability of all indorsers included in the chain of notice, each holder for collection being regarded as a real holder, and his relation to the party from whom the paper is received being such that the latter is entitled to be treated as his immediate principal; and it is not necessary that notice of dishonor, to be effective in fixing the liability of indorsers, should be given by the holder at presentment directly to the beneficial owner, disregarding all intervening holders for collection only.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1142, 1148-1155.]

3. **BILLS AND NOTES** \S 539—ACTION AGAINST INDORSER—FINDINGS OF FACT.

In action against indorser of a note which had been sent to a trust company for collection, a finding that the trust company had never been plaintiff's agent for any purpose whatsoever might be disregarded as a mere conclusion of law; the facts showing the trust company to be a holder for collection and therefore as matter of law the owner's agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934.]

4. **BILLS AND NOTES** \S 420—NOTICE OF DISHONOR.

Where the holder of a note, receiving notice of its dishonor, notified a prior indorser and the original payee of the dishonor by telephone and personal visit and oral notification respectively, this was sufficient compliance with the Negotiable Instruments Law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1138-1140.]

Appeal from Court of Common Pleas, Fairfield County; John J. Walsh, Acting Judge.

Action by the Blue Ribbon Garage, Incorporated, against R. L. Baldwin and others. From judgment for plaintiff, the named defendant and others appeal. No error.

On February 15, 1915, the plaintiff became the owner of the note in suit in part payment for the sale to the defendant Baldwin of an automobile. The note was drawn by the defendant the State of Maine Lumber Company, to the order of the defendant Atwater, and was made payable at the Connecticut Trust & Safe Deposit Company, of Hartford. It bore the indorsements of the five individuals who were made defendants, including Atwater and Baldwin, against whom judgment was rendered. The plaintiff still owns the note, which remains unpaid. The date of maturity was March 2, 1915.

February 26, 1915, the plaintiff deposited it for collection with the First Bridgeport National Bank of Bridgeport. That bank forwarded it in due course of business to their agents, the State Bank of Albany, for collection. The State Bank of Albany in like manner forwarded it for collection to its agents, the Hartford National Bank of Hartford. On or before the morning of March 2, 1915, the last-named bank delivered it to the Connecticut Trust & Safe Deposit Company, the place of payment. Payment not having been made at the close of business upon that day, it was handed by the discount clerk of the trust company to its teller, who demanded payment, and, no payment having been made, wrote across the face of the note: "Protested for nonpayment Mar. 2, 1915, Harvey W. Corbin, Notary Public." He then made a certificate of protest and ten notices of protest, one addressed to each of the banks, and each party whose name appeared upon the note, pinned the certificate to the original note and placed the note and certificate thus attached, together with the ten copies of the notice of protest, in an envelope and mailed it with its inclosures, including two-cent stamps for each notice save one, to the Hartford National Bank. On the following day, the last-named bank mailed the note, certificate of protest, and notices, save only the notice to itself, to the State Bank of Albany. On March 5th, the First Bridgeport National Bank received from that bank in the first mail the same inclosures less the notice to the State Bank of Albany. The Bridgeport bank immediately thereafter remailed them, less the notice to it, to the plaintiff, who received them during the forenoon of the same day. Upon that day Baldwin was notified by the plaintiff's treasurer by telephone of the dishonor. On the following day, Atwater, who resided in New Haven, was visited by the plaintiff's agent and orally notified. No attempt was made by the plaintiff to notify the other indorsers.

George E. Beers, of New Haven, and Daniel J. Danaher, of Meriden, for appellants Baldwin and Atwater. John Smith, of Bridgeport, for appellee.

PRENTICE, C. J. (after stating the facts as above). [1, 2] The course of conduct of the notary who made presentment of the note in suit and of the several banks through whose hands it passed in the collection process conformed strictly, in so far as notice of dishonor was concerned, to the requirements of the law merchant formerly controlling and to those of the negotiable instrument law now in force. By the overwhelming weight of authority under the law merchant, a holder for collection of negotiable paper, which had been dishonored, performed his full duty in respect to notice of its dishonor by giving such notice in due form and time to the party from whom he received it. Where the paper before presentment had passed through several hands, whether they were those of mere holders for collection or of parties having a beneficial interest in it, the approved rule was that notice given by each holder in turn to the prior one from whom it was received was notice sufficiently given to fix the liability of all indorsers included in the chain of notice. *United States Bank v. Goddard*, 5 Mason, 366, 375, Fed. Cas. No. 917; *Eagle Bank v. Hathaway*, 5 Metc. (Mass.) 212, 215; *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79, 84; *Farmers' Bank v. Vail*, 21 N. Y. 485, 487; *Seaton v. Scovill*, 18 Kan. 433, 438, 21 Am. Rep. 212, note 26 Am. Rep. 779; *Wood v. Callaghan*, 61 Mich. 402, 411, 28 N. W. 162, 1 Am. St. Rep. 597; *Daniel on Negotiable Instruments*, 331. Each holder for collection was regarded as a real holder and his relation to the party from whom the paper was received such that the latter was entitled to be treated as his immediate principal. *Bartlett v. Isbell*, 31 Conn. 296, 299, 83 Am. Dec. 146; *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79, 84; *Freeman's Bank v. Perkins*, 18 Me. 292, 294; *Howard v. Ives*, 1 Hill (N. Y.) 263, 264; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 587, 28 Atl. 563, 23 L. R. A. 173.

The Negotiable Instruments Act has not changed the law in any of these respects. The defendant's broad contention that notice of dishonor to be effective in fixing the liability of indorsers should be given by the holder at presentment directly to the beneficial owner disregarding all intervening holders for collection only is without foundation in the act, and we have so distinctly held. *Gleason v. Thayer*, 87 Conn. 248, 250, 87 Atl. 790, Ann. Cas. 1915B, 1069. Such a requirement, necessitating, as it would, inquiries as to who was the real owner and what his address, and involving embarrassment and complications in accounting as between those through whose hands the paper passed in the process of collection, would be fruitful of such annoyances, difficulties, and hazards of

miscarriage and loss as to make it an unsatisfactory substitute for the simple, orderly, and effective method pursued in this case and by us heretofore approved. The case of *East Haddam Bank v. Scovil*, 12 Conn. 303, furnishes a good example of easily possible consequences. The law under consideration in *Gleason v. Thayer* was, to be sure, the Negotiable Instruments Act as it was enacted in New York; but its provisions of present pertinence were identical with those of our own.

The defendant's counsel undertake to escape from the operation of the decision in that case by an attempt to distinguish between the two cases upon the ground that the note in *Gleason v. Thayer* presumably was indorsed by the Whaling Bank to the collection bank in New York, whereas it does not appear by the record that the note in this case, when presented for payment, bore any bank indorsements. It would doubtless be quite in accordance with the fact to assume that it did, but that is not a matter of controlling importance. The note, as indorsed upon its delivery to the Bridgeport Bank, was transferable by delivery, and the finding is that it was sent along through the chain of banks for collection. Each bank received and transmitted it to its agents for that purpose, and each receiving bank became its holder for collection with all the rights, powers, and obligations attached to such holders. *East Haddam Bank v. Scovil*, 12 Conn. 302, 311.

[3] Counsel for the defendant attach great importance to one of the paragraphs in the finding, and build much of their argument upon it. The paragraph is to the effect that the Connecticut Trust & Safe Deposit Company has never been the plaintiff's agent for any purpose whatsoever. That finding is one of law and not of fact. The legal character of the relation in which the trust company stood to the owners of the note is to be determined as a legal conclusion upon the facts. The finding, to be sure, does not state in so many words that the Hartford National Bank delivered the note to the trust company for collection for its account, but there is no other reasonable inference from the facts found than that it did so. The conduct of the parties throughout so indicates quite unmistakably. As a holder for collection is, as a matter of law, the agent of the owner, the finding of the court upon this matter must be disregarded as not justified as a matter of law by the facts. *Gleason v. Thayer*, 87 Conn. 248, 250, 87 Atl. 790, Ann. Cas. 1915B, 1069.

[4] The action of the plaintiff in giving notice to the defendants Baldwin and Atwater, following its receipt in due course from the Bridgeport Bank, of the notice of dishonor, complied in all respects with the requirements of the law, and no complaint of

irregularity in that respect is made by the defendants.

Certain evidence tending to prove a banking custom in the matter of giving notices of dishonor was received against objection that it was not permissible to show conformity to a custom at variance with the provisions of statute. The court has found no such custom, nor did it decide the case upon the strength of one. Its decision was based upon the provisions of statute and compliance therewith.

Two or three objections to the admission of testimony, offered to show that the Hartford National Bank mailed the note, certificate of protest, and notices to the State Bank of Albany on March 3, relate to details which, in view of other testimony, were unimportant. The court was amply justified in finding that it did so upon proof that these papers were received by the Bridgeport Bank by first mail on the 5th contained in a letter from the State Bank of Albany addressed to it.

There is no error. The other Judges concurred.

(91 Conn. 718)

Appeal of CORDANO.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. INTOXICATING LIQUORS ⇨103—LICENSES—ASSIGNMENTS.

Under Pub. Acts 1915, c. 282, prohibiting granting of licenses to sell intoxicating liquor within 200 feet of a church, but exempting transfer applications which are left to the discretion of the commissioners, the owner of a license, whether or not he has qualified to sell under it, may sell and assign it as a piece of property to another who may make application to sell under it as a transferee.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112.]

2. INTOXICATING LIQUORS ⇨103—LICENSES—CHARACTERISTICS.

Property in a license to sell intoxicating liquor is recognized by law to the fullest extent as property having a recognized pecuniary value and the subject of sale, attachment, levy, or replevy.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112.]

3. INTOXICATING LIQUORS ⇨103—LICENSES—TRANSFERS.

Pub. Acts 1915, c. 282, prohibits the granting of licenses for places located within 200 feet of a church, but exempts transfers from the operation of the statute. Chapter 36 provides that a license sold upon execution shall for its unexpired term be as valid in the hands of its purchasers as in the hands of the original licensee, provided that before the purchaser may sell thereunder he shall comply with all the requirements relative to the procuring of an original license. A license was sold on execution and purchased by a brewing company which did not qualify as a licensee thereunder, but transferred it to one who made application. Subsequent to such assignment a church was erected within 200 feet of the saloon. *Held* that, transfers being exempt from the operation of the statute, the assignee might qualify to sell under the license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112.]

4. INTOXICATING LIQUORS \Leftrightarrow 103—LICENSES —FRAUD.

The assignee of a liquor license sold upon execution and purchased by a brewing company which failed to qualify as a licensee thereunder is not guilty of fraud in applying for permission to sell under the license as being in no position to claim such rights where Pub. Laws 1915, c. 282, expressly exempts transfers from the operation of the prohibition against licensing drinking places within 200 feet of a church.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112.]

5. INTOXICATING LIQUORS \Leftrightarrow 103—LICENSES —FRAUD.

The assignee of a liquor license purchased by a brewery on execution against the original holder is not guilty of fraud in applying for permission to sell thereunder because of the fact that the assignor had not in fact perfected its assignment to the applicant at the time he applied for permission to sell; the facts being known to the county commissioners.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112.]

Appeal from Superior Court, Litchfield County; William L. Bennett, Judge.

Remonstrance by Nathaniel Cordano to the action of the County Commissioners in granting the transfer of a liquor license. Affirmed on reservation to superior court, and remonstrant appeals. Affirmed.

In 1915 the county commissioners of Litchfield county granted to T. J. Sullivan a license to sell spirituous and intoxicating liquors at 215 Main street, in Winsted, expiring October 31, 1916. In June, 1916, this license was sold on execution against Sullivan. The Yale Brewing Company was the purchaser. That company did not qualify as a licensee under the license, but sold the same to one Davis, who did apply on July 31, 1916, for a transfer of the license to him.

Subsequent to November, 1915, and the date of Davis' application, a church had been built and opened for services within 200 feet of the saloon. A remonstrance was filed to Davis' application upon the ground of the proximity of the church to the saloon. Upon the hearing before the commissioners no witnesses were produced to establish the unsuitability of the place, but the facts, as to its proximity to the church, were agreed upon as the facts upon which the commissioners' decision was to be rendered. The claim was made in behalf of the remonstrance that the application was to be regarded as an original one, and that therefore the prohibition of the statute against the granting of a license for a place within 200 feet from a church edifice was applicable to the situation, and forbade the transfer of Sullivan's license to Davis. This claim was overruled, and the application granted. From this action the appellant, who was one of the remonstrants, appealed.

Davis is a suitable person to receive a license.

Frank B. Munn, of Winsted, for remonstrating taxpayer. Walter Holcomb, of Torrington, for applicant for transfer. John T. Hubbard, of Litchfield, for county commissioners.

PRENTICE, C. J. (after stating the facts as above). The stipulation of counsel upon which this reservation was made limits the questions, whose answers should determine the judgment to be rendered by the superior court under our advice, in substance to two, as follows: (1) Was the county commissioners' action in granting Davis's application for a transfer to him of Sullivan's license in violation of the provisions of statute touching licenses for places located within 200 feet of a church? and (2) Was Davis's application a fraudulent one?

Any question that might have been made in the superior court that the county commissioners erred in their exercise of discretion in granting the application is waived.

[1] It appears to be conceded by the remonstrant appellant that, if Davis had received a transfer from Sullivan, his application to the commissioners would not have encountered the church prohibition. Such certainly would have been the case, since chapter 282 of the Public Acts of 1915, which embodies that prohibition, specially excepts from its operation transfer applications, and leaves the decision in their case to the discretion of the commissioners, in view of the circumstances of each particular case.

Davis, however, did not hold an assignment to himself from Sullivan, the licensee. His right to the license came to him from the Yale Brewing Company, who had purchased it upon an execution sale, and had never qualified as a licensee under it. The remonstrant's contention is that under such conditions he did not occupy the position of one who was entitled to a transfer of the license within the meaning of our license statutes, and therefore could not avail himself of the exceptions provided in chapter 282 of the Public Acts of 1915 in cases of transfer. His claim is that the exception made in that act in favor of transfers of licenses refers only to such as attend the passing of the ownership of the license directly from the licensee to the applicant for a transfer and without the intervention of any other person's ownership of the license, and that all other persons not so deriving title to the license appear before the county commissioners as original applicants and subject to the regulations governing such applicants. In support of this position he points to chapter 148 of the Public Acts of 1915, where it is provided that any licensee, or in case of his death his administrator or executor, may, with the consent of the county commissioners, transfer his license. This, he says, is inclusive of all transfers which the law rec-

ognizes as such, and confines the power to make assignments, which by the approval of the county commissioners may become transfers, to licensees.

This construction of our statute is exceedingly narrow and technical, and does not comport with sound reason. It reaches not only those who, as here, are purchasers of a license at an execution sale, but also those who hold voluntary assignments from the owner of a license, provided they have not put themselves in a position to engage in the liquor business under its authority. We search in vain for a practical reason for the distinction thus made between licensed and nonlicensed owners of a license in the matter of their competency to make an assignment of the license which may be perfected as a transfer by the action of the county commissioners. Especially hard is it to find a reasonable basis for such distinction, since ownership by purchase and assignment does not carry with it the right to utilize the license in the conduct of the business. In every case one who acquires an outstanding license is required to obtain the approval of the county commissioners before he can sell under it. As the license authorities have reserved to them the power to dictate as to who among assignees may exercise the franchise by becoming sellers, and are called upon in every case to exercise that power, it is difficult to discover what abuse can possibly arise from making assignees of nonlicensed persons transferees of the license which is not to be anticipated in the case of assignees of licensed persons. The public interest is not concerned with the character and suitability for the conduct of the liquor business of a seller of a license who does not propose to operate under it. What is its vital concern is the character and suitability of the purchaser who applies for leave to sell under the license.

[2] Our law recognizes to the fullest extent the quality of property in a license. It is property having a recognized pecuniary value and the subject of sale, attachment, levy, or replevy. *Sayers' Appeal*, 89 Conn. 315, 317, 94 Atl. 358; *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 395, 50 Atl. 1023. As property and the subject of sale, the owner may prima facie at least sell it and place the purchaser in his position as owner. What is there to impose restraint upon this power of substitution of owners so that only one class of them, to wit, those who have qualified as licensees under the license, are free to make the substitution as fully and completely as the law in other respects permits it to be made? The statutes expressly impose none, and none is to be found by way of implication unless the remonstrant's construction of chapter 148 of the Public Acts of 1915 is to be accepted as correct. As we already have had occasion to observe, practical reasons in support of that construction are not apparent. On the other hand, it is easy to discover reasons and cogent ones in opposition to it. We

are of the opinion that the owner of the license, whether or not he has qualified to sell under it, may sell and assign it as a piece of property to another who may make application to sell under it as a transferee.

[3] But the remonstrant is not driven to rely upon the broad proposition just discussed. He advances a more narrow one based upon that portion of chapter 36 of the Public Acts of 1915, which provides that a license sold upon execution shall for its unexpired term be as valid in the hands of its purchaser as in the hands of the original licensee, "provided before such purchaser may avail himself of the benefit of such license, he shall comply with all the requirements of law relative to the procuring of an original license." His claim is that here, by implication at least, is a direction that an execution purchaser, and of a necessity therefore his assignee, must, if he would avail himself of any beneficial use of the purchased license, appear before the county commissioners in all respects as an original applicant, and be governed by all the statutory regulations concerning the granting of licenses to such applicants. As one of these regulations is the prohibition of the issuance of a license to sell at a place located within 200 feet of a church edifice, he says that it follows that an execution purchaser applicant comes within the operation of that prohibition.

He is, of course, correct in his statement that an assignee of an execution purchaser can stand in no better position as an applicant for leave to sell than would his assignor if he were making such application. If it be so that the law provides a special rule for the case of an execution purchaser so that he is made to occupy a different and less advantageous position when he seeks to utilize his purchase by qualifying as a seller from that occupied by voluntary assignees of licensed persons, then, without doubt, every owner under him of the license stands in no better position. The controlling question therefore is: Does our law make execution purchasers a class apart from all other purchasers, and subject them, when they seek to avail themselves of their purchases, to different and more stringent regulations than those to which all other purchasers are subjected?

In answering this question the particular provision of statute which alone is relied upon as accomplishing that result should be read in connection with the other provisions touching the same general subject, and such construction, consistent with the language used, given to it as will make a harmonious and consistent whole. In arriving at that construction, the evil sought to be avoided should be borne in mind.

The evil which our law governing transfers of license privileges seeks to avoid manifestly is the sale of spirituous and intoxicating

liquors by persons whose fitness to do so has not been passed upon and approved by the licensing authorities. Our policy in that regard is clearly indicated by our statutes. We insist that every would-be seller shall present his application for leave to sell to the county commissioners, and that they, after a formal hearing upon a prescribed notice, pass upon his fitness to exercise the desired privilege. This requirement extends to every one whether he be an original applicant or one desiring to sell as a substitute licensee.

When the applicant seeks to exercise the right which was originally given to another, a transfer of the license becomes necessary. That transfer is not accomplished by a purchase and assignment of the license. It is accomplished when, and only when, the county commissioners have signified their consent to the substitution of licensee. Chapter 148, P. A. 1915. Our statutes make it clear that the word "transfer," as used in them, refers not to the transaction as between individuals whereby the property interest passes, but to the transfer of the right to sell which follows the county commissioners' consent. It matters not whether the license, as representing an inchoate right to sell, was obtained by a third party through a voluntary assignment or upon execution sale. There is no transfer within the meaning of our statutes until the county commissioners have given their consent to the substitution of parties, and there is in either case one when that consent is given.

Bearing in mind that fact and also that chapter 282, the latest in the order of enactment of the license statutes, in unrestricted language exempts transfers from the operation of the prohibition against the grant of licenses for a place located within 200 feet of a church edifice, and also that no reasons are apparent for the making of a distinction between purchasers of different classes, it is reasonably manifest that the two statutory provisions should be read the one as prescribing the applicant's course of action, and the other the county commissioners' duty in passing upon his application when duly presented. By force of chapter 36 the applicant must proceed in the matter of application in all respects as an original applicant is required to do. By virtue of chapter 282 the county commissioners, in passing upon the application when thus presented, are to be governed by the regulations touching transfers.

[4, 5] The remonstrant's claim that the plaintiff's application was fraudulent is based largely upon his assumption of an alleged false position in asserting that he desired a transfer of Sullivan's license and in asking for such transfer when he was in no position to claim it. What we have said upon that subject disposes of that feature of the charge of fraud. The charge is also based in part

upon the fact that at the time the application was made the Yale Brewing Company had not in fact perfected its assignment to the applicant, although it was perfected prior to the hearing before the commissioners. Nowhere in the application or in the applicant's affidavit accompanying it is it said that the assignment had been made. The application was for a transfer of Sullivan's license to Davis, and nothing more. We discover no misrepresentation of fact by Davis, nor possibility of misunderstanding or misconception on the part of the commissioners as to any material matter involved in their decision. It does not appear but that the situation was fully understood by all, and it is of no practical importance whether or not the assignment to Davis was in form executed at the time of the application's date.

The superior court is advised to affirm the order of the county commissioners.

No costs in this court will be taxed in favor of either of the parties. The other Judges concurred.

(91 Conn. 692)

TURNER v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. APPEAL AND ERROR \S 704(2) — CORRECTION OF FINDING — MEMORANDUM OF DECISION.

The memorandum of decision, not being made a part of the finding, cannot be corrected on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2900, 2939, 2941.]

2. APPEAL AND ERROR \S 536 — RECORD — AGREED STATEMENT OF FACTS.

An agreed statement of facts, not being certified to by the trial court and made part of the record, has no place therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2402, 2403.]

3. APPEAL AND ERROR \S 656(3) — CORRECTION OF FINDING.

Appellant cannot have correction on appeal under the method of Gen. St. 1902, § 797, of a finding of the trial court, without having the evidence certified and made part of the record.

4. CARRIERS \S 12(1) — POWER TO REGULATE CHARGES.

Under Public Service Corporations Act (Pub. Acts 1911, c. 128) § 23, it is only after hearing on complaint and finding that the rates made by a Public Service Corporation are unreasonable that the Public Service Commission may disturb them, and determine and prescribe just and reasonable maximum rates and charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7, 15-20.]

5. CARRIERS \S 18(2) — RATES — APPEAL FROM ORDER — REVIEW BY COURT.

Under Public Service Corporations Act (Pub. Acts 1911, c. 128) § 29, providing for appeal from the Commission to the superior court, and section 31, as amended by Pub. Acts 1913, c. 225, providing that said court shall hear such appeal and examine the question of legality of the order and the propriety and expediency thereof in so far as it may properly have cognizance of the subject, the court may determine whether the Commission's order fixing maximum

rates, or declining to change the rates fixed by the company, is valid, by ascertaining whether the rate so fixed or left unchanged was reasonable; this being a judicial question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24.]

6. PUBLIC SERVICE COMMISSIONS §7—"REASONABLE RATE."

The reasonableness of a rate fixed by or for a public service corporation is to be determined after viewing its effect on the public as well as the company; the rate being unreasonable if so low as to be destructive of the company's property or if so high, either intrinsically or because discriminatory, as to be an unjust exaction from the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Rate.]

7. CARRIERS §13(2) — RATES — DISCRIMINATION.

In determining whether the rate of a carrier in one locality is, in view of its rates in other localities, discriminatory, depending on the localities being similarly situated and subject to like conditions, the element of distance is not necessarily a controlling factor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 22, 24.]

8. APPEAL AND ERROR §1010(1)—REVIEW—QUESTIONS OF FACT.

The facts found not supporting, much less requiring, the conclusion that a carrier's rate was excessive or discriminatory, the Supreme Court cannot disturb the trial court's adjudication sustaining the Public Service Commission's determination of reasonableness of the rate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981, 4024.]

Appeal from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Petition by John C. Turner and others against the Connecticut Company. From judgment of court, on appeal from Public Utilities Commission, petitioner Turner appeals. Affirmed.

Petition for a reduction in the rates of fare charged by the respondent between certain points on one of its lines running from Stamford to Norwalk, which rates were alleged to be unreasonable, brought to the Public Utilities Commission, who heard and denied the petition; and thence by appeal to the superior court; facts found and judgment rendered confirming the action of the Public Utilities Commission, from which the petitioner Turner appealed.

The Connecticut Company operates seven electric street car lines on its Stamford division which converge at Atlantic square in Stamford. Two of these lines run outside of Stamford, one to Sound Beach and one to Noroton, and five terminate at suburban points in Stamford. Passengers riding from Atlantic square to Noroton bridge, a distance of 2.33 miles, pay one five-cent fare, and another fare from that point to Noroton village and points beyond. Passengers riding from Atlantic square to Sound Beach and the five suburban lines pay one five-cent fare, and on three of these lines ride less than the distance from the square to Noroton bridge,

while on three they ride a greater distance, viz. to Springdale, 3.5 miles; to Sound Beach, 3.22 miles, and to Shippan Point, 2.79 miles. The New York and Stamford Railway Company operates an electric street car line which converges at said Atlantic square. Passengers riding by this line from the square to Cos Cob, another suburb of Stamford, pay one five-cent fare and ride 3.8 miles. Passengers on all of these lines may transfer at the square from one of these lines to any of the others. The village of Noroton was originally a part of Stamford, and in all of its associations is closely connected with Stamford. In point of healthfulness, natural beauty, and the character of its population it is a desirable place to live, and is in no particular inferior to Springdale or Cos Cob. Since the electric street car line was built through Noroton two houses have been built between the Noroton bridge turnout and St. Luke's Church, and 14 houses have been built west of and within one quarter of a mile of the Noroton bridge. Since the electric street car line was built to Springdale and the five-cent fare established between Springdale and Stamford, 170 houses have been built in Springdale, and its population has increased rapidly and largely.

On February 24, 1915, the appellant, together with nine other residents of Darien, petitioned the Public Utilities Commission—"to order a fare extension or 'lap over' so called, operative in both directions between the said Noroton river bridge and said St. Luke's Church, or to make such other adjustment of fares as may be necessary or advisable, so as to give a single five-cent rate or charge for each passenger between Atlantic square and St. Luke's Church."

The term "lap over" is one used in reference to electric street car lines to denote the distance which a passenger is allowed to ride beyond a given fare limit before he is required to pay another fare, or upon taking a car going in the opposite direction, the distance which he may ride before reaching a given fare limit at which he will be required to pay a fare.

The Stamford division is one of the poorest earning divisions in the company's system, and the Stamford portion of the Stamford-Norwalk line of the Connecticut Company's system is one of the best earning lines in this division. The establishment of the proposed lap over to St. Luke's Church would extend the first five-cent limit out of Stamford, and thereby to some extent decrease the net earnings of the Stamford division.

In December, 1914, by agreement the towns of Stamford and Darien paid \$2,500 on account of the cost of widening the said bridge over Noroton river and the Connecticut Company the balance of said cost, \$3,162, and in addition \$33,000 in making physical connection between its lines and Noroton river and providing other facilities for through traffic.

The Connecticut Company thereafter laid its tracks across the bridge and thus connected its tracks, and this was the last step to complete a continuous line of electric street tracks between New York and Boston.

The Commission found and held that the facts before them did not establish the unreasonableness of the present rate, and therefore denied the petition. The superior court adjudged that the action of the Commission was reasonable and proper, and confirmed it and dismissed the appeal.

William T. Andrews and Peter Dondlinger, both of Stamford, for appellant. Seth W. Baldwin, of New Haven, for appellee.

WHEELER, J. (after stating the facts as above). [1-3] The first seven assignments of error are assumed by the appellant to relate to the correction of the finding. In fact they relate to matters which are parts of the memorandum of decision. That is not made a part of the finding, so that its correction cannot be had. The cause is to be decided upon the facts found, not upon those contained in the memorandum of decision. Further, the agreed statements of facts which the appellant assumes to be a part of the record had no place in the record. They were not certified to by the trial court and made a part of the record. So far as we know, they were not necessarily before the trial court, and certainly were not necessarily the only facts in evidence. Counsel for the appellee say the appellant petitioner introduced oral testimony. Whether this is accurate or not, the appellant cannot secure the correction of the finding under the method of General Statutes, § 797, without having the evidence certified and made a part of the record. The assignments of error, aside from those relating to the correction of the finding, are varying ways of stating the single point that the trial court erred in holding that the action of the Commission was reasonable in finding and deciding that the present rates complained of were not unreasonable. The act regulating Public Service Corporations (Public Acts of 1911, c. 128) in section 23 provides that:

"Any ten patrons of any such company * * * may bring a written petition to the Commission alleging that the rates or charges made by such company * * * are unreasonable."

Thereupon, after hearing had, the Commission, if it finds such rates and charges to be unreasonable, may determine and prescribe just and reasonable maximum rates and charges to be thereafter made by such company, and said company shall not thereafter demand any rate or charge in excess of the maximum rate or charge so prescribed.

The limitation of rates to what are reasonable is the enactment in statutory form of an ancient rule of the common law. *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 743, 58 Atl. 332; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S.

362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. Ed. 229.

"To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

[4] The remedy for the enforcement of reasonable rates provided by our act was new in this jurisdiction. So long as the company establishes reasonable rates, these cannot be lowered by commission or court. When it fails in this duty the Public Utilities Commission is authorized to prescribe just and reasonable maximum rates. And its authority, under this act, may be invoked whenever the rates as fixed are either so high or so low as to be unreasonable. The Commission is an administrative one, with the delegated legislative function of fixing railway rates.

[5] A court may not be required to fix or regulate a tariff of rates for services to be rendered by a public service corporation, since this is a legislative function and may be conferred by law upon a specially designated ministerial body. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 499, 17 Sup. Ct. 896, 42 L. Ed. 243; *Janvrin, Petitioner*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319; *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 58 Atl. 332.

Section 29 of the act provides for an appeal to the superior court from any order of the Commission. And section 31, as amended by chapter 225 of the Public Acts of 1913, provides that:

"Said court shall hear such appeal and examine the question of the legality of the order * * * and the propriety and expediency of such order * * * in so far as said court may properly have cognizance of such subject."

Under this provision the court may hear and determine whether the order of the Commission fixing maximum rates, or its order declining to change the rate fixed by the company, is valid or not, by ascertaining whether the rate so fixed or the rate unchanged was reasonable or not. Such a question is a judicial one.

It has been so held in construing a like or similar provision in state and federal statute. *Janvrin, Petitioner*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319; *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 743, 58 Atl. 332; *Chicago, M. & St. P. Co. v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.

[6] The reasonableness of the rate is to

be determined after viewing its effect upon the public as well as upon the company. The rate may, on the one hand, be so low as to be destructive of the property of the company, or it may be so high as to be an unjust exaction from the public; either intrinsically so, or because it is discriminatory. In either instance the rate is unreasonable. What the court does in passing upon this question is to decide after hearing had in the course of a judicial proceeding, whether the rate complained of is so high or so low as to be unreasonable. No satisfactory definition of reasonable, as applied to rates, applicable to each case, can be made. Each must be decided upon its own facts and upon a consideration of many varying elements. A passenger rate upon a railway, to be reasonable, must be just to the public as well as to the railway. It should be large enough to provide for the passenger reasonable service and for the railway a reasonable return. The rate may be made high enough to cover the cost of service, the carrying charges, a reasonable sum for depreciation, and a fair return upon the investment. Less than this will not give the railway a reasonable rate. The action of a utilities commission which reduces a rate below this point unduly deprives the owners of their property without just compensation. If a rate exceeds this point to an appreciable degree and the Commission, upon proper application, declines to reduce it, the court would, in the absence of other controlling facts, reduce it to a reasonable point.

[7] If a rate in one locality is largely in excess of rates in other localities similarly situated and subject to like conditions, it is an unreasonable rate, for this would instance a discrimination against one locality in favor of another, or other localities. A discriminating rate of this character would be an unreasonable rate, since as a general principle the service of a public utility should be equal to all patrons similarly circumstanced. Baldwin, American Railroad Law, c. 25, § 6; Elliott on Railroads, § 1467; Union Pacific Ry. Co. v. Goodridge, 149 U. S. 680, 690, 13 Sup. Ct. 970, 37 L. Ed. 896; Western Union Telegraph Co. v. Call Pub. Co., 181 U. S. 92, 99, 21 Sup. Ct. 561, 45 L. Ed. 765; Portland Ry., L. & P. Co. v. Oregon R. R. Commission, 229 U. S. 397, 411, 33 Sup. Ct. 820, 57 L. Ed. 1248.

When we examine the finding before us we see that there are no facts found from which it could have been inferred as matter of fact by the trial court, or must be inferred by us as matter of law, that the ten-cent rate between Atlantic Square and Noroton is exorbitant or excessive. We have not before us the cost of service between these points, nor the fair share of the carrying charges and of depreciation, or what would be a fair return, for this distance. We are not given either the gross or net earnings, or the per car hour, or per car mile earnings. Nor are the conditions found to be similar. All that the

finding tells us is that the earnings are less on this system than on the defendant's other systems. This unrelated fact, by itself, does not help in ascertaining what, if any, profits there are from this rate, and whether they are excessive or exorbitant. The petitioner does not stand upon the intrinsic unreasonableness of this rate, but upon the claim that this rate is a discriminatory one, and results and has resulted to the serious disadvantage of the people of the village of Noroton.

It would seem, from the facts found, that an inference of fact may have been justified that Springdale had grown greatly and Noroton had not, because of the one community having had a five-cent rate to Atlantic square and the other not. But we cannot so conclude, unless there is a specific finding of that fact. Many other considerations may have operated or largely contributed to this result. We may assume that a five-cent rate would benefit Noroton and its public, for this is a self-evident fact. But we do not know what its effect would be upon the returns to the railway. It may be held to be a principle of traffic that a reduction of rates increases the volume of business, but no principle which we are at liberty to regard tells us in a given case what will be the extent of the increase, or what the effect upon the net returns. Chicago, etc., Ry. Co. v. Wellman, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. Ed. 176.

In determining the reasonableness of a rate we cannot leave out of the consideration the effect of the change of rate upon the railway return any more than we can that upon the public.

The petitioner's case reduces itself to this: That the schedule of rates upon the Stamford division gives a materially longer ride for a single five-cent fare on some of the lines converging at Atlantic square than it does on the Noroton line. In a similar situation the court say:

"The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service. * * * The discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable." Portland Ry. L. & P. Co. v. Oregon R. Commission, 229 U. S. 397, 411, 33 Sup. Ct. 820, 57 L. Ed. 1248.

The petitioner is accurate in his claim as to the lines to Springdale, Sound Beach, and Shippan's Point, but as to the other three lines converging at the square the single five-cent fare on the Noroton line gives the longer ride. And the distance covered by the single five-cent fare on the Noroton line is practically the average distance the single fare will carry a passenger on all the lines of the system converging at the square.

The element of distance may be a controlling factor in a case of discrimination, but not invariably so. As a rule, other factors

are necessarily relevant before the conclusion of a discrimination in rates can be made. Facts which affect the question of traffic profit are factors to be considered. It may be that a divergence in rates between communities similarly conditioned would be discriminatory irrespective of the element of traffic profit. That situation we leave open until it presents itself. And the identity or similarity of conditions are also important factors in determining whether a rate is discriminatory.

[8] The foundation of the petitioner's claim of a discrimination is that the defendant charges "Noroton passengers twice the fare that it charges to other passengers similarly circumstanced." The finding does not support this. The judgment must be controlled by the finding. And upon that we cannot hold that there was any undue preference or advantage in the other rates, or that the trial court erred in concluding that the rate complained of was not reasonable, for the facts found do not support, much less require, the conclusion that this rate is either exorbitant, excessive, or discriminatory.

There is no error. The other Judges concurred.

(91 Conn. 727)

BULKELEY v. BROTHERHOOD ACCIDENT CO.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. INSURANCE §339 — ACCIDENT INSURANCE — CHANGE OF OCCUPATION.

The act of setting off a single firework is not a change of occupation from that of gardener to that of user or handler of fireworks, within the provision of an accident policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 879.]

2. INSURANCE §461(1) — ACCIDENT INSURANCE — VOLUNTARY EXPOSURE TO DANGER.

Evidence that the bombs were ordinarily safe, that from one to two minutes usually elapsed between the lighting of the fuse and the explosion of the charge, which threw the bomb upwards, and that insured, his employer, and members of the family had set off a great many of them on other occasions, is enough to show that the act of setting off in the usual way a bomb, a firework, was not a voluntary exposure to unnecessary danger, within the provision of an accident policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1180.]

3. EVIDENCE §126(2) — DECLARATIONS — MANNER OF ACCIDENT.

Relative to the question whether insured, fatally injured by explosion of a bomb which he was setting off, voluntarily exposed himself to unnecessary danger, within the provision of his accident policy, his declarations while on the way to the hospital, in answer to the question as to what happened, that it went off sooner than he expected, and something about a quick-burning fuse, all that witness could remember, are relevant and admissible, and make it more probable that the accident occurred because of a

quick-firing fuse than from attempting to set off the bomb in some unusual way.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 373.]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Morgan G. Bulkeley, administrator, against the Brotherhood Accident Company on a policy of health and accident insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff's decedent, Oscar L. Johnson, a gardener in the plaintiff's employ, was injured by the explosion of a firework called a bomb, intended to be fired by placing it in a mortar and lighting a fuse. Some of these fireworks, left over from the previous Fourth of July, were found about the premises, and Johnson was seen to take a bomb and mortar from plaintiff's garage toward an open place near by. Nobody witnessed the accident, but an explosion was heard, and Johnson was observed rolling on the grass trying to extinguish a fire burning in the clothing about his neck and chest. Two days afterwards Johnson died in consequence of burns and wounds received from the explosion of the bomb. While being taken to the hospital Johnson was asked, "What happened?" and said that it went off sooner than he expected, and something about a quick-burning fuse.

The policy exempts the defendant from liability for injuries caused by "voluntary exposure to unnecessary danger," and provides that in case of injury after the insured has "changed his occupation to one classified by the company as one more hazardous than that herein stated" the company's liability shall be only for the amount which the premium would have purchased at the rate fixed by the company for such more hazardous occupation.

The complaint alleges that the insured duly fulfilled all the conditions of the insurance on his part, and that the death was not from any cause excepted in the policy. The answer leaves the plaintiff to his proof as to the facts, denies that the assured fulfilled the conditions of the insurance, alleges that the injury was caused by voluntary exposure to unnecessary danger, and, as an alternative defense, that the assured had changed his occupation, and was engaged in using or handling fireworks when injured, whereby the company's liability was reduced to \$200, in respect of which a tender is pleaded.

Stewart N. Dunning, of Hartford, for appellant. Warren B. Johnson, of Hartford, for appellee.

BEACH, J. (after stating the facts as above). [1, 2] It is too plain for discussion that the act of setting off a single firework

is not a change of occupation from that of gardener to that of a user or handler of fireworks.

The other ground of defense, that the injury was caused by voluntary exposure to unnecessary danger, rests upon the determination of a motion to correct the finding by erasing therefrom the finding that the death was not from any cause excepted in the policy, and by substituting therefor a proposed finding that the plaintiff offered no evidence to show that decedent did not voluntarily expose himself to unnecessary danger. It is, however, unnecessary to follow the defendant's argument any further, because the finding of the trial court is supported by the evidence, and the defense of voluntary exposure to unnecessary danger is disposed of on the merits in the plaintiff's favor. There was evidence tending to show that the bombs were ordinarily safe, that from one to two minutes usually elapsed between the lighting of the fuse and the explosion of the charge which threw the bomb upward, and that the decedent, his employer, and members of the employer's family had set off great numbers of them at Independence Day celebrations. This was enough to show that the act of setting off one of these bombs in the usual way was not a voluntary exposure to unnecessary danger.

[3] Then the question remained whether Johnson attempted to set the bomb off in some unusual way, or in some other way voluntarily exposed himself to unnecessary danger in setting it off. On this point his declarations made while being taken to the hospital are relevant and admissible, and they make it more probable than otherwise that the accident occurred because of a defective quick-firing fuse. Defendant excepted to the admission of these declarations, and now makes the claim that they were too vague and indefinite to be admitted in evidence. This, however, was the fault of the witness to whom the declarations were made, who was obliged to give the substance of what was said because he could not remember the words. Taking these disconnected phrases as expressing the substance of Johnson's declarations, there is no difficulty whatever in supporting the finding of the trial court that the death was not from any cause excepted in the policy.

There is no error. The other Judges concurred.

(257 Pa. 76)

SCHWEHM v. CHELTEN TRUST CO.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. BUILDING AND LOAN ASSOCIATIONS § 28(4) — AUTHORITY OF PRESIDENT OF LOAN SOCIETY—MISAPPROPRIATION—LIABILITY.

The president of a loan society, whom the by-laws made the chief executive officer and ac-

tive manager, was authorized to accept money paid to the society by cash or by check to its order, and his misappropriation of funds so paid was the loss of the society.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 29.]

2. BANKS AND BANKING § 100(2) — PRESIDENT OF LOAN SOCIETY — INDORSEMENT OF BILLS OR NOTES.

Where the authority of a bank president comes from the directors, he may indorse bills or notes payable to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 259.]

3. BANKS AND BANKING § 138—DEPOSITS—PAYMENT ON CHECK—LIABILITY TO DEPOSITOR.

Where a depositor drew his check upon defendant bank to the order of a loan society, whose president and chief executive officer indorsed it and misappropriated the proceeds, the bank was not liable, as the proceeds were paid to the society in accordance with the terms of the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 393-405.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for a bank deposit by Harry J. Schwehm against the Cheltenham Trust Company. Verdict for plaintiff for \$5,294.50, and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Chas. C. Norris, Jr., of Philadelphia, for appellant. Julius C. Levi and David Mandel, Jr., both of Philadelphia, for appellee.

POTTER, J. The plaintiff in this case, who was a depositor with the Cheltenham Trust Company, drew his check upon that institution for the sum of \$5,002, payable to the order of Federal Loan Society. The check was indorsed, "Federal Loan Society, H. W. Stoll, President, Jos. R. Friedman," and was cashed by the Franklin Trust Company, and collected by the latter from defendant, through the Corn Exchange National Bank, and charged by defendant against plaintiff's deposit account.

[1] Plaintiff claimed that Stoll, who was president of the Federal Loan Society, had no authority to indorse the check in the name of the society, that his indorsement did not transfer title to it, and that defendant's action in paying it, and charging it against his account, was not binding upon him. He therefore brought this suit to recover the amount so charged. At the trial, a request for binding instructions in favor of defendant was refused, and the jury were instructed to render a verdict for plaintiff for the full amount of the claim. From the judgment thereon entered, defendant has appealed. Its counsel contend that under the by-laws of the Federal Loan Society, the president was constituted the general manager of the business

of the corporation, and this necessarily gave him the power to indorse its commercial paper. It appears from the record that the by-laws were not silent as to the president's authority, but they provided that he should be the chief executive officer of the company and should "have general and active management of the business of the company," should "have general supervision and direction of all the other officers of the company," and see that their duties were properly performed, should make annually to the board of directors a report of the operations of the company for the fiscal year, and from time to time report to them such matters as the interests of the company might require to be brought to their notice, and should "have the general powers and supervision and management usually vested in the office of the president of a corporation." Broader powers in the management of the business could hardly have been bestowed. The president was not only authorized to act for the company, but was to see that all other officers discharged their duties. Counsel for plaintiff, however, contend that the power of the president was limited by two provisions of the by-laws. The first directs the treasurer to "deposit all money and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the board of directors." This provision, however, only relates to the duties of the treasurer, who is expressly placed under the "general supervision and direction" of the president. It puts no limitation on the powers conferred on the president himself. The other provision is that "all checks, drafts or orders for the payment shall be signed by the treasurer and countersigned by the president." This refers only to instruments for the payment of money by the corporation, not to the indorsement or transfer of instruments of which the corporation is not the maker, but the payee. It does not limit the power of the president as to the latter.

[2, 3] Under the by-laws, as noted above, the president was made the "chief executive officer" and the general and active manager of the business of the company. He had control over every other officer of the company, and power to direct the disbursement of its funds. This authority was ample to authorize him to accept money paid to the company, whether in cash or in the form of a check payable to the order of the company. If he misappropriated funds paid in good faith to him as the representative of the company, the loss must be that of the corporation that authorized him to act, and held him out to the public as its chief officer and general agent. As the power was delegated to the president in the by-laws, "here is no question here, as to acquiescence, by the board of directors. No action upon the part of the directors was necessary. But

even where his authority comes from the directors, the president of a bank may indorse bills or notes payable to it. And it would seem that he has an implied power to indorse and transfer its negotiable paper. 1 Daniels, Neg. Inst. § 394.

It should be remembered that in the present case, in so far as the record shows, the validity of the indorsement was not questioned by the Federal Loan Society, the payee of the check. It is the drawer of the check who complains. It does not appear that the corporation has denied that it was bound by the indorsement of its president, or that it has refused to carry out the contract for which the check constituted the consideration. What the transaction was, is not very clear, but apparently it was a purchase of stock. Plaintiff testified that he had not received the stock, but did not say that the corporation had refused to issue it to him, nor did he say that he had made demand for it. Under the facts shown, we are clearly of opinion that payment of the check to the president of the company was payment to the corporation.

The fifth and sixth assignments of error are sustained. The judgment is reversed, and is here entered for defendant.

(257 Pa. 17)

O'MALLEY et al. v. PUBLIC LEDGER CO.
(Supreme Court of Pennsylvania. March 5, 1917.)

1. MUNICIPAL CORPORATIONS §706(4)—EVIDENCE OF OWNERSHIP—INJURIES ON STREET.

In an action for personal injuries when struck by a motor truck alleged to be the property of defendant company, where it appeared that defendant's name was painted upon the car containing bundles of newspapers, testimony of a policeman that shortly before the accident he saw a car of such description delivering bundles of newspapers, and knew it because he had often seen it in the neighborhood delivering newspapers, and that in the particular case his attention had been attracted to the driver's hurry in tossing papers from the car, was admissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. APPEAL AND ERROR §960—JURY §149—QUESTION FOR JURY—WITHDRAWAL OF JURY.

In such action, where plaintiff husband testified as to conversation on day "when we were awarded the verdict" in former trial, where there was no effort to lead him to the objectionable remark, and where the jury were instructed to disregard it, the refusal of a continuance was within trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Jury, Cent. Dig. §§ 635-637.]

3. MUNICIPAL CORPORATIONS §706(6)—USE OF STREET—PERSONAL INJURY—QUESTION FOR JURY.

In action for personal injury when struck by a motor truck, alleged to belong to defendant newspaper company, *held*, on the evidence, that the ownership of the car and its operation in the company's service was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injury by Catharine O'Malley and John O'Malley against the Public Ledger Company. Verdict for plaintiff John O'Malley for \$750, and for Catharine O'Malley for \$3,000, reduced by the court to \$500 and \$2,000, respectively, with judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHISKER, and FRAZER, JJ.

Robert P. Shick and Winfield W. Crawford, both of Philadelphia, for appellant. Bertram D. Rearick, of Philadelphia, for appellees.

MOSCHISKER, J. John O'Malley and Catharine, his wife, sued to recover for personal injuries to the latter; verdicts were rendered in their favor, upon which judgments were entered; the defendant has appealed.

On January 8, 1915, between 5 and 5:30 a. m., Mrs. O'Malley was struck by a southward-bound automobile while crossing Twentieth street, in the city of Philadelphia, at the south side of McClellan street, or about 150 feet from Moore street, the next thoroughfare to the north. The testimony relied upon by the plaintiffs, when viewed in the light most favorable to them, is sufficient to sustain the following material findings: Just before leaving the sidewalk, Mrs. O'Malley looked up and down Twentieth street and, seeing no vehicles approaching from either direction, she started slowly to cross eastward; in the center of that thoroughfare there is a single car track, and, just before she reached the first rail of this track, she was struck by the automobile, which had turned southward into Twentieth street from Moore street; the machine was being driven at from 40 to 50 miles an hour, and came suddenly upon Mrs. O'Malley, without warning of any kind; she was knocked down, and subsequently, as a result of the accident, suffered a miscarriage and other injurious results; finally, the motor in question was owned by the Public Ledger Company and, at the time of the injury to Mrs. O'Malley, it was being operated in the defendant's service.

There are numerous assignments of error; but only a few of them require serious consideration. To begin with, we have looked at the medical testimony with care, and feel that it is sufficient to connect Mrs. O'Malley's impaired physical condition with the accident, and to justify the conclusion that her injuries followed as a result thereof.

[1] We see no error in the admission of the testimony of the policeman, Jordan. He recalled the date of the occurrence under investigation; and the fact that his memory in this respect was aided by the circumstance

that he had held a conversation with another officer concerning the accident, right after it happened, would not militate against the admission of his testimony. It may be well to note, however, that the details of this conversation were not allowed in evidence. Other witnesses who saw the accident had already testified that the car which injured Mrs. O'Malley was a small machine with the name of the Public Ledger painted thereon, containing bundles of newspapers. The policeman was permitted to state that, very shortly after the time fixed by the former witnesses, he saw an automobile of like description delivering bundles of newspapers about 4½ squares from the place of the accident; that he knew the car, having seen it in the neighborhood morning after morning, on a like errand; and that, on this particular occasion, the driver attracted attention by his seeming hurry, when he tossed out papers upon the corner where the witness was standing, without stopping his machine. Although this testimony, by itself, would have but little weight, yet, in connection with other evidence in the case, it was circumstantially relevant to identify the automobile which caused the damage as a vehicle belonging to and, at the time, in the service of the defendant. *Bowling v. Roberts*, 235 Pa. 89, 33 Atl. 600; *Hershinger v. Penna. R. R. Co.*, 25 Pa. Super. Ct. 147.

[2] While the trial judge might have withdrawn a juror because of the unfortunate remark made by Mr. O'Malley when upon the stand, to the effect that he had a conversation with another man on the day "when we were awarded the verdict" (evidently referring to the verdict in a former trial of the same cause), yet we cannot say the refusal so to do constitutes reversible error. The trial had been on for three days; there was no attempt on the part of counsel for the plaintiff to obtain an unfair advantage by leading on the witness to the objectionable remark. On the contrary, it seems to have slipped out without any premeditated purpose, and, when this occurred, the judge at once warned the jurors entirely to disregard the incident; moreover, at the end of his charge, he repeated these instructions. In conclusion, we do not conceive it at all probable the remark in question had any effect prejudicial to the defendant; for if the jurors understood from it that there had been a former finding in favor of the plaintiffs, it must be assumed they likewise realized that this verdict had been set aside by the court.

[3] No part of the charge is assigned for error, and a careful reading thereof shows that all the testimony was properly and correctly submitted to the jurors, not only to find the relevant facts, but to draw their own inferences therefrom in determining the issues involved. Of course, there was testimony produced by the defendant militating against the evidence depended upon by the

plaintiffs to show the former's ownership of the car and that the machine was being operated in its service at the time of the accident; but this testimony was mostly oral, and hence it was for the jury to pass upon.

The assignments of error are all overruled, and the judgments affirmed.

(257 Pa. 25)

SCOTT v. AMERICAN EXPRESS CO.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. WITNESSES — 379(7)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

The credibility of a witness may be impeached by his previous statements inconsistent with or contradictory to his testimony, including statements made in pleadings, where the omission in the inconsistent statement occurred when the occasion called upon him for disclosure.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1251.]

2. WITNESSES — 387—IMPEACHMENT—INCONSISTENT STATEMENTS—SWORN PLEADINGS.

In an action against an express company for injury to an employé from the defective condition of the brakes and steering apparatus of its motor truck, defended on ground that the accident was caused by the intoxication of the driver, a fellow servant, where defendant's superintendent testified that he visited the driver after the accident, and he then showed signs of having been drinking, his cross-examination as to whether he had not sworn to answers in the driver's action in another court arising out of same accident which said nothing about the driver's intoxication, was erroneous, where under the rules of that court the facts constituting the defense were not required to be stated in the answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232.]

3. APPEAL AND ERROR — 232(2)—ADMISSIBILITY OF EVIDENCE—OBJECTION.

Where the record was not clear as to the ground upon which objection to the cross-examination of a witness was based, the rule that on appeal a party complaining of the admission of evidence in the court below will be confined to the specific objection there made, was not applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431.]

4. APPEAL AND ERROR — 1004(1)—AMOUNT OF VERDICT—REVIEW.

The amount of a verdict will be reviewed by the Supreme Court under authority of Act May 20, 1891 (P. L. 101), only when so grossly excessive as to shock the sense of justice, and to show a clear abuse of the lower court's discretion in refusing to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948.]

5. DEATH — 99(3)—EXCESSIVE DAMAGES.

Verdicts of \$1,717 awarded the father of injured minor employé, and \$12,540 awarded the estate of the minor, were not excessive, where he suffered a compound fracture of both legs above the knees, lacerations and bruises of the scalp, arms and back, underwent two operations, and lived four months after the accident.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal in-

juries by Elizabeth Scott, administratrix of the estate of Joseph P. Scott, deceased, and Elizabeth Scott, administratrix of the estate of Edward A. Scott, deceased, against the American Express Company. Verdict for plaintiff as administratrix of the estate of Edward A. Scott for \$1,717, and as administratrix of her deceased son, Joseph P. Scott, for \$12,540, and judgment thereon, motion for new trial denied, and defendant appeals. Reversed with a new venire.

Plaintiff's injuries consisted of compound fractures of both legs above the knees, lacerations and bruises of the scalp, arms and back. Two unsuccessful operations were performed to secure unions of the fractures of the legs. Plaintiff suffered extreme pain except when under the influence of opiates, and died as a result of such injuries over four months after the accident.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

John Lewis Evans, John G. Johnson, and Thomas De Witt Cuyler, all of Philadelphia, for appellant. Francis M. McAdams and William H. Wilson, both of Philadelphia, for appellee.

FRAZER, J. This action was brought by Joseph P. Scott, a minor, and Edward A. Scott, his father, to recover damages for injuries sustained by the former, as a result of alleged negligence of defendant in permitting the brakes and steering apparatus on a motor truck, on which the minor was riding in the discharge of his duties, to become out of order and remain in a state of disrepair, which resulted in the machine becoming unmanageable in descending a street with some grade, and striking a telephone pole located along the highway. Joseph P. Scott died as a result of his injuries, and, upon the subsequent death of his father, Elizabeth Scott prosecuted the action to judgment as administratrix of their estates.

The deceased minor was employed by defendant to ride on its trucks and assist drivers in handling and guarding express packages. The defense was that the accident was caused by the negligence of the driver, who, according to the evidence, had been drinking and was in an intoxicated condition at the time; which fact was known to Young Scott. The trial judge submitted the case to the jury, in a charge to which no complaint is made, and there was a verdict on behalf of the father's estate for \$1,717, and on behalf of the estate of the minor for \$12,540. A motion for a new trial was dismissed by the court below, and defendant appealed.

We deem it unnecessary to refer in detail to the circumstances of the accident, since the only questions argued before this court were as to the correctness of the action of the court in admitting certain evidence to

impeach the credibility of one of defendant's witnesses, and whether or not the verdict on behalf of the minor's estate was excessive.

[1, 2] Superintendent *Julier*, of defendant company, testified to visiting the hospital within two hours after the accident, and, in reply to a question by his own attorney, stated he saw *Carey*, the driver, at that time and his breath smelled as if he had been drinking. On cross-examination by plaintiff's counsel he was asked whether he had not sworn to and signed answers in actions by the driver and another person against defendant in the municipal court involving the same accident. Upon objection being made, counsel for plaintiff stated he wished to test the credibility of the witness, whereupon the objection was overruled. The witness then admitted he had signed and sworn to the papers, and that they contained no statement to the effect that the driver had been drinking, or was intoxicated. Defendant contends this testimony was improperly admitted and was extremely prejudicial to it, owing to the fact that the jury as laymen were likely to place undue weight on the omission, whereas, in fact, such omission was unimportant, and the statement unnecessary as a part of the pleadings in the case.

The rule is well settled that the credibility of a witness may be impeached by showing previously made statements inconsistent with, or contradictory to, his present testimony, and this includes inconsistent statements made in pleadings in the causes. *Henry's Penna. Trial Evidence*, § 65, and cases cited; *Floyd v. Kulp Lumber Co.*, 222 Pa. 257, 71 Atl. 13; 2 *Wigmore on Evidence*, § 1066. To constitute grounds for discrediting a witness, however, the omission must be made at a time when the occasion was such that he was called upon to make the disclosure. It is only where the witness on a previous occasion was under some duty to speak the whole truth concerning the matter about which he now testifies that impeachment becomes permissible by showing an omission to state certain material facts included in his testimony. *Royal Insurance Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622; *Huston's Estate*, 167 Pa. 217, 31 Atl. 553. Consequently, in considering the competency of the evidence offered for the purpose of impeaching the witness, the scope of the answers filed in the municipal court of Philadelphia should be considered. Rule 7 of that court provides that an answer shall contain an admission or denial of each fact averred in the statement of claim, and that all facts not denied by defendant, or of which he does not aver himself to be ignorant, shall be deemed to be admitted. This rule does not require defendant to state the facts constituting his defense, but merely to either admit or deny those averred in the statement of claim. We have no knowledge of the contents of the statements of claim referred to, as they are not printed in either paper book, and nowhere in

the record does it appear that the question of intoxication was raised in the declaration in either case. The answers in questions admit the happening of the accident, but deny that either the brakes or steering apparatus were defective or out of order, or that the accident was the consequence of the failure of these parts of the truck to properly work, or of anything else for which defendant was responsible. No necessity appears for the assertion or denial of the charge that the driver had been drinking previous to the happening of the accident.

The formal pleadings in a case are drawn by attorneys in technical language, and contain only such averments of facts as in the opinion of the attorneys are material to make out a *prima facie* case. They, therefore, do not purport to be a complete history or recital of all the facts of the transaction, and no unfavorable inference should be drawn from the failure to include details which are the natural and usual parts of the proof, rather than of the pleadings in the case. For these reasons it was error to permit the use of the answers, filed in the municipal court cases, in attacking the credibility of the witness.

[3] Plaintiff claims the evidence was objected to solely on the ground that it should have been introduced as a part of plaintiff's case; that this objection conceded its relevancy, and, under the familiar rule that a party complaining on appeal of the admission of evidence, in the court below, will be confined to the specific objection there made. *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410; *Roebbling's Sons Co. v. American Amusement & Construction Co.*, 231 Pa. 261, 80 Atl. 647. An examination of the record fails to convince us that this rule should be applied in the present case. When the papers were handed to the witness *Julier*, defendant's counsel made the following objection: "I object to any evidence in regard to these papers, unless it is introduced as part of plaintiff's case." The trial judge then said: "It goes to the credibility of the witness, I understand. Is that the purpose?" Plaintiff's counsel replied: "That is the purpose entirely." The court thereupon overruled the objection, but no exception was taken to the ruling at this point. After a preliminary examination of the witness the record shows the following:

"Q. In those affidavits you didn't say a word, did you, as to *Carey* [the driver] being drunk or as to having a smell of intoxicating liquor on him? (Objected to by counsel for defendant. Objection overruled; exception to defendant.) A. No."

While the objection first made relates to the order of the admission of the evidence, the comment of the court and counsel for plaintiff clearly indicate the evidence was offered for the sole purpose of testing the credibility of the witness, and the general objection following that, upon which the exception was

founded, may well have been based upon that ground. It is sufficient to say that the record is not clear or specific on this point, and in that case the rule invoked by appellee will not be applied. *Kuhn v. Ligonier Valley R. R. Co.*, 255 Pa. 445, 100 Atl. 142. It follows that the first assignment of error must be sustained.

[4, 5] The other question involved is whether or not the damages awarded are excessive, or whether the court below abused its discretion in refusing to cut down the verdict, or allow a new trial. Since the passage of Act May 20, 1891 (P. L. 101), giving this court power to set aside verdicts deemed to be excessive, we have repeatedly said that the question of the amount of the verdict would be reviewed only in cases where so grossly excessive as to shock our sense of justice, and where the impropriety of allowing a verdict to stand is so manifest as to show a clear abuse of discretion on the part of the court below in refusing to set it aside. *Quigley v. Penna. R. R. Co.*, 210 Pa. 162, 59 Atl. 958; *Reed v. Pittsburg, Carnegie & Western R. R.*, 210 Pa. 211, 59 Atl. 1067; *Dunlap v. Pittsburg, Harmony, Butler & New Castle Ry. Co.*, 247 Pa. 230, 93 Atl. 276. In view of the nature of the injury, the pain and suffering endured, and all the circumstances of the case, it cannot be said the verdict in this case is so excessive as to warrant our interference upon that ground.

The judgment is reversed with a new venire.

(257 Pa. 1)

THOENEBE et al. v. MOSBY et al.

(Supreme Court of Pennsylvania. Feb. 26, 1917.)

NUISANCE §3(9)—DANCE HALL—CHARACTER OF NEIGHBORHOOD.

A bill in equity to enjoin dancing in a hall in a neighborhood not strictly residential was properly dismissed, where it appeared that the colored persons attending the dances conducted themselves in an orderly manner, and made no more noise than was usual on such occasions, though after the dancing, which usually closed at 12 o'clock, there was considerable noise in the street on departing, as that could be satisfactorily controlled by the police.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 20-22.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by W. Herman Thoenebe and others against Jerome Mosby and John Foreman, trading as Mosby & Foreman, and Joseph M. Thomas, trading as Charles J. Thomas Sons. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Bill in equity for an injunction. The facts appear in the following opinion by Bregy, P. J., in the court of common pleas:

This is a bill alleging that the defendants are maintaining a nuisance at the hall, 1512 to 1520 North Thirteenth street.

(1) The plaintiffs reside on Thirteenth street between Jefferson and Oxford streets.

(2) The defendants Mosby and Foreman are lessees of a hall on Thirteenth street between Jefferson and Oxford streets, where they have a dancing school. The defendant Thomas is the owner of the building.

(3) On Monday, Thursday, and Saturday nights Mosby and Foreman, who rent the hall on the third floor of the stable building known as Thomas' stable, have dancing parties that begin at 9 o'clock and continue till 12 o'clock. On Wednesday night they teach dancing from 8:30 o'clock to 10:45 o'clock. On Tuesday and Friday nights the hall is not occupied by the dancing school in any way, but the lessees sublet it (with the consent of the owner, Mr. Thomas) for concerts, balls, and so on as they can obtain a tenant. During the 15 months the defendants have occupied the hall they have rented it for the above purposes 14 times.

(4) On Monday, Thursday, and Saturday nights, the music for the dancing parties begins at 9 o'clock and continues till 11:50, when it stops and the patrons leave—the hall being emptied by 12 o'clock. On Wednesday night, the teaching night, the school begins at 8:30 and closes at 10:45. On the occasions that the hall has been rented out for different entertainments, they have occupied the hall till 2 o'clock a. m.

(5) The music at the dancing parties consists of five pieces, viz.: Piano, violin, cornet, trombone, and trap drum. On Wednesday nights the music is by the piano only. The same five pieces play at the balls or entertainments when the place is rented.

(6) When the music continues after 11 o'clock it is muffled to subdue its noise, and so continues till the audience leaves.

(7) The hall here alluded to is on the third floor of a large public stable building that has been so occupied for over 40 years. During the many years of the existence of this stable it has been occupied as such, both for the stabling of private teams and the hiring of horses and carriages to the public. The hall on the third floor has for over 30 years been rented out as a dancing school, for parties, concerts, and for different kinds of public meetings, political and otherwise.

(8) The neighborhood is no longer a strictly residential one. This one square on Thirteenth street between Jefferson and Oxford has in addition to the large stable already mentioned quite a number of business places. From the north side of Jefferson street to the south side of Oxford street, there is on one side a large furniture manufactory, a barber shop, a store, a tailor shop, a china decorating store, and an empty store at the corner; on the other side there is a saloon, tailor shop, a wall paper establishment, a butcher shop, and other stores. On the south side of Jefferson street at Thirteenth street there is a grocery store at one corner and a drug store at the other; and on the north side of Oxford, a grocery store at one corner and an insurance office at the other.

(9) The persons attending the dances and entertainments heretofore spoken of have behaved themselves in a proper way in the hall, and no misbehavior there has been proved or, in fact, alleged against them.

(10) The patrons of the hall are colored people.

(11) When the audience disperses there is on the street the noises of these persons talking to each other, saying good-bye and the calling to a friend to wait, etc.

(12) At the dancing parties the attendance is from 80 to 100; at the times the hall is rented sometimes there are as many as 400 there.

(13) The occupants of four houses on Thirteenth street complain that they are annoyed by the music in the hall and by the noise in

the street when the patrons leave. Very many more say they are not annoyed and have no complaint to make.

(14) Within the last few years the immediate neighborhood, but not this street, has become tenanted by a large number of colored people.

Conclusions of Law.

The plaintiffs seek to have the defendants close the hall at about 10 o'clock, complaining that the continuation of the music after that hour and the dispersal of the audience and its attendant noise are a nuisance that annoys them. The complaint raises the question as to what hour a dancing school, party, concert, or ball should close its doors. The answer must depend upon the neighborhood, and the facts of each particular case, as there can be no general rule on the subject. Considering the fact that I have found this not to be a strictly residential neighborhood, but one that has changed into a partly business one, I do not consider it unreasonable to keep open the dancing school till 12 o'clock. The hours of entertainment are not what they used to be. Everything is later, and, as times change, we must change our habits with them. Everything has been done by the proprietors of the school to lessen the sound of the music after 11 o'clock, and I see no reason to interfere with the dancing school.

As to the parties or balls that are held on other evenings, while not very many in number, another question presents itself. Considering the neighborhood and the admitted fact that on an average of once a month an entertainment of some kind is given which continues till 2 o'clock in the morning, is it proper to issue an injunction? This question is not without difficulty. That it is an annoyance to the plaintiffs to have their sleep broken by these gatherings is undoubtedly true. Those who live in cities must take what goes with it, however. Those who live in business neighborhoods cannot expect or demand the quiet of the suburbs.

As the neighborhood changes they must take the consequences. If it changes for the worse and personal discomfort follows, that must be submitted to. The running of street cars and the noise of the automobiles all night long are among the few annoyances that all sections of the city are now subjected to, but would some years ago have been considered a nuisance. Applying the principle that an injunction should not issue in doubtful cases, I would not issue one here.

There remains only the other question, viz.: Can the bill prevail because of the noise in the street after the entertainments are dismissed? As I have found that the defendants' entertainments bring together an assemblage of respectable, well-behaved people, and that the noises in the street are not of a kind that are induced by or encouraged by the defendants' parties, I see no reason for a court of equity to act. This is a matter for the police to see to. We would not hesitate to enjoin the gathering of disorderly, dissolute, drunken, or depraved persons, whose coming together must necessarily annoy the residents of nearby houses, but the saying of parting words by respectable people and the calling to friends as they leave the hall is a matter for the police to regulate, rather than for a court to dispose of by injunction.

The court dismissed the bill. Plaintiffs appealed. Error assigned, *inter alia*, was the decree of the court.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Ormond Rambo and Frank H. Warner, both of Philadelphia, for appellants. J. H. Shoemaker, of Philadelphia, for appellees.

PER CURIAM. This bill was filed to enjoin dancing and music in a certain hall in the city of Philadelphia. That it was properly dismissed appears by the facts found and legal conclusions reached by the learned president judge of the court below, and, on them, the decree is affirmed at the costs of appellants.

(257 Pa. 159)

COMMONWEALTH ex rel. BROWN, Atty. Gen., v. SCHWARTZ.

(Supreme Court of Pennsylvania. March 12, 1917.)

QUO WARRANTO ~~60~~—JUDGMENT OF OUSTER—JUSTICE OF THE PEACE.

A judgment of ouster in quo warranto proceedings to test the right of a justice of the peace to hold office in a borough was properly entered, where it appeared that respondent had been defeated at an election under which he claimed his right to the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 71.]

Appeal from Court of Common Pleas, Lackawanna County.

Quo warranto by the Commonwealth, on relation of Francis Shunk Brown, Attorney General, against Frank Berger and Phillip Schwartz, to test the right of the last defendant to act as justice of the peace of the borough of Old Forge. Judgment for defendant Berger, and writ dismissed as to him, and judgment of ouster against defendant Schwartz, and he appeals. Affirmed.

It appears by the record that an election to fill vacancies in the office of justice of the peace of Old Forge borough was held in November, 1915, at which time the following candidates received the number of votes set out after their names: E. J. Garvin, 819 votes; Frank Berger, 808 votes; Fred Rooney, 806 votes; J. J. Chelland, 691 votes; Phillip Schwartz, 641 votes. It appeared also that commissions were thereafter issued to Frank Berger and Phillip Schwartz as justices of the peace. When the case came to trial it was agreed that it should be heard by the court without a jury, and after such hearing the court found the following facts and conclusions of law:

Facts.

(1) The territory constituting the borough of Old Forge, before the incorporation of the borough, had two justices of the peace.

(2) The borough was incorporated on May 2, 1899.

(3) An attempt was made at the February election of 1899 to secure a vote for an increase of two justices in the township of Old Forge. Notices were posted as required by the act of assembly, and there was a vote actually taken on the question of increase. There was no return of the vote made to the office of the clerk

of the court, nor the executive department of Harrisburg. Nor is there any evidence whatever in this case as to whether the vote was in favor or against an increase. The election of 1899 has no place in the consideration of the present controversy.

(4) Another election was held in the borough of Old Forge in 1905, at which the question of increase in the number of justices was voted upon. The public notices posted before the election specified an increase of three justices, but the return of the vote on file in the clerk's office shows an increase of one only. Counsel have agreed that the tabulation prepared by the clerk is a correct copy of the returns in his office. The tabulation is as follows:

	For Increase.	Against Increase.	
1st Ward	23	64	
2d Ward	—	—	
3d Ward	—	2	
4th Ward	75	5	For one justice
5th Ward	9	0	Increase one
6th Ward	0	0	

This shows that the total vote in the borough against the increase was 71; there were 23 votes for increase without designation of any number, and there were 84 votes in favor of an increase of one.

Conclusions of Law.

1. Old Forge township previous to its incorporation was entitled to two justices of the peace.

Counsel for all parties conceded this proposition.

2. There was not, in law, an increase in the number of justices in Old Forge township by the election of 1899. There has been some misapprehension as to the election of 1899. Counsel have tried this case on the supposition that the election was a borough election, although, as already stated, there was no borough until the May following. However, this is of no moment. The election was undoubtedly a township election, and a township, as such, had the right to vote an increase in the number of justices. The same misapprehension is to be noticed in the opinion of the deputy attorney general found in the case of the Old Forge Justices, 30 Pa. C. C. 164, who supposed the election of 1899 was a borough election, and, basing his opinion on an affidavit, he states that there was an increase of one justice at that election in Old Forge in 1899. We have no doubt that if the evidence before us was before the Deputy Attorney General he would not have advised the Governor in 1904 to make an appointment of one person to fill the vacancy until May, 1905.

3. The number of justices of the peace in Old Forge borough was lawfully increased by one at the election in 1905. This proposition is so plain that it needs no discussion.

4. Old Forge borough, prior to the election of 1905, was entitled to two justices of the peace. After said election it is entitled to three.

5. Two vacancies for the office of justice of the peace were to be filled at the November election, 1915. E. J. Garvin and Frank Berger having received the majority of votes in the borough at said election for said office, are entitled thereto, having been lawfully elected. We note in this connection, that the right of E. J. Garvin to office is not in question in this case.

6. The respondent, Phillip Schwartz, failed of election in 1915, and is therefore not entitled to the office of justice of the peace of Old Forge borough.

Subsequently exceptions to the findings of fact and conclusions of law were dismissed, and judgment was entered in favor of the defendant Frank Berger, and the writ dismissed

as to him, and as to the defendant Phillip Schwartz judgment was entered in favor of the relator, that the said defendant be ousted and altogether excluded from the office of justice of the peace of Old Forge borough. Phillip Schwartz, defendant, appealed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

A. A. Vosburg and John Memolo, both of Scranton, for appellant. John H. Bonner, of Scranton, for appellee.

PER CURIAM. This case was tried without a jury, and the judgment of ouster against appellant is affirmed on the facts found and the legal conclusions reached by the learned trial judge.

(257 Pa. 48)

MAGUIRE v. PREFERRED REALTY CO.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. ACKNOWLEDGMENT §5—DEEDS—NECESSITY AS BETWEEN PARTIES.

A deed executed and delivered is sufficient to pass title between the parties, though not acknowledged.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 22-42, 44.]

2. PLEADING §8(15)—FRAUD—ALLEGATIONS.

Where a declaration in ejectment contains no allegations of fact showing fraud, an amendment must, in the same degree of certainty, detail the circumstances pointing to that conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½.]

3. EJECTMENT §75—STATEMENT OF CLAIM—DEMURRER.

A statement of claim in ejectment averred that plaintiff conveyed the realty to defendant in consideration of its agreement to give plaintiff certain shares of stock, and that after the conveyance defendant had refused to deliver any stock to plaintiff so that the consideration of the conveyance had failed, but did not allege the facts indicating fraud in securing the deed. Held that ejectment was not the proper remedy, so that a demurrer to the statement of claim was properly sustained without prejudice to plaintiff's right to assert the claim in some other proceeding.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 204.]

Appeal from Court of Common Pleas, Philadelphia County.

Ejectment by Mary Maguire against the Preferred Realty Company for recovery of land situate in the city of Philadelphia. Demurrer to plaintiff's statement of claim sustained, judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Alex. Simpson, Jr., of Philadelphia, for appellant. Graham C. Woodward and Samuel F. Wheeler, both of Philadelphia, for appellee.

MOSCHZISKER, J. This action was in ejectment; a declaration and abstract of title were filed, to which a demurrer was entered; the judgment favored defendant, and plaintiff has appealed. In the course of his opinion, Judge Ferguson, of the court below, states the material facts thus:

"The plaintiff avers that she signed a deed conveying the premises in question to the defendant [corporation], but that she did not acknowledge the deed in the presence of the notary public who certified that she had done so. She also avers that the deed was signed in the presence and at the request of Samuel F. Wheeler, 'who was her attorney,' and who the plaintiff believed was the sole manager and counsel and owner of all the capital stock of the defendant corporation; and that the consideration for the deed was a verbal agreement made by the defendant, through Wheeler, that all the defendant's corporate stock should be transferred and delivered to her as security for money due her for advances made to Wheeler and his wife and for money expended in connection with the sheriff's sale under which plaintiff obtained title. The declaration further sets out that the deed was recorded without plaintiff's knowledge or consent, and the defendant, through Wheeler, refused to surrender the stock [and that "the consideration for said conveyance wholly failed"]."

[1] After the foregoing review of the facts stated in the declaration demurred to, the opinion goes on to say:

"It will be observed that the plaintiff fails to aver anything with relation to the delivery of the deed; in fact, a delivery is necessarily implied from the averment that there was a consideration which failed. The plaintiff nowhere alleges that she demanded a return of the deed. What she seeks is a delivery of the stock of the defendant corporation, to be held by her as security. It is also to be noted that the plaintiff does not aver that the defendant company, to whom she made the deed, held the stock or was in a position to deliver it as the consideration, but the stock is alleged to be owned by Wheeler, who refuses to deliver it. A deed does not necessarily have to be acknowledged before a notary public to make it a valid instrument between parties. *Rigler v. Cloud*, 14 Pa. 361; *Cable v. Cable*, 146 Pa. 451, 23 Atl. 223. Execution and delivery are sufficient to pass the title, and there is no averment in the declaration from which it could be inferred that the deed was not delivered."

Then, after citing several authorities, the court below determined that, on the face of the plaintiff's pleading, the suit was merely an effort to enforce "a verbal agreement, made by one not a party to the deed, that all the capital stock of the defendant company should be transferred and delivered to the plaintiff as security," which "agreement cannot be enforced by an action in ejectment."

The plaintiff contends that the learned court below misconceived the real purpose of her suit, and that the very form of the action—ejectment—shows it was to recover the land and not to gain the consideration; but, even looking at the case from that viewpoint, it is not at all apparent material error was committed in entering the judgment under review. In her first declaration, the plaintiff simply averred:

"On January 17, 1916, plaintiff conveyed said premises to the Preferred Realty Company, the defendant, by deed of that date, recorded, etc. * * * Said conveyance was made in consideration of an agreement by defendant, through its president, to give plaintiff stock of defendant in payment therefor; but, since said conveyance was made, defendant, through its president, has refused to give to plaintiff any of the stock of defendant. * * * Wherefore the consideration for said conveyance has wholly failed," etc.

Subsequently an "amended declaration and abstract of title" were filed, containing the averments already outlined, and the appellant contends that these new averments are sufficient to show such a case of fraud as entirely to avoid plaintiff's deed of conveyance and leave the property in her as though that instrument had never been executed. If this were so, then it might be that the plaintiff could maintain ejectment; but, being on demurrer, the judgment must stand or fall upon a review of the declaration as written, and not on the facts of the case as they are contended to be in appellant's argument.

[2] The original declaration contains no allegations of fact indicating fraud, and the averments in the amendment, while, perhaps, suggesting the possibility of some fraudulent purpose on the part of Mr. Wheeler, when he secured the deed from the plaintiff, do not so charge in terms. "Fraud is never to be presumed." *Addleman v. Manufacturers' Light & Heat Co.*, 242 Pa. 587, 590, 89 Atl. 674, 675. When there is no particular averment of a fraudulent purpose, but the circumstances detailed are depended upon as showing such to be the case, then the facts relied upon must not only be fully and unequivocally averred, but they must point with some degree of certainty to the conclusion contended for; and in such cases the intendments are taken most strongly against the pleader, for he is presumed to have stated all the facts involved, and to have done so as favorably to himself as his conscience will permit. *Baker v. Tustin*, 245 Pa. 490, 501, 91 Atl. 891; *Little v. Thropp*, 245 Pa. 539, 544, 91 Atl. 924.

[3] Here, as already suggested, the facts detailed in plaintiff's declarations do not, with any degree of certainty, lead the mind to the conclusion that, if they should be proved, a jury would be justified in finding the deed, under which the defendant claims, to have been fraudulently obtained by it. We say this, for the averments of the declaration are vague and inconclusive in many material respects. In the first place, it is not averred that Mr. Wheeler was plaintiff's counsel or attorney at the time the deed was executed by her, or that he acted in such capacity in this particular transaction; next, there is no allegation that he was duly authorized or actually did act on behalf of the defendant company in making the alleged verbal agreement with the plaintiff; and, finally, the averment that Wheeler was the

owner of all the corporate stock of the defendant except a few shares, is too indefinite to substitute him in all respects for the latter, there being no allegation that he was the sole owner, in possession of the stock, or in control of the corporation, at the time of the occurrences complained of. The foregoing are only a few of many insufficiencies which, if necessary, might be pointed out; but they are enough to show the inadequacy of the declaration. We feel, however, the plaintiff should be placed in such position that the present judgment will not be taken as precluding her from properly asserting her alleged rights in some other action or proceeding where both the realty company and Mr. Wheeler are included as defendants.

The assignments of error are overruled, and the judgment is affirmed, without prejudice, as above indicated.

(257 Pa. 6)

ALLEN v. SCHEIB et al.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. EASEMENTS §51—USE—EXTENT.

An easement cannot lawfully be used for a purpose different from that for which it was dedicated.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112.]

2. EASEMENTS §12(2)—FEE—"ROAD"—"PRIVATE ROAD."

The term "road," and especially "private road," is indicative of an easement rather than a fee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 36-38.

For other definitions, see Words and Phrases, First and Second Series, Road; Private Road.]

3. EASEMENTS §61(9)—ACTION FOR INJUNCTION—BURDEN OF PROOF.

The burden was upon plaintiff to establish her ownership to the fee of the land, included in a private road in which defendants had a user, before she was entitled to construct a gas pipe line on the surface.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143.]

4. EASEMENTS §61(9)—ACTION FOR INJUNCTION—INTEREST—EVIDENCE.

Evidence in a suit by the owner of a farm to enjoin defendants from obstructing a private way giving access to a public road held to show that plaintiff did not have the fee in the road, but had only an easement of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143.]

5. EASEMENTS §51—WAY—USE.

The owner of an easement in a private right of way, in which defendants also had a right of use, was not entitled to maintain a line of gas pipe on the surface, as that was not contemplated when the easement of way was created.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112.]

6. INJUNCTION §130—OBJECTION TO JURISDICTION—STATUTE.

Though defendant's first objection to the jurisdiction of equity, to enjoin interference with

easement made in request for findings after the evidence was submitted was not in compliance with Act June 7, 1907 (P. L. 440) § 1, it did not affect the chancellor's duty to dismiss the bill if the facts averred were not substantially proved at the trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 288-300.]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity for an injunction by Eleanor Walker Allen against John Schelb, Sr., and another. From a decree awarding an injunction, defendants appeal. Modified and affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

E. J. McKenna, of Pittsburgh, for appellants. J. W. Collins, of Pittsburgh, for appellee.

WALLING, J. This equitable action is to determine the rights of the respective parties to a certain strip of land situate in Richland township, Allegheny county, and used as a private road. The Butler plank road extends through said township in a northerly direction, and the farm of the late John Scott, containing 142 acres, is located thereon. He died in 1875, and clause 4 of his will provides:

"I give and devise to my grandson, John Scott Teacher, 15 acres of my Bakerstown farm; to my daughter, Catherine Harbison, 10 acres; to my granddaughter, Sarah Harbison, 5 acres; to my daughter Jase Harbison, 10 acres, all to be divided out of my Bakerstown farm west of the plank road."

He left other heirs and devisees aside from those above mentioned; and, by some family arrangement made shortly after his death, the 40 acres mentioned in the clause was set aside to the devisees therein named out of the northwest corner of the farm, away from the public highway. To afford access to the 40-acre tract it seems to have been a part of the agreement that a private road or lane, of the width of 16½ feet, should be opened, extending eastwardly from the southeast corner of the 40-acre tract, about 1,295 feet, to the Butler plank road, which lane was later fenced and opened, and has been used for about 20 years last past by the occupants of the 40 acres, the same having been partitioned in 1876, among the devisees above named. This is shown by a map made that year by Charles Gibson, at the instance of one of the devisees. The purparts thereby allotted were sold from time to time, and the deeds therefor include fractional parts of the lane, corresponding to the size of the respective purparts, for example, each deed for 15 acres includes three-eighths of the lane. In 1901 the title to the 40-acre tract, together with whatever interest the owners thereof had in the lane, became vested in John Scott Harbison, who conveyed same to plaintiff in

1911. The lane was also used by the owners of the balance of the John Scott farm, as their necessities required.

So far as appears the family arrangement above stated was not in writing, and there is no record of any conveyance from the John Scott heirs to plaintiff's predecessors for the 40 acres or the lane. Plaintiff contends that the lane was included in the 40 acres. There is a part of the John Scott farm containing about 33 acres, some 24 acres of which lie between the 40 acres and the Butler plank road and north of the lane, as to which he seems to have died intestate. In 1881, all of the heirs of John Scott joined in a conveyance of the 24-acre tract to James D. Harblson, wherein the southern boundary is described as:

"Thence along a certain road or lane between the land herein conveyed and the land of John Stirling."

Another part of the Scott farm, containing about 30 acres, and called the Stirling tract, is on the west side of the plank road and bounded on the north by the 40-acre tract and the lane.

By sundry conveyances the title to the 24-acre and the 30-acre tracts became vested in Thomas Morrow, who in 1910 conveyed same with other land to defendant, John Scheib, Sr., the deed for which in one of the courses mentioned, "a point at the corner of a private road," and the general description therein includes the lane and the land on both sides thereof. After Mr. Scheib bought this land there was a controversy about the use of the lane, between Mr. Harblson and plaintiff on one side, and the defendants, "John Scheib, Sr., and John G. Scheib, on the other, each side claiming to own the same. One of the findings of the court below is:

"Sixth. That said John Scheib, Sr., by destroying drains along said private road, taking out posts and trees planted by plaintiff and by other acts has repeatedly interfered with plaintiff in the use of said private road."

The defendants, or those in their employ, also drove their stock across this lane, and in so doing obstructed it with wires, and repeatedly suffered the same to remain in that condition, to the annoyance and damage of plaintiff.

In 1913, plaintiff entered into a contract with one Sebastian Mueller, for the construction and maintenance of a line of gas pipe in the lane, which defendants by opposition and threats prevented being done. Thereafter plaintiff filed her bill in this case, joining said Mueller as a defendant, but the bill as to him was dismissed. The learned trial judge, sitting as a chancellor, found that plaintiff had a good title in fee simple to the strip of land herein called the lane, and entered a final decree, inter alia, enjoining defendants from interfering with the construction of the gas line, and also from interfering with plaintiff's free use and main-

tenance of the private road. Defendants concede that plaintiff has a right to the use of the lane as a passageway; in fact that is the only means of access to her property. We fully agree with the learned chancellor that under all the facts and circumstances defendants should be enjoined from interfering with plaintiff's free use and enjoyment of the said private road as such.

But plaintiff's right to lay or authorize another to lay a line of gas pipe therein depends upon the nature of her ownership. If an easement, then she can use it only for the purpose for which it was established or dedicated, and cannot lay a pipe line therein. *U. S. Pipe Line Co. & Breckenridge v. Del., Lack. & Western R. R. Co.*, 62 N. J. Law, 254, 41 Atl. 759, 42 L. R. A. 572; 14 Cyc. 1207, note 98.

[1] As an easement it cannot lawfully be used for a purpose different from that for which it was dedicated. *Kirkham v. Sharp*, 1 Whart. 323, 29 Am. Dec. 57; *Mershon v. Fidelity Ins., Trust & Safe Deposit Co.*, 208 Pa. 292, 57 Atl. 569; 14 Cyc. 1215.

[2-5] As above stated the chancellor finds that plaintiff owns the fee. If so, she may, of course, construct the gas line therein; but a careful examination of the record fails to disclose any sufficient evidence to support that conclusion. As above stated, there is no deed or other writing showing any conveyance by the Scott heirs of the so-called private road. True, the road is recognized in their deed to James D. Harblson as above quoted, "thence along a certain road or lane between the land herein conveyed and the land of John Stirling"; but that does not show that the title to the fee thereof has passed from the Scott heirs. The term "road," and especially "private road," is indicative of an easement rather than a fee. See *Klister v. Recser*, 98 Pa. 1, 42 Am. Rep. 608. Plaintiff relies largely on the evidence of her grantor, John S. Harblson, as tending to establish a parol partition of the Scott farm made in 1876, by which this lane is alleged to have been allotted to the owners of the 40-acre tract, and as a part thereof. But he does not say that all of the Scott heirs were present, and shows they were not when he names those who were there. The chancellor in one part of his exhaustive discussion says:

"Respecting plaintiff's right to the uninterrupted use of the road there is no room for dispute. Respecting the precise limits of her rights, whether she has a fee or a mere easement, is a debatable question. * * * Whether Mr. Scheib has the fee in the 16½-foot strip of land or the mere right to use it in common with the plaintiff, or any right in it, he has no right to fill up necessary drains, or otherwise prevent the free use and proper maintenance of the road, and plaintiff is entitled to an injunction restraining him from interfering with her in the exercise of her lawful rights."

The John Scott heirs, aside from those named in clause 4 of the will, were not par-

ties to the partition of the 40-acre tract, nor to the Gibson survey, nor, so far as the record shows, bound thereby. And certainly they were not bound by the recitals in the deeds from the owners of the respective purports of the 40-acre tract. One cannot create a fee in land merely by including it in his conveyance. And the above-cited reference to this road or lane in the deed from the Scott heirs to James D. Harbison, and also in the deed from Morrow to defendant, are certainly as consistent with an easement as with a fee. The mere reference in a conveyance to a private road does not tend to show ownership in fee thereof in the party for whose use it may have been established. Such road, or alley, may, *prima facie*, be used by all abutting owners, and defendants as such would have standing to object to an additional use being made thereof by the construction therein of a gas line, especially as this is proposed to be constructed on the surface of the ground.

Plaintiff as the owner of the 40-acre tract undoubtedly has an easement in the private road and a right to the free and uninterrupted use thereof as a way for purposes of passage over and upon the same; and, so far as appears, defendants may lawfully make such use thereof as will not interfere with the rights of plaintiff.

The burden was upon plaintiff to establish her ownership to the fee of the land included in the road, and therein her proofs fail, and the finding of the court below in her favor as to that cannot be sustained; nor can the decree in so far as it restrains defendants from interfering to prevent plaintiff from the construction of a gas line in the road.

[8] The defendants, John Scheib, Sr., and John G. Scheib, did not, by demurrer or answer, question the jurisdiction of the court, upon the ground that the suit should have been brought at law, but filed an answer to the merits of the case without asking for an issue as to any questions of fact, and thereby the right of trial by jury seems to have been waived, under the provisions of section 1, of the act of June 7, 1907 (P. L. 440; 5 Purdon's Digest, p. 6061). The defendants first raised the question of jurisdiction in requests for findings after the evidence was submitted; this was not a compliance with the statute. *Nanhelm v. Smith*, 253 Pa. 380, 98 Atl. 602. However, the proviso to this section is:

"That this shall not alter or affect the duty of the chancellor to dismiss the bill if the facts therein averred, as showing or tending to show the right to relief, be not substantially proved at the trial"

—and by reason thereof plaintiff is not entitled to relief based on her alleged ownership of the fee of the land in question; for such claim is not substantially proven.

The final decree entered by the court below is therefore modified by striking out so much thereof as restrains defendants, John

Scheib, Sr., and John G. Scheib, from interfering with plaintiff in the construction and maintenance of a gas line in or upon said private road. The costs on this appeal to be paid by the appellee.

(40 R. I. 473)

GAGNON v. RHODE ISLAND CO.

(No. 5022.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. TRIAL \S 260(1)—REFUSAL OF INSTRUCTIONS COVERED.

The refusal of instructions, which in so far as they were correct were covered by those given, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

2. DAMAGES \S 52—PERSONAL INJURIES—MENTAL SUFFERING.

Mental suffering of a pregnant woman consequent upon apprehension and anxiety as to the effect of an injury upon the fetus becomes an element of her damage as a natural and proximate result of the negligence which caused the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

3. DAMAGES \S 52—PERSONAL INJURIES—MENTAL SUFFERING.

Although a mother should not be given damages for her child's misfortune during life resulting from an injury to the fetus, or for her own consequent mental distress during the lifetime of the child occasioned by its deformity, she is entitled to damages for her distress and disappointment at the time of the birth because through defendant's negligence she has been deprived of the right and satisfaction of bearing a sound child, if it be found that the child's deformity is due to the injury received through defendant's negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Eleanore Gagnon against the Rhode Island Company. Verdict for plaintiff, new trial denied, and defendant excepts. Exceptions overruled, and case remitted for entry of judgment.

Archambault & Jalbert, of Woonsocket, for plaintiff. Clifford Whipple and Alonzo R. Williams, both of Providence, for defendant.

PER CURIAM. This is an action of trespass on the case brought to recover damages for injuries alleged to have been suffered by the plaintiff through negligence of the defendant. The case was tried before a justice of the superior court sitting with a jury and resulted in a verdict for the plaintiff. Defendant's motion for a new trial was denied by said justice. The case is before us upon the defendant's exception to the decision of said justice on the motion for a new trial and upon exceptions taken by the defendant to certain rulings of said justice made in the course of the trial.

It appears that the defendant's car track on John street near Pleasant street in the city of Woonsocket is laid on the westerly side of the roadway in John street, the westerly rail of said track being 2 feet and 10 inches from the curbstone of the westerly sidewalk of John street. Near the corner of John and Pleasant streets said track begins to curve toward the east and runs into Pleasant street. In passing upon and around said curve the rear of a double-truck car of the defendant begins to overlap the westerly sidewalk of John street and continues to so overlap the sidewalk for a considerable distance, the greatest overlapping being 15 inches at one point. On the day of the occurrence complained of, the plaintiff, in company with two other women, was walking in a southerly direction on the westerly sidewalk of John street; the plaintiff being the one nearest to the curbstone. There was testimony from which the jury might find that the servants of the defendant were operating one of the defendant's double-truck cars on said John street behind said plaintiff; and, without warning or care for the safety of the plaintiff, when the danger to the plaintiff must have been apparent to the servants of the defendant, they drove said car around said curve, whereby the rear of said car projected over a portion of the westerly sidewalk of John street, struck the plaintiff, knocked her down, and inflicted serious injuries upon her. The justice presiding refused to disturb the verdict in respect to the finding of liability or the assessment of damages. After an examination of the transcript of evidence, we find no reason for overruling his decision.

[1] The defendant's exceptions to the refusal of said justice to charge the jury as requested are without merit. Said justice carefully instructed the jury as to the duty of the plaintiff and of the defendant in the premises, and, so far as the charge which the defendant requested was a correct statement of the law applicable to the evidence, such instruction had been fully given by said justice.

[2, 3] The plaintiff at the time of the accident was pregnant; she was struck and felt pain in her back and side, and she testified that at the time of the accident "I felt the child pushing toward the right." The plaintiff further testified that from the time of the accident until the birth of the child she entertained fears that the child would be born deformed. The defendant excepted to the admission of testimony that the head of the child was deformed at birth. The defendant then excepted to the admission of testimony that when the plaintiff saw this deformity she was pained. The defendant also excepted to the charge of the justice to the jury that in assessing damages they might consider any mental suffering, which they found that the plaintiff had en-

dured, due to her apprehension that she would give birth to a deformed child; and that they might consider her mental suffering at the time of the birth caused by her disappointment at finding a deformity in the head of the child, if the jury should also find that the deformity was a result of the accident to the plaintiff. The justice very carefully instructed the jury that the plaintiff was not entitled to compensation for the injury to the child or for any disappointment and suffering which she as its mother might feel during its life by reason of any deformity in the child; but that the jury were justified in giving compensation to the plaintiff for the mental suffering which the jury might find she had endured before the birth by reason of her apprehension of the child's deformity, and also for her suffering at the time of birth caused by disappointment in finding she had not been delivered of a sound child, provided they also found that the deformity was due to the accident. The exceptions which we are now considering should be overruled. The foetus is a part of the person of a pregnant woman, and if, by reason of the nature and circumstances of an injury to her person caused by the negligence of a defendant, she suffers apprehension and anxiety as to the effect of the injury upon the foetus, in accordance with the well-recognized rule, such mental suffering becomes an element of her damage as a natural and proximate result of the negligence which caused the injury. Furthermore, although she should not be given damages for the child's misfortune during life, resulting from an injury to the foetus, nor for her own subsequent mental distress during the lifetime of the child occasioned by its deformity, the mother is entitled to damages for her distress and disappointment at the time of the birth because through the defendant's negligence she has been deprived of the right and the satisfaction of bearing a sound child, if it be found that the child's deformity is due to the injury she received through the defendant's negligence. *Percott v. Robinson*, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 504, 124 Am. St. Rep. 987; *Big Sandy v. Blankenship*, 133 Ky. 438, 118 S. W. 316, 23 L. R. A. (N. S.) 345, 19 Ann. Cas. 264.

The defendant's exceptions are all overruled, and the case is remitted to the superior court for the entry of judgment on the verdict.

PARIAN v. OLSSON et al. (No. 4795.)
(Supreme Court of Rhode Island. June 26, 1917.)

EXCEPTIONS. BILL OF ~~EXHIBIT~~ 59(1) — TRANSCRIPT OF EVIDENCE.

Where plaintiff filed with his bill of exceptions a partial transcript of the testimony, consisting only of the cross-examination of the plaintiff, and certain rulings of the trial judge

upon granting the nonsuit, and endeavored to supplement the partial transcript by including in his bill of exceptions a summary statement purporting to show what was proved by the other portions of the evidence, in order thereby to bring upon the record the purport of the whole testimony on behalf of the plaintiff, the action of the trial judge in striking out and disallowing the summary statement of the testimony and allowing the bill of exceptions thus changed and in refusing to allow the partial transcript of evidence filed with the bill of exceptions on the ground that it was insufficient was proper.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 106, 108.]

Action by Daniel Parian against Magnus Olsson and others. On plaintiff's petition to establish the truth of his exceptions. Petition denied and dismissed.

William J. Brown, of Providence, for plaintiff. Fred L. Owen, of Providence, for defendants.

PER CURIAM. Upon the plaintiff's petition to establish the truth of his exceptions and the correctness and sufficiency of the transcript of testimony. It appears that the plaintiff, after suffering a nonsuit in the superior court, having reserved certain exceptions, in due time filed his bill of exceptions, and therewith a partial transcript of testimony consisting only of the cross-examination of the plaintiff, and containing also certain rulings of the trial judge upon granting the nonsuit.

The plaintiff endeavored to supplement the partial transcript by including in his bill of exceptions a summary statement purporting to show what was proved by the other portions of the evidence, in order thereby to bring upon the record the purport of the whole testimony on behalf of the plaintiff. The trial judge struck out and disallowed this summary statement with regard to the testimony in the case, and allowed the bill of exceptions as thus changed. The trial judge also refused to allow the partial transcript of evidence filed with the bill of exceptions on the ground that it was insufficient.

Thereupon in due time the plaintiff filed in this court his petition to establish the truth of his exceptions and the correctness and sufficiency of the transcript, under rule 13 of this court (62 Atl. ix). He asks this court to establish his bill of exceptions as originally filed, including the summary statement of testimony therein, and attempts by his sworn petition and by affidavit to show not only the correctness of the portion of the transcript as filed, but also by another summary statement what was the purport and substance of all the other testimony in the case.

We think the case is ruled by the case of *Beaule v. Acme Finishing Co.*, 36 R. I. 74, 89 Atl. 73. In that case a similar attempt was made. The plaintiff filed with his bill of exceptions only a portion of the transcript, containing none of the evidence submitted to

the jury, but only containing certain rulings of the trial judge. Plaintiff incorporated in his bill of exceptions as filed a summary statement of the meaning and effect of certain evidence alleged to have been introduced at the trial; the trial judge struck out and disallowed this summary statement and allowed the rest of the bill of exceptions. The trial judge also allowed the partial transcript as sufficient for the consideration of certain numbered exceptions, and found it not to be sufficient for the consideration of certain other numbered exceptions. Plaintiff then petitioned this court to establish the truth of his exceptions and the sufficiency of the transcript, and this court sustained the action of the trial judge in striking out the summary statement, and also in his ruling as to the insufficiency of the partial transcript for consideration of certain exceptions.

For the same reasons stated in *Beaule v. Acme Finishing Co.*, supra, this court is unable in the case at bar to find that the trial judge erred either in changing the bill of exceptions by striking out as he did or in his disallowance of the transcript as insufficient. We are unable to accept the plaintiff's statement in his petition and affidavits in place of the testimony which has not been brought before us in due course of procedure; and we are forced to rely upon the finding of the trial judge as to the insufficiency of the partial transcript.

Therefore the plaintiff's petition must be denied and dismissed.

(40 R. I. 456)

MILLER v. TRUSTEES OF TRINITY UNION METHODIST EPISCOPAL CHURCH. (No. 364.)

(Supreme Court of Rhode Island. July 3, 1917.)

1. MECHANICS' LIENS §130(1) — STATEMENT — SEPARATE BUILDINGS.

A Sunday school building on the same tract of property upon which a church was located and connected therewith by a corridor, electric wires, and steam pipes is not a building separate from the church within the Lien Law (Laws 1909, c. 257).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 178, 180, 181.]

2. MECHANICS' LIENS §158 — STATEMENT — AMENDMENT.

A mechanic's lien claimant can file an amended lien statement at any time before the expiration of the period allowed for filing the original lien, which amended statement takes the place of the original statement in all respects.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278.]

Appeal from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by Charles Miller against the Trustees of Trinity Union Methodist Episcopal Church to establish a mechanic's lien. Decree for defendant, and petitioner appeals. Reversed and remanded.

Charles H. McKenna, of Providence, for petitioner. Gardner, Pirce & Thornley, of Providence (Thomas G. Bradshaw, of Providence, of counsel), for respondent.

VINCENT, J. This is a petition to establish a mechanic's lien upon land and buildings belonging to the Trinity Union Methodist Episcopal Church. The cause comes before this court upon the petitioner's appeal from a final decree of the superior court denying and dismissing his petition. The petitioner's claim is for certain extra work and materials furnished by him in the construction of a certain building owned by the respondents.

It appears that the Thomas F. Cullinan Company entered into a written contract with the trustees of Trinity Union Methodist Episcopal Church to erect a certain building for Sunday school purposes upon the premises owned by them and located at the corner of Bridgham street and Trinity square, in the city of Providence; that the contract for the painting was sublet by the Cullinan Company to Charles Miller, the present petitioner; that the petitioner delivered certain materials and commenced work under his painting contract on May 3, 1915, and rendered his bill to the Cullinan Company for \$1,000, which was the entire amount of the contract price; that the petitioner on the 4th and 5th days of October, 1915, performed certain extra work and supplied certain extra materials amounting to \$32.86, rendering a bill therefor on October 11, 1915; that the petitioner performed some work around a doorway in the church, a building adjoining the Sunday school building and standing upon a separate and adjoining lot of land; that the Sunday school while being erected was connected with the church by a corridor, electric wires, water and steam pipes, etc.; that a notice of intention to claim a mechanic's lien was served on respondent on November 5, 1915, and on the same day a copy thereof was placed on record in the office of the recorder of deeds in Providence; that the petitioner on January 6, 1916, lodged his account or demand in the office of said recorder of deeds and filed his notice, setting forth the land and to whose interest therein the account or demand referred for the purpose of commencing legal proceedings; that the petitioner afterwards lodged in the office of said recorder of deeds three other accounts or demands, each of which was followed by a notice setting forth the land and to whose estate the account or demand referred for the purpose of commencing legal proceedings. These accounts were filed respectively on January 31, 1916, February 25, 1916, and February 29, 1916; that on March 1, 1916, within 20 days after the lodging of the fourth account, and the demand and notice, the petitioner filed in the office of the clerk of the superior court for Providence county his pe-

tition to enforce said claim of lien, attaching thereto notice of the last account or demand filed under date of February 29, 1916; that notice of the filing of said petition was duly given by the clerk of the superior court for Providence county.

All these accounts were filed within the statutory period of 6 months from the commencement of the work and the furnishing of the materials which are the subject of the claim, and the petition to enforce the lien was filed in the clerk's office of the superior court within 20 days after the lodging of the fourth account, demand, and notice.

[1] The respondent claims that the petitioner is seeking to enforce a joint lien on two separate buildings; that is, that the Sunday school building, although connected by means of a corridor, electric wires, water and steam pipes, etc., is, in contemplation of the statutory provisions, two separate buildings, and that the petitioner's account lodged with the recorder of deeds fails to separate and specify which items apply to the Sunday school building and which apply to the church building. The respondent also claims that the petitioner cannot be permitted to file more than one account within the required period of 6 months from the commencement of the work or, in other words, that the second, third, and fourth accounts filed must be regarded as amendatory of the first account filed on January 6, 1916, and, that being so, the petition to enforce a lien was not filed in the office of the clerk of the superior court within 20 days after the commencement of legal proceedings.

The respondent, admitting for the purpose of argument that the petitioner may abandon the first three accounts filed by him for the purpose of commencing legal process, and can rely upon the fourth account filed February 29, 1916, contends that such fourth account is fatally defective in that it does not specify which items are chargeable to the Sunday school building and which items are chargeable to the church building.

The estate of the respondent at the corner of Bridgham street and Trinity square comprises two adjoining lots of land, one having been conveyed to it March 14, 1864, and the other November 10, 1909. The church building, so called, is situated upon the first-named lot, and the Sunday school building upon the other lot. These buildings are used by the respondent for the purpose of conducting and carrying on its usual and customary church work, and the two structures are, for more convenient use, connected by a passageway providing an easy and unexposed means of communication from one to the other. Light, heat, and water are supplied to the Sunday school building by means of wires, steam, and water pipes extended from the church building through the connecting corridor before mentioned.

The respondent has cited section 7, c. 257,

General Laws of 1909, and also several Rhode Island cases in support of its contention that the account is defective in not specifying the items chargeable to each building. In order to extend to these authorities any applicability to the case before us, it would be necessary to reach the conclusion that the church and Sunday school buildings were separate and distinct structures. In *Bouchard v. Guisti*, 22 R. I. 591, 48 Atl. 934, the notice failed to state that the materials were furnished for any building or improvement at all.

In *McElroy v. Kelly*, 27 R. I. 64, 60 Atl. 679, it was held that the petitioner should have filed a separate notice of his intention to claim a lien upon each house and a separate account for each house of the material furnished and used in it. In that case, as the court said in its opinion:

"The houses were exactly alike but were not joined together in a block, but separated and adapted to be occupied each with a separate curtilage."

In *Butler & Co. v. Rivers*, 4 R. I. 88, the petitioner proceeded against two several estates having distinct owners, and sought to charge both estates for the work and materials furnished for each, as the court said, "in effect to make one of them chargeable with work and materials expended upon the other."

In *McDuff Coal & Lumber Co. v. Del Monaco*, 32 R. I. 323, 79 Atl. 831, the petitioner undertook to proceed upon the theory that, inasmuch as three houses on separate tracts of land were undergoing construction at or about the same time, they had a general lien upon all of them for a general balance due on the assumption that probably approximately one-third of the materials had been used in each house, and that consequently they could include all three claims in one proceeding.

The respondent claims that it appears from the foregoing cases to be incumbent upon one desiring to establish a mechanic's lien for materials furnished and used in the construction of more than one building, whether such building be upon the same or adjacent lots of land, to describe each lot and building separately and to particularize in his account the items chargeable to each. We have no controversy with such deduction from the cases cited. As before stated, in order to make them applicable it must be assumed that the church and the Sunday school structures are separate and independent buildings. We cannot so hold. The whole tract of land is owned by the respondent; the buildings are used for one general purpose; they are physically connected, the one being dependent upon the other for light, heat, and water. We think that under these conditions the respondent's claim of two separate and distinct buildings cannot be accepted. In fact, to carry out and establish the connecting corridor work upon both structures

would be required, and the determination of a proper dividing line between the two would be difficult, if not impossible.

[2] The respondent further contends that the account lodged with the recorder of deeds February 29, 1916, that being the fourth account, is fatally defective, because it is in amendment of the first account filed January 6, 1916, and cites *Harris v. Page*, 23 R. I. 440, 50 Atl. 859. In that case the petitioner sought to amend his account by extending it or adding thereto items not appearing in the original statement. The opinion does not state specifically whether the application to amend was made before or after the expiration of the time allowed by statute for filing an account as the commencement of legal process to establish a lien, but it may be reasonably presumed that it was after; for otherwise the petitioner might have filed a new account and raised the same question which we are now discussing.

The respondent further claims that the filing of the first account on January 6, 1916, was the commencement of legal process, and that within 20 days thereafter the petitioner was bound to file his petition in equity in the superior court and failing to do so lost his lien. The petitioner, on the other hand, claims that he is not limited under section 7 of chapter 257 to the filing of one account, but that he can file other accounts, waiving and abandoning all former ones, provided the last account is filed within the time limited for the commencement of legal process and his petition to enforce the lien is filed within 20 days thereafter.

It is apparent that the first three accounts filed by the petitioner, for one reason or another, were defective. The fourth account was filed within the required time, and the fact that the petitioner proceeded further in the establishment of his lien upon the fourth account only is evidence of an intention upon his part to abandon all accounts previously filed.

To say that the petitioner must stand upon the first account filed, however defective it may later be discovered to be, and that he cannot abandon it and file another account within the statutory period, would, in our opinion, be inflicting upon a petitioner an unnecessary and unwarranted hardship which the statute neither requires nor contemplates.

The respondent argues that after the filing of the first account innocent parties might reasonably infer that the full amount of the claim had been disclosed, and thus be led into dealing with the estate to their disadvantage should the filing of a later account be permitted. We do not see any great force in this argument. The statute fixes a period within which proceedings may be instituted for the establishment of liens, and one who deals with the estate before its expiration must do so at his peril.

The appeal of the petitioner is sustained, the decree of the superior court denying and

dismissing the petition is reversed, and the cause is remanded to the superior court, with direction to enter a decree establishing the lien of the petitioner upon the estate of the respondent described in the petition for the sum of \$32.68.

KINGSTON v. WILSON. (No. 5084.)

(Supreme Court of Rhode Island. July 5, 1917.)

GARNISHMENT §56 — PROPERTY SUBJECT — DEPOSITS.

Where it appeared that none of the money deposited with the garnishee trust company in the account of defendant as agent belonged to him, but was wholly the money of his principal, the garnishee was not chargeable.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 110, 111.]

Exceptions from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by James Kingston against Robert H. Wilson. Plaintiff's motion to charge the garnishee was denied, and he excepts. Exception overruled, and case remitted.

John P. Beagan, of Providence, for plaintiff. Benjamin W. Grim, of Providence, for defendant.

PER CURIAM. This is an action of debt on judgment. The case is before us on plaintiff's exception to the ruling of a justice of the superior court denying the plaintiff's motion to charge the garnishee.

According to the affidavit filed by the Industrial Trust Company, garnishee in the case, it appears that at the time of the attachment made under the direction contained in the writ, there was in the hands and possession of said garnishee \$289.12 standing in the name of the defendant as agent; that the defendant had stated to the garnishee that he was the agent of Colgate & Co. From the uncontradicted evidence given at hearing before said justice on the plaintiff's motion to charge the garnishee it appeared that the defendant was the manager "for the district here" of Colgate & Co., and was charged with the duty of directing the work of the salesmen employed by said Colgate & Co.; that there were about 17 men employed by Colgate & Co. under the direction of the defendant; that none of the money deposited in said account of "Robert Wilson, Agent," belonged to the defendant, but was wholly the money of Colgate & Co. In view of these facts, which said justice found to be true, we are of the opinion that there is no error in the action of the superior court denying the motion to charge the garnishee.

Plaintiff's exception is overruled; the case is remitted to the superior court for further proceedings.

STATE v. McAVOY (two cases). (Nos. 4948, 4949.)

(40 R. I. 437)

(Supreme Court of Rhode Island. July 8, 1917.)

1. EMBEZZLEMENT §38—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement by an agent in charge of selling and delivering flour, evidence as to instructions given defendant by his predecessor as to his duties in making reports, collections, and deposits was admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

2. CRIMINAL LAW §1169(1) — REVIEW — HARMLESS ERROR.

In a prosecution for embezzlement by an agent intrusted with the duty of selling and delivering flour, admission of slips showing deliveries of flour by the warehouse company and of an inventory of flour kept therein made by its bookkeeper, if error, held harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3180, 3187.]

3. EMBEZZLEMENT §38—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement of the proceeds of flour sold and delivered by an agent, testimony by the bookkeeper of the warehouse wherein the flour was kept as to the number of barrels on hand as shown by the report of the defendant to the milling company was admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

4. EMBEZZLEMENT §44(5) — DEFENSES—DEL CREDERE.

In a prosecution for embezzlement, evidence held not to show that defendant was a del credere factor.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 70.]

5. EMBEZZLEMENT §14 — DEFENSES — DEL CREDERE FACTORS.

That an agent charged with embezzlement was a del credere factor of his principal constitutes no defense; such relation not changing the ordinary one existing between himself and his principal within Gen. Laws 1909, c. 345, § 16, providing that every officer, agent, clerk, or servant who shall embezzle property which shall have come into his possession by virtue of his employment shall be deemed guilty of larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15.]

6. EMBEZZLEMENT §38—EVIDENCE—MATERIALITY—PRIVILEGED COMMUNICATIONS.

In a prosecution for embezzlement, it was not error to exclude as immaterial correspondence received by the state board of tax commissioners offered on the question as to whether the employer, a company incorporated in another state, had been doing business in this state, since under Pub. Laws 1912, c. 769, § 15, such information could not be divulged except upon order of the court.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

7. EMBEZZLEMENT §48(1) — INSTRUCTIONS — APPROPRIATION OF PROPERTY.

In a prosecution for embezzlement, it was not error to instruct that the ownership of the flour the proceeds of which were alleged to have been embezzled was controlling as to defendant's rights thereto.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72, 75.]

3. EMBEZZLEMENT ~~§~~44(1)—EVIDENCE—SUFFICIENCY.

In a prosecution for embezzlement, evidence held to warrant a finding of guilty.

[H.I. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 67, 70.]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Harry A. McAvoy was convicted of embezzlement, and he brings exceptions. Exceptions overruled.

Herbert A. Rice, Atty. Gen. (Claude R. Branch, of Providence, of counsel), for the State. Fitzgerald & Higgins and Peter M. O'Reilly, all of Providence, for defendant.

VINCENT, J. In December, 1914, the grand jury for Providence county presented two indictments against the defendant for embezzlement. To each of these indictments the defendant pleaded not guilty and was released on bail. The two cases were tried together in the superior court. The defendant moved to be discharged at the conclusion of the testimony offered on behalf of the state. The motion was denied. The jury returned a verdict of guilty as charged in each indictment, each being for the embezzlement of an amount exceeding \$500. The defendant filed a motion for a new trial, upon the usual grounds, which was denied by the trial court.

The case is now before us upon the defendant's exceptions covering the denial of his motion for discharge; to various rulings during the trial as to the admissibility of evidence; to certain portions of the charge of the court; and to the denial of the motion for a new trial. The defendant's exceptions are 58 in number, but we are advised by his brief that he relies only upon exceptions numbered 1, 2, 3, 32, 33, 34, 36, 53, 54, 57, and 58.

The indictment No. 8269, now before us on exceptions No. 4948, charges the defendant, Harry A. McAvoy, on the 1st day of January, 1914, at Providence—

"being then and there the clerk and agent of the Bay State Milling Company, a corporation, did then and there by virtue of his said employment have, receive, and take into his possession money to a large amount, to wit, to the amount of \$1,368.87, and of the value of \$1,368.87, of the property and money of the said Bay State Milling Company, a corporation as aforesaid, the said Harry A. McAvoy's employer, and the said Harry A. McAvoy the said money then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said Bay State Milling Company, a corporation as aforesaid, the said Harry A. McAvoy's said employer, whereby and by force of the statute in such case made and provided the said Harry A. McAvoy is deemed guilty of larceny," etc.

The indictment No. 8270, now before us on exceptions No. 4949, is identical with the one above referred to, with the exception of the date of the embezzlement, which is stated

on July 1, 1914, and the amount embezzled as \$2,834.30.

The defendant, covering the periods of the alleged embezzlements, was in the employ of the Bay State Milling Company a corporation created under the laws of the state of Minnesota and having its principal office in the city of Boston, Mass. All the dealings of the defendant were with this office. The defendant was hired by the president of the company, Bernard J. Rothwell, and his assistant, Ernest C. Harris, and commenced work for said company in April or May, 1913. His duties were to sell flour in Providence and vicinity and to collect the proceeds of such sales. During his earlier employment by the milling company he performed these duties for a stated salary of \$70 per month and an allowance for expenses, both of which were paid by the checks of the milling company.

Upon assuming his duties the defendant was instructed to conduct the business in the same manner in which it had been conducted by his predecessor, Fay G. Hicks. In compliance with such instructions, the defendant submitted himself to the tutelage of Hicks for a period of about a week, receiving from him minute directions as to the method of conducting the business and being introduced by him to various customers.

The instructions given to the defendant by Hicks were that each sale was to be reported to the milling company by sending to its office in Boston a duplicate or carbon copy of the invoice slip on the day of the sale, and a weekly report, including an account of the stock on hand at the warehouse and a list of the collections. The milling company furnished to the defendant a pad of invoice slips, numbered consecutively, there being four copies to each number, distinguishable from each other by the color or character of the paper. The original or white slip was to be kept by the defendant; the blue slip to be sent to the customer; the slip of tissue paper was to be forwarded to the office of the milling company in Boston; and the pink slip was not required under the arrangement with the defendant. Printed blanks for the weekly reports were also furnished to the defendant by the milling company which were designed to show, when properly filled out, the number of barrels of flour received during the week; an itemized list of the number of barrels delivered to customers from the warehouse; the number of barrels remaining in the warehouse; and an itemized list of all amounts collected from customers. As soon as the defendant collected the proceeds of sales, either in money or by check, he was to deposit the same in the Merchants' National Bank in Providence in the name of the milling company and report the same by sending to the milling company a copy of the deposit slip.

On November 1, 1913, a further arrange-

ment was made between the defendant and the milling company whereby the defendant should thereafter, instead of receiving a fixed salary, be paid a commission of 35 cents for every barrel of flour sold by him, he paying his own expenses, the expenses of storing and carting the flour in Providence and the guaranteeing of all accounts. This arrangement does not appear to have modified, or to have been intended to modify, the previous instructions given to defendant as to reports, collections, and deposits. In carrying out this additional arrangement the defendant was paid \$16 a week in advance on account of commissions. The balance due the defendant on account of commissions was paid to him from time to time by check from the milling company, and he was not permitted to deduct such commissions from his collections. Later, the milling company becoming dissatisfied with the defendant's dilatoriness in collecting the accounts, a further arrangement was made between the parties, taking effect in March, 1914, whereby the defendant was to be charged interest on all accounts which were not collected within 45 days.

During the summer of 1914 there were some negotiations between the defendant and the milling company looking to some arrangement whereby the defendant should buy the flour from the milling company and sell it on his own account, and on October 9, 1914, the defendant wrote to the milling company that by the next month he hoped to "buy the business outright." This arrangement was never completed, and the defendant admitted at the trial that this letter was written merely for the purpose of gaining time.

The milling company shipped the flour in its own name to a warehouse in Providence. None of the flour was ever consigned or charged to the defendant, and the defendant's name did not appear in the shipment. All the bills sent by the defendant to purchasers of flour were in the name of the milling company, a notice being stamped thereon requesting remittance to "Harry A. McAvoy, Agt." The defendant also in the transaction of the business used stationery which was headed "Bay State Milling Company." The defendant was given no authority to make prices on his own account, and letters and bills were sent direct to delinquent customers by the milling company.

The defendant undertook and purported to conduct the business in accordance with these arrangements. He sent to the milling company duplicate invoice slips and copies of deposit slips and a weekly report in the form heretofore described.

The evidence shows that the defendant made sales and deliveries which he never reported to the milling company, and that he made collections which he did not deposit in the Merchants' National Bank or report to the milling company, but appropriated the same to his own use. There is evidence

showing the methods resorted to by the defendant in concealing from the milling company that he was obtaining money which he did not report; that he omitted to report to the company certain collections which he had made on deliveries reported; that he omitted to report certain sales and deliveries; that he would deliver flour to two different customers under invoices of the same number and report but one of these deliveries to the company, sending the white slip to one customer and the blue slip of the same number to another customer instead of retaining either for himself, and on the tissue slip of the same number send to the company a report of only one of the sales.

The defendant admitted that in one instance he had intentionally concealed from the milling company one sale and collection amounting to \$85, but he testified that his failure to report other collections to the number of a dozen or more was due to forgetfulness.

The defendant had been instructed to deposit all collections to the account of the milling company in the Merchants' National Bank and send the milling company a copy of each deposit slip; and, according to the testimony of the officers of the milling company, the defendant had no authority to indorse any check made out to the order of the milling company or to deal with either money or checks received in payment of flour except to deposit the same to the account of the milling company in the Merchants' National Bank. The testimony shows, however, that several checks made out to the order of the milling company were deposited by the defendant to his own account in the Industrial Trust Company of Providence, the defendant indorsing them "Bay State Milling Company, Harry A. McAvoy, Agent," and that the amounts represented by such checks were never reported to the milling company as collections.

In July, 1914, the milling company wrote to the warehouse in Providence in which the flour was stored requesting an inventory of the flour of the milling company then in its possession. The defendant, visiting the office of the warehouse company and seeing the letter requesting an inventory, told the representatives of the warehouse company that he would take care of that matter, and accordingly prepared an inventory on a sheet of letter paper headed with the name of the warehouse company, which paper had in some unexplained manner come into the defendant's possession. The inventory thus prepared by the defendant was typewritten and without signature. There was nothing upon it to indicate that it was not compiled by employes of the warehouse company. The amounts given in this inventory corresponded with those given by the defendant in his reports, but exceeded by about 300 barrels the amount of flour which was actually in the hands of the warehouse company.

The defendant made some explanation of this matter of the inventory to the effect that an employé of the warehouse company asked him to make out the inventory and that he copied the figures from his previous reports. Although the milling company later wrote to the defendant referring to this report as the report of the warehouse company, the defendant did not advise the milling company that such report had been made by himself.

There was also testimony that on November 14, 1914, the milling company was notified by the Merchants' National Bank that its account was overdrawn. This turned out to be due to the fact that the defendant had deposited in that bank a check against his own account in the Industrial Trust Company which did not prove to be good. Mr. Harris of the milling company came to Providence and telephoned the defendant that he would like to see him at the Narragansett Hotel. Harris testifies that defendant stated to him over the telephone that he would be at the hotel in a few minutes. The defendant, however, went to New London, Conn. Harris, after waiting for a time, telephoned the defendant's father, who in turn telephoned the defendant at New London, suggesting to the defendant that he return to Providence, and he accordingly came back the next day. The defendant, however, testifies that he told Harris over the telephone that he had made arrangements to go to the southern part of the state to see prospective customers and could not see him that day. On cross-examination the defendant admitted that he had never before solicited business in Westerly, and that he could not remember the name of a single person upon whom he called. He said that he went to New London because there was no decent hotel in Westerly where he could spend the night. The defendant further admitted on cross-examination that he knew nothing whatever about the hotels at Westerly, and had no reason whatever for being dissatisfied with them. Witnesses for the state testified that the defendant admitted at the start that he had gone to Connecticut because he was afraid to face Harris; that he had appropriated money collected to the extent of some \$6,000, including about \$2,000 of the sales which he had not reported to the milling company; that he had made out a false inventory on the letter paper of the warehouse company, and that he had paid out most of the money which he had taken to make up for losses in speculating in wheat; that the defendant, without making any attempt to justify the taking of the money, told the representatives of the company that they could put him in jail if they wanted to, and when arrested by Inspector Maguire he said he had been a fool to give up his ledger to the company. In October, 1914, in answer to some complaints of the milling company that he was behind in the collection of his accounts, the

defendant wrote to the milling company that in a few weeks an estate in which he was interested would be settled, and that he would then have the money to remit, but he admitted on cross-examination that this story was a falsehood, and that there was no such estate.

The only exceptions pressed by the defendant, as stated in his brief, are those numbered, 1, 2, 3, 32, 33, 34, 36, 53, 54, 57, and 58.

[1] The defendant's exceptions 1, 2, and 3 relate to the admission of certain testimony of Fay G. Hicks. Hicks was the predecessor of the defendant as the Providence agent of the milling company. The defendant was told to get from Hicks instructions as to the method of carrying on the business. The defendant went to Hicks, and Hicks spent the greater part of a week in giving him instructions as to making and reporting sales and collections and also taking him to interview customers. The defendant objected to the testimony of Hicks in reference to the instructions he gave to the defendant on the ground that such instructions were given in April, 1913; that the contract under which he was then employed by the milling company ended in November, 1913, previous to the embezzlement set forth in the indictment; and that the arrangements from November 1, 1913, to the conclusion of his dealings with that company were very different, and it was immaterial what the arrangements were prior to 1914, the time laid in the indictment.

We do not think that the contract between the defendant and the milling company can be said to have ended in November, 1913. The contract was added to or modified in some respects at that time, but such additions or modifications did not relate to the reports, collections, and deposits which the defendant was instructed to make and under which instructions he undertook to act.

The modifications referred to related to the defendant's compensation, the guaranteeing of accounts, and to the payment of interest on accounts after the same had been overdue for a certain period. The duties of the defendant in the matter of reports, collections, and deposits were those given to him by Hicks at the instance of the milling company, and we think that such testimony was properly admitted, and that the defendant's exceptions 1, 2, and 3 must be overruled.

The defendant's exceptions 32, 33, and 34 relate to the same matter, and may be considered together.

In July, 1914, the milling company wrote to the warehouse company for an inventory of the flour on hand. This inventory, as before stated, was made up by the defendant, type-written upon the letter paper of the warehouse company, was without signature, and bore no indication that it emanated from the defendant. It was sent by the defendant to the milling company purporting to be a correct statement by the warehouse company of the amount of flour on hand. The state, in its endeavor to show the falsity of this state-

ment and that the amount of flour in the possession of the milling company was much less than that represented in the report, offered in evidence an inventory of the flour in the hands of the warehouse company on July 30, 1914, made up by the bookkeeper of that company. In making such inventory the bookkeeper started with the balance of flour as shown by the inventory of the month preceding, and deducted therefrom the deliveries during the month as reported to him by the teamers. These reports of the teamers were made from time to time upon slips used for that purpose which were filed in the office of the warehouse company. Some of these slips were offered in evidence in verification of the inventory of the bookkeeper. Another employé of the warehouse company testified that he actually counted the stock of flour on hand, and found that his figures corresponded with the figures of the inventory made by the bookkeeper. Besides this, Mr. Harris of the milling company counted the barrels of flour on hand in the warehouse and found a shortage of 575 barrels.

[2] The defendant contends that the introduction of the slips referred to showing deliveries of flour made by the teamers of the warehouse company and the introduction of the inventory of flour made therefrom by the bookkeeper of the warehouse company amounted to nothing more than the introduction of hearsay evidence, the admission of which was error. The apparent purpose of the testimony was to show that the defendant had deceived the milling company by conveying to that company a false report of the flour on hand. If we take the view that the admission of such testimony was erroneous, it would not constitute reversible error in view of the fact that there was other testimony establishing the falsity of the defendant's inventory which he did not dispute. The defendant's exceptions 32 and 33 must be overruled.

[3] The defendant's exception 34 is to the ruling of the court allowing the bookkeeper of the warehouse to testify as to the number of whole barrels of flour on hand as shown by the report of the defendant made to the milling company. The defendant objected to the question on the ground that the issue was not the embezzlement of flour. We see no merit in this exception. The number of barrels disposed of and unaccounted for by the defendant would naturally form a basis for ascertaining the amount of money covered by the embezzlement. The defendant's exception 34 is overruled.

[4] At the conclusion of the testimony for the state the defendant moved that he be discharged, and his exception 36 is to the refusal of the trial court to grant that motion. The basis of this motion was that under the facts as presented the defendant was a *del credere* factor, and that the relations between himself and the milling company were simply those of debtor and creditor. Passing over

the contention of the state that the disposition of such a motion is within the discretion of the court and is not the subject of exception, two questions present themselves for consideration: (1) Was the relation of the defendant with the milling company that of *del credere* factor? and (2) if such relation existed, could the defendant be found guilty of embezzlement under the indictments brought against him?

In determining the first of these questions, we must consider the agreement between the parties and apply thereto the familiar rules of construction, all of which are subordinate to the leading principle that the intention of the parties must prevail unless inconsistent with some rule of law. And such intention must be gathered not from a portion or portions of the contract but from the whole taken together. 11 R. C. L. 755; 1 Clark & Skyles on Agency, 24.

In the case at bar the flour was never consigned by the milling company to the defendant. It was shipped direct to the warehouse in Providence, where it was held as the property of and in the name of the milling company and was at all times subject to its orders. The defendant, after making a sale of flour, was permitted by the milling company to withdraw from its stock in the warehouse a sufficient number of barrels to fill the order. A bill was rendered to the purchaser in the name of the milling company, there being stamped upon such bill a notice to pay the amount due thereon to the defendant as its agent. Upon the receipt of the money the defendant was obligated, under his contract, to deposit it in full in the Merchants' National Bank to the credit of the milling company without any deduction therefrom for salary, commission, or expenses.

We cannot find any intent of the parties, either expressed by the contract itself or by the methods in which their respective duties under it were discharged, that would warrant us in drawing the conclusion that the defendant was acting otherwise than as the agent of the milling company.

The defendant seems to place much reliance upon the fact that under certain conditions he was to be held responsible to the milling company for interest upon accounts overdue for a certain length of time, and in some instances for the payment of the principal sum. The reason for this arrangement is quite apparent from the record. The milling company had expressed its dissatisfaction at the seeming indifference of the defendant regarding the prompt collection of the accounts due and his want of care in the selection of responsible customers. The arrangement was doubtless made for the purpose of stimulating the defendant to look more closely after the collections and to be more careful about making sales to irresponsible parties. It could hardly be inferred

without power to refer the matter at bar to a vice ordinary is also unsound. The contention is that because the appeal is given in terms to the ordinary, and that no power to refer it is given in the same statute, the right does not exist. This is fallacious, for by act of 1913 (P. L. p. 81) the ordinary is empowered to refer any matter pending in the Prerogative Court to a vice ordinary for hearing and advice, but the jurisdiction which the vice ordinaries exercise, upon reference to them, is not derived from this statute, but by delegation from the ordinary by virtue of his inherent powers.

In an exhaustive review of the powers of the vice chancellors (whose office was likewise created by statute), in *Re Thompson*, 85 N. J. Eq. 221, 96 Atl. 102, Chancellor Walker, at page 257, holds that:

"Their jurisdiction is complete by delegation from the chancellor under the authority inhering in his general power derived from the High Court of Chancery in England and devolved upon our Court of Chancery by the ordinances of Lord Cornbury and Governor Franklin, and ratified by the Constitutions of 1776 and 1844."

And at page 261 of 85 N. J. Eq., 96 Atl. 102, he holds that a perfect analogy exists with reference to the Prerogative Court, in which the Legislature has authorized the appointment of vice ordinaries, the ancient office of surrogate, as deputy or assistant to the ordinary, being the source of power in the vice ordinaries.

It is to be observed that in the act creating the office of vice ordinary (P. L. 1913, p. 81) the Legislature has provided that the ordinary may refer to any vice ordinary any cause or other matter which at any time may be pending in the Prerogative Court, to hear the same for the ordinary and report thereon to him and advise what order or decree should be made therein. Now, if the ordinary is a functionary apart from himself as the judge of the Prerogative Court, it is singular that the lawmaking body did not bestow the power to refer upon the judge of the Prerogative Court, the only functionary who in such case could constitutionally exercise it, instead of casting it upon the ordinary, who could not lawfully do so. In this we have legislative interpretation to the effect that the ordinary and judge of the Prerogative Court, and likewise their jurisdiction, are one and the same.

Enough has been shown, I think, to demonstrate that the act under which this assessment was made, and which gives an appeal to the ordinary, treats the ordinary and the Prerogative Court as one and the same—a single judicial entity.

[3] The giving of an appeal to the ordinary in the inheritance transfer tax act is a valid legislative enactment.

It may be that certiorari in the Supreme Court is a method for the review of an appraisal or tax made or levied under the inheritance transfer tax act, but, considering that an appeal has been provided to the or-

inary, the Supreme Court would probably deny the allocatur on such a writ before, or even after, the time for appeal to the ordinary had expired, as the allowance of an allocatur is discretionary. *Florenzle v. East Orange*, 88 N. J. Law, 438, 97 Atl. 260.

In *Re Prudential Ins. Co. of America*, 82 N. J. Eq. 335, 88 Atl. 970, the Court of Errors and Appeals held that the statutory scheme providing for the condemnation of the capital stock of a stock life insurance company for certain purposes mentioned was cast by the Legislature upon the chancellor, or the Court of Chancery, a distinction which, if it exists, was of no practical moment to the motion then before the Court of Errors and Appeals, and at page 339 that the statutory proceeding before that court was reviewable by certiorari only, regardless of the fact that one of the agencies that took part in it was the "Court of Chancery."

I hold that the proceeding before me is one in the Prerogative Court, and one which the ordinary could lawfully refer by virtue of the act of 1913 (P. L. p. 81) empowering him to refer to any vice ordinary any cause or other matter which at any time might be pending in the Prerogative Court.

Now, the act of 1909 (P. L. p. 325) provides for taxing the transfer of property of decedents by devise, descent, etc., and section 18, as seen, allows any one dissatisfied with an assessment of such taxes to appeal to the ordinary. The only question raised by such an appeal is as to whether or not the assessment is excessive, and the review of such a question may be devolved upon a court of appeal. *Florenzle v. East Orange*, 88 N. J. Law, 438, 97 Atl. 260. There an appeal from an assessment for benefits for a municipal improvement was confided to the circuit court, and the jurisdiction thus given was upheld. Here an appeal from the assessment of a property transfer tax is confided to the ordinary of the Prerogative Court. The principle is the same. The grant of appellate jurisdiction to this court in tax transfer matters is as valid as that to the circuit courts in assessments for municipal improvements.

[4] The reason that legislation establishing special statutory tribunals for the hearing and determining of appeals theretofore cognizable only in the Supreme Court on certiorari is valid is because a review of the decision of the special tribunal is removable into the Supreme Court by certiorari, and that court's jurisdiction on certiorari is therefore not impaired. Certiorari in such cases is in the nature of an appeal, and an appeal is a judicial proceeding cognizable in a court.

[5] It would appear that the decree of the Prerogative Court on these appeals is reviewable by certiorari in the Supreme Court, instead of by appeal to the Court of Errors and Appeals. In *re Prudential Ins. Co. of America*, 82 N. J. Eq. 335, 339, 88 Atl. 970; *Florenzle v. East Orange*, 88 N. J. Law, 438,

440, 97 Atl. 260. This question is suggested in the briefs, but is not before me for decision.

The jurisdictional question having been determined, I will, upon application of counsel, designate a day for hearing the facts.

(80 N. J. Law, 457)

MATERKA v. ERIE R. CO.

(Supreme Court of New Jersey. June 6, 1917.)

(Syllabus by the Court.)

1. TRIAL \S 139(1)—**JURY**—**WEIGHT OF TESTIMONY**.

It is for the jury to say what weight shall be given to the testimony of a witness having an opportunity to hear, standing at or near the crossing where the accident occurred, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, in a grade crossing accident case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 333-341.]

2. RAILROADS \S 350(1) — **GRADE CROSSING ACCIDENT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY**.

It was not error in this case to refuse to direct a verdict in favor of the defendant on the ground there was no proof of negligence on the part of the defendant or because the decedent was guilty of contributory negligence. They were both jury questions. *Holmes v. Pennsylvania R. R. Co.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1031, *Weiss v. Central R. R. Co.*, 76 N. J. Law, 348, 69 Atl. 1087, and *Howe v. Northern R. R. Co.*, 78 N. J. Law, 683, 76 Atl. 979, distinguished.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1152.]

Appeal from Circuit Court, Hudson County.

Action by Mary Materka, administratrix, etc., against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1916, before **TRENCHARD** and **BLACK, JJ.**

Collins & Corbin and **George S. Hobart**, all of Jersey City, for appellant. **Alexander Simpson**, of Jersey City, for respondent.

BLACK, J. This action was brought by the plaintiff, as administratrix of **Ferdinand Materka**, to recover damages for the benefit of his widow and next of kin, by reason of his death, on September 6, 1912, by being struck by an east-bound express train, at the Park Avenue grade crossing, in the borough of East Rutherford and Rutherford, Bergen county, while he was crossing the tracks on foot. At that crossing there were four tracks, safety gates, and a watchman. A rule to show cause was allowed, reserving objections and exceptions noted at the trial. The verdict was reduced to the sum of \$4,000. The trial court refused to set aside the verdict on the ground that it was against the weight of evidence. The points argued by the appellant for a reversal of the judgment are: First, there was no proof of negligence on the part of the defendant; second, a ver-

dict should have been directed for the defendant because of contributory negligence of the decedent, **Ferdinand Materka**; third, error in the charge of the trial judge, and in the refusal to charge as requested, but this latter point involves the same points as are in the first two, except as hereinafter noted. This is the second trial of the case. The judgment recovered in the first trial was reversed by the Supreme Court for trial errors. The judgment of the Supreme Court was affirmed by the Court of Errors and Appeals. In the report of the case the facts are quite fully and satisfactorily stated. *Materka v. Erie R. R. Co.*, 88 N. J. Law, 372, 95 Atl. 612.

[1, 2] The crux of the case is whether there was evidence from which the jury might find that the decedent attempted to make the crossing while the safety gates were up and without receiving any warning from the flagman; that the train which struck the decedent approached the crossing without giving the statutory signals of ringing a bell or sounding a steam whistle. The record shows the following testimony: **David Harris**, a witness, testified:

"Q. Were the gates up when you crossed over? A. Ye. * * * I crossed into East Rutherford, and I saw this gentleman get off this trolley car and cross the railroad tracks. Q. Were the gates up when he crossed? A. The gates were up on one—yes. Q. On your side? A. The side I crossed the gate was up on, yes. Q. That is the side he entered the tracks from? A. That is the side he entered the tracks on. Q. When he came from the trolley car and went on the tracks the gates were up, I understand? A. That is right, sir. Q. After he got on the tracks what occurred? A. Why, that gate on the Rutherford side went down. Q. Yes? A. And the gate on the East Rutherford side was up. Q. Yes? A. And I passed a remark. Q. You cannot tell what you said, just what you saw. You saw this? A. I saw this man cross the tracks, and there was a train coming down the track, and I said to myself, 'I don't think he will get across,' and with that I saw the man hit. * * * Q. Did you hear any whistle or bell up to the time you saw him hit? A. I did not, sir."

On cross-examination:

"Q. You did not know it was coming? A. No, sir. Q. You were not listening for it? A. No, sir. Q. Not paying any attention to it at all? A. No, sir. Q. I understand you to say, however, that you did see it coming; is that right, you did see the train coming before it struck Mr. Materka? A. Yes. (Witness marks on a photograph, Exhibit P-5, where he was standing at that time.)"

Redirect:

"Q. Now Mr. Hobart asked you if you were listening for the express train. You did not know it was coming until you saw it, did you? A. No, sir. Q. And from the time you started across the crossing up to and until the time you saw the express train had you heard any whistle or bell of any kind? A. No, sir."

Genevieve Ruth Saxly a witness standing at the crossing at the time of the accident, did not hear any whistle before the decedent was struck. She said she was not listening for whistles.

Under the rule laid down in the cases, in

the Court of Errors and Appeals of this state, such as *Danskin v. Pennsylvania R. R. Co.*, 83 N. J. Law, 522, 526, 83 Atl. 1006, *Horandt v. Central R. R. Co.*, 81 N. J. Law, 490, 83 Atl. 511, *Walbel v. West Jersey, etc.*, R. R. Co., 87 N. J. Law, 573, 94 Atl. 951, and *McLean v. Erie R. R. Co.*, 69 N. J. Law, 57, 60, 54 Atl. 238, affirmed 70 N. J. Law, 337, 57 Atl. 1132, this evidence was for the jury, it made a jury question. The point cannot be removed from the domain of the jury.

The cases of *Holmes v. Pennsylvania R. R.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1031, *Weiss v. Central R. R. Co.*, 76 N. J. Law, 348, 69 Atl. 1087, and *Howe v. Northern R. R. Co.*, 78 N. J. Law, 683, 76 Atl. 979, distinguished. So contributory negligence of the decedent was also a jury question under such cases as *Brown v. Erie R. R. Co.*, 87 N. J. Law, 487, 91 Atl. 1023, and *Ferneti v. West Jersey, etc.*, R. R. Co., 87 N. J. Law, 268, 93 Atl. 576.

This disposes of the case, except it is further urged that there was error in the refusal of the trial court to charge each of two specific requests in reference to the statutory signals and the operation of the crossing gates; each request covers separate charges of negligence. The judgment must be reversed, so it is argued, because the trial judge permitted the jury to base a verdict upon either ground, notwithstanding the specific requests submitted by the defendant with respect to each allegation of negligence. The court in the charge to the jury had covered each ground fully, accurately, and clearly. The requests refused were, in effect, to take the case from the jury; hence this was not error, in view of the cases above cited.

The judgment of the Hudson circuit court is affirmed, with costs.

(256 Pa. 608)

WEIL v. MARQUIS.

(Supreme Court of Pennsylvania. Feb. 26, 1917.)

1. EXECUTORS AND ADMINISTRATORS §586—BENEFIT OF DECEDENT—BENEFIT OF CREDITORS.

An executor or administrator may bring an action to set aside the fraudulent transactions of the deceased for the benefit of creditors, whose trustee he is.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665.]

2. EXECUTORS AND ADMINISTRATORS §586—DEATH OF TRANSFEROR — ADMINISTRATOR'S ACTION FOR BENEFIT OF CREDITORS.

A transfer of property in fraud of creditors is a nullity, and, after the transferor's death, an action is maintainable by his administrator as trustee to recover so much of the property transferred as may be needed to pay just claims of creditors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665.]

3. INSURANCE §586—BENEFICIARIES—VESTED INTEREST.

Where the insured took out life insurance policies payable to his wife and did not exercise his right to change his beneficiary during his lifetime, the widow's interest in the policies on his death became a vested interest.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1470.]

4. INSURANCE §590—BENEFICIARY—LIABILITY OF FUND FOR DEBTS.

Act April 15, 1868 (P. L. 103), providing that insurance money payable to the wife and children of an assured shall be free from the claim of creditors, governed where an intestate who had taken out life insurance policies payable to his wife and died without having exercised the right to change the beneficiary, and where the widow collected the insurance money amounting to less than his debts, so that she was entitled to hold the proceeds as against the insured's administratrix suing for money had and received; Act May 1, 1876 (P. L. 53), Act June 1, 1911 (P. L. 581), and Act May 5, 1915 (P. L. 253), relating to other forms of insurance and to beneficiaries, not applying.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1479, 1482, 1485.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for money had and received by Nita M. Well, administratrix of the estate of Abraham Marquis, deceased, against Jeanette A. Marquis. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The facts appear in the following opinion by Audenried, P. J., in the court below:

Abraham Marquis died August 14, 1914, intestate and insolvent. He had taken out sundry policies of insurance upon his life, each of which was made payable to the defendant, his wife, subject, however, to the provision that he might change the beneficiary thereunder. He died without having exercised that right, and his widow collected the money payable on these policies, which amounted to much less than his debts. Letters of administration upon the estate of Marquis have been granted to the plaintiff, who has brought this action against his widow to recover what the latter received from the insurance companies.

Upon these facts, which are not denied by the defendant, the plaintiff asks judgment for either the amount of the proceeds collected on the policies or the amount of their surrender value immediately before the death of the insured; both amounts being ascertainable from the affidavit of defense.

[1, 2] As to the first question discussed by counsel, we have no doubt. While an executor or administrator, as the mere personal representative of a decedent, can take no step to set aside for the benefit of heirs, next of kin, legatees, or devisees, the fraudulent transactions of the deceased, his right to do so for the benefit of the creditors, whose trustee he is, has long been recognized in this state. *Chester County Trust Co. v. Pugh*, 241 Pa. 124, 88 Atl. 319, 50 L. R. A. (N. S.) 320, Ann. Cas. 1915B, 211. A transfer of property in fraud of creditors is a nullity as against the interests attempted to be defrauded; and, after the death of the transferor, an action is maintainable by his administrator, as their trustee for the recovery of as much of the property so transferred as may be needed for the payment of their just claims. *Buehler v. Gloninger*, 2 Watts, 226; *Stewart v.*

Kearney, 6 Watts, 453, 81 Am. Dec. 482. While the statement of claim does not allege actual fraud in the dealings of the defendant with her husband in respect to the policies of insurance procured by the latter upon his life, it is argued that the facts above mentioned make out a case of constructive fraud. We think that, if this contention can be sustained, the right of the plaintiff to a recovery against the defendant is clear.

Several acts of assembly have been referred to by counsel as bearing on the matter before the court, and our next inquiry, therefore, is whether these have any application to the case.

The most recent legislation on the subject of life insurance policies such as those referred to in the plaintiff's statement is the Act of May 5, 1915, P. L. 253. By its terms, this statute relates to policies of life insurance "which have heretofore or which shall be hereafter taken out for the benefit of, or assigned to, the wife or children, or any other relative dependent upon" the person whose life is insured. Grammatically, the use of the perfect tense of the verb in the clause "which have heretofore (been) taken out" seems to imply that the policies therein referred to were existing policies that had not, when the act became effective, matured and been paid. If this clause were construed to embrace all policies that had been issued prior to the passage of the act, thus including those with respect to whose proceeds rights had already vested, the act, to that extent, would violate both section 17 of article 1 of the Constitution of Pennsylvania and clause 1 of section 10, art. 1, of the Constitution of the United States, since it would impair the obligation of contract by depriving creditors of their remedy, an impediment, in the shape of an exemption which did not exist when their debts were contracted, being placed in the way of collecting them. *Penrose v. Erie Canal Co.*, 56 Pa. 46; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Kener v. Le Grange Mills*, 231 U. S. 215, 34 Sup. Ct. 83, 58 L. Ed. 189. We are of opinion, therefore, that this act does not affect the case before us.

Nor does section 25 of the Act of May 1, 1876 (P. L. 60) apply. The provisions of that section are expressly confined to policies issued by companies incorporated under the act of which it forms a part. It does not appear, and the court cannot assume, that the insurance companies that issued the policies referred to in this case were so incorporated.

Section 27 of the Act of June 1, 1911, P. L. 581, provides as follows: "A policy of insurance issued by any company, heretofore or hereafter incorporated, on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to their benefit." Unless this enactment is held to be retrospective in its operation, it does not apply to the policies involved in this case. The last of these to be issued was taken out more than nine months before it became a law. But the act is not, in this respect, retroactive. The use of the present tense of the verb in the conditional part of the second sentence of the section quoted plainly indicates that no reference to policies previously issued is intended; and, if its language were otherwise, no effect could be given to it, so far as concerns such policies, for the same constitutional reasons that are referred to above in discussing the Act of May 5, 1915. Moreover, even if it was intended to change the law as to the rights of creditors in respect to policies of life insurance theretofore issued, notice of such an intention is wholly lacking in the title of the act; and the attempt to make such

a change was therefore futile. Section 3, art. 3, Constitution of Pennsylvania. When the subject expressed in the title of an act is not broad enough to cover all its provisions, such parts of the act as are not within the purview of the title are void. *Hatfield v. Com.*, 120 Pa. 395, 14 Atl. 151; *Potter County Water Co. v. Austin Borough*, 206 Pa. 297, 55 Atl. 991.

So far as our examination of the acts of assembly goes, the only legislation that bears upon the question involved in these rules is section 1 of the Act of April 15, 1868 (P. L. 103). This reads as follows: "All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear of all claims of the creditors of such person."

It is conceded by the plaintiff that, if the policies in question were within the scope of this act, judgment must be entered in favor of the defendant. It is contended, however, that they do not fall within either of the two classes of policies which the statute was intended to protect from the creditors of the person who has taken them out and paid their premiums.

From the affidavit of defense it is impossible to determine how the policies whose proceeds are in dispute were originally issued. All that appears is that the defendant was, prior to the death of her husband, the beneficiary thereunder, and that he had the right to appoint another as beneficiary in her place.

It is argued on behalf of the plaintiff that, if the policies when originally issued were made payable to the defendant subject to the condition that her husband should not designate some other person as payee of their proceeds, they were taken out by him for his own benefit and not for hers; and that consequently the case does not fall within the first of the two categories embraced by the act. It is further argued that, if the policies were issued in the name of the insured, they are not within the second class to which the act refers, because the wife took no interest in them under the subsequent assignment thereof to her; the reservation to the insured of the right to change the beneficiary securing full control of the policies to him and leaving him, therefore, their real owner.

Although the policy of the law, even where the rights of creditors may be adversely affected, favors the wife to whom her husband has attempted to secure the benefit of insurance upon his life (*Kulp v. March*, 181 Pa. 627, 37 Atl. 913, 59 Am. St. Rep. 687), the argument of the plaintiff thus summarized is of great weight, and, if the creditors had attempted to reach the policies during the lifetime of the insured, we can see no reason why they should not have been successful (*In re Herr* [No. 2 D. C.] 182 Fed. 716; *In re Jamison Bros. & Co.* [D. C.] 222 Fed. 92; *In re Shoemaker* [D. C.] 225 Fed. 329).

[3, 4] Nevertheless, the facts presented by this case differ in a very important point from those involved in the bankruptcy cases to which reference has been made. Here the insured is no longer living. He had, it is true, reserved to himself under his insurance contracts the option of letting them inure to the benefit of his wife or appointing some other beneficiary in her stead. This he might have exercised whenever he saw fit during his life, but it ended at the very instant of his death. It did not survive him. See *McDonald, Ex'x, v. Columbian National Life Insurance Co.*, 253 Pa. 239, 97 Atl. 1086, L. R. A. 1916F, 1244. The moment he breathed his last, the happening of the condition subsequent which might have divested the defendant's rights in the policies became impossible. If up to that time her interest in the

policies amounted to nothing more than a bare expectancy, that expectancy then ripened, and her interest in the policies and their proceeds immediately became a vested one.

Thus the air was cleared; and the position of the creditors became forthwith what it would have been if, when the policies were originally issued or subsequently assigned to her, no right to change their beneficiary had been reserved by the insured. Setting aside the question of fraud, any right that the creditors of Marquis or their representative had to object to the statute as a bar to the appropriation of the policies of insurance on his life payable to his wife to the discharge of their claims against him rested solely on the ground that he still held a control over them equivalent to ownership. That foundation has slipped away. As the case now stands, the disposition of the proceeds of the policies is governed by the Act of April 15, 1868.

If the defendant's rights as beneficiary resulted from the assignment of the policies to her by her husband, it would, of course, be possible to attack them, under the Act of 13 Eliz. C. S., on the ground of fraud. The Act of 1868 protects such assignments only when bona fide. Although the assignment in this case, if there was an assignment, was made by an insolvent to his wife, with a reservation of power to control the disposition of the policies as he pleased, the court cannot declare the transaction, however suspicious it may be, fraudulent *per se*. The statement of claim raises no question of fraud in fact; but, if fraud were alleged, the question of the good faith of the defendant and her husband would necessarily take the case to the jury, to whose province such questions peculiarly appertain. *Sebring v. Brickley*, 7 Pa. Super. Ct. 198.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

Morris Wolf and Horace Stern, both of Philadelphia, for appellant. Hampton L. Carson and Joseph Carson, both of Philadelphia, for appellee.

PER CURIAM. This appeal is dismissed on the opinion of the learned president judge of the court below discharging the rules for judgment for want of a sufficient affidavit of defense.

(256 Pa. 620)

COMMONWEALTH v. STAUSH.

(Supreme Court of Pennsylvania. Feb. 26, 1917.)

1. CRIMINAL LAW § 980(2)—PLEA OF GUILTY—SENTENCE—STATUTE.

Act March 31, 1860 (P. L. 402) § 74, providing that, where a defendant pleads guilty to an indictment for murder, the court shall proceed by examination of witnesses to determine the degree of the crime, must be strictly construed, and thereunder the examination of witnesses by the court means the seeing and hearing of the witnesses, and a mere reading of their testimony by a judge or judges who did not see or hear them is not a compliance with the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2494, 2495.]

2. CRIMINAL LAW § 980(2)—PLEA OF GUILTY—SENTENCE—STATUTE.

Under such provision, every member of a court passing upon the degree of guilt must see and hear the witnesses upon whose testimony the degree of homicide is to be determined, and where three of the five judges heard the

testimony and thereafter the president judge who was not present during the examination of witnesses read the evidence, and joined in the deliberations, and wrote the court's opinion fixing the crime as murder in the first degree, the judgment would be reversed, and a procedendo awarded with leave to defendant to renew in the court below a motion to withdraw his plea of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2494, 2495.]

Appeal from Court of Oyer and Terminer, Luzerne County.

John Staush was convicted of murder in the first degree, and he appeals. Reversed, and procedendo awarded with leave to defendant to renew in court below his motion for leave to withdraw his plea of guilty.

Argued before BROWN, C. J., and MES- TREZAT, STEWART, MOSCHZISKE, and WALLING, JJ.

M. J. Torilinski and George Howorth, both of Wilkes-Barre, for appellant. Frank P. Slattery, Dist. Atty. of Luzerne County, and Edwin Shortz, Jr., Asst. Dist. Atty., both of Wilkes-Barre, for the Commonwealth.

BROWN, O. J. [1] John Staush, the appellant, entered a plea of guilty to an indictment charging him with murder, and it thereupon became the duty of the court below, under section 74 of the act of March 31, 1860 (P. L. 402), to "proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly." Three of the five judges of that court met to perform the duty imposed upon it, and witnesses were examined before them. At the examination the commonwealth was represented by the district attorney, and the prisoner, with his counsel, was present. The testimony was taken down by the court stenographer, whose transcript of the same was duly approved by one of the judges and ordered to be filed. After the hearing, and before the three judges had reached any conclusion as to the degree of the prisoner's guilt, they asked the president judge of the court—who had not been present at the examination of the witnesses—to join them in their consideration of the testimony taken, for the purpose of fixing the degree of the crime. After reading the evidence, he took part in their deliberation, and found that the prisoner was guilty of murder of the first degree. Subsequently he wrote the opinion of the court, fixing the degree of guilt, and pronounced the judgment of death. The real error of which the appellant complains—and the only one upon which we need pass—is the action of the court below in having its president judge consult with his three colleagues over a most solemn question, involving life, without his having seen or heard the witnesses upon whose testimony it was to be determined.

A tribunal, specially designated by the Legislature, fixes the degree of guilt, upon

conviction by confession, on an indictment charging murder. Such a case is no longer for a jury, whose province it is to fix the degree of homicide in every case where the accused goes to trial on his plea of not guilty. The Legislature might have provided that, on a plea of guilty, a jury should hear the testimony relating to the crime for the sole purpose of fixing the degree of guilt; but it has not done so. It has committed that duty to the court having jurisdiction of the indictment, and perhaps wisely so, in view of human sympathy to which jurors not infrequently yield when called to pass upon the life or death of a fellow man. To enable it to discharge this duty the court must examine witnesses and hear what they know and are able to truthfully tell of the circumstances attending the admitted felonious killing. As this statutory provision, relating to a criminal procedure, must be strictly construed, the examination of witnesses by the court means its seeing and hearing them, not a mere reading of their testimony by a judge or judges who neither saw nor heard them, and it means that every member of a court passing upon the degree of guilt in a homicide case must see and hear the witnesses upon whose testimony the question is to be determined. If it had been for a jury to determine the degree of the appellant's guilt, and but eight of the jurors had seen and heard the witnesses, a verdict of the twelve condemning him to death would be promptly set aside, if the other four jurors had simply read the testimony of the witnesses from the stenographer's notes; and yet this, in effect, is the situation here presented.

[2] The court below, composed of four of its five members, found the prisoner guilty of murder of the first degree. They were his triers; they deliberated together over what their verdict should be, and, after so deliberating, fixed his crime as the highest known to the law; but one of them had neither seen nor heard a single witness called to sustain the commonwealth in asking for a first degree finding, or the plea of the prisoner that intoxication had reduced the degree of his offense. One of the three judges who heard the witnesses long hesitated in reaching his conclusion, and if the fourth, who heard none of them, had heard them all, he might also not only have long hesitated, but actually refused to concur in the finding of first degree murder. In findings of fact by a judge, sitting as a chancellor, the credibility of witnesses and the weight to be given to their testimony are for him, and their credibility is often sustained or impaired by their appearance on the witness stand and by their manner of testifying. If this is true in civil cases, it is surely true in a proceeding in a criminal court in which a human life is at stake.

We are not to be understood as saying, or even intimating, that on the testimony of the witnesses seen and heard by the three learned judges of the court below they would have erred in adjudging the prisoner guilty of murder of the first degree; for that is not the question before us. All that we now decide is that error was committed in having the president judge take part, under the circumstances stated, in a consultation and deliberation which resulted in a finding necessarily followed by the judgment from which we have this appeal.

Judgment reversed, and procedendo awarded, with leave to the prisoner to renew in the court below his motion for leave to withdraw his plea of guilty.

(257 Pa. 13)

WOOD v. WILLIAM KANE MFG. CO., Inc.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MASTER AND SERVANT §90 — MASTER'S DUTY—EXTENT.

The mere relation of master and servant does not imply an obligation on the master to take more care of the servant than he may reasonably be expected to take of himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139.]

2. MASTER AND SERVANT §265(12)—NEGLECT—EMPLOYMENT OF SERVANTS.

The presumption is that an employer has exercised proper care in the selection of its employes, and one charging negligence in the employment of men must show it by proper evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 891, 906.]

3. MASTER AND SERVANT §150(6) — ACTION FOR INJURY—NEGLECT—EVIDENCE.

Where plaintiff in charge of riveting boilers was supplied by his employer with helpers, and where one of the helpers, not shown to be incompetent, and who was not instructed by plaintiff as to his duties, accidentally let go of the base of a boiler so that it fell upon plaintiff, there was no negligence on the part of defendant, and the court should have directed a verdict for it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 302, 307.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injury by Thomas Wood against the William Kane Manufacturing Company, Incorporated. Verdict for plaintiff for \$2,000 and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Frank P. Prichard, of Philadelphia, for appellant. John J. McDevitt, Jr., and Samuel G. Stem, both of Philadelphia, for appellee.

POTTER, J. This was an action of trespass to recover damages for personal inju-

ries. Plaintiff, who had the management of the boiler making shop of the defendant company, charged his employer with negligence in failing to provide an experienced helper, which, as he alleged, resulted in his injuries. He was supplied with helpers, varying in number from three to six, who received instructions from him. On the day of the accident, plaintiff was engaged in riveting the base of an upright boiler. The base was not a perfect cylinder, but was smaller at the top than at the bottom. It was about 14 inches high, and weighed about 250 pounds. Plaintiff suspended it by two hooks from a crane, and asked two of the helpers to steady it while he applied a pneumatic riveter. In order to secure proper contact it was apparently necessary to tilt the base slightly. The pneumatic riveter was applied under some pressure to the side of the base, and when it was withdrawn, one of the helpers let go of the base, and it slipped from the hooks and fell, injuring plaintiff's hand. It appears from the evidence that Gordon, the helper in question, had been employed in the establishment about a year, but had never been called upon to assist in steadying a base of that particular description. It was, as plaintiff said, "something out of the ordinary" as to shape, and he had made but five of them during a period of three years. Plaintiff gave no instruction to the helper, Gordon, as to steadying the base while the riveting was being done. The service required was not complicated, or difficult to perform. There is nothing in the evidence to show that the young man was incapable. He seems to have been taken by surprise at the effect upon the base of the removal of the pressure, and failed to hold on steadily. A word of caution in advance from the plaintiff, who was standing close by, would, no doubt, have prevented the accident. It cannot justly be charged to any lack of experience, upon the part of the helper, in assisting to steady a piece of metal of that particular size and shape. It may very well be that, for the performance of complicated or difficult work involving danger, an employer would be bound to furnish not only competent, but experienced, men, especially for leadership and supervision. But in the present case, the plaintiff himself was supervising the work, and the part which the helper was called upon to perform was of the simplest possible character. He was asked to hold but little weight, and was merely to lay his hand upon the base to help steady it, while supported by the hooks.

[1] If any instruction or warning was needed to aid him in the discharge of this very simple duty, the necessity for it arose upon the instant, and the word of caution should have come from the plaintiff, who was in immediate charge of the operation. The mere relation of master and servant can never imply an obligation upon the part of the master to take more care of the servant than

he may reasonably be expected to take of himself.

[2, 3] The presumption is that the employer has exercised proper care in the selection of employes, and it is incumbent upon one charging negligence, in the employment of men, to show it by proper evidence. The plaintiff here was acquainted with the helper, and knew he had been working in the shop for at least a year. The evidence shows no suggestion that any complaint as to incompetence upon the part of the helper was ever made by the plaintiff, or any one else. The fact that he was employed merely as a helper is in itself an indication that, having proper capacity, he was expected to gain skill in the work and knowledge of its details, under the guidance and instruction of more experienced men, such as plaintiff, with whom he was associated.

We find nothing in this record to justify placing the legal responsibility for the results of the accident upon the defendant.

The first assignment of error is sustained. the judgment is reversed, and is here entered for defendant.

(257 Pa. 22)

**MULHERN et al. v. PHILADELPHIA
HOME-MADE BREAD CO.**

(Supreme Court of Pennsylvania. March 5, 1917.)

**1. MUNICIPAL CORPORATIONS § 705(3)—USE
OF STREET—CARE AS TO CHILDREN.**

Special caution on the part of drivers of vehicles is required for the protection of children congregating in the vicinity of a school-house.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

**2. MUNICIPAL CORPORATIONS § 706(6)—USE
OF STREETS—NEGLECT OF DRIVER OF VEHICLE—QUESTION FOR JURY.**

In an action for damages for personal injury to a school child from being run over by a wagon, held, on the evidence, that whether the driver's failure to stop it or turn aside to avoid the injury was negligence was a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injuries by Anna Mulhern, by her father and next friend, William J. Mulhern, and by William J. Mulhern in his own right, against the Philadelphia Home-Made Bread Company. Verdict for plaintiff Anna Mulhern for \$2,000, and for plaintiff William J. Mulhern for \$200, and judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHISKEER, and FRAZER, JJ.

William H. Peace, of Philadelphia, for appellant. John Martin Doyle and Eugene Raymond, both of Philadelphia, for appellees.

POTTER, J. These appeals are grounded upon the refusal of the court below to give binding instructions in favor of the defendant, or to enter judgment non obstante veredicto. It appears from the testimony that about noon on February 4, 1900, some school children just released from school were walking and sliding upon the icy sidewalk on the south side of Tasker street near Eighteenth. Anna Mulhern, a child some ten years of age, fell or was pushed over the curb into the edge of the driveway of the street as a wagon driven by an employé of defendant was approaching, the right-hand wheels running near the curb. The horse was turned somewhat aside, but the front wheel of the wagon ran over the little girl's leg and broke it. The question for determination was whether the driver, by the exercise of proper care, should have seen the child after it fell and was lying partly in the street ahead of him in time to stop his wagon, or turn it aside to avoid the accident, and whether his failure to do so was negligence.

A bystander testified that he saw the child lying partly in the gutter when the wagon was some 30 feet distant, and he said that the driver was not then looking ahead, but was at the moment looking backward into the body of his wagon. The jury may well have found that the proximity of a number of children upon the sidewalk at the side of the street upon which he was driving and the well-known tendency of children to make sudden and heedless dashes should have put the driver upon his guard at that particular place, at least to the extent of keeping his horse well in hand.

[1] It is common knowledge that special caution is required for the protection of children who congregate in the vicinity of a schoolhouse. The plaintiff Anna Mulhern testified that after she had fallen down and was lying partly in the gutter she saw the wagon coming along the street some 30 to 50 feet away from her. If this was the fact, the driver could have stopped his wagon or turned it aside before reaching her, if he was moving at a proper rate of speed and had his horse under proper control.

[2] On the other hand, the evidence upon the part of defendant tended to show that the child came so suddenly and unexpectedly from the sidewalk into the line of travel in the street that the accident was unavoidable. If this was the case, defendant should not have been held responsible.

Counsel for appellant has contended with great earnestness that the trial judge should have held as matter of law that the evidence did not justify an inference of negligence upon the part of the driver. But we are unable to agree with his contention in this respect. As we read the evidence, the question was purely one of fact upon conflicting state-

ments by the witnesses. If the jury accepted as credible the evidence offered by the plaintiff, they were justified in inferring negligence upon the part of the driver. Had they accepted as accurate the testimony on behalf of the defendant, they must have concluded that the driver was not at fault in any way, and the verdict would have been for the defendant. We may feel that the jury might very properly have reached another conclusion, but the question of fact in dispute was for them to decide. To the charge of the court in submitting the case no exception was taken.

The judgment is affirmed.

(257 Pa. 42)

HARDIE et ux. v. BARRETT.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. HIGHWAYS \S 175(1)—HIRED AUTOMOBILE—INJURY—CONTRIBUTORY NEGLIGENCE.

When the dangers arising from the negligent operation of a hired automobile in which one is riding as an invited guest are manifest to a passenger having an adequate opportunity to control the situation, and he permits himself without protest to be driven to his injury, he is fixed with his own negligence which bars a recovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

2. HIGHWAYS \S 175(1)—COLLISION—CONTRIBUTORY NEGLIGENCE.

Where a husband and wife hired an automobile driven by the owner's chauffeur and made no effort to have the chauffeur drive at a proper speed and on the right side of the street, they would be guilty of contributory negligence barring their recovery for injuries from a collision.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

3. HIGHWAYS \S 175(1)—PERSONAL INJURY—NEGLIGENCE—PROXIMATE CAUSE.

In an action by a husband and wife for personal injuries when the hired automobile in which they were riding in New Jersey collided with defendant's wagon during a time when the New Jersey law required that it display lights, the fact that there were no lights on defendant's wagon, if not the proximate cause of the accident, even though negligence, would not justify a recovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injuries by James G. Hardie and Olive M. Hardie, his wife, and James G. Hardie against William M. Barrett, as president of the Adams Express Company, a joint-stock association under the laws of New York. Verdict for defendant and judgment thereon, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Sydney Young, of Philadelphia, for appellants. John Lewis Evans and Thomas DeWitt Cuyler, both of Philadelphia, for appellee.

MOSCHZISKER, J. On the evening of August 22, 1913, James G. Hardie, and Olive M., his wife, hired an automobile with its driver, one Louis S. Chester, Jr., to convey them, with two women guests, from Sea Isle City, N. J., to a nearby yacht club. On the way a collision occurred between the car in which they were riding and a one-horse express wagon belonging to the defendant company. Both Mr. Hardie and his wife were injured; they sued for damages, and by express agreement of record their cases were tried together, the issues involved were submitted to the jury, and in each instance the verdict favored the defendant, judgments were entered accordingly, and the plaintiffs have appealed.

The testimony on all the important issues was most conflicting; but, when viewed in the light of the verdicts rendered, the following facts can be found therefrom: The accident happened on a rainy evening, between 8:30 and 9 o'clock. Mr. Hardie occupied a front seat in the automobile, beside the chauffeur, while Mrs. Hardie, her mother and the other woman were in the tonneau. The car was equipped with five lights, "two large acetylene gas lamps on the head, two on the side, and one red light in the rear." The headlights illuminated the road so that one in the car "could see 200 feet in front," and made the way "bright enough to see distinctly the curb." The part of the road upon which the accident happened had a curb on the west side and a single track trolley line on the east, with a space of 22 feet between. The automobile was traveling southward, on the left-hand, or wrong, side of the road, at an estimated speed of 40 miles an hour. The wagon was traveling northward on the right-hand, or proper, side of the road, the horse going at "a very slow trot." The driver of the latter vehicle, in an endeavor to avoid the collision, had his horse "nearly half way over" the trolley track when the accident occurred. The automobile struck the wagon on the near front wheel; both vehicles were badly damaged.

On the foregoing facts, it may be seen that the chauffeur, and not the driver of the horse and wagon, was the one guilty of the negligence which caused the accident; but the plaintiffs complain that the trial judge committed substantial error by the manner in which he submitted certain issues to the jury. In disposing of these complaints, we shall first consider together assignments 1 and 2.

In brief, the trial judge instructed that, if the automobile was being driven with "manifest improper speed," or if the chauffeur

had his car "manifestly on the wrong place in the road," and these faults, or either of them, contributed to the happening of the accident, if the plaintiffs made no effort to "get him to go at a proper rate of speed" or "over on the right side of the road," they would be guilty of contributory negligence, but that they could not be found so guilty unless the before-mentioned alleged faults on the part of the chauffeur were "manifest."

In reviewing these instructions, it must be kept in mind that the plaintiffs did not endeavor to excuse the fact that the chauffeur was on the wrong side of the road by explaining he was temporarily and justifiably out of the regular track; on the contrary, they called him as their witness, and each of them gave testimony to substantiate his story that, at the time of the accident and prior thereto, he had been continually driving on the proper side of the road, at a speed not exceeding 15 miles an hour, which was much lowered immediately before the collision. Both plaintiffs not only stood upon but reiterated this account of the manner in which the automobile was alleged to have been handled; and, of course, ex necessitate, it excluded the possibility of a remonstrance on their part having been made to the chauffeur, by eliminating all possible reasons therefor. Moreover, the plaintiffs' attitude at trial, in a manner, adopted, or set their seal of approval upon, the chauffeur's real conduct, as the jury found it to be.

[1] The rule is well established that, when possible dangers arising out of the negligent operation of a hired vehicle or a conveyance in which one is riding as an invited guest are manifest to a passenger who has any adequate opportunity to control the situation, if he sits by without protest and permits himself to be driven on to his injury, this is negligence which will bar recovery. In other words, the negligence of the driver is not imputed to the passenger, but the latter is fixed with his own negligence when he joins the former in testing manifest dangers. For discussion and, in some instances, application of this rule, see *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 387; *Dean v. Penna. R. R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Winner v. Oakland Township*, 158 Pa. 405, 27 Atl. 1110, 1111; *Dryden v. Penna. R. R. Co.*, 211 Pa. 620, 61 Atl. 249; *Thompson v. Penna. R. R. Co.*, 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351; *Kunkle v. Lancaster County*, 219 Pa. 52, 67 Atl. 918; *Walsh v. Altoona & Logan Val. Elec. Ry. Co.*, 232 Pa. 479, 81 Atl. 551; *Wachsmith v. Balto. & Ohio R. R. Co.*, 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Trumbower v. Lehigh Valley Transit Co.*, 235 Pa. 397, 84 Atl. 403; *Senft v. Western Maryland Railway Co.*, 246 Pa. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.*, 248 Pa. 130, 93 Atl. 873.

[2, 3] Here, the clear, strong, preponderating evidence shows that the chauffeur was seen by numerous disinterested witnesses, some three or four blocks north from the point of the accident, driving in a reckless manner, at an estimated speed of 40 miles an hour, on the wrong side of the road, quite close to the trolley track; furthermore, the admissions of the plaintiffs show that they both were familiar with automobiles and able to appreciate the possible dangers of this highly improper course of conduct. As already indicated, since the story told by the plaintiffs, as to the management of the motor was rejected by the jury, the position assumed by the former at trial left but one conclusion possible; i. e., that they had joined the chauffeur in testing the dangers of the situation created by the way in which the car was in fact being driven. Under the circumstances, we see no error in the instructions complained of.

At this point it is but fair to say that the instructions in question were coupled with a correct and fair presentation of the plaintiffs' side of the case, and the jurors were plainly told that, if they believed the latter's testimony, they should render a verdict accordingly.

One other assignment calls for consideration. There is an act of assembly in New Jersey which requires all vehicles to have lights displayed thereon during specified hours, covering the time when this accident happened; and the defendant admitted there was no light on its wagon. The trial judge directed attention to this state of affairs, and instructed the jurors that, if the absence of a light "contributed to the accident, if that * * * prevented the plaintiffs' chauffeur from seeing the horse and wagon, that may be considered by you as an act of negligence which caused the accident; * * * and, * * * if * * * there was no negligence on the part of the plaintiffs, the plaintiffs would be entitled to your verdict." These instructions were practically the last word to the jury, and we think them as favorable to appellants as they had a right to expect. Had there been a light on the wagon, it might have saved the plaintiffs from the result of their own negligence in permitting the car occupied by them to be driven in the manner in which it was operated on the night of the accident; but even this is hardly probable, since the plaintiffs said the acetylene gaslights on the front of their automobile enabled them to see at least 200 feet ahead. On the other hand, if the absence of a light on the wagon was not the proximate cause of the accident, even though an act of negligence on the part of the defendant, it would not justify recovery by the plaintiffs (*Christner v. Cumberland & Elk Lick Coal Co.*, 146 Pa. 87, 23 Atl.

221); and this in effect is what the trial judge said to the jury.

The assignments of error are overruled, and the judgments affirmed.

(287 Pa. 37)

KUEHNE v. BROWN.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE — NEGLIGENCE — QUESTION FOR JURY.

In an action for injury from the negligent operation of an automobile, where the evidence of defendant's failure to blow his horn was only negative, and there was no positive evidence that he gave such warning, the weight of the negative evidence was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

2. MUNICIPAL CORPORATIONS \S 705(3)—OPERATION OF AUTOMOBILE — TEST — NEGLIGENCE.

In action for personal injury to a child struck by an automobile while in a highway between crossings, the test of defendant's liability was whether in the exercise of due care he should have seen the child in time to have avoided injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515.]

3. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE—PERSONAL INJURY — QUESTION FOR JURY.

In such action, *held*, on the evidence, that whether defendant was negligent in not seeing the child in time to have avoided the injury was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

4. MUNICIPAL CORPORATIONS \S 706(6)—OPERATION OF AUTOMOBILE — NEGLIGENCE — QUESTION FOR JURY.

In a father's action in his own right for injury to minor child by defendant's automobile, conflicting testimony as to its speed and distance required to come to a stop made a question for jury as to defendant's negligence in operating the car.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

5. PARENT AND CHILD \S 7(9)—OPERATION OF AUTOMOBILE—INJURY TO CHILD—PARENT'S CONTRIBUTORY NEGLIGENCE.

Where the father of a child, suing jointly with him for personal injury from defendant's automobile, had permitted the child to cross a highway when the automobile was approaching only 75 feet away, notwithstanding his statement that he looked in both directions and saw nothing approaching, he was guilty of contributory negligence barring a recovery in his own right.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. § 94.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Paul Kuehne, Jr., by his father and next friend, Paul Kuehne, and by Paul Kuehne, in his own right, against George H. Brown, to recover for personal injuries to the minor plaintiff. Compulsory nonsuit entered as to both plaintiffs, which the court subsequently refused to take off,

and plaintiffs appeal. Affirmed as to one plaintiff, and reversed as to the other.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRA-
ZER, JJ.

W. Horace Hepburn, Jr., of Philadelphia,
for appellant.

FRAZER, J. This is an action by a father and his minor child to recover for injuries to the latter sustained by reason of alleged negligence of defendant in operating his automobile. A nonsuit was entered by the court below as to both plaintiffs, and from this action they have appealed.

At the time of the accident, September 6, 1915, the plaintiff, Paul Kuehne, Jr., was five years of age. He and his father, the other plaintiff, were standing on the west side of Rising Sun Lane, near Comly street, in the City of Philadelphia, talking with friends. This is a suburban section of the city, and Rising Sun Lane is about 60 feet in width, with trolley tracks on each side of the street, and a driveway for vehicles in the center; the driveway being of sufficient width to permit three vehicles to stand abreast. The street is without sidewalks, but at the place where plaintiffs were standing is a platform constructed of planks, and extending across the gutter to the car track. The father with his two children were standing on the platform referred to when one of the occupants of an automobile, occupied by the child's mother and others and standing on the opposite side of the street from the platform on which the boy and his father stood, called to the child, Paul, that there was room for him in the car. The boy immediately started to cross the street, and was about midway between the platform and the automobile when he was struck by defendant's car, coming south at a speed estimated by various witnesses at from 8 or 10 to 40 miles an hour. There is no dispute, however, that the horn was not blown, or other warning given of its approach. Another car was standing on the same side of the street as the car in which Mrs. Kuehne was seated, 100 feet down the road in the direction from which defendant's automobile approached, and, to pass this car, defendant was obliged to turn to the left side of the road. There were no obstructions in the street and nothing to prevent defendant from seeing the persons standing on the platform adjoining the railway tracks, or the boy on the street after leaving the platform. The distance from the platform to the point at which the child was injured was estimated, by the witnesses, at from 12 to 20 feet. Witnesses also testified that when the child started to cross the street defendant's automobile was in the neighborhood of 75 or 100 feet away, and that the brakes were not applied to the car until within about 5 feet from the child, and that following the collision the automobile skidded

on the gravel road for a distance of more than 30 feet.

The court below concluded the evidence of negligence on the part of defendant was insufficient to submit to the jury, so far as the rights of the minor were concerned, for the reason that the accident did not happen at a street crossing; that the evidence of defendant's failure to give warning of his approach was negative only; and that there was nothing to impose upon him the duty of blowing his horn at the particular spot where the accident happened.

[1-3] In so far as the question of warning is concerned, while the evidence of failure to blow the horn was negative only, there was no positive evidence that defendant gave such warning, consequently, the weight of the negative evidence was for the jury. *Longenecker v. Penna. R. R. Co.*, 105 Pa. 328; *Haverstick v. Penna. R. R. Co.*, 171 Pa. 101, 32 Atl. 1128. However, to the extent that the rights of the child are concerned, whether or not warning was given was not a vital matter, as there is no question of contributory negligence on his part, the sole question in his case being whether defendant, in the exercise of due care, should have seen the child in time to avoid the accident. The evidence shows defendant's view of the road, and of the child on the platform over the gutter and also in the street, was unobstructed, making the situation before him such as to impose upon him the use of due care to avoid injuring those who were rightfully using the highway, even though there was no crossing at this particular point. There is evidence from which the jury might have found that the child did not suddenly dart in front of the car at a time too late for defendant to avoid the accident, but on the contrary that there was ample opportunity to stop his car had he been looking ahead. If approaching at an extreme rate of speed, as testified to by several witnesses, and as indicated by the skidding of the machine upon endeavoring to stop, it cannot be said, as matter of law, that defendant was performing his full duty toward those who were properly using the highway. Assuming the car was operated at the minimum rate of speed, testified to by other witnesses, no apparent excuse is shown for defendant not seeing the child in time to stop his car and prevent the accident, in view of the testimony as to the distance which he traveled from the time the child started to cross from the platform to the automobile, and the unobstructed condition of the street. Consequently, the question whether he had notice of the presence of the child in the road in time to appreciate the danger and avoid a collision was one for the jury to determine, under proper instructions from the court. *Tatarewicz v. United Traction Co.*, 220 Pa. 560, 69 Atl. 995; *Bloom v. Whelan*, 56 Pa. Super. Ct. 277.

[4, 5] In so far as the rights of the father

are concerned the conflicting testimony as to the speed of the car, together with the distance required to come to a stop, was sufficient to submit to the jury on the question of defendant's negligence in operating the car. As to the contributory negligence of the father, his testimony was that before permitting the child to start across the street to the automobile in which his wife was seated he looked in both directions and saw no car approaching. Considering there was an unobstructed view of the street for 300 or 400 yards, with the exception of the presence of another automobile, which was about 100 feet distant, and in view of the testimony that defendant's car was approximately 75 feet away when the child was permitted to start across the street, it is useless for plaintiff to say he looked and did not see the automobile when it must have been in plain view at the time; hence his negligence in permitting a child of such tender years to cross the street alone is too apparent to require submission to the jury. To the extent, therefore, that the father is concerned, the nonsuit was proper. *Glassey v. Hestonville, Mantua & Fairmount Pass. Ry. Co.*, 57 Pa. 172; *Johnson et ux. v. Reading City Pass. Ry.*, 160 Pa. 647, 28 Atl. 1001, 40 Am. St. Rep. 752; *Pollack v. Penna. R. R. Co.* (No. 2) 210 Pa. 634, 60 Atl. 312, 105 Am. St. Rep. 846.

The fourth assignment of error is sustained, the judgment is reversed, and the record remitted with a new venire.

(257 Pa. 32)

In re HUNTER'S ESTATE et al.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. MORTGAGES \Leftrightarrow 559(3) — MORTGAGEE'S RELEASE OF TITLE—MORTGAGOR'S PERSONAL LIABILITY.

Where a mortgagee has parted with his title to the mortgaged premises, his release of part thereof without the mortgagor's knowledge or consent discharges the mortgagor from personal liability for any loss to the mortgagee from a deficiency in the proceeds in a subsequent sale under foreclosure proceedings, as by such release the mortgagee assumes the risk of the unreleased part of the property.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1592.]

2. MORTGAGES \Leftrightarrow 559(3)—PENAL BOND—LIABILITY.

In an audit of the account of a substituted trustee of an assigned estate, it appeared that prior to the assignment the assignor had mortgaged real estate and had given a penal bond to further secure the mortgage debt, and that subsequent to the assignment parts of the realty were released from the lien of the mortgage, without the mortgagor's knowledge or consent, and that the mortgaged premises were afterwards sold for a sum insufficient to pay the mortgage. *Held*, that the mortgagor was discharged of any liability on the bond.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1592.]

Appeal from Court of Common Pleas, Philadelphia.

Henry K. Fox, executor of the estate of Elizabeth M. Lassalle, deceased, appeals from a decree dismissing exceptions to the report of Charles H. Mathews, auditor, in the matter of the estate of James Hunter and John Hunter, individually, and as copartners. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

F. B. Vogel and Henry K. Fox, both of Philadelphia, for appellant. George Sterner and Charles R. Maguire, both of Philadelphia, for appellees.

WALLING, J. This is an appeal from a decree of distribution of an assigned estate. In 1887 John Hunter individually and the firm of James and John Hunter made a general assignment to John Field, for benefit of creditors. Prior thereto in 1878 said James Hunter and John Hunter, being the owners of certain lands, comprising about 32 acres, and situate near Fifty-Fifth street and Lancaster avenue, Philadelphia, executed a mortgage thereon and an accompanying bond to Wm. C. Houston, administrator, etc., to secure a loan of \$27,000, payable in three years, with interest. Some days later John Hunter conveyed his interest in the mortgaged premises to James Hunter, who thereafter and before the assignment executed a second mortgage upon the same property, by virtue of which, subsequent to the assignment, the same was sold by the sheriff and the title thereto, subject to the prior mortgage, became vested in Margaret D. Hunter, who died in May, 1891, intestate. And in December of the same year, by partition among her heirs, such title became vested in Wm. D. Hunter. There then remained unpaid on the first loan the sum of \$10,000. However, such title so vesting in Wm. D. Hunter did not include all the lands embraced in the original mortgage, some having been released meantime as hereinafter stated. On May 26, 1891, the administrator entered judgment on the bond accompanying the first mortgage; and on November 18, 1892, he assigned the bond and mortgage to James M. Connely, the father-in-law of Wm. D. Hunter, for the consideration of \$10,000.

Between the date of the assignment for benefit of creditors and the time of the transfer of the bond and mortgage to Connely, the holder of the first mortgage had released from the lien thereof twelve separate pieces of land; some of which were released for the nominal consideration of \$1 each. And it does not appear that the original mortgagors, or their assignee, consented to such release or had knowledge thereof. On November 23, 1894, at the instance of Connely and on the judgment entered on the bond

as aforesaid, all of the unreleased part of the land included in the first mortgage was sold by the sheriff for \$2,000, at which sale Connely became the purchaser, and on the same day conveyed a portion of the premises so bought by him to James Dunlap for \$15,000. Two months later Connely assigned the mortgage and judgment entered on the bond to his son-in-law, Wm. D. Hunter, for the consideration of \$1; and the latter same day reassessed the damages on the judgment at \$9,281.66. And on February 7, 1895, Connely, also for the consideration of \$1, made a deed to his said son-in-law for the balance of the land included in the sheriff's sale "subject to existing incumbrance." On the 5th of the following June, Wm. D. Hunter sold the land conveyed to him by the said last-named deed to James B. Johnson for \$12,000, "clear of incumbrance"; by various transfers, the first mortgage and judgment on the accompanying bond became vested in appellant in 1907. Since that date the judgment has been twice revived, and on each occasion judgment was entered for want of an appearance, on two returns of "nihil habet." The last of these judgments was entered February 20, 1914, at which time the damages were assessed at \$22,351.22. James Hunter died in 1896, John Field in 1904, and John Hunter in 1910. The assignee filed a partial account in 1889 and a final account in 1897, both being duly audited and confirmed, and no claim being presented on account of the first mortgage and bond at either of the audits.

In 1906 Herman H. Wilson was appointed substituted trustee in place of John Field, then deceased. And in 1911 the substituted trustee filed an account showing a balance in his hands as the proceeds of a private sale of real estate, formerly the property of John Hunter. An auditor was appointed to pass upon exceptions and report distribution of the balance; and before him appellant presented his claim on the revived judgment. Other claims amounting to \$100,976.07 were also presented and proven before the auditor; and to such other claims the net fund for distribution, amounting to \$1,790.79, was distributed by the auditor and court below, to the exclusion of appellant's claim; and this appeal was taken from the final decree of distribution of the fund.

[1] We entirely agree with the conclusion

reached by the court below. Where the mortgagor has parted with his title to the mortgaged premises, a release of a part thereof by the mortgagee, without the knowledge or consent of the mortgagor, will discharge the latter from personal liability for any loss to the mortgagee resulting from a deficiency in the proceeds of a subsequent sale in foreclosure proceedings. *Meigs v. Tunnicliffe*, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. Rep. 769, 6 Ann. Cas. 549. See opinion by Mr. Justice Stewart. By such release the mortgagee assumes the risk of the unreleased portion of the property being of sufficient value to secure his debt. That he was not mistaken in this case appears from the fact that shortly after the sheriff's sale such unreleased property was resold for more than double the amount unpaid on the mortgage. However, in the absence of fraud or collusion at the sheriff's sale, the profits on such resales would not inure to the benefit of the original mortgagors.

[2] The rights of creditors were fixed by the assignment; and while the confession of judgment thereafter upon the bond would as against the mortgaged premises relate back to the recording of the mortgage, it would not give the obligee in such bond any rights superior to those of other creditors as to the balance of the assigned estate. The entry of such judgment did not create a lien on land, aside from the mortgaged premises, which had previously passed from the mortgagors by deed of assignment for benefit of creditors. *Cowan, Casey & Hutkoff v. Penna. Plate Glass Co.*, 184 Pa. 1, 38 Atl. 1075. The act of April 2, 1822 (7 Smith's Laws, 551; *Stewart's Purdon*, vol. 1, p. 1185), to which our attention was called at bar, authorizes the collection of the mortgage debt from the unreleased part of the premises, and provides for the protection of the rights of the respective part owners under such circumstances, but makes no reference to the personal liability of the mortgagor, and is not applicable to this case. As in our opinion the release above stated of parts of the mortgaged premises is a complete answer to appellant's claim on the fund for distribution, it is not deemed necessary to discuss other features of the case.

The assignments of error are overruled, and the decree affirmed at the costs of the appellant.

(91 Conn. 709)

Appeal of SCHELLEN.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

MUNICIPAL CORPORATIONS—§514(7)—PUBLIC IMPROVEMENTS—ASSESSMENTS.

Where the city has constructed a sewer improvement, collected all the assessments therefor, and made full payment, it cannot raise an amount in excess of the cost by assessing benefits to one who has subsequently erected a dwelling and made connections with the sewer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1211.]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

In the matter of sewer assessment of the borough of Groton. From a judgment confirming an assessment of benefits for sewer improvement, Pierre L. Schellen, an abutting landowner, appeals. Reversed and remanded.

The borough of Groton is empowered by its charter to lay out and construct a sewer system, to have supervision and control of the same, and to assess against persons whose property is specially benefited thereby such sums as they ought justly and equitably to pay therefor to be determined according to such rule of assessment based upon frontage and area, either or both, as it may adopt as being just and reasonable. Pursuant to this authority, the borough, in 1913 and 1914, laid out and constructed a sewer system, and assessed against the several owners of land abutting on the streets in which it was built the estimated cost of its construction. This assessment was completed in May, 1913. The appellant, as the owner of a tract of land located at the corner of Broad and Ramsdell streets, was one of the persons assessed. He and all others against whom the assessments were made paid the amounts thereof to the borough. Preparatory to making these assessments, the borough, acting under the authority of its charter, adopted a rule for the assessment of benefits which provided that the estimated cost of the work should be assessed on the property specially benefited in the proportion of four-tenths to frontage and six-tenths to area; the area to be calculated to a line parallel with and not more than 100 feet distant from the street frontage. The rule provided for a departure from strict adherence to the above provisions where such adherence would lead to injustice and for a certain frontage exemption in the case of corner lots. It was provided that the rate of assessment should be 50 cents per lineal foot of frontage, and $7\frac{1}{2}$ mills per square foot of area benefited. The assessments of 1913 were made in conformity to this rule. No change in or addition to any of the sewers has been made since their original construction in 1913 and 1914.

Subsequent to May, 1913, the appellant built a house upon his land which was located more than 100 feet from the street

and connected the same with the sewer, and certain others did likewise. A modification of the rule of assessment was then made by the borough so that it was provided that in all cases where a house situated more than 100 feet from the street should be connected with the sewer, a further and additional assessment should be made against the owner on account of the sewer with which connection was made, such additional assessment to be made at the rate of $7\frac{1}{2}$ mills per square foot of area upon so much land not theretofore covered by the existing rule as would be included within a circle having a radius of 50 feet from the center of the house. Following this modification and pursuant to its provisions, an additional assessment was made against the appellant amounting to \$255.16. From that assessment the present appeal was taken.

Other facts not pertinent to the opinion need not be stated.

Jeremiah J. Desmond, of Norwich, and Warren B. Burrows, of New London, for appellant. Arthur T. Keefe, of New London, for appellee.

PRENTICE, C. J. (after stating the facts as above). It is an open question whether the borough's power to assess benefits on account of this public improvement was not exhausted before the attempted assessment appealed from was made in 1916, even though the actual cost of the work exceeded the estimated cost which was originally assessed and some portion of the actual cost remained undistributed over the property specially benefited. *City of Chicago v. People ex rel. Norton*, 56 Ill. 327, 332; *Meech v. City of Buffalo*, 29 N. Y. 198, 215. Doubtless authority to make a supplemental assessment to cover cost not already assessed may be conferred by statute; but there appears to be no such grant of power to the borough of Groton. That question, however, is one which we have no occasion to answer, since it nowhere appears in this record that the actual cost of the sewer system constructed exceeded its estimated cost which, pursuant to the rule adopted by the borough, was assessed on the property specially benefited and by the owners of that property wholly paid in. In so far as appears, the borough has been fully compensated for the cost of construction by the property owners specially benefited and assessed. It is without authority to raise an amount in excess of the cost of a public improvement through the medium of an assessment of benefits, and that for aught that appears is what the borough undertook to do when it made the assessment of 1916 against the appellant.

There is error; the judgment is set aside, and the cause remanded, with direction to vacate the assessment appealed from. The other Judges concurred.

(91 Conn. 680)

PICKETT v. RUICKOLDT.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. INSANE PERSONS — 92—ACTION BY CONSERVATOR.

Action to recover property of an incapable person would not be defeated because brought in his conservator's own name and not in the ward's name, where the complaint alleged the conservator brought the action as such conservator, since he was the proper person to bring the action, and under Gen. St. 1902, §§ 622, 623, as to nonjoinder and misjoinder and substituting plaintiff, the ward's name might be substituted on motion.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 161, 162.]

2. INSANE PERSONS — 44 — ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON.

Death of an incapable person does not abate action brought for his benefit by his conservator.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

3. INSANE PERSONS — 44—ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON—SUBSTITUTED PLAINTIFF—ADMINISTRATOR.

Where conservator of an incapable person had sued in his own name for benefit of the ward, on the ward's death his administrator had a right to be substituted as plaintiff under Gen. St. 1902, § 623, as to substituted plaintiff, and Survival Act (Pub. Acts 1903, c. 193) § 1.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

4. INSANE PERSONS — 44 — ACTION BY CONSERVATOR — DEATH OF INCAPABLE PERSON — SURVIVAL OF CAUSE OF ACTION—"RIGHT OF ACTION."

Under the Survival Act, § 1, providing that "no cause or right of action" shall be lost or destroyed by death, etc., survival of actions is the rule and not the exception, and the presumption is that every cause or right of action survives until the contrary is made to appear; the phrase "right of action" including the right to commence and maintain an action and being broad enough to include a right to be admitted to prosecute a pending action either as a co-plaintiff, or substituted plaintiff (citing *Words and Phrases*, Right of Action).

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

5. INSANE PERSONS — 44—ACTION BY CONSERVATOR—DEATH OF INCAPABLE PERSON—SUBSTITUTION OF PARTIES — MOTION TO ERASE FROM DOCKET.

Under Gen. St. 1902, § 622, providing that no action shall be defeated by nonjoinder or misjoinder of parties, where administrator of an incapable person after his death entered to prosecute under Survival Act, § 2, an action commenced for such person in his lifetime by his conservator in his own name, instead of applying to be substituted as plaintiff under Gen. St. 1902, § 623, as to substituted plaintiff, defendant's appropriate remedy was not a motion to dismiss and erase from the docket, but a motion to strike from the record the entry to prosecute.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 69, 70.]

Appeal from Superior Court, New Haven County; Joseph P. Tuttle, Judge.

Action by Edwin S. Pickett, Conservator, against George W. Ruickoldt. From order erasing case from docket, plaintiff appeals.

Error, and cause remanded, with direction to restore it to docket.

Leonard M. Daggett and Robert J. Woodruff, both of New Haven, for appellant. Philip Pond and Louis M. Rosenbluth, both of New Haven, for appellee.

BEACH, J. This action was brought by the conservator in his own name to recover real and personal property alleged to have been transferred without consideration by the ward to his brother, while under the undue influence of the transferee. Before any answer was filed the ward died, and the Union & New Haven Trust Company, his administrator, entered to prosecute. Ten months afterward the defendant filed a suggestion on the record of the termination of the conservatorship, and moved that the cause be dismissed and erased from the docket. The motion was granted on the ground that the action was originally improperly brought in the name of the conservator, and not in the name of the ward by the conservator acting in his behalf; that as the action never stood in the name of the deceased ward, the statute authorizing the administrator of a deceased plaintiff to enter and prosecute does not apply; and that since no motion was made to substitute one plaintiff for another, the action was without a plaintiff. The old rule was that a conservator could not maintain an action to collect the ward's debts in his own name as conservator. *Treat v. Peck*, 5 Conn. 280; *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622; *Riggs v. Zaleski*, 44 Conn. 120. Even if the rule still prevails, the consequences of a failure to observe it are very different now from what they were when *Riggs v. Zaleski* was decided in 1876.

[1] The conservator was the proper person to bring the action, and in his complaint he alleges that he brings it as the conservator of Arthur Ruickoldt. Under sections 622 and 623 of the General Statutes, the action could not have been defeated, in Ruickoldt's lifetime, because not brought in his name. Being on the face of the complaint beneficially interested, his name might have been entered or substituted as a plaintiff, on motion. In the meantime, the action, even if brought by the wrong plaintiff, was still pending. As was said in *Bowen v. National Life Ass'n*, 63 Conn. 460, 476, 27 Atl. 1059, 1062, the Practice Act has "radically changed the old practice with reference to joinder, admission and dropping of the parties to a suit, and the changes were intentionally and deliberately made."

[2] When Ruickoldt died the action did not abate; nor was the conservator discharged by his ward's death. He still had the estate in his hands and must account for it to the court of probate. Until he was discharged the action was not without a plaintiff and, subject to possible objection

which the defendant did not make, it remained pending in court, with the conservator as the sole nominal plaintiff, until August 7, 1915, when the administrator entered to prosecute. If the administrator then had a right to enter, the action remained in court with two plaintiffs, until the final account of the conservator was accepted and he was discharged by the court of probate. The record does not show when the conservator was discharged, but that fact was not suggested on the record until May, 1916, ten months after the administrator had entered to prosecute.

[3] We think the administrator had a right to be substituted as plaintiff under section 623 of the General Statutes. Ruickoldt was the party for whose benefit the action was brought, and his right to be substituted as a plaintiff in the action was a substantial right which survived to the administrator.

[4] The broad language of section 1 of the Survival Act of 1903 is that:

"No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person."

Under this statute the survival of actions is the rule and not the exception, and the presumption is that every cause or right of action survives until the contrary is made to appear by way of exception to the rule. The phrase "right of action" includes the right to commence and maintain an action. Words and Phrases (vol. 7) p. 6266. It is broad enough to include a right to be admitted to prosecute a pending action either as a coplaintiff, or substituted plaintiff; and under section 623 the administrator had a right to be substituted as plaintiff in place of the conservator. Nobody would doubt that the administrator of a decedent, who ought to have been made a defendant, but was omitted through mistake, could be joined as defendant in an action which survived against the estate, and we see no reason why the administrator of a decedent who ought to have been joined as a plaintiff, but was omitted through mistake, may not be admitted as a coplaintiff, or as substituted plaintiff, if necessary, in a pending action which survives in favor of the estate.

[5] Strictly speaking, the right which survived to the administrator in this case was the very same right which the decedent had in his lifetime; viz. the right to be substituted as plaintiff under section 623 of the General Statutes. It is therefore true, as the memorandum of the superior court suggests, that the administrator ought to have made application under that statute to be substituted as plaintiff, instead of entering to prosecute under section 2 of the Survival Act. Nevertheless he succeeded in making himself a party on the record by entering to prosecute, and the defendant's real grievance was not that the administrator had no right to come into the action, but that he had come in

through the wrong door. That being so, the appropriate remedy was not a motion to dismiss and erase from the docket, but a motion to strike from the record the entry to prosecute. Section 622 of the General Statutes provides that "no action shall be defeated by the nonjoinder or misjoinder of parties"; and this must include the lesser proposition that no action should be defeated because the right party came into it, or attempted to come into it, in the wrong way.

There is error, and the cause is remanded, with direction to restore it to the docket. The other Judges concurred.

(91 Conn. 674)

BLUE RIBBON GARAGE, Inc., v. BALDWIN et al.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. **BILLS AND NOTES** \S 414—NOTICE OF DISHONOR.

Under Negotiable Instruments Law (Pub. Laws 1897, c. 74) as well as the former law merchant, a holder for collection of negotiable paper, which has been dishonored, performs his full duty in respect to notice of its dishonor by giving such notice in due form and time to the party from whom he receives it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1142, 1148-1155.]

2. **BILLS AND NOTES** \S 414—NOTICE OF DISHONOR.

Under Negotiable Instruments Law, as well as former law merchant, where negotiable paper before presentment has passed through several hands, whether of mere holders for collection or of parties beneficially interested therein, notice given by each holder in turn to the prior one from whom it was received is notice sufficiently given to fix the liability of all indorsers included in the chain of notice, each holder for collection being regarded as a real holder, and his relation to the party from whom the paper is received being such that the latter is entitled to be treated as his immediate principal; and it is not necessary that notice of dishonor, to be effective in fixing the liability of indorsers, should be given by the holder at presentment directly to the beneficial owner, disregarding all intervening holders for collection only.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1142, 1148-1155.]

3. **BILLS AND NOTES** \S 539—ACTION AGAINST INDORSER—FINDINGS OF FACT.

In action against indorser of a note which had been sent to a trust company for collection, a finding that the trust company had never been plaintiff's agent for any purpose whatsoever might be disregarded as a mere conclusion of law; the facts showing the trust company to be a holder for collection and therefore as matter of law the owner's agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934.]

4. **BILLS AND NOTES** \S 420—NOTICE OF DISHONOR.

Where the holder of a note, receiving notice of its dishonor, notified a prior indorser and the original payee of the dishonor by telephone and personal visit and oral notification respectively, this was sufficient compliance with the Negotiable Instruments Law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1138-1140.]

Appeal from Court of Common Pleas, Fairfield County; John J. Walsh, Acting Judge.

Action by the Blue Ribbon Garage, Incorporated, against R. L. Baldwin and others. From judgment for plaintiff, the named defendant and others appeal. No error.

On February 15, 1915, the plaintiff became the owner of the note in suit in part payment for the sale to the defendant Baldwin of an automobile. The note was drawn by the defendant the State of Maine Lumber Company, to the order of the defendant Atwater, and was made payable at the Connecticut Trust & Safe Deposit Company, of Hartford. It bore the indorsements of the five individuals who were made defendants, including Atwater and Baldwin, against whom judgment was rendered. The plaintiff still owns the note, which remains unpaid. The date of maturity was March 2, 1915.

February 26, 1915, the plaintiff deposited it for collection with the First Bridgeport National Bank of Bridgeport. That bank forwarded it in due course of business to their agents, the State Bank of Albany, for collection. The State Bank of Albany in like manner forwarded it for collection to its agents, the Hartford National Bank of Hartford. On or before the morning of March 2, 1915, the last-named bank delivered it to the Connecticut Trust & Safe Deposit Company, the place of payment. Payment not having been made at the close of business upon that day, it was handed by the discount clerk of the trust company to its teller, who demanded payment, and, no payment having been made, wrote across the face of the note: "Protested for nonpayment Mar. 2, 1915, Harvey W. Corbin, Notary Public." He then made a certificate of protest and ten notices of protest, one addressed to each of the banks, and each party whose name appeared upon the note, pinned the certificate to the original note and placed the note and certificate thus attached, together with the ten copies of the notice of protest, in an envelope and mailed it with its inclosures, including two-cent stamps for each notice save one, to the Hartford National Bank. On the following day, the last-named bank mailed the note, certificate of protest, and notices, save only the notice to itself, to the State Bank of Albany. On March 5th, the First Bridgeport National Bank received from that bank in the first mail the same inclosures less the notice to the State Bank of Albany. The Bridgeport bank immediately thereafter remailed them, less the notice to it, to the plaintiff, who received them during the forenoon of the same day. Upon that day Baldwin was notified by the plaintiff's treasurer by telephone of the dishonor. On the following day, Atwater, who resided in New Haven, was visited by the plaintiff's agent and orally notified. No attempt was made by the plaintiff to notify the other indorsers.

George E. Beers, of New Haven, and Daniel J. Danaher, of Meriden, for appellants Baldwin and Atwater. John Smith, of Bridgeport, for appellee.

PRENTICE, C. J. (after stating the facts as above). [1, 2] The course of conduct of the notary who made presentment of the note in suit and of the several banks through whose hands it passed in the collection process conformed strictly, in so far as notice of dishonor was concerned, to the requirements of the law merchant formerly controlling and to those of the negotiable instrument law now in force. By the overwhelming weight of authority under the law merchant, a holder for collection of negotiable paper, which had been dishonored, performed his full duty in respect to notice of its dishonor by giving such notice in due form and time to the party from whom he received it. Where the paper before presentment had passed through several hands, whether they were those of mere holders for collection or of parties having a beneficial interest in it, the approved rule was that notice given by each holder in turn to the prior one from whom it was received was notice sufficiently given to fix the liability of all indorsers included in the chain of notice. *United States Bank v. Goddard*, 5 Mason, 366, 375, Fed. Cas. No. 917; *Eagle Bank v. Hathaway*, 5 Metc. (Mass.) 212, 215; *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79, 84; *Farmers' Bank v. Vail*, 21 N. Y. 485, 487; *Seaton v. Scovill*, 18 Kan. 433, 438, 21 Am. Rep. 212, note 26 Am. Rep. 779; *Wood v. Callaghan*, 61 Mich. 402, 411, 28 N. W. 162, 1 Am. St. Rep. 597; *Daniel on Negotiable Instruments*, 331. Each holder for collection was regarded as a real holder and his relation to the party from whom the paper was received such that the latter was entitled to be treated as his immediate principal. *Bartlett v. Isbell*, 31 Conn. 296, 299, 83 Am. Dec. 146; *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79, 84; *Freeman's Bank v. Perkins*, 18 Me. 292, 294; *Howard v. Ives*, 1 Hill (N. Y.) 263, 264; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 587, 28 Atl. 563, 23 L. R. A. 173.

The Negotiable Instruments Act has not changed the law in any of these respects. The defendant's broad contention that notice of dishonor to be effective in fixing the liability of indorsers should be given by the holder at presentment directly to the beneficial owner disregarding all intervening holders for collection only is without foundation in the act, and we have so distinctly held. *Gleason v. Thayer*, 87 Conn. 248, 250, 87 Atl. 790, Ann. Cas. 1915B, 1069. Such a requirement, necessitating, as it would, inquiries as to who was the real owner and what his address, and involving embarrassment and complications in accounting as between those through whose hands the paper passed in the process of collection, would be fruitful of such annoyances, difficulties, and hazards of

mis carriage and loss as to make it an unsatisfactory substitute for the simple, orderly, and effective method pursued in this case and by us heretofore approved. The case of *East Haddam Bank v. Scovill*, 12 Conn. 303, furnishes a good example of easily possible consequences. The law under consideration in *Gleason v. Thayer* was, to be sure, the Negotiable Instruments Act as it was enacted in New York; but its provisions of present pertinence were identical with those of our own.

The defendant's counsel undertake to escape from the operation of the decision in that case by an attempt to distinguish between the two cases upon the ground that the note in *Gleason v. Thayer* presumably was indorsed by the Whaling Bank to the collection bank in New York, whereas it does not appear by the record that the note in this case, when presented for payment, bore any bank indorsements. It would doubtless be quite in accordance with the fact to assume that it did, but that is not a matter of controlling importance. The note, as indorsed upon its delivery to the Bridgeport Bank, was transferable by delivery, and the finding is that it was sent along through the chain of banks for collection. Each bank received and transmitted it to its agents for that purpose, and each receiving bank became its holder for collection with all the rights, powers, and obligations attached to such holders. *East Haddam Bank v. Scovill*, 12 Conn. 302, 311.

[3] Counsel for the defendant attach great importance to one of the paragraphs in the finding, and build much of their argument upon it. The paragraph is to the effect that the Connecticut Trust & Safe Deposit Company has never been the plaintiff's agent for any purpose whatsoever. That finding is one of law and not of fact. The legal character of the relation in which the trust company stood to the owners of the note is to be determined as a legal conclusion upon the facts. The finding, to be sure, does not state in so many words that the Hartford National Bank delivered the note to the trust company for collection for its account, but there is no other reasonable inference from the facts found than that it did so. The conduct of the parties throughout so indicates quite unmistakably. As a holder for collection is, as a matter of law, the agent of the owner, the finding of the court upon this matter must be disregarded as not justified as a matter of law by the facts. *Gleason v. Thayer*, 87 Conn. 248, 250, 87 Atl. 790, Ann. Cas. 1915B, 1069.

[4] The action of the plaintiff in giving notice to the defendants Baldwin and Atwater, following its receipt in due course from the Bridgeport Bank, of the notice of dishonor, complied in all respects with the requirements of the law, and no complaint of

irregularity in that respect is made by the defendants.

Certain evidence tending to prove a banking custom in the matter of giving notices of dishonor was received against objection that it was not permissible to show conformity to a custom at variance with the provisions of statute. The court has found no such custom, nor did it decide the case upon the strength of one. Its decision was based upon the provisions of statute and compliance therewith.

Two or three objections to the admission of testimony, offered to show that the Hartford National Bank mailed the note, certificate of protest, and notices to the State Bank of Albany on March 3, relate to details which, in view of other testimony, were unimportant. The court was amply justified in finding that it did so upon proof that these papers were received by the Bridgeport Bank by first mail on the 5th contained in a letter from the State Bank of Albany addressed to it.

There is no error. The other Judges concurred.

(91 Conn. 718)

Appeal of CORDANO.

(Supreme Court of Errors of Connecticut. June 14, 1917.)

1. INTOXICATING LIQUORS §103—LICENSES—ASSIGNMENTS.

Under Pub. Acts 1915, c. 282, prohibiting granting of licenses to sell intoxicating liquor within 200 feet of a church, but exempting transfer applications which are left to the discretion of the commissioners, the owner of a license, whether or not he has qualified to sell under it, may sell and assign it as a piece of property to another who may make application to sell under it as a transferee.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108-112.]

2. INTOXICATING LIQUORS §103—LICENSES—CHARACTERISTICS.

Property in a license to sell intoxicating liquor is recognized by law to the fullest extent as property having a recognized pecuniary value and the subject of sale, attachment, levy, or replevy.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108-112.]

3. INTOXICATING LIQUORS §103—LICENSES—TRANSFERS.

Pub. Acts 1915, c. 282, prohibits the granting of licenses for places located within 200 feet of a church, but exempts transfers from the operation of the statute. Chapter 36 provides that a license sold upon execution shall for its unexpired term be as valid in the hands of its purchasers as in the hands of the original licensee, provided that before the purchaser may sell thereunder he shall comply with all the requirements relative to the procuring of an original license. A license was sold on execution and purchased by a brewing company which did not qualify as a licensee thereunder, but transferred it to one who made application. Subsequent to such assignment a church was erected within 200 feet of the saloon. Held that, transfers being exempt from the operation of the statute, the assignee might qualify to sell under the license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108-112.]

4. INTOXICATING LIQUORS ⇨103—LICENSES—FRAUD.

The assignee of a liquor license sold upon execution and purchased by a brewing company which failed to qualify as a licensee thereunder is not guilty of fraud in applying for permission to sell under the license as being in no position to claim such rights where Pub. Laws 1915, c. 282, expressly exempts transfers from the operation of the prohibition against licensing drinking places within 200 feet of a church.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

5. INTOXICATING LIQUORS ⇨103—LICENSES—FRAUD.

The assignee of a liquor license purchased by a brewery on execution against the original holder is not guilty of fraud in applying for permission to sell thereunder because of the fact that the assignor had not in fact perfected its assignment to the applicant at the time he applied for permission to sell; the facts being known to the county commissioners.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

Appeal from Superior Court, Litchfield County; William L. Bennett, Judge.

Remonstrance by Nathaniel Cordano to the action of the County Commissioners in granting the transfer of a liquor license. Affirmed on reservation to superior court, and remonstrant appeals. Affirmed.

In 1915 the county commissioners of Litchfield county granted to T. J. Sullivan a license to sell spirituous and intoxicating liquors at 215 Main street, in Winsted, expiring October 31, 1916. In June, 1916, this license was sold on execution against Sullivan. The Yale Brewing Company was the purchaser. That company did not qualify as a licensee under the license, but sold the same to one Davis, who did apply on July 31, 1916, for a transfer of the license to him.

Subsequent to November, 1915, and the date of Davis' application, a church had been built and opened for services within 200 feet of the saloon. A remonstrance was filed to Davis' application upon the ground of the proximity of the church to the saloon. Upon the hearing before the commissioners no witnesses were produced to establish the unsuitability of the place, but the facts, as to its proximity to the church, were agreed upon as the facts upon which the commissioners' decision was to be rendered. The claim was made in behalf of the remonstrance that the application was to be regarded as an original one, and that therefore the prohibition of the statute against the granting of a license for a place within 200 feet from a church edifice was applicable to the situation, and forbade the transfer of Sullivan's license to Davis. This claim was overruled, and the application granted. From this action the appellant, who was one of the remonstrants, appealed.

Davis is a suitable person to receive a license.

Frank B. Munn, of Winsted, for remonstrating taxpayer. Walter Holcomb, of Torrington, for applicant for transfer. John T. Hubbard, of Litchfield, for county commissioners.

PRENTICE, C. J. (after stating the facts as above). The stipulation of counsel upon which this reservation was made limits the questions, whose answers should determine the judgment to be rendered by the superior court under our advice, in substance to two, as follows: (1) Was the county commissioners' action in granting Davis's application for a transfer to him of Sullivan's license in violation of the provisions of statute touching licenses for places located within 200 feet of a church? and (2) Was Davis's application a fraudulent one?

Any question that might have been made in the superior court that the county commissioners erred in their exercise of discretion in granting the application is waived.

[1] It appears to be conceded by the remonstrant appellant that, if Davis had received a transfer from Sullivan, his application to the commissioners would not have encountered the church prohibition. Such certainly would have been the case, since chapter 282 of the Public Acts of 1915, which embodies that prohibition, specially excepts from its operation transfer applications, and leaves the decision in their case to the discretion of the commissioners, in view of the circumstances of each particular case.

Davis, however, did not hold an assignment to himself from Sullivan, the licensee. His right to the license came to him from the Yale Brewing Company, who had purchased it upon an execution sale, and had never qualified as a licensee under it. The remonstrant's contention is that under such conditions he did not occupy the position of one who was entitled to a transfer of the license within the meaning of our license statutes, and therefore could not avail himself of the exceptions provided in chapter 282 of the Public Acts of 1915 in cases of transfer. His claim is that the exception made in that act in favor of transfers of licenses refers only to such as attend the passing of the ownership of the license directly from the licensee to the applicant for a transfer and without the intervention of any other person's ownership of the license, and that all other persons not so deriving title to the license appear before the county commissioners as original applicants and subject to the regulations governing such applicants. In support of this position he points to chapter 148 of the Public Acts of 1915, where it is provided that any licensee, or in case of his death his administrator or executor, may, with the consent of the county commissioners, transfer his license. This, he says, is inclusive of all transfers which the law rec-

ognizes as such, and confines the power to make assignments, which by the approval of the county commissioners may become transfers, to licensees.

This construction of our statute is exceedingly narrow and technical, and does not comport with sound reason. It reaches not only those who, as here, are purchasers of a license at an execution sale, but also those who hold voluntary assignments from the owner of a license, provided they have not put themselves in a position to engage in the liquor business under its authority. We search in vain for a practical reason for the distinction thus made between licensed and nonlicensed owners of a license in the matter of their competency to make an assignment of the license which may be perfected as a transfer by the action of the county commissioners. Especially hard is it to find a reasonable basis for such distinction, since ownership by purchase and assignment does not carry with it the right to utilize the license in the conduct of the business. In every case one who acquires an outstanding license is required to obtain the approval of the county commissioners before he can sell under it. As the license authorities have reserved to them the power to dictate as to who among assignees may exercise the franchise by becoming sellers, and are called upon in every case to exercise that power, it is difficult to discover what abuse can possibly arise from making assignees of nonlicensed persons transferees of the license which is not to be anticipated in the case of assignees of licensed persons. The public interest is not concerned with the character and suitability for the conduct of the liquor business of a seller of a license who does not propose to operate under it. What is its vital concern is the character and suitability of the purchaser who applies for leave to sell under the license.

[2] Our law recognizes to the fullest extent the quality of property in a license. It is property having a recognized pecuniary value and the subject of sale, attachment, levy, or replevy. *Sayers' Appeal*, 89 Conn. 315, 317, 94 Atl. 358; *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 395, 50 Atl. 1023. As property and the subject of sale, the owner may prima facie at least sell it and place the purchaser in his position as owner. What is there to impose restraint upon this power of substitution of owners so that only one class of them, to wit, those who have qualified as licensees under the license, are free to make the substitution as fully and completely as the law in other respects permits it to be made? The statutes expressly impose none, and none is to be found by way of implication unless the remonstrant's construction of chapter 148 of the Public Acts of 1915 is to be accepted as correct. As we already have had occasion to observe, practical reasons in support of that construction are not apparent. On the other hand, it is easy to discover reasons and cogent ones in opposition to it. We

are of the opinion that the owner of the license, whether or not he has qualified to sell under it, may sell and assign it as a piece of property to another who may make application to sell under it as a transferee.

[3] But the remonstrant is not driven to rely upon the broad proposition just discussed. He advances a more narrow one based upon that portion of chapter 36 of the Public Acts of 1915, which provides that a license sold upon execution shall for its unexpired term be as valid in the hands of its purchaser as in the hands of the original licensee, "provided before such purchaser may avail himself of the benefit of such license, he shall comply with all the requirements of law relative to the procuring of an original license." His claim is that here, by implication at least, is a direction that an execution purchaser, and of a necessity therefore his assignee, must, if he would avail himself of any beneficial use of the purchased license, appear before the county commissioners in all respects as an original applicant, and be governed by all the statutory regulations concerning the granting of licenses to such applicants. As one of these regulations is the prohibition of the issuance of a license to sell at a place located within 200 feet of a church edifice, he says that it follows that an execution purchaser applicant comes within the operation of that prohibition.

He is, of course, correct in his statement that an assignee of an execution purchaser can stand in no better position as an applicant for leave to sell than would his assignor if he were making such application. If it be so that the law provides a special rule for the case of an execution purchaser so that he is made to occupy a different and less advantageous position when he seeks to utilize his purchase by qualifying as a seller from that occupied by voluntary assignees of licensed persons, then, without doubt, every owner under him of the license stands in no better position. The controlling question therefore is: Does our law make execution purchasers a class apart from all other purchasers, and subject them, when they seek to avail themselves of their purchases, to different and more stringent regulations than those to which all other purchasers are subjected?

In answering this question the particular provision of statute which alone is relied upon as accomplishing that result should be read in connection with the other provisions touching the same general subject, and such construction, consistent with the language used, given to it as will make a harmonious and consistent whole. In arriving at that construction, the evil sought to be avoided should be borne in mind.

The evil which our law governing transfers of license privileges seeks to avoid manifestly is the sale of spirituous and intoxicating

liquors by persons whose fitness to do so has not been passed upon and approved by the licensing authorities. Our policy in that regard is clearly indicated by our statutes. We insist that every would-be seller shall present his application for leave to sell to the county commissioners, and that they, after a formal hearing upon a prescribed notice, pass upon his fitness to exercise the desired privilege. This requirement extends to every one whether he be an original applicant or one desiring to sell as a substitute licensee.

When the applicant seeks to exercise the right which was originally given to another, a transfer of the license becomes necessary. That transfer is not accomplished by a purchase and assignment of the license. It is accomplished when, and only when, the county commissioners have signified their consent to the substitution of licensee. Chapter 148, P. A. 1915. Our statutes make it clear that the word "transfer," as used in them, refers not to the transaction as between individuals whereby the property interest passes, but to the transfer of the right to sell which follows the county commissioners' consent. It matters not whether the license, as representing an inchoate right to sell, was obtained by a third party through a voluntary assignment or upon execution sale. There is no transfer within the meaning of our statutes until the county commissioners have given their consent to the substitution of parties, and there is in either case one when that consent is given.

Bearing in mind that fact and also that chapter 282, the latest in the order of enactment of the license statutes, in unrestricted language exempts transfers from the operation of the prohibition against the grant of licenses for a place located within 200 feet of a church edifice, and also that no reasons are apparent for the making of a distinction between purchasers of different classes, it is reasonably manifest that the two statutory provisions should be read the one as prescribing the applicant's course of action, and the other the county commissioners' duty in passing upon his application when duly presented. By force of chapter 38 the applicant must proceed in the matter of application in all respects as an original applicant is required to do. By virtue of chapter 282 the county commissioners, in passing upon the application when thus presented, are to be governed by the regulations touching transfers.

[4, 5] The remonstrant's claim that the plaintiff's application was fraudulent is based largely upon his assumption of an alleged false position in asserting that he desired a transfer of Sullivan's license and in asking for such transfer when he was in no position to claim it. What we have said upon that subject disposes of that feature of the charge of fraud. The charge is also based in part

upon the fact that at the time the application was made the Yale Brewing Company had not in fact perfected its assignment to the applicant, although it was perfected prior to the hearing before the commissioners. Nowhere in the application or in the applicant's affidavit accompanying it is it said that the assignment had been made. The application was for a transfer of Sullivan's license to Davis, and nothing more. We discover no misrepresentation of fact by Davis, nor possibility of misunderstanding or misconception on the part of the commissioners as to any material matter involved in their decision. It does not appear but that the situation was fully understood by all, and it is of no practical importance whether or not the assignment to Davis was in form executed at the time of the application's date.

The superior court is advised to affirm the order of the county commissioners.

No costs in this court will be taxed in favor of either of the parties. The other Judges concurred.

(91 Conn. 692)

TURNER v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. APPEAL AND ERROR \S 704(2) — CORRECTION OF FINDING — MEMORANDUM OF DECISION.

The memorandum of decision, not being made a part of the finding, cannot be corrected on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2900, 2939, 2941.]

2. APPEAL AND ERROR \S 536 — RECORD — AGREED STATEMENT OF FACTS.

An agreed statement of facts, not being certified to by the trial court and made part of the record, has no place therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2402, 2403.]

3. APPEAL AND ERROR \S 656(3) — CORRECTION OF FINDING.

Appellant cannot have correction on appeal under the method of Gen. St. 1902, § 797, of a finding of the trial court, without having the evidence certified and made part of the record.

4. CARRIERS \S 12(1) — POWER TO REGULATE CHARGES.

Under Public Service Corporations Act (Pub. Acts 1911, c. 128) § 23, it is only after hearing on complaint and finding that the rates made by a Public Service Corporation are unreasonable that the Public Service Commission may disturb them, and determine and prescribe just and reasonable maximum rates and charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7, 15-20.]

5. CARRIERS \S 18(2) — RATES — APPEAL FROM ORDER — REVIEW BY COURT.

Under Public Service Corporations Act (Pub. Acts 1911, c. 128) § 29, providing for appeal from the Commission to the superior court, and section 31, as amended by Pub. Acts 1913, c. 225, providing that said court shall hear such appeal and examine the question of legality of the order and the propriety and expediency thereof in so far as it may properly have cognizance of the subject, the court may determine whether the Commission's order fixing maximum

rates, or declining to change the rates fixed by the company, is valid, by ascertaining whether the rate so fixed or left unchanged was reasonable; this being a judicial question.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 13, 16-18, 20, 24.]

6. PUBLIC SERVICE COMMISSIONS §7—"REASONABLE RATE."

The reasonableness of a rate fixed by or for a public service corporation is to be determined after viewing its effect on the public as well as the company; the rate being unreasonable if so low as to be destructive of the company's property or if so high, either intrinsically or because discriminatory, as to be an unjust exaction from the public.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Reasonable Rate*.]

7. CARRIERS §13(2) — RATES — DISCRIMINATION.

In determining whether the rate of a carrier in one locality is, in view of its rates in other localities, discriminatory, depending on the localities being similarly situated and subject to like conditions, the element of distance is not necessarily a controlling factor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 22, 24.]

8. APPEAL AND ERROR §1010(1)—REVIEW—QUESTIONS OF FACT.

The facts found not supporting, much less requiring, the conclusion that a carrier's rate was excessive or discriminatory, the Supreme Court cannot disturb the trial court's adjudication sustaining the Public Service Commission's determination of reasonableness of the rate.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981, 4024.]

Appeal from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Petition by John C. Turner and others against the Connecticut Company. From judgment of court, on appeal from Public Utilities Commission, petitioner Turner appeals. Affirmed.

Petition for a reduction in the rates of fare charged by the respondent between certain points on one of its lines running from Stamford to Norwalk, which rates were alleged to be unreasonable, brought to the Public Utilities Commission, who heard and denied the petition; and thence by appeal to the superior court; facts found and judgment rendered confirming the action of the Public Utilities Commission, from which the petitioner Turner appealed.

The Connecticut Company operates seven electric street car lines on its Stamford division which converge at Atlantic square in Stamford. Two of these lines run outside of Stamford, one to Sound Beach and one to Noroton, and five terminate at suburban points in Stamford. Passengers riding from Atlantic square to Noroton bridge, a distance of 2.33 miles, pay one five-cent fare, and another fare from that point to Noroton village and points beyond. Passengers riding from Atlantic square to Sound Beach and the five suburban lines pay one five-cent fare, and on three of these lines ride less than the distance from the square to Noroton bridge,

while on three they ride a greater distance, viz. to Springdale, 3.5 miles; to Sound Beach, 3.22 miles, and to Shippan Point, 2.79 miles. The New York and Stamford Railway Company operates an electric street car line which converges at said Atlantic square. Passengers riding by this line from the square to Cos Cob, another suburb of Stamford, pay one five-cent fare and ride 3.8 miles. Passengers on all of these lines may transfer at the square from one of these lines to any of the others. The village of Noroton was originally a part of Stamford, and in all of its associations is closely connected with Stamford. In point of healthfulness, natural beauty, and the character of its population it is a desirable place to live, and is in no particular inferior to Springdale or Cos Cob. Since the electric street car line was built through Noroton two houses have been built between the Noroton bridge turnout and St. Luke's Church, and 14 houses have been built west of and within one quarter of a mile of the Noroton bridge. Since the electric street car line was built to Springdale and the five-cent fare established between Springdale and Stamford, 170 houses have been built in Springdale, and its population has increased rapidly and largely.

On February 24, 1915, the appellant, together with nine other residents of Darien, petitioned the Public Utilities Commission—"to order a fare extension or 'lap over' so called, operative in both directions between the said Noroton river bridge and said St. Luke's Church, or to make such other adjustment of fares as may be necessary or advisable, so as to give a single five-cent rate or charge for each passenger between Atlantic square and St. Luke's Church."

The term "lap over" is one used in reference to electric street car lines to denote the distance which a passenger is allowed to ride beyond a given fare limit before he is required to pay another fare, or upon taking a car going in the opposite direction, the distance which he may ride before reaching a given fare limit at which he will be required to pay a fare.

The Stamford division is one of the poorest earning divisions in the company's system, and the Stamford portion of the Stamford-Norwalk line of the Connecticut Company's system is one of the best earning lines in this division. The establishment of the proposed lap over to St. Luke's Church would extend the first five-cent limit out of Stamford, and thereby to some extent decrease the net earnings of the Stamford division.

In December, 1914, by agreement the towns of Stamford and Darien paid \$2,500 on account of the cost of widening the said bridge over Noroton river and the Connecticut Company the balance of said cost, \$3,162, and in addition \$33,000 in making physical connection between its lines and Noroton river and providing other facilities for through traffic.

The Connecticut Company thereafter laid its tracks across the bridge and thus connected its tracks, and this was the last step to complete a continuous line of electric street tracks between New York and Boston.

The Commission found and held that the facts before them did not establish the unreasonableness of the present rate, and therefore denied the petition. The superior court adjudged that the action of the Commission was reasonable and proper, and confirmed it and dismissed the appeal.

William T. Andrews and Peter Dondlinger, both of Stamford, for appellant. Seth W. Baldwin, of New Haven, for appellee.

WHEELER, J. (after stating the facts as above). [1-3] The first seven assignments of error are assumed by the appellant to relate to the correction of the finding. In fact they relate to matters which are parts of the memorandum of decision. That is not made a part of the finding, so that its correction cannot be had. The cause is to be decided upon the facts found, not upon those contained in the memorandum of decision. Further, the agreed statements of facts which the appellant assumes to be a part of the record had no place in the record. They were not certified to by the trial court and made a part of the record. So far as we know, they were not necessarily before the trial court, and certainly were not necessarily the only facts in evidence. Counsel for the appellee say the appellant petitioner introduced oral testimony. Whether this is accurate or not, the appellant cannot secure the correction of the finding under the method of General Statutes, § 797, without having the evidence certified and made a part of the record. The assignments of error, aside from those relating to the correction of the finding, are varying ways of stating the single point that the trial court erred in holding that the action of the Commission was reasonable in finding and deciding that the present rates complained of were not unreasonable. The act regulating Public Service Corporations (Public Acts of 1911, c. 128) in section 23 provides that:

"Any ten patrons of any such company * * * may bring a written petition to the Commission alleging that the rates or charges made by such company * * * are unreasonable."

Thereupon, after hearing had, the Commission, if it finds such rates and charges to be unreasonable, may determine and prescribe just and reasonable maximum rates and charges to be thereafter made by such company, and said company shall not thereafter demand any rate or charge in excess of the maximum rate or charge so prescribed.

The limitation of rates to what are reasonable is the enactment in statutory form of an ancient rule of the common law. *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 743, 58 Atl. 332; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S.

362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. Ed. 229.

"To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

[4] The remedy for the enforcement of reasonable rates provided by our act was new in this jurisdiction. So long as the company establishes reasonable rates, these cannot be lowered by commission or court. When it fails in this duty the Public Utilities Commission is authorized to prescribe just and reasonable maximum rates. And its authority, under this act, may be invoked whenever the rates as fixed are either so high or so low as to be unreasonable. The Commission is an administrative one, with the delegated legislative function of fixing railway rates.

[5] A court may not be required to fix or regulate a tariff of rates for services to be rendered by a public service corporation, since this is a legislative function and may be conferred by law upon a specially designated ministerial body. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 499, 17 Sup. Ct. 896, 42 L. Ed. 243; *Janvrin, Petitioner*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319; *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 58 Atl. 332.

Section 29 of the act provides for an appeal to the superior court from any order of the Commission. And section 31, as amended by chapter 225 of the Public Acts of 1913, provides that:

"Said court shall hear such appeal and examine the question of the legality of the order * * * and the propriety and expediency of such order * * * in so far as said court may properly have cognizance of such subject."

Under this provision the court may hear and determine whether the order of the Commission fixing maximum rates, or its order declining to change the rate fixed by the company, is valid or not, by ascertaining whether the rate so fixed or the rate unchanged was reasonable or not. Such a question is a judicial one.

It has been so held in construing a like or similar provision in state and federal statute. *Janvrin, Petitioner*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319; *Raritan River R. Co. v. Traction Co.*, 70 N. J. Law (41 Vroom) 732, 743, 58 Atl. 332; *Chicago, M. & St. P. Co. v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.

[6] The reasonableness of the rate is to

be determined after viewing its effect upon the public as well as upon the company. The rate may, on the one hand, be so low as to be destructive of the property of the company, or it may be so high as to be an unjust exaction from the public; either intrinsically so, or because it is discriminatory. In either instance the rate is unreasonable. What the court does in passing upon this question is to decide after hearing had in the course of a judicial proceeding, whether the rate complained of is so high or so low as to be unreasonable. No satisfactory definition of reasonable, as applied to rates, applicable to each case, can be made. Each must be decided upon its own facts and upon a consideration of many varying elements. A passenger rate upon a railway, to be reasonable, must be just to the public as well as to the railway. It should be large enough to provide for the passenger reasonable service and for the railway a reasonable return. The rate may be made high enough to cover the cost of service, the carrying charges, a reasonable sum for depreciation, and a fair return upon the investment. Less than this will not give the railway a reasonable rate. The action of a utilities commission which reduces a rate below this point unduly deprives the owners of their property without just compensation. If a rate exceeds this point to an appreciable degree and the Commission, upon proper application, declines to reduce it, the court would, in the absence of other controlling facts, reduce it to a reasonable point.

[7] If a rate in one locality is largely in excess of rates in other localities similarly situated and subject to like conditions, it is an unreasonable rate, for this would instance a discrimination against one locality in favor of another, or other localities. A discriminating rate of this character would be an unreasonable rate, since as a general principle the service of a public utility should be equal to all patrons similarly circumstanced. Baldwin, American Railroad Law, c. 25, § 6; Elliott on Railroads, § 1467; Union Pacific Ry. Co. v. Goodridge, 149 U. S. 680, 690, 13 Sup. Ct. 970, 37 L. Ed. 896; Western Union Telegraph Co. v. Call Pub. Co., 181 U. S. 92, 99, 21 Sup. Ct. 561, 45 L. Ed. 765; Portland Ry., L. & P. Co. v. Oregon R. R. Commission, 229 U. S. 397, 411, 33 Sup. Ct. 820, 57 L. Ed. 1248.

When we examine the finding before us we see that there are no facts found from which it could have been inferred as matter of fact by the trial court, or must be inferred by us as matter of law, that the ten-cent rate between Atlantic Square and Noroton is exorbitant or excessive. We have not before us the cost of service between these points, nor the fair share of the carrying charges and of depreciation, or what would be a fair return, for this distance. We are not given either the gross or net earnings, or the per car hour, or per car mile earnings. Nor are the conditions found to be similar. All that the

finding tells us is that the earnings are less on this system than on the defendant's other systems. This unrelated fact, by itself, does not help in ascertaining what, if any, profits there are from this rate, and whether they are excessive or exorbitant. The petitioner does not stand upon the intrinsic unreasonableness of this rate, but upon the claim that this rate is a discriminatory one, and results and has resulted to the serious disadvantage of the people of the village of Noroton.

It would seem, from the facts found, that an inference of fact may have been justified that Springdale had grown greatly and Noroton had not, because of the one community having had a five-cent rate to Atlantic square and the other not. But we cannot so conclude, unless there is a specific finding of that fact. Many other considerations may have operated or largely contributed to this result. We may assume that a five-cent rate would benefit Noroton and its public, for this is a self-evident fact. But we do not know what its effect would be upon the returns to the railway. It may be held to be a principle of traffic that a reduction of rates increases the volume of business, but no principle which we are at liberty to regard tells us in a given case what will be the extent of the increase, or what the effect upon the net returns. Chicago, etc., Ry. Co. v. Wellman, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. Ed. 176.

In determining the reasonableness of a rate we cannot leave out of the consideration the effect of the change of rate upon the railway return any more than we can that upon the public.

The petitioner's case reduces itself to this: That the schedule of rates upon the Stamford division gives a materially longer ride for a single five-cent fare on some of the lines converging at Atlantic square than it does on the Noroton line. In a similar situation the court say:

"The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service. * * * The discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable." Portland Ry. L. & P. Co. v. Oregon R. Commission, 229 U. S. 397, 411, 33 Sup. Ct. 820, 57 L. Ed. 1248.

The petitioner is accurate in his claim as to the lines to Springdale, Sound Beach, and Shippan's Point, but as to the other three lines converging at the square the single five-cent fare on the Noroton line gives the longer ride. And the distance covered by the single five-cent fare on the Noroton line is practically the average distance the single fare will carry a passenger on all the lines of the system converging at the square.

The element of distance may be a controlling factor in a case of discrimination, but not invariably so. As a rule, other factors

are necessarily relevant before the conclusion of a discrimination in rates can be made. Facts which affect the question of traffic profit are factors to be considered. It may be that a divergence in rates between communities similarly conditioned would be discriminatory irrespective of the element of traffic profit. That situation we leave open until it presents itself. And the identity or similarity of conditions are also important factors in determining whether a rate is discriminatory.

[8] The foundation of the petitioner's claim of a discrimination is that the defendant charges "Noroton passengers twice the fare that it charges to other passengers similarly circumstanced." The finding does not support this. The judgment must be controlled by the finding. And upon that we cannot hold that there was any undue preference or advantage in the other rates, or that the trial court erred in concluding that the rate complained of was not reasonable, for the facts found do not support, much less require, the conclusion that this rate is either exorbitant, excessive, or discriminatory.

There is no error. The other Judges concurred.

(91 Conn. 727)

BULKELEY v. BROTHERHOOD ACCIDENT CO.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. INSURANCE §339 — ACCIDENT INSURANCE — CHANGE OF OCCUPATION.

The act of setting off a single firework is not a change of occupation from that of gardener to that of user or handler of fireworks, within the provision of an accident policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 879.]

2. INSURANCE §461(1) — ACCIDENT INSURANCE — VOLUNTARY EXPOSURE TO DANGER.

Evidence that the bombs were ordinarily safe, that from one to two minutes usually elapsed between the lighting of the fuse and the explosion of the charge, which threw the bomb upwards, and that insured, his employer, and members of the family had set off a great many of them on other occasions, is enough to show that the act of setting off in the usual way a bomb, a firework, was not a voluntary exposure to unnecessary danger, within the provision of an accident policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1180.]

**3. EVIDENCE §126(2) — DECLARATIONS — MAN-
NER OF ACCIDENT.**

Relative to the question whether insured, fatally injured by explosion of a bomb which he was setting off, voluntarily exposed himself to unnecessary danger, within the provision of his accident policy, his declarations while on the way to the hospital, in answer to the question as to what happened, that it went off sooner than he expected, and something about a quick-burning fuse, all that witness could remember, are relevant and admissible, and make it more probable that the accident occurred because of a

quick-firing fuse than from attempting to set off the bomb in some unusual way.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 373.]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Morgan G. Bulkeley, administrator, against the Brotherhood Accident Company on a policy of health and accident insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff's decedent, Oscar L. Johnson, a gardener in the plaintiff's employ, was injured by the explosion of a firework called a bomb, intended to be fired by placing it in a mortar and lighting a fuse. Some of these fireworks, left over from the previous Fourth of July, were found about the premises, and Johnson was seen to take a bomb and mortar from plaintiff's garage toward an open place near by. Nobody witnessed the accident, but an explosion was heard, and Johnson was observed rolling on the grass trying to extinguish a fire burning in the clothing about his neck and chest. Two days afterwards Johnson died in consequence of burns and wounds received from the explosion of the bomb. While being taken to the hospital Johnson was asked, "What happened?" and said that it went off sooner than he expected, and something about a quick-burning fuse.

The policy exempts the defendant from liability for injuries caused by "voluntary exposure to unnecessary danger," and provides that in case of injury after the insured has "changed his occupation to one classified by the company as one more hazardous than that herein stated" the company's liability shall be only for the amount which the premium would have purchased at the rate fixed by the company for such more hazardous occupation.

The complaint alleges that the insured duly fulfilled all the conditions of the insurance on his part, and that the death was not from any cause excepted in the policy. The answer leaves the plaintiff to his proof as to the facts, denies that the assured fulfilled the conditions of the insurance, alleges that the injury was caused by voluntary exposure to unnecessary danger, and, as an alternative defense, that the assured had changed his occupation, and was engaged in using or handling fireworks when injured, whereby the company's liability was reduced to \$200, in respect of which a tender is pleaded.

Stewart N. Dunning, of Hartford, for appellant. Warren B. Johnson, of Hartford, for appellee.

BEACH, J. (after stating the facts as above). [1, 2] It is too plain for discussion that the act of setting off a single firework

is not a change of occupation from that of gardener to that of a user or handler of fireworks.

The other ground of defense, that the injury was caused by voluntary exposure to unnecessary danger, rests upon the determination of a motion to correct the finding by erasing therefrom the finding that the death was not from any cause excepted in the policy, and by substituting therefor a proposed finding that the plaintiff offered no evidence to show that decedent did not voluntarily expose himself to unnecessary danger. It is, however, unnecessary to follow the defendant's argument any further, because the finding of the trial court is supported by the evidence, and the defense of voluntary exposure to unnecessary danger is disposed of on the merits in the plaintiff's favor. There was evidence tending to show that the bombs were ordinarily safe, that from one to two minutes usually elapsed between the lighting of the fuse and the explosion of the charge which threw the bomb upward, and that the decedent, his employer, and members of the employer's family had set off great numbers of them at Independence Day celebrations. This was enough to show that the act of setting off one of these bombs in the usual way was not a voluntary exposure to unnecessary danger.

[3] Then the question remained whether Johnson attempted to set the bomb off in some unusual way, or in some other way voluntarily exposed himself to unnecessary danger in setting it off. On this point his declarations made while being taken to the hospital are relevant and admissible, and they make it more probable than otherwise that the accident occurred because of a defective quick-firing fuse. Defendant excepted to the admission of these declarations, and now makes the claim that they were too vague and indefinite to be admitted in evidence. This, however, was the fault of the witness to whom the declarations were made, who was obliged to give the substance of what was said because he could not remember the words. Taking these disconnected phrases as expressing the substance of Johnson's declarations, there is no difficulty whatever in supporting the finding of the trial court that the death was not from any cause excepted in the policy.

There is no error. The other Judges concurred.

(257 Pa. 76)

SCHWEHM v. CHELTEN TRUST CO.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. BUILDING AND LOAN ASSOCIATIONS § 23(4) — AUTHORITY OF PRESIDENT OF LOAN SOCIETY—MISAPPROPRIATION—LIABILITY.

The president of a loan society, whom the by-laws made the chief executive officer and ac-

tive manager, was authorized to accept money paid to the society by cash or by check to its order, and his misappropriation of funds so paid was the loss of the society.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 29.]

2. BANKS AND BANKING § 109(2) — PRESIDENT OF LOAN SOCIETY — INDORSEMENT OF BILLS OR NOTES.

Where the authority of a bank president comes from the directors, he may indorse bills or notes payable to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 259.]

3. BANKS AND BANKING § 138—DEPOSITS—PAYMENT ON CHECK—LIABILITY TO DEPOSITOR.

Where a depositor drew his check upon defendant bank to the order of a loan society, whose president and chief executive officer indorsed it and misappropriated the proceeds, the bank was not liable, as the proceeds were paid to the society in accordance with the terms of the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 398-405.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for a bank deposit by Harry J. Schwehm against the Chelten Trust Company. Verdict for plaintiff for \$5,294.50, and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Chas. C. Norris, Jr., of Philadelphia, for appellant. Julius C. Levi and David Mandel, Jr., both of Philadelphia, for appellee.

POTTER, J. The plaintiff in this case, who was a depositor with the Chelten Trust Company, drew his check upon that institution for the sum of \$5,002, payable to the order of Federal Loan Society. The check was indorsed, "Federal Loan Society, H. W. Stoll, President, Jos. R. Friedman," and was cashed by the Franklin Trust Company, and collected by the latter from defendant, through the Corn Exchange National Bank, and charged by defendant against plaintiff's deposit account.

[1] Plaintiff claimed that Stoll, who was president of the Federal Loan Society, had no authority to indorse the check in the name of the society, that his indorsement did not transfer title to it, and that defendant's action in paying it, and charging it against his account, was not binding upon him. He therefore brought this suit to recover the amount so charged. At the trial, a request for binding instructions in favor of defendant was refused, and the jury were instructed to render a verdict for plaintiff for the full amount of the claim. From the judgment thereon entered, defendant has appealed. Its counsel contend that under the by-laws of the Federal Loan Society, the president was constituted the general manager of the business

of the corporation, and this necessarily gave him the power to indorse its commercial paper. It appears from the record that the by-laws were not silent as to the president's authority, but they provided that he should be the chief executive officer of the company and should "have general and active management of the business of the company," should "have general supervision and direction of all the other officers of the company," and see that their duties were properly performed, should make annually to the board of directors a report of the operations of the company for the fiscal year, and from time to time report to them such matters as the interests of the company might require to be brought to their notice, and should "have the general powers and supervision and management usually vested in the office of the president of a corporation." Broader powers in the management of the business could hardly have been bestowed. The president was not only authorized to act for the company, but was to see that all other officers discharged their duties. Counsel for plaintiff, however, contend that the power of the president was limited by two provisions of the by-laws. The first directs the treasurer to "deposit all money and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the board of directors." This provision, however, only relates to the duties of the treasurer, who is expressly placed under the "general supervision and direction" of the president. It puts no limitation on the powers conferred on the president himself. The other provision is that "all checks, drafts or orders for the payment shall be signed by the treasurer and countersigned by the president." This refers only to instruments for the payment of money by the corporation, not to the indorsement or transfer of instruments of which the corporation is not the maker, but the payee. It does not limit the power of the president as to the latter.

[2, 3] Under the by-laws, as noted above, the president was made the "chief executive officer" and the general and active manager of the business of the company. He had control over every other officer of the company, and power to direct the disbursement of its funds. This authority was ample to authorize him to accept money paid to the company, whether in cash or in the form of a check payable to the order of the company. If he misappropriated funds paid in good faith to him as the representative of the company, the loss must be that of the corporation that authorized him to act, and held him out to the public as its chief officer and general agent. As the power was delegated to the president in the by-laws, there is no question here, as to acquiescence, by the board of directors. No action upon the part of the directors was necessary. But

even where his authority comes from the directors, the president of a bank may indorse bills or notes payable to it. And it would seem that he has an implied power to indorse and transfer its negotiable paper. 1 Daniels, Neg. Inst. § 394.

It should be remembered that in the present case, in so far as the record shows, the validity of the indorsement was not questioned by the Federal Loan Society, the payee of the check. It is the drawer of the check who complains. It does not appear that the corporation has denied that it was bound by the indorsement of its president, or that it has refused to carry out the contract for which the check constituted the consideration. What the transaction was, is not very clear, but apparently it was a purchase of stock. Plaintiff testified that he had not received the stock, but did not say that the corporation had refused to issue it to him, nor did he say that he had made demand for it. Under the facts shown, we are clearly of opinion that payment of the check to the president of the company was payment to the corporation.

The fifth and sixth assignments of error are sustained. The judgment is reversed, and is here entered for defendant.

(257 Pa. 17)

O'MALLEY et al. v. PUBLIC LEDGER CO.
(Supreme Court of Pennsylvania. March 5, 1917.)

1. MUNICIPAL CORPORATIONS ¶706(4)—EVIDENCE OF OWNERSHIP—INJURIES ON STREET.

In an action for personal injuries when struck by a motor truck alleged to be the property of defendant company, where it appeared that defendant's name was painted upon the car containing bundles of newspapers, testimony of a policeman that shortly before the accident he saw a car of such description delivering bundles of newspapers, and knew it because he had often seen it in the neighborhood delivering newspapers, and that in the particular case his attention had been attracted to the driver's hurry in tossing papers from the car, was admissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. APPEAL AND ERROR ¶860—JURY ¶149—QUESTION FOR JURY—WITHDRAWAL OF JURY.

In such action, where plaintiff husband testified as to conversation on day "when we were awarded the verdict" in former trial, where there was no effort to lead him to the objectionable remark, and where the jury were instructed to disregard it, the refusal of a continuance was within trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Jury, Cent. Dig. §§ 635-637.]

3. MUNICIPAL CORPORATIONS ¶706(6)—USE OF STREET—PERSONAL INJURY—QUESTION FOR JURY.

In action for personal injury when struck by a motor truck, alleged to belong to defendant newspaper company, held, on the evidence, that the ownership of the car and its operation in the company's service was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injury by Catharine O'Malley and John O'Malley against the Public Ledger Company. Verdict for plaintiff John O'Malley for \$750, and for Catharine O'Malley for \$3,000, reduced by the court to \$500 and \$2,000, respectively, with judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Robert P. Shick and Winfield W. Crawford, both of Philadelphia, for appellant. Bertram D. Rearick, of Philadelphia, for appellees.

MOSCHZISKER, J. John O'Malley and Catharine, his wife, sued to recover for personal injuries to the latter; verdicts were rendered in their favor, upon which judgments were entered; the defendant has appealed.

On January 8, 1915, between 5 and 5:30 a. m., Mrs. O'Malley was struck by a southward-bound automobile while crossing Twentieth street, in the city of Philadelphia, at the south side of McClellan street, or about 150 feet from Moore street, the next thoroughfare to the north. The testimony relied upon by the plaintiffs, when viewed in the light most favorable to them, is sufficient to sustain the following material findings: Just before leaving the sidewalk, Mrs. O'Malley looked up and down Twentieth street and, seeing no vehicles approaching from either direction, she started slowly to cross eastward; in the center of that thoroughfare there is a single car track, and, just before she reached the first rail of this track, she was struck by the automobile, which had turned southward into Twentieth street from Moore street; the machine was being driven at from 40 to 50 miles an hour, and came suddenly upon Mrs. O'Malley, without warning of any kind; she was knocked down, and subsequently, as a result of the accident, suffered a miscarriage and other injurious results; finally, the motor in question was owned by the Public Ledger Company and, at the time of the injury to Mrs. O'Malley, it was being operated in the defendant's service.

There are numerous assignments of error; but only a few of them require serious consideration. To begin with, we have looked at the medical testimony with care, and feel that it is sufficient to connect Mrs. O'Malley's impaired physical condition with the accident, and to justify the conclusion that her injuries followed as a result thereof.

[1] We see no error in the admission of the testimony of the policeman, Jordan. He recalled the date of the occurrence under investigation; and the fact that his memory in this respect was aided by the circumstance

that he had held a conversation with another officer concerning the accident, right after it happened, would not militate against the admission of his testimony. It may be well to note, however, that the details of this conversation were not allowed in evidence. Other witnesses who saw the accident had already testified that the car which injured Mrs. O'Malley was a small machine with the name of the Public Ledger painted thereon, containing bundles of newspapers. The policeman was permitted to state that, very shortly after the time fixed by the former witnesses, he saw an automobile of like description delivering bundles of newspapers about $4\frac{1}{2}$ squares from the place of the accident; that he knew the car, having seen it in the neighborhood morning after morning, on a like errand; and that, on this particular occasion, the driver attracted attention by his seeming hurry, when he tossed out papers upon the corner where the witness was standing, without stopping his machine. Although this testimony, by itself, would have but little weight, yet, in connection with other evidence in the case, it was circumstantially relevant to identify the automobile which caused the damage as a vehicle belonging to and, at the time, in the service of the defendant. *Bowling v. Roberts*, 235 Pa. 89, 83 Atl. 600; *Hershinger v. Penna. R. R. Co.*, 25 Pa. Super. Ct. 147.

[2] While the trial judge might have withdrawn a juror because of the unfortunate remark made by Mr. O'Malley when upon the stand, to the effect that he had a conversation with another man on the day "when we were awarded the verdict" (evidently referring to the verdict in a former trial of the same cause), yet we cannot say the refusal so to do constitutes reversible error. The trial had been on for three days; there was no attempt on the part of counsel for the plaintiff to obtain an unfair advantage by leading on the witness to the objectionable remark. On the contrary, it seems to have slipped out without any premeditated purpose, and, when this occurred, the judge at once warned the jurors entirely to disregard the incident; moreover, at the end of his charge, he repeated these instructions. In conclusion, we do not conceive it at all probable the remark in question had any effect prejudicial to the defendant; for if the jurors understood from it that there had been a former finding in favor of the plaintiffs, it must be assumed they likewise realized that this verdict had been set aside by the court.

[3] No part of the charge is assigned for error, and a careful reading thereof shows that all the testimony was properly and correctly submitted to the jurors, not only to find the relevant facts, but to draw their own inferences therefrom in determining the issues involved. Of course, there was testimony produced by the defendant militating against the evidence depended upon by the

plaintiffs to show the former's ownership of the car and that the machine was being operated in its service at the time of the accident; but this testimony was mostly oral, and hence it was for the jury to pass upon.

The assignments of error are all overruled, and the judgments affirmed.

(257 Pa. 25)

SCOTT v. AMERICAN EXPRESS CO.
(Supreme Court of Pennsylvania. March 5, 1917.)

1. WITNESSES — 379(7)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

The credibility of a witness may be impeached by his previous statements inconsistent with or contradictory to his testimony, including statements made in pleadings, where the omission in the inconsistent statement occurred when the occasion called upon him for disclosure.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1251.]

2. WITNESSES — 387—IMPEACHMENT—INCONSISTENT STATEMENTS—SWORN PLEADINGS.

In an action against an express company for injury to an employé from the defective condition of the brakes and steering apparatus of its motor truck, defended on ground that the accident was caused by the intoxication of the driver, a fellow servant, where defendant's superintendent testified that he visited the driver after the accident, and he then showed signs of having been drinking, his cross-examination as to whether he had not sworn to answers in the driver's action in another court arising out of same accident which said nothing about the driver's intoxication, was erroneous, where under the rules of that court the facts constituting the defense were not required to be stated in the answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232.]

3. APPEAL AND ERROR — 232(2)—ADMISSIBILITY OF EVIDENCE—OBJECTION.

Where the record was not clear as to the ground upon which objection to the cross-examination of a witness was based, the rule that on appeal a party complaining of the admission of evidence in the court below will be confined to the specific objection there made, was not applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431.]

4. APPEAL AND ERROR — 1004(1)—AMOUNT OF VERDICT—REVIEW.

The amount of a verdict will be reviewed by the Supreme Court under authority of Act May 20, 1891 (P. L. 101), only when so grossly excessive as to shock the sense of justice, and to show a clear abuse of the lower court's discretion in refusing to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948.]

5. DEATH — 99(3)—EXCESSIVE DAMAGES.

Verdicts of \$1,717 awarded the father of injured minor employé, and \$12,540 awarded the estate of the minor, were not excessive, where he suffered a compound fracture of both legs above the knees, lacerations and bruises of the scalp, arms and back, underwent two operations, and lived four months after the accident.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal in-

juries by Elizabeth Scott, administratrix of the estate of Joseph P. Scott, deceased, and Elizabeth Scott, administratrix of the estate of Edward A. Scott, deceased, against the American Express Company. Verdict for plaintiff as administratrix of the estate of Edward A. Scott for \$1,717, and as administratrix of her deceased son, Joseph P. Scott, for \$12,540, and judgment thereon, motion for new trial denied, and defendant appeals. Reversed with a new venire.

Plaintiff's injuries consisted of compound fractures of both legs above the knees, lacerations and bruises of the scalp, arms and back. Two unsuccessful operations were performed to secure unions of the fractures of the legs. Plaintiff suffered extreme pain except when under the influence of opiates, and died as a result of such injuries over four months after the accident.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

John Lewis Evans, John G. Johnson, and Thomas De Witt Cuyler, all of Philadelphia, for appellants. Francis M. McAdams and William H. Wilson, both of Philadelphia, for appellee.

FRAZER, J. This action was brought by Joseph P. Scott, a minor, and Edward A. Scott, his father, to recover damages for injuries sustained by the former, as a result of alleged negligence of defendant in permitting the brakes and steering apparatus on a motor truck, on which the minor was riding in the discharge of his duties, to become out of order and remain in a state of disrepair, which resulted in the machine becoming unmanageable in descending a street with some grade, and striking a telephone pole located along the highway. Joseph P. Scott died as a result of his injuries, and, upon the subsequent death of his father, Elizabeth Scott prosecuted the action to judgment as administratrix of their estates.

The deceased minor was employed by defendant to ride on its trucks and assist drivers in handling and guarding express packages. The defense was that the accident was caused by the negligence of the driver, who, according to the evidence, had been drinking and was in an intoxicated condition at the time; which fact was known to Young Scott. The trial judge submitted the case to the jury, in a charge to which no complaint is made, and there was a verdict on behalf of the father's estate for \$1,717, and on behalf of the estate of the minor for \$12,540. A motion for a new trial was dismissed by the court below, and defendant appealed.

We deem it unnecessary to refer in detail to the circumstances of the accident, since the only questions argued before this court were as to the correctness of the action of the court in admitting certain evidence to

impeach the credibility of one of defendant's witnesses, and whether or not the verdict on behalf of the minor's estate was excessive.

[1, 2] Superintendent Julier, of defendant company, testified to visiting the hospital within two hours after the accident, and, in reply to a question by his own attorney, stated he saw Carey, the driver, at that time and his breath smelled as if he had been drinking. On cross-examination by plaintiff's counsel he was asked whether he had not sworn to and signed answers in actions by the driver and another person against defendant in the municipal court involving the same accident. Upon objection being made, counsel for plaintiff stated he wished to test the credibility of the witness, whereupon the objection was overruled. The witness then admitted he had signed and sworn to the papers, and that they contained no statement to the effect that the driver had been drinking, or was intoxicated. Defendant contends this testimony was improperly admitted and was extremely prejudicial to it, owing to the fact that the jury as laymen were likely to place undue weight on the omission, whereas, in fact, such omission was unimportant, and the statement unnecessary as a part of the pleadings in the case.

The rule is well settled that the credibility of a witness may be impeached by showing previously made statements inconsistent with, or contradictory to, his present testimony, and this includes inconsistent statements made in pleadings in the causes. *Henry's Penna. Trial Evidence*, § 65, and cases cited; *Floyd v. Kulp Lumber Co.*, 222 Pa. 257, 71 Atl. 13; 2 *Wigmore on Evidence*, § 1086. To constitute grounds for discrediting a witness, however, the omission must be made at a time when the occasion was such that he was called upon to make the disclosure. It is only where the witness on a previous occasion was under some duty to speak the whole truth concerning the matter about which he now testifies that impeachment becomes permissible by showing an omission to state certain material facts included in his testimony. *Royal Insurance Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622; *Huston's Estate*, 167 Pa. 217, 31 Atl. 553. Consequently, in considering the competency of the evidence offered for the purpose of impeaching the witness, the scope of the answers filed in the municipal court of Philadelphia should be considered. Rule 7 of that court provides that an answer shall contain an admission or denial of each fact averred in the statement of claim, and that all facts not denied by defendant, or of which he does not aver himself to be ignorant, shall be deemed to be admitted. This rule does not require defendant to state the facts constituting his defense, but merely to either admit or deny those averred in the statement of claim. We have no knowledge of the contents of the statements of claim referred to, as they are not printed in either paper book, and nowhere in

the record does it appear that the question of intoxication was raised in the declaration in either case. The answers in questions admit the happening of the accident, but deny that either the brakes or steering apparatus were defective or out of order, or that the accident was the consequence of the failure of these parts of the truck to properly work, or of anything else for which defendant was responsible. No necessity appears for the assertion or denial of the charge that the driver had been drinking previous to the happening of the accident.

The formal pleadings in a case are drawn by attorneys in technical language, and contain only such averments of facts as in the opinion of the attorneys are material to make out a prima facie case. They, therefore, do not purport to be a complete history or recital of all the facts of the transaction, and no unfavorable inference should be drawn from the failure to include details which are the natural and usual parts of the proof, rather than of the pleadings in the case. For these reasons it was error to permit the use of the answers, filed in the municipal court cases, in attacking the credibility of the witnesses.

[3] Plaintiff claims the evidence was objected to solely on the ground that it should have been introduced as a part of plaintiff's case; that this objection conceded its relevancy, and, under the familiar rule that a party complaining on appeal of the admission of evidence, in the court below, will be confined to the specific objection there made. *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410; *Roebling's Sons Co. v. American Amusement & Construction Co.*, 231 Pa. 261, 80 Atl. 647. An examination of the record fails to convince us that this rule should be applied in the present case. When the papers were handed to the witness Julier, defendant's counsel made the following objection: "I object to any evidence in regard to these papers, unless it is introduced as part of plaintiff's case." The trial judge then said: "It goes to the credibility of the witness, I understand. Is that the purpose?" Plaintiff's counsel replied: "That is the purpose entirely." The court thereupon overruled the objection, but no exception was taken to the ruling at this point. After a preliminary examination of the witness the record shows the following:

"Q. In those affidavits you didn't say a word, did you, as to Carey [the driver] being drunk or as to having a smell of intoxicating liquor on him? (Objected to by counsel for defendant. Objection overruled; exception to defendant.) A. No."

While the objection first made relates to the order of the admission of the evidence, the comment of the court and counsel for plaintiff clearly indicate the evidence was offered for the sole purpose of testing the credibility of the witness, and the general objection following that, upon which the exception was

founded, may well have been based upon that ground. It is sufficient to say that the record is not clear or specific on this point, and in that case the rule invoked by appellee will not be applied. *Kuhn v. Ligonier Valley R. R. Co.*, 255 Pa. 445, 100 Atl. 142. It follows that the first assignment of error must be sustained.

[4, 5] The other question involved is whether or not the damages awarded are excessive, or whether the court below abused its discretion in refusing to cut down the verdict, or allow a new trial. Since the passage of Act May 20, 1891 (P. L. 101), giving this court power to set aside verdicts deemed to be excessive, we have repeatedly said that the question of the amount of the verdict would be reviewed only in cases where so grossly excessive as to shock our sense of justice, and where the impropriety of allowing a verdict to stand is so manifest as to show a clear abuse of discretion on the part of the court below in refusing to set it aside. *Quigley v. Penna. R. R. Co.*, 210 Pa. 162, 59 Atl. 958; *Reed v. Pittsburg, Carnegie & Western R. R.*, 210 Pa. 211, 59 Atl. 1067; *Dunlap v. Pittsburgh, Harmony, Butler & New Castle Ry. Co.*, 247 Pa. 230, 93 Atl. 276. In view of the nature of the injury, the pain and suffering endured, and all the circumstances of the case, it cannot be said the verdict in this case is so excessive as to warrant our interference upon that ground.

The judgment is reversed with a new venire.

(257 Pa. 1)

THOENEBE et al. v. MOSBY et al.
(Supreme Court of Pennsylvania. Feb. 26, 1917.)

NUISANCE §3(9)—DANCE HALL—CHARACTER OF NEIGHBORHOOD.

A bill in equity to enjoin dancing in a hall in a neighborhood not strictly residential was properly dismissed, where it appeared that the colored persons attending the dances conducted themselves in an orderly manner, and made no more noise than was usual on such occasions, though after the dancing, which usually closed at 12 o'clock, there was considerable noise in the street on departing, as that could be satisfactorily controlled by the police.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 20-22.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by W. Herman Thoenebe and others against Jerome Mosby and John Foreman, trading as Mosby & Foreman, and Joseph M. Thomas, trading as Charles J. Thomas Sons. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Bill in equity for an injunction. The facts appear in the following opinion by Bregy, P. J., in the court of common pleas:

This is a bill alleging that the defendants are maintaining a nuisance at the hall, 1512 to 1520 North Thirteenth street.

(1) The plaintiffs reside on Thirteenth street between Jefferson and Oxford streets.

(2) The defendants Mosby and Foreman are lessees of a hall on Thirteenth street between Jefferson and Oxford streets, where they have a dancing school. The defendant Thomas is the owner of the building.

(3) On Monday, Thursday, and Saturday nights Mosby and Foreman, who rent the hall on the third floor of the stable building known as Thomas' stable, have dancing parties that begin at 9 o'clock and continue till 12 o'clock. On Wednesday night they teach dancing from 8:30 o'clock to 10:45 o'clock. On Tuesday and Friday nights the hall is not occupied by the dancing school in any way, but the lessees sublet it (with the consent of the owner, Mr. Thomas) for concerts, balls, and so on as they can obtain a tenant. During the 15 months the defendants have occupied the hall they have rented it for the above purposes 14 times.

(4) On Monday, Thursday, and Saturday nights, the music for the dancing parties begins at 9 o'clock and continues till 11:50, when it stops and the patrons leave—the hall being emptied by 12 o'clock. On Wednesday night, the teaching night, the school begins at 8:30 and closes at 10:45. On the occasions that the hall has been rented out for different entertainments, they have occupied the hall till 2 o'clock a. m.

(5) The music at the dancing parties consists of five pieces, viz.: Piano, violin, cornet, trombone, and trap drum. On Wednesday nights the music is by the piano only. The same five pieces play at the balls or entertainments when the place is rented.

(6) When the music continues after 11 o'clock it is muffled to subdue its noise, and so continues till the audience leaves.

(7) The hall here alluded to is on the third floor of a large public stable building that has been so occupied for over 40 years. During the many years of the existence of this stable it has been occupied as such, both for the stabling of private teams and the hiring of horses and carriages to the public. The hall on the third floor has for over 30 years been rented out as a dancing school, for parties, concerts, and for different kinds of public meetings, political and otherwise.

(8) The neighborhood is no longer a strictly residential one. This one square on Thirteenth street between Jefferson and Oxford has in addition to the large stable already mentioned quite a number of business places. From the north side of Jefferson street to the south side of Oxford street, there is on one side a large furniture manufactory, a barber shop, a store, a tailor shop, a china decorating store, and an empty store at the corner; on the other side there is a saloon, tailor shop, a wall paper establishment, a butcher shop, and other stores. On the south side of Jefferson street at Thirteenth street there is a grocery store at one corner and a drug store at the other; and on the north side of Oxford, a grocery store at one corner and an insurance office at the other.

(9) The persons attending the dances and entertainments heretofore spoken of have behaved themselves in a proper way in the hall, and no misbehavior there has been proved or, in fact, alleged against them.

(10) The patrons of the hall are colored people.

(11) When the audience disperses there is on the street the noises of these persons talking to each other, saying good-bye and the calling to a friend to wait, etc.

(12) At the dancing parties the attendance is from 80 to 100; at the times the hall is rented sometimes there are as many as 400 there.

(13) The occupants of four houses on Thirteenth street complain that they are annoyed by the music in the hall and by the noise in

the street when the patrons leave. Very many more say they are not annoyed and have no complaint to make.

(14) Within the last few years the immediate neighborhood, but not this street, has become tenanted by a large number of colored people.

Conclusions of Law.

The plaintiffs seek to have the defendants close the hall at about 10 o'clock, complaining that the continuation of the music after that hour and the dispersal of the audience and its attendant noise are a nuisance that annoys them. The complaint raises the question as to what hour a dancing school, party, concert, or ball should close its doors. The answer must depend upon the neighborhood, and the facts of each particular case, as there can be no general rule on the subject. Considering the fact that I have found this not to be a strictly residential neighborhood, but one that has changed into a partly business one, I do not consider it unreasonable to keep open the dancing school till 12 o'clock. The hours of entertainment are not what they used to be. Everything is later, and, as times change, we must change our habits with them. Everything has been done by the proprietors of the school to lessen the sound of the music after 11 o'clock, and I see no reason to interfere with the dancing school.

As to the parties or balls that are held on other evenings, while not very many in number, another question presents itself. Considering the neighborhood and the admitted fact that on an average of once a month an entertainment of some kind is given which continues till 2 o'clock in the morning, is it proper to issue an injunction? This question is not without difficulty. That it is an annoyance to the plaintiffs to have their sleep broken by these gatherings is undoubtedly true. Those who live in cities must take what goes with it, however. Those who live in business neighborhoods cannot expect or demand the quiet of the suburbs.

As the neighborhood changes they must take the consequences. If it changes for the worse and personal discomfort follows, that must be submitted to. The running of street cars and the noise of the automobiles all night long are among the few annoyances that all sections of the city are now subjected to, but would some years ago have been considered a nuisance. Applying the principle that an injunction should not issue in doubtful cases, I would not issue one here.

There remains only the other question, viz.: Can the bill prevail because of the noise in the street after the entertainments are dismissed? As I have found that the defendants' entertainments bring together an assemblage of respectable, well-behaved people, and that the noises in the street are not of a kind that are induced by or encouraged by the defendants' parties, I see no reason for a court of equity to act. This is a matter for the police to see to. We would not hesitate to enjoin the gathering of disorderly, dissolute, drunken, or depraved persons, whose coming together must necessarily annoy the residents of nearby houses, but the saying of parting words by respectable people and the calling to friends as they leave the hall is a matter for the police to regulate, rather than for a court to dispose of by injunction.

The court dismissed the bill. Plaintiffs appealed. Error assigned, *inter alia*, was the decree of the court.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Ormond Rambo and Frank H. Warner, both of Philadelphia, for appellants. J. H. Shoemaker, of Philadelphia, for appellees.

PER CURIAM. This bill was filed to enjoin dancing and music in a certain hall in the city of Philadelphia. That it was properly dismissed appears by the facts found and legal conclusions reached by the learned president judge of the court below, and, on them, the decree is affirmed at the costs of appellants.

(257 Pa. 159)

COMMONWEALTH ex rel. BROWN, Atty. Gen., v. SCHWARTZ.

(Supreme Court of Pennsylvania. March 12, 1917.)

QUO WARRANTO ~~60~~—JUDGMENT OF OUSTER—JUSTICE OF THE PEACE.

A judgment of ouster in quo warranto proceedings to test the right of a justice of the peace to hold office in a borough was properly entered, where it appeared that respondent had been defeated at an election under which he claimed his right to the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 71.]

Appeal from Court of Common Pleas, Lackawanna County.

Quo warranto by the Commonwealth, on relation of Francis Shunk Brown, Attorney General, against Frank Berger and Phillip Schwartz, to test the right of the last defendant to act as justice of the peace of the borough of Old Forge. Judgment for defendant Berger, and writ dismissed as to him, and judgment of ouster against defendant Schwartz, and he appeals. Affirmed.

It appears by the record that an election to fill vacancies in the office of justice of the peace of Old Forge borough was held in November, 1915, at which time the following candidates received the number of votes set out after their names: E. J. Garvin, 819 votes; Frank Berger, 808 votes; Fred Rooney, 806 votes; J. J. Chelland, 691 votes; Phillip Schwartz, 641 votes. It appeared also that commissions were thereafter issued to Frank Berger and Phillip Schwartz as justices of the peace. When the case came to trial it was agreed that it should be heard by the court without a jury, and after such hearing the court found the following facts and conclusions of law:

Facts.

(1) The territory constituting the borough of Old Forge, before the incorporation of the borough, had two justices of the peace.

(2) The borough was incorporated on May 2, 1899.

(3) An attempt was made at the February election of 1899 to secure a vote for an increase of two justices in the township of Old Forge. Notices were posted as required by the act of assembly, and there was a vote actually taken on the question of increase. There was no return of the vote made to the office of the clerk

of the court, nor the executive department of Harrisburg. Nor is there any evidence whatever in this case as to whether the vote was in favor or against an increase. The election of 1899 has no place in the consideration of the present controversy.

(4) Another election was held in the borough of Old Forge in 1905, at which the question of increase in the number of justices was voted upon. The public notices posted before the election specified an increase of three justices, but the return of the vote on file in the clerk's office shows an increase of one only. Counsel have agreed that the tabulation prepared by the clerk is a correct copy of the returns in his office. The tabulation is as follows:

	For Increase.	Against Increase.	
1st Ward	23	64	
2d Ward	—	—	
3d Ward	—	2	
4th Ward	75	5	For one justice
5th Ward	9	0	Increase one
6th Ward	0	0	

This shows that the total vote in the borough against the increase was 71; there were 23 votes for increase without designation of any number, and there were 84 votes in favor of an increase of one.

Conclusions of Law.

1. Old Forge township previous to its incorporation was entitled to two justices of the peace.

Counsel for all parties conceded this proposition.

2. There was not, in law, an increase in the number of justices in Old Forge township by the election of 1899. There has been some misapprehension as to the election of 1899. Counsel have tried this case on the supposition that the election was a borough election, although, as already stated, there was no borough until the May following. However, this is of no moment. The election was undoubtedly a township election, and a township, as such, had the right to vote an increase in the number of justices. The same misapprehension is to be noticed in the opinion of the deputy attorney general found in the case of the Old Forge Justices, 30 Pa. C. C. 164, who supposed the election of 1899 was a borough election, and, basing his opinion on an affidavit, he states that there was an increase of one justice at that election in Old Forge in 1899. We have no doubt that if the evidence before us was before the Deputy Attorney General he would not have advised the Governor in 1904 to make an appointment of one person to fill the vacancy until May, 1906.

3. The number of justices of the peace in Old Forge borough was lawfully increased by one at the election in 1905. This proposition is so plain that it needs no discussion.

4. Old Forge borough, prior to the election of 1905, was entitled to two justices of the peace. After said election it is entitled to three.

5. Two vacancies for the office of justice of the peace were to be filled at the November election, 1915. E. J. Garvin and Frank Berger having received the majority of votes in the borough at said election for said office, are entitled thereto, having been lawfully elected. We note in this connection, that the right of E. J. Garvin to office is not in question in this case.

6. The respondent, Phillip Schwartz, failed of election in 1915, and is therefore not entitled to the office of justice of the peace of Old Forge borough.

Subsequently exceptions to the findings of fact and conclusions of law were dismissed, and judgment was entered in favor of the defendant Frank Berger, and the writ dismissed

as to him, and as to the defendant Phillip Schwartz judgment was entered in favor of the relator, that the said defendant be ousted and altogether excluded from the office of justice of the peace of Old Forge borough. Phillip Schwartz, defendant, appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

A. A. Vosburg and John Memolo, both of Scranton, for appellant. John H. Bonner, of Scranton, for appellee.

PER CURIAM. This case was tried without a jury, and the judgment of ouster against appellant is affirmed on the facts found and the legal conclusions reached by the learned trial judge.

(257 Pa. 48)

MAGUIRE v. PREFERRED REALTY CO.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. ACKNOWLEDGMENT \S 5—DEEDS—NECESSITY AS BETWEEN PARTIES.

A deed executed and delivered is sufficient to pass title between the parties, though not acknowledged.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 22-42, 44.]

2. PLEADING \S 8(15)—FRAUD—ALLEGATIONS.

Where a declaration in ejectment contains no allegations of fact showing fraud, an amendment must, in the same degree of certainty, detail the circumstances pointing to that conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½.]

3. EJECTMENT \S 75—STATEMENT OF CLAIM—DEMURRER.

A statement of claim in ejectment averred that plaintiff conveyed the realty to defendant in consideration of its agreement to give plaintiff certain shares of stock, and that after the conveyance defendant had refused to deliver any stock to plaintiff so that the consideration of the conveyance had failed, but did not allege the facts indicating fraud in securing the deed. Held that ejectment was not the proper remedy, so that a demurrer to the statement of claim was properly sustained without prejudice to plaintiff's right to assert the claim in some other proceeding.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 204.]

Appeal from Court of Common Pleas, Philadelphia County.

Ejectment by Mary Maguire against the Preferred Realty Company for recovery of land situate in the city of Philadelphia. Demurrer to plaintiff's statement of claim sustained, judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POT-
TER, MOSCHISKER, FRAZER, and WAL-
LING, JJ.

Alex. Simpson, Jr., of Philadelphia, for appellant. Graham C. Woodward and Samuel F. Wheeler, both of Philadelphia, for appellee.

MOSCHZISKER, J. This action was in ejectment; a declaration and abstract of title were filed, to which a demurrer was entered; the judgment favored defendant, and plaintiff has appealed. In the course of his opinion, Judge Ferguson, of the court below, states the material facts thus:

"The plaintiff avers that she signed a deed conveying the premises in question to the defendant [corporation], but that she did not acknowledge the deed in the presence of the notary public who certified that she had done so. She also avers that the deed was signed in the presence and at the request of Samuel F. Wheeler, 'who was her attorney,' and who the plaintiff believed was the sole manager and counsel and owner of all the capital stock of the defendant corporation; and that the consideration for the deed was a verbal agreement made by the defendant, through Wheeler, that all the defendant's corporate stock should be transferred and delivered to her as security for money due her for advances made to Wheeler and his wife and for money expended in connection with the sheriff's sale under which plaintiff obtained title. The declaration further sets out that the deed was recorded without plaintiff's knowledge or consent, and the defendant, through Wheeler, refused to surrender the stock [and that "the consideration for said conveyance wholly failed"]."

[1] After the foregoing review of the facts stated in the declaration demurred to, the opinion goes on to say:

"It will be observed that the plaintiff fails to aver anything with relation to the delivery of the deed; in fact, a delivery is necessarily implied from the averment that there was a consideration which failed. The plaintiff nowhere alleges that she demanded a return of the deed. What she seeks is a delivery of the stock of the defendant corporation, to be held by her as security. It is also to be noted that the plaintiff does not aver that the defendant company, to whom she made the deed, held the stock or was in a position to deliver it as the consideration, but the stock is alleged to be owned by Wheeler, who refuses to deliver it. A deed does not necessarily have to be acknowledged before a notary public to make it a valid instrument between parties. *Rigler v. Cloud*, 14 Pa. 381; *Cable v. Cable*, 148 Pa. 451, 23 Atl. 223. Execution and delivery are sufficient to pass the title, and there is no averment in the declaration from which it could be inferred that the deed was not delivered."

Then, after citing several authorities, the court below determined that, on the face of the plaintiff's pleading, the suit was merely an effort to enforce "a verbal agreement, made by one not a party to the deed, that all the capital stock of the defendant company should be transferred and delivered to the plaintiff as security," which "agreement cannot be enforced by an action in ejectment."

The plaintiff contends that the learned court below misconceived the real purpose of her suit, and that the very form of the action—ejectment—shows it was to recover the land and not to gain the consideration; but, even looking at the case from that viewpoint, it is not at all apparent material error was committed in entering the judgment under review. In her first declaration, the plaintiff simply averred:

"On January 17, 1916, plaintiff conveyed said premises to the Preferred Realty Company, the defendant, by deed of that date, recorded, etc. * * * Said conveyance was made in consideration of an agreement by defendant, through its president, to give plaintiff stock of defendant in payment therefor; but, since said conveyance was made, defendant, through its president, has refused to give to plaintiff any of the stock of defendant. * * * Wherefore the consideration for said conveyance has wholly failed," etc.

Subsequently an "amended declaration and abstract of title" were filed, containing the averments already outlined, and the appellant contends that these new averments are sufficient to show such a case of fraud as entirely to avoid plaintiff's deed of conveyance and leave the property in her as though that instrument had never been executed. If this were so, then it might be that the plaintiff could maintain ejectment; but, being on demurrer, the judgment must stand or fall upon a review of the declaration as written, and not on the facts of the case as they are contended to be in appellant's argument.

[2] The original declaration contains no allegations of fact indicating fraud, and the averments in the amendment, while, perhaps, suggesting the possibility of some fraudulent purpose on the part of Mr. Wheeler, when he secured the deed from the plaintiff, do not so charge in terms. "Fraud is never to be presumed." *Addleman v. Manufacturers' Light & Heat Co.*, 242 Pa. 587, 590, 89 Atl. 674, 675. When there is no particular averment of a fraudulent purpose, but the circumstances detailed are depended upon as showing such to be the case, then the facts relied upon must not only be fully and unequivocally averred, but they must point with some degree of certainty to the conclusion contended for; and in such cases the intendments are taken most strongly against the pleader, for he is presumed to have stated all the facts involved, and to have done so as favorably to himself as his conscience will permit. *Baker v. Tustin*, 245 Pa. 499, 501, 91 Atl. 891; *Little v. Thropp*, 245 Pa. 539, 544, 91 Atl. 924.

[3] Here, as already suggested, the facts detailed in plaintiff's declarations do not, with any degree of certainty, lead the mind to the conclusion that, if they should be proved, a jury would be justified in finding the deed, under which the defendant claims, to have been fraudulently obtained by it. We say this, for the averments of the declaration are vague and inconclusive in many material respects. In the first place, it is not averred that Mr. Wheeler was plaintiff's counsel or attorney at the time the deed was executed by her, or that he acted in such capacity in this particular transaction; next, there is no allegation that he was duly authorized or actually did act on behalf of the defendant company in making the alleged verbal agreement with the plaintiff; and, finally, the averment that Wheeler was the

owner of all the corporate stock of the defendant except a few shares, is too indefinite to substitute him in all respects for the latter, there being no allegation that he was the sole owner, in possession of the stock, or in control of the corporation, at the time of the occurrences complained of. The foregoing are only a few of many insufficiencies which, if necessary, might be pointed out; but they are enough to show the inadequacy of the declaration. We feel, however, the plaintiff should be placed in such position that the present judgment will not be taken as precluding her from properly asserting her alleged rights in some other action or proceeding where both the realty company and Mr. Wheeler are included as defendants.

The assignments of error are overruled, and the judgment is affirmed, without prejudice, as above indicated.

(257 Pa. 6)

ALLEN v. SCHEIB et al.

(Supreme Court of Pennsylvania. March 5, 1917.)

1. EASEMENTS ⇨51—USE—EXTENT.

An easement cannot lawfully be used for a purpose different from that for which it was dedicated.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112.]

2. EASEMENTS ⇨12(2)—FEE—"ROAD"—"PRIVATE ROAD."

The term "road," and especially "private road," is indicative of an easement rather than a fee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 36-38.]

For other definitions, see Words and Phrases, First and Second Series, Road; Private Road.]

3. EASEMENTS ⇨61(9)—ACTION FOR INJUNCTION—BURDEN OF PROOF.

The burden was upon plaintiff to establish her ownership to the fee of the land, included in a private road in which defendants had a user, before she was entitled to construct a gas pipe line on the surface.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143.]

4. EASEMENTS ⇨61(9)—ACTION FOR INJUNCTION—INTEREST—EVIDENCE.

Evidence in a suit by the owner of a farm to enjoin defendants from obstructing a private way giving access to a public road *held* to show that plaintiff did not have the fee in the road, but had only an easement of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143.]

5. EASEMENTS ⇨51—WAY—USE.

The owner of an easement in a private right of way, in which defendants also had a right of use, was not entitled to maintain a line of gas pipe on the surface, as that was not contemplated when the easement of way was created.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112.]

6. INJUNCTION ⇨130—OBJECTION TO JURISDICTION—STATUTE.

Though defendant's first objection to the jurisdiction of equity, to enjoin interference with

easement made in request for findings after the evidence was submitted was not in compliance with Act June 7, 1907 (P. L. 440) § 1, it did not affect the chancellor's duty to dismiss the bill if the facts averred were not substantially proved at the trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 288-300.]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity for an injunction by Eleanor Walker Allen against John Scheib, Sr., and another. From a decree awarding an injunction, defendants appeal. Modified and affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

E. J. McKenna, of Pittsburgh, for appellants. J. W. Collins, of Pittsburgh, for appellee.

WALLING, J. This equitable action is to determine the rights of the respective parties to a certain strip of land situate in Richland township, Allegheny county, and used as a private road. The Butler plank road extends through said township in a northerly direction, and the farm of the late John Scott, containing 142 acres, is located thereon. He died in 1875, and clause 4 of his will provides:

"I give and devise to my grandson, John Scott Teacher, 15 acres of my Bakerstown farm; to my daughter, Catherine Harbison, 10 acres; to my granddaughter, Sarah Harbison, 5 acres; to my daughter Jase Harbison, 10 acres, all to be divided out of my Bakerstown farm west of the plank road."

He left other heirs and devisees aside from those above mentioned; and, by some family arrangement made shortly after his death, the 40 acres mentioned in the clause was set aside to the devisees therein named out of the northwest corner of the farm, away from the public highway. To afford access to the 40-acre tract it seems to have been a part of the agreement that a private road or lane, of the width of 16½ feet, should be opened, extending eastwardly from the southeast corner of the 40-acre tract, about 1,295 feet, to the Butler plank road, which lane was later fenced and opened, and has been used for about 20 years last past by the occupants of the 40 acres, the same having been partitioned in 1876, among the devisees above named. This is shown by a map made that year by Charles Gibson, at the instance of one of the devisees. The purparts thereby allotted were sold from time to time, and the deeds therefor include fractional parts of the lane, corresponding to the size of the respective purparts, for example, each deed for 15 acres includes three-eighths of the lane. In 1901 the title to the 40-acre tract, together with whatever interest the owners thereof had in the lane, became vested in John Scott Harbison, who conveyed same to plaintiff in

1911. The lane was also used by the owners of the balance of the John Scott farm, as their necessities required.

So far as appears the family arrangement above stated was not in writing, and there is no record of any conveyance from the John Scott heirs to plaintiff's predecessors for the 40 acres or the lane. Plaintiff contends that the lane was included in the 40 acres. There is a part of the John Scott farm containing about 33 acres, some 24 acres of which lie between the 40 acres and the Butler plank road and north of the lane, as to which he seems to have died intestate. In 1881, all of the heirs of John Scott joined in a conveyance of the 24-acre tract to James D. Harbison, wherein the southern boundary is described as:

"Thence along a certain road or lane between the land herein conveyed and the land of John Stirling."

Another part of the Scott farm, containing about 30 acres, and called the Stirling tract, is on the west side of the plank road and bounded on the north by the 40-acre tract and the lane.

By sundry conveyances the title to the 24-acre and the 30-acre tracts became vested in Thomas Morrow, who in 1910 conveyed same with other land to defendant, John Scheib, Sr., the deed for which in one of the courses mentioned, "a point at the corner of a private road," and the general description therein includes the lane and the land on both sides thereof. After Mr. Scheib bought this land there was a controversy about the use of the lane, between Mr. Harbison and plaintiff on one side, and the defendants, "John Scheib, Sr., and John G. Scheib, on the other, each side claiming to own the same. One of the findings of the court below is:

"Sixth. That said John Scheib, Sr., by destroying drains along said private road, taking out posts and trees planted by plaintiff and by other acts has repeatedly interfered with plaintiff in the use of said private road."

The defendants, or those in their employ, also drove their stock across this lane, and in so doing obstructed it with wires, and repeatedly suffered the same to remain in that condition, to the annoyance and damage of plaintiff.

In 1913, plaintiff entered into a contract with one Sebastian Mueller, for the construction and maintenance of a line of gas pipe in the lane, which defendants by opposition and threats prevented being done. Thereafter plaintiff filed her bill in this case, joining said Mueller as a defendant, but the bill as to him was dismissed. The learned trial judge, sitting as a chancellor, found that plaintiff had a good title in fee simple to the strip of land herein called the lane, and entered a final decree, inter alia, enjoining defendants from interfering with the construction of the gas line, and also from interfering with plaintiff's free use and main-

tenance of the private road. Defendants concede that plaintiff has a right to the use of the lane as a passageway; in fact that is the only means of access to her property. We fully agree with the learned chancellor that under all the facts and circumstances defendants should be enjoined from interfering with plaintiff's free use and enjoyment of the said private road as such.

But plaintiff's right to lay or authorize another to lay a line of gas pipe therein depends upon the nature of her ownership. If an easement, then she can use it only for the purpose for which it was established or dedicated, and cannot lay a pipe line therein. *U. S. Pipe Line Co. & Breckenridge v. Del., Lack. & Western R. R. Co.*, 62 N. J. Law, 254, 41 Atl. 759, 42 L. R. A. 572; 14 Cyc. 1207, note 93.

[1] As an easement it cannot lawfully be used for a purpose different from that for which it was dedicated. *Kirkham v. Sharp*, 1 Whart. 323, 29 Am. Dec. 57; *Mershon v. Fidelity Ins., Trust & Safe Deposit Co.*, 208 Pa. 292, 57 Atl. 569; 14 Cyc. 1215.

[2-5] As above stated the chancellor finds that plaintiff owns the fee. If so, she may, of course, construct the gas line therein; but a careful examination of the record fails to disclose any sufficient evidence to support that conclusion. As above stated, there is no deed or other writing showing any conveyance by the Scott heirs of the so-called private road. True, the road is recognized in their deed to James D. Harbison as above quoted, "thence along a certain road or lane between the land herein conveyed and the land of John Stirling"; but that does not show that the title to the fee thereof has passed from the Scott heirs. The term "road," and especially "private road," is indicative of an easement rather than a fee. See *Klister v. Recser*, 98 Pa. 1, 42 Am. Rep. 608. Plaintiff relies largely on the evidence of her grantor, John S. Harbison, as tending to establish a parol partition of the Scott farm made in 1876, by which this lane is alleged to have been allotted to the owners of the 40-acre tract, and as a part thereof. But he does not say that all of the Scott heirs were present, and shows they were not when he names those who were there. The chancellor in one part of his exhaustive discussion says:

"Respecting plaintiff's right to the uninterrupted use of the road there is no room for dispute. Respecting the precise limits of her rights, whether she has a fee or a mere easement, is a debatable question. * * * Whether Mr. Scheib has the fee in the 16½-foot strip of land or the mere right to use it in common with the plaintiff, or any right in it, he has no right to fill up necessary drains, or otherwise prevent the free use and proper maintenance of the road, and plaintiff is entitled to an injunction restraining him from interfering with her in the exercise of her lawful rights."

The John Scott heirs, aside from those named in clause 4 of the will, were not par-

ties to the partition of the 40-acre tract, nor to the Gibson survey, nor, so far as the record shows, bound thereby. And certainly they were not bound by the recitals in the deeds from the owners of the respective purports of the 40-acre tract. One cannot create a fee in land merely by including it in his conveyance. And the above-cited reference to this road or lane in the deed from the Scott heirs to James D. Harbison, and also in the deed from Morrow to defendant, are certainly as consistent with an easement as with a fee. The mere reference in a conveyance to a private road does not tend to show ownership in fee thereof in the party for whose use it may have been established. Such road, or alley, may, *prima facie*, be used by all abutting owners, and defendants as such would have standing to object to an additional use being made thereof by the construction therein of a gas line, especially as this is proposed to be constructed on the surface of the ground.

Plaintiff as the owner of the 40-acre tract undoubtedly has an easement in the private road and a right to the free and uninterrupted use thereof as a way for purposes of passage over and upon the same; and, so far as appears, defendants may lawfully make such use thereof as will not interfere with the rights of plaintiff.

The burden was upon plaintiff to establish her ownership to the fee of the land included in the road, and therein her proofs fail, and the finding of the court below in her favor as to that cannot be sustained; nor can the decree in so far as it restrains defendants from interfering to prevent plaintiff from the construction of a gas line in the road.

[6] The defendants, John Schelb, Sr., and John G. Schelb, did not, by demurrer or answer, question the jurisdiction of the court, upon the ground that the suit should have been brought at law, but filed an answer to the merits of the case without asking for an issue as to any questions of fact, and thereby the right of trial by jury seems to have been waived, under the provisions of section 1, of the act of June 7, 1907 (P. L. 440; 5 Purdon's Digest, p. 6081). The defendants first raised the question of jurisdiction in requests for findings after the evidence was submitted; this was not a compliance with the statute. *Nanhelm v. Smith*, 253 Pa. 380, 98 Atl. 602. However, the proviso to this section is:

"That this shall not alter or affect the duty of the chancellor to dismiss the bill if the facts therein averred, as showing or tending to show the right to relief, be not substantially proved at the trial"

—and by reason thereof plaintiff is not entitled to relief based on her alleged ownership of the fee of the land in question; for such claim is not substantially proven.

The final decree entered by the court below is therefore modified by striking out so much thereof as restrains defendants, John

Schelb, Sr., and John G. Schelb, from interfering with plaintiff in the construction and maintenance of a gas line in or upon said private road. The costs on this appeal to be paid by the appellee.

(40 R. I. 473)

GAGNON v. RHODE ISLAND CO.

(No. 5022.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. TRIAL — 260(1) — REFUSAL OF INSTRUCTIONS COVERED.

The refusal of instructions, which in so far as they were correct were covered by those given, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

2. DAMAGES — 52 — PERSONAL INJURIES — MENTAL SUFFERING.

Mental suffering of a pregnant woman consequent upon apprehension and anxiety as to the effect of an injury upon the fetus becomes an element of her damage as a natural and proximate result of the negligence which caused the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

3. DAMAGES — 52 — PERSONAL INJURIES — MENTAL SUFFERING.

Although a mother should not be given damages for her child's misfortune during life resulting from an injury to the fetus, or for her own consequent mental distress during the lifetime of the child occasioned by its deformity, she is entitled to damages for her distress and disappointment at the time of the birth because through defendant's negligence she has been deprived of the right and satisfaction of bearing a sound child, if it be found that the child's deformity is due to the injury received through defendant's negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Eleanore Gagnon against the Rhode Island Company. Verdict for plaintiff, new trial denied, and defendant excepts. Exceptions overruled, and case remitted for entry of judgment.

Archambault & Jalbert, of Woonsocket, for plaintiff. Clifford Whipple and Alonzo R. Williams, both of Providence, for defendant.

PER CURIAM. This is an action of trespass on the case brought to recover damages for injuries alleged to have been suffered by the plaintiff through negligence of the defendant. The case was tried before a justice of the superior court sitting with a jury and resulted in a verdict for the plaintiff. Defendant's motion for a new trial was denied by said justice. The case is before us upon the defendant's exception to the decision of said justice on the motion for a new trial and upon exceptions taken by the defendant to certain rulings of said justice made in the course of the trial.

It appears that the defendant's car track on John street near Pleasant street in the city of Woonsocket is laid on the westerly side of the roadway in John street, the westerly rail of said track being 2 feet and 10 inches from the curbstone of the westerly sidewalk of John street. Near the corner of John and Pleasant streets said track begins to curve toward the east and runs into Pleasant street. In passing upon and around said curve the rear of a double-truck car of the defendant begins to overlap the westerly sidewalk of John street and continues to so overlap the sidewalk for a considerable distance, the greatest overlapping being 15 inches at one point. On the day of the occurrence complained of, the plaintiff, in company with two other women, was walking in a southerly direction on the westerly sidewalk of John street; the plaintiff being the one nearest to the curbstone. There was testimony from which the jury might find that the servants of the defendant were operating one of the defendant's double-truck cars on said John street behind said plaintiff; and, without warning or care for the safety of the plaintiff, when the danger to the plaintiff must have been apparent to the servants of the defendant, they drove said car around said curve, whereby the rear of said car projected over a portion of the westerly sidewalk of John street, struck the plaintiff, knocked her down, and inflicted serious injuries upon her. The justice presiding refused to disturb the verdict in respect to the finding of liability or the assessment of damages. After an examination of the transcript of evidence, we find no reason for overruling his decision.

[1] The defendant's exceptions to the refusal of said justice to charge the jury as requested are without merit. Said justice carefully instructed the jury as to the duty of the plaintiff and of the defendant in the premises, and, so far as the charge which the defendant requested was a correct statement of the law applicable to the evidence, such instruction had been fully given by said justice.

[2, 3] The plaintiff at the time of the accident was pregnant; she was struck and felt pain in her back and side, and she testified that at the time of the accident "I felt the child pushing toward the right." The plaintiff further testified that from the time of the accident until the birth of the child she entertained fears that the child would be born deformed. The defendant excepted to the admission of testimony that the head of the child was deformed at birth. The defendant then excepted to the admission of testimony that when the plaintiff saw this deformity she was pained. The defendant also excepted to the charge of the justice to the jury that in assessing damages they might consider any mental suffering, which they found that the plaintiff had en-

dured, due to her apprehension that she would give birth to a deformed child; and that they might consider her mental suffering at the time of the birth caused by her disappointment at finding a deformity in the head of the child, if the jury should also find that the deformity was a result of the accident to the plaintiff. The justice very carefully instructed the jury that the plaintiff was not entitled to compensation for the injury to the child or for any disappointment and suffering which she as its mother might feel during its life by reason of any deformity in the child; but that the jury were justified in giving compensation to the plaintiff for the mental suffering which the jury might find she had endured before the birth by reason of her apprehension of the child's deformity, and also for her suffering at the time of birth caused by disappointment in finding she had not been delivered of a sound child, provided they also found that the deformity was due to the accident. The exceptions which we are now considering should be overruled. The fetus is a part of the person of a pregnant woman, and if, by reason of the nature and circumstances of an injury to her person caused by the negligence of a defendant, she suffers apprehension and anxiety as to the effect of the injury upon the fetus, in accordance with the well-recognized rule, such mental suffering becomes an element of her damage as a natural and proximate result of the negligence which caused the injury. Furthermore, although she should not be given damages for the child's misfortune during life, resulting from an injury to the fetus, nor for her own subsequent mental distress during the lifetime of the child occasioned by its deformity, the mother is entitled to damages for her distress and disappointment at the time of the birth because through the defendant's negligence she has been deprived of the right and the satisfaction of bearing a sound child, if it be found that the child's deformity is due to the injury she received through the defendant's negligence. *Prescott v. Robinson*, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987; *Big Sandy v. Blankenship*, 133 Ky. 438, 118 S. W. 316, 23 L. R. A. (N. S.) 345, 19 Ann. Cas. 264.

The defendant's exceptions are all overruled, and the case is remitted to the superior court for the entry of judgment on the verdict.

PARIAN v. OLSSON et al. (No. 4795.)
(Supreme Court of Rhode Island. June 28, 1917.)

EXCEPTIONS, BILL OF \S 59(1) — TRANSCRIPT OF EVIDENCE.

Where plaintiff filed with his bill of exceptions a partial transcript of the testimony, consisting only of the cross-examination of the plaintiff, and certain rulings of the trial judge

upon granting the nonsuit, and endeavored to supplement the partial transcript by including in his bill of exceptions a summary statement purporting to show what was proved by the other portions of the evidence, in order thereby to bring upon the record the purport of the whole testimony on behalf of the plaintiff, the action of the trial judge in striking out and disallowing the summary statement of the testimony and allowing the bill of exceptions thus changed and in refusing to allow the partial transcript of evidence filed with the bill of exceptions on the ground that it was insufficient was proper.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 106, 108.]

Action by Daniel Parlan against Magnus Olsson and others. On plaintiff's petition to establish the truth of his exceptions. Petition denied and dismissed.

William J. Brown, of Providence, for plaintiff. Fred L. Owen, of Providence, for defendants.

PER CURIAM. Upon the plaintiff's petition to establish the truth of his exceptions and the correctness and sufficiency of the transcript of testimony. It appears that the plaintiff, after suffering a nonsuit in the superior court, having reserved certain exceptions, in due time filed his bill of exceptions, and therewith a partial transcript of testimony consisting only of the cross-examination of the plaintiff, and containing also certain rulings of the trial judge upon granting the nonsuit.

The plaintiff endeavored to supplement the partial transcript by including in his bill of exceptions a summary statement purporting to show what was proved by the other portions of the evidence, in order thereby to bring upon the record the purport of the whole testimony on behalf of the plaintiff. The trial judge struck out and disallowed this summary statement with regard to the testimony in the case, and allowed the bill of exceptions as thus changed. The trial judge also refused to allow the partial transcript of evidence filed with the bill of exceptions on the ground that it was insufficient.

Thereupon in due time the plaintiff filed in this court his petition to establish the truth of his exceptions and the correctness and sufficiency of the transcript, under rule 13 of this court (62 Atl. ix). He asks this court to establish his bill of exceptions as originally filed, including the summary statement of testimony therein, and attempts by his sworn petition and by affidavit to show not only the correctness of the portion of the transcript as filed, but also by another summary statement what was the purport and substance of all the other testimony in the case.

We think the case is ruled by the case of *Beaule v. Acme Finishing Co.*, 36 R. I. 74, 89 Atl. 73. In that case a similar attempt was made. The plaintiff filed with his bill of exceptions only a portion of the transcript, containing none of the evidence submitted to

the jury, but only containing certain rulings of the trial judge. Plaintiff incorporated in his bill of exceptions as filed a summary statement of the meaning and effect of certain evidence alleged to have been introduced at the trial; the trial judge struck out and disallowed this summary statement and allowed the rest of the bill of exceptions. The trial judge also allowed the partial transcript as sufficient for the consideration of certain numbered exceptions, and found it not to be sufficient for the consideration of certain other numbered exceptions. Plaintiff then petitioned this court to establish the truth of his exceptions and the sufficiency of the transcript, and this court sustained the action of the trial judge in striking out the summary statement, and also in his ruling as to the insufficiency of the partial transcript for consideration of certain exceptions.

For the same reasons stated in *Beaule v. Acme Finishing Co.*, supra, this court is unable in the case at bar to find that the trial judge erred either in changing the bill of exceptions by striking out as he did or in his disallowance of the transcript as insufficient. We are unable to accept the plaintiff's statement in his petition and affidavits in place of the testimony which has not been brought before us in due course of procedure; and we are forced to rely upon the finding of the trial judge as to the insufficiency of the partial transcript.

Therefore the plaintiff's petition must be denied and dismissed.

(40 R. I. 456)

MILLER v. TRUSTEES OF TRINITY UNION METHODIST EPISCOPAL CHURCH. (No. 364.)

(Supreme Court of Rhode Island. July 3, 1917.)

1. MECHANICS' LIENS \Leftrightarrow 130(1) — **STATEMENT — SEPARATE BUILDINGS.**

A Sunday school building on the same tract of property upon which a church was located and connected therewith by a corridor, electric wires, and steam pipes is not a building separate from the church within the Lien Law (Laws 1909, c. 257).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 178, 180, 181.]

2. MECHANICS' LIENS \Leftrightarrow 158 — **STATEMENT — AMENDMENT.**

A mechanic's lien claimant can file an amended lien statement at any time before the expiration of the period allowed for filing the original lien, which amended statement takes the place of the original statement in all respects.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278.]

Appeal from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by Charles Miller against the Trustees of Trinity Union Methodist Episcopal Church to establish a mechanic's lien. Decree for defendant, and petitioner appeals. Reversed and remanded.

Charles H. McKenna, of Providence, for petitioner. Gardner, Pirce & Thornley, of Providence (Thomas G. Bradshaw, of Providence, of counsel), for respondent.

VINCENT, J. This is a petition to establish a mechanic's lien upon land and buildings belonging to the Trinity Union Methodist Episcopal Church. The cause comes before this court upon the petitioner's appeal from a final decree of the superior court denying and dismissing his petition. The petitioner's claim is for certain extra work and materials furnished by him in the construction of a certain building owned by the respondents.

It appears that the Thomas F. Cullinan Company entered into a written contract with the trustees of Trinity Union Methodist Episcopal Church to erect a certain building for Sunday school purposes upon the premises owned by them and located at the corner of Bridgman street and Trinity square, in the city of Providence; that the contract for the painting was sublet by the Cullinan Company to Charles Miller, the present petitioner; that the petitioner delivered certain materials and commenced work under his painting contract on May 3, 1915, and rendered his bill to the Cullinan Company for \$1,000, which was the entire amount of the contract price; that the petitioner on the 4th and 5th days of October, 1915, performed certain extra work and supplied certain extra materials amounting to \$32.86, rendering a bill therefor on October 11, 1915; that the petitioner performed some work around a doorway in the church, a building adjoining the Sunday school building and standing upon a separate and adjoining lot of land; that the Sunday school while being erected was connected with the church by a corridor, electric wires, water and steam pipes, etc.; that a notice of intention to claim a mechanic's lien was served on respondent on November 5, 1915, and on the same day a copy thereof was placed on record in the office of the recorder of deeds in Providence; that the petitioner on January 6, 1916, lodged his account or demand in the office of said recorder of deeds and filed his notice, setting forth the land and to whose interest therein the account or demand referred for the purpose of commencing legal proceedings; that the petitioner afterwards lodged in the office of said recorder of deeds three other accounts or demands, each of which was followed by a notice setting forth the land and to whose estate the account or demand referred for the purpose of commencing legal proceedings. These accounts were filed respectively on January 31, 1916, February 25, 1916, and February 29, 1916; that on March 1, 1916, within 20 days after the lodging of the fourth account, and the demand and notice, the petitioner filed in the office of the clerk of the superior court for Providence county his pe-

tion to enforce said claim of lien, attaching thereto notice of the last account or demand filed under date of February 29, 1916; that notice of the filing of said petition was duly given by the clerk of the superior court for Providence county.

All these accounts were filed within the statutory period of 6 months from the commencement of the work and the furnishing of the materials which are the subject of the claim, and the petition to enforce the lien was filed in the clerk's office of the superior court within 20 days after the lodging of the fourth account, demand, and notice.

[1] The respondent claims that the petitioner is seeking to enforce a joint lien on two separate buildings; that is, that the Sunday school building, although connected by means of a corridor, electric wires, water and steam pipes, etc., is, in contemplation of the statutory provisions, two separate buildings, and that the petitioner's account lodged with the recorder of deeds fails to separate and specify which items apply to the Sunday school building and which apply to the church building. The respondent also claims that the petitioner cannot be permitted to file more than one account within the required period of 6 months from the commencement of the work or, in other words, that the second, third, and fourth accounts filed must be regarded as amendatory of the first account filed on January 6, 1916, and, that being so, the petition to enforce a lien was not filed in the office of the clerk of the superior court within 20 days after the commencement of legal proceedings.

The respondent, admitting for the purpose of argument that the petitioner may abandon the first three accounts filed by him for the purpose of commencing legal process, and can rely upon the fourth account filed February 29, 1916, contends that such fourth account is fatally defective in that it does not specify which items are chargeable to the Sunday school building and which items are chargeable to the church building.

The estate of the respondent at the corner of Bridgman street and Trinity square comprises two adjoining lots of land, one having been conveyed to it March 14, 1864, and the other November 10, 1909. The church building, so called, is situated upon the first-named lot, and the Sunday school building upon the other lot. These buildings are used by the respondent for the purpose of conducting and carrying on its usual and customary church work, and the two structures are, for more convenient use, connected by a passageway providing an easy and unexposed means of communication from one to the other. Light, heat, and water are supplied to the Sunday school building by means of wires, steam, and water pipes extended from the church building through the connecting corridor before mentioned.

The respondent has cited section 7, c. 257.

General Laws of 1909, and also several Rhode Island cases in support of its contention that the account is defective in not specifying the items chargeable to each building. In order to extend to these authorities any applicability to the case before us, it would be necessary to reach the conclusion that the church and Sunday school buildings were separate and distinct structures. In *Bouchard v. Gulsti*, 22 R. I. 591, 48 Atl. 934, the notice failed to state that the materials were furnished for any building or improvement at all.

In *McElroy v. Kelly*, 27 R. I. 64, 60 Atl. 679, it was held that the petitioner should have filed a separate notice of his intention to claim a lien upon each house and a separate account for each house of the material furnished and used in it. In that case, as the court said in its opinion:

"The houses were exactly alike but were not joined together in a block, but separated and adapted to be occupied each with a separate curtilage."

In *Butler & Co. v. Rivers*, 4 R. I. 38, the petitioner proceeded against two several estates having distinct owners, and sought to charge both estates for the work and materials furnished for each, as the court said, "in effect to make one of them chargeable with work and materials expended upon the other."

In *McDuff Coal & Lumber Co. v. Del Monaco*, 32 R. I. 323, 79 Atl. 831, the petitioner undertook to proceed upon the theory that, inasmuch as three houses on separate tracts of land were undergoing construction at or about the same time, they had a general lien upon all of them for a general balance due on the assumption that probably approximately one-third of the materials had been used in each house, and that consequently they could include all three claims in one proceeding.

The respondent claims that it appears from the foregoing cases to be incumbent upon one desiring to establish a mechanic's lien for materials furnished and used in the construction of more than one building, whether such building be upon the same or adjacent lots of land, to describe each lot and building separately and to particularize in his account the items chargeable to each. We have no controversy with such deduction from the cases cited. As before stated, in order to make them applicable it must be assumed that the church and the Sunday school structures are separate and independent buildings. We cannot so hold. The whole tract of land is owned by the respondent; the buildings are used for one general purpose; they are physically connected, the one being dependent upon the other for light, heat, and water. We think that under these conditions the respondent's claim of two separate and distinct buildings cannot be accepted. In fact, to carry out and establish the connecting corridor work upon both structures

would be required, and the determination of a proper dividing line between the two would be difficult, if not impossible.

[2] The respondent further contends that the account lodged with the recorder of deeds February 29, 1916, that being the fourth account, is fatally defective, because it is in amendment of the first account filed January 6, 1916, and cites *Harris v. Page*, 23 R. I. 440, 50 Atl. 859. In that case the petitioner sought to amend his account by extending it or adding thereto items not appearing in the original statement. The opinion does not state specifically whether the application to amend was made before or after the expiration of the time allowed by statute for filing an account as the commencement of legal process to establish a lien, but it may be reasonably presumed that it was after; for otherwise the petitioner might have filed a new account and raised the same question which we are now discussing.

The respondent further claims that the filing of the first account on January 6, 1916, was the commencement of legal process, and that within 20 days thereafter the petitioner was bound to file his petition in equity in the superior court and failing to do so lost his lien. The petitioner, on the other hand, claims that he is not limited under section 7 of chapter 257 to the filing of one account, but that he can file other accounts, waiving and abandoning all former ones, provided the last account is filed within the time limited for the commencement of legal process and his petition to enforce the lien is filed within 20 days thereafter.

It is apparent that the first three accounts filed by the petitioner, for one reason or another, were defective. The fourth account was filed within the required time, and the fact that the petitioner proceeded further in the establishment of his lien upon the fourth account only is evidence of an intention upon his part to abandon all accounts previously filed.

To say that the petitioner must stand upon the first account filed, however defective it may later be discovered to be, and that he cannot abandon it and file another account within the statutory period, would, in our opinion, be inflicting upon a petitioner an unnecessary and unwarranted hardship which the statute neither requires nor contemplates.

The respondent argues that after the filing of the first account innocent parties might reasonably infer that the full amount of the claim had been disclosed, and thus be led into dealing with the estate to their disadvantage should the filing of a later account be permitted. We do not see any great force in this argument. The statute fixes a period within which proceedings may be instituted for the establishment of liens, and one who deals with the estate before its expiration must do so at his peril.

The appeal of the petitioner is sustained, the decree of the superior court denying and

dismissing the petition is reversed, and the cause is remanded to the superior court, with direction to enter a decree establishing the lien of the petitioner upon the estate of the respondent described in the petition for the sum of \$32.68.

KINGSTON v. WILSON. (No. 5084.)

(Supreme Court of Rhode Island. July 5, 1917.)

GARNISHMENT ¶56 — PROPERTY SUBJECT — DEPOSITS.

Where it appeared that none of the money deposited with the garnishee trust company in the account of defendant as agent belonged to him, but was wholly the money of his principal, the garnishee was not chargeable.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 110, 111.]

Exceptions from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by James Kingston against Robert H. Wilson. Plaintiff's motion to charge the garnishee was denied, and he excepts. Exception overruled, and case remitted.

John P. Beagan, of Providence, for plaintiff. Benjamin W. Grim, of Providence, for defendant.

PER CURIAM. This is an action of debt on judgment. The case is before us on plaintiff's exception to the ruling of a justice of the superior court denying the plaintiff's motion to charge the garnishee.

According to the affidavit filed by the Industrial Trust Company, garnishee in the case, it appears that at the time of the attachment made under the direction contained in the writ, there was in the hands and possession of said garnishee \$289.12 standing in the name of the defendant as agent; that the defendant had stated to the garnishee that he was the agent of Colgate & Co. From the uncontradicted evidence given at hearing before said justice on the plaintiff's motion to charge the garnishee it appeared that the defendant was the manager "for the district here" of Colgate & Co., and was charged with the duty of directing the work of the salesmen employed by said Colgate & Co.; that there were about 17 men employed by Colgate & Co. under the direction of the defendant; that none of the money deposited in said account of "Robert Wilson, Agent," belonged to the defendant, but was wholly the money of Colgate & Co. In view of these facts, which said justice found to be true, we are of the opinion that there is no error in the action of the superior court denying the motion to charge the garnishee.

Plaintiff's exception is overruled; the case is remitted to the superior court for further proceedings.

(40 R. I. 437)
STATE v. McAVOY (two cases).
(Nos. 4948, 4949.)

(Supreme Court of Rhode Island. July 3, 1917.)

1. EMBEZZLEMENT ¶38—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement by an agent in charge of selling and delivering flour, evidence as to instructions given defendant by his predecessor as to his duties in making reports, collections, and deposits was admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

2. CRIMINAL LAW ¶1169(1) — REVIEW — HARMLESS ERROR.

In a prosecution for embezzlement by an agent intrusted with the duty of selling and delivering flour, admission of slips showing deliveries of flour by the warehouse company and of an inventory of flour kept therein made by its bookkeeper, if error, held harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3130, 3137.]

3. EMBEZZLEMENT ¶38—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement of the proceeds of flour sold and delivered by an agent, testimony by the bookkeeper of the warehouse wherein the flour was kept as to the number of barrels on hand as shown by the report of the defendant to the milling company was admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

4. EMBEZZLEMENT ¶44(5) — DEFENSES—DEL CREDERE.

In a prosecution for embezzlement, evidence held not to show that defendant was a del credere factor.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 70.]

5. EMBEZZLEMENT ¶14 — DEFENSES — DEL CREDERE FACTORS.

That an agent charged with embezzlement was a del credere factor of his principal constitutes no defense; such relation not changing the ordinary one existing between himself and his principal within Gen. Laws 1909, c. 345, § 16, providing that every officer, agent, clerk, or servant who shall embezzle property which shall have come into his possession by virtue of his employment shall be deemed guilty of larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15.]

6. EMBEZZLEMENT ¶38—EVIDENCE—MATERIALITY—PRIVILEGED COMMUNICATIONS.

In a prosecution for embezzlement, it was not error to exclude as immaterial correspondence received by the state board of tax commissioners offered on the question as to whether the employer, a company incorporated in another state, had been doing business in this state, since under Pub. Laws 1912, c. 769, § 15, such information could not be divulged except upon order of the court.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66.]

7. EMBEZZLEMENT ¶48(1) — INSTRUCTIONS — APPROPRIATION OF PROPERTY.

In a prosecution for embezzlement, it was not error to instruct that the ownership of the flour the proceeds of which were alleged to have been embezzled was controlling as to defendant's rights thereto.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72, 75.]

S. EMBEZZLEMENT 44(1)—EVIDENCE—SUFFICIENCY.

In a prosecution for embezzlement, evidence held to warrant a finding of guilty.

[H.I. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 67, 70.]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Harry A. McAvoy was convicted of embezzlement, and he brings exceptions. Exceptions overruled.

Herbert A. Rice, Atty. Gen. (Claude R. Branch, of Providence, of counsel), for the State. Fitzgerald & Higgins and Peter M. O'Reilly, all of Providence, for defendant.

VINCENT, J. In December, 1914, the grand jury for Providence county presented two indictments against the defendant for embezzlement. To each of these indictments the defendant pleaded not guilty and was released on bail. The two cases were tried together in the superior court. The defendant moved to be discharged at the conclusion of the testimony offered on behalf of the state. The motion was denied. The jury returned a verdict of guilty as charged in each indictment, each being for the embezzlement of an amount exceeding \$500. The defendant filed a motion for a new trial, upon the usual grounds, which was denied by the trial court.

The case is now before us upon the defendant's exceptions covering the denial of his motion for discharge; to various rulings during the trial as to the admissibility of evidence; to certain portions of the charge of the court; and to the denial of the motion for a new trial. The defendant's exceptions are 58 in number, but we are advised by his brief that he relies only upon exceptions numbered 1, 2, 3, 32, 33, 34, 36, 53, 54, 57, and 58.

The indictment No. 8269, now before us on exceptions No. 4948, charges the defendant, Harry A. McAvoy, on the 1st day of January, 1914, at Providence—

"being then and there the clerk and agent of the Bay State Milling Company, a corporation, did then and there by virtue of his said employment have, receive, and take into his possession money to a large amount, to wit, to the amount of \$1,368.87, and of the value of \$1,368.87, of the property and money of the said Bay State Milling Company, a corporation as aforesaid, the said Harry A. McAvoy's employer, and the said Harry A. McAvoy the said money then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said Bay State Milling Company, a corporation as aforesaid, the said Harry A. McAvoy's said employer, whereby and by force of the statute in such case made and provided the said Harry A. McAvoy is deemed guilty of larceny," etc.

The indictment No. 8270, now before us on exceptions No. 4949, is identical with the one above referred to, with the exception of the date of the embezzlement, which is stated

on July 1, 1914, and the amount embezzled as \$2,834.30.

The defendant, covering the periods of the alleged embezzlements, was in the employ of the Bay State Milling Company a corporation created under the laws of the state of Minnesota and having its principal office in the city of Boston, Mass. All the dealings of the defendant were with this office. The defendant was hired by the president of the company, Bernard J. Rothwell, and his assistant, Ernest C. Harris, and commenced work for said company in April or May, 1913. His duties were to sell flour in Providence and vicinity and to collect the proceeds of such sales. During his earlier employment by the milling company he performed these duties for a stated salary of \$70 per month and an allowance for expenses, both of which were paid by the checks of the milling company.

Upon assuming his duties the defendant was instructed to conduct the business in the same manner in which it had been conducted by his predecessor, Fay G. Hicks. In compliance with such instructions, the defendant submitted himself to the tutelage of Hicks for a period of about a week, receiving from him minute directions as to the method of conducting the business and being introduced by him to various customers.

The instructions given to the defendant by Hicks were that each sale was to be reported to the milling company by sending to its office in Boston a duplicate or carbon copy of the invoice slip on the day of the sale, and a weekly report, including an account of the stock on hand at the warehouse and a list of the collections. The milling company furnished to the defendant a pad of invoice slips, numbered consecutively, there being four copies to each number, distinguishable from each other by the color or character of the paper. The original or white slip was to be kept by the defendant; the blue slip to be sent to the customer; the slip of tissue paper was to be forwarded to the office of the milling company in Boston; and the pink slip was not required under the arrangement with the defendant. Printed blanks for the weekly reports were also furnished to the defendant by the milling company which were designed to show, when properly filled out, the number of barrels of flour received during the week; an itemized list of the number of barrels delivered to customers from the warehouse; the number of barrels remaining in the warehouse; and an itemized list of all amounts collected from customers. As soon as the defendant collected the proceeds of sales, either in money or by check, he was to deposit the same in the Merchants' National Bank in Providence in the name of the milling company and report the same by sending to the milling company a copy of the deposit slip.

On November 1, 1913, a further arrange-

ment was made between the defendant and the milling company whereby the defendant should thereafter, instead of receiving a fixed salary, be paid a commission of 35 cents for every barrel of flour sold by him, he paying his own expenses, the expenses of storing and carting the flour in Providence and the guaranteeing of all accounts. This arrangement does not appear to have modified, or to have been intended to modify, the previous instructions given to defendant as to reports, collections, and deposits. In carrying out this additional arrangement the defendant was paid \$16 a week in advance on account of commissions. The balance due the defendant on account of commissions was paid to him from time to time by check from the milling company, and he was not permitted to deduct such commissions from his collections. Later, the milling company becoming dissatisfied with the defendant's dilatoriness in collecting the accounts, a further arrangement was made between the parties, taking effect in March, 1914, whereby the defendant was to be charged interest on all accounts which were not collected within 45 days.

During the summer of 1914 there were some negotiations between the defendant and the milling company looking to some arrangement whereby the defendant should buy the flour from the milling company and sell it on his own account, and on October 9, 1914, the defendant wrote to the milling company that by the next month he hoped to "buy the business outright." This arrangement was never completed, and the defendant admitted at the trial that this letter was written merely for the purpose of gaining time.

The milling company shipped the flour in its own name to a warehouse in Providence. None of the flour was ever consigned or charged to the defendant, and the defendant's name did not appear in the shipment. All the bills sent by the defendant to purchasers of flour were in the name of the milling company, a notice being stamped thereon requesting remittance to "Harry A. McAvoy, Agt." The defendant also in the transaction of the business used stationery which was headed "Bay State Milling Company." The defendant was given no authority to make prices on his own account, and letters and bills were sent direct to delinquent customers by the milling company.

The defendant undertook and purported to conduct the business in accordance with these arrangements. He sent to the milling company duplicate invoice slips and copies of deposit slips and a weekly report in the form heretofore described.

The evidence shows that the defendant made sales and deliveries which he never reported to the milling company, and that he made collections which he did not deposit in the Merchants' National Bank or report to the milling company, but appropriated the same to his own use. There is evidence

showing the methods resorted to by the defendant in concealing from the milling company that he was obtaining money which he did not report; that he omitted to report to the company certain collections which he had made on deliveries reported; that he omitted to report certain sales and deliveries; that he would deliver flour to two different customers under invoices of the same number and report but one of these deliveries to the company, sending the white slip to one customer and the blue slip of the same number to another customer instead of retaining either for himself, and on the tissue slip of the same number send to the company a report of only one of the sales.

The defendant admitted that in one instance he had intentionally concealed from the milling company one sale and collection amounting to \$85, but he testified that his failure to report other collections to the number of a dozen or more was due to forgetfulness.

The defendant had been instructed to deposit all collections to the account of the milling company in the Merchants' National Bank and send the milling company a copy of each deposit slip; and, according to the testimony of the officers of the milling company, the defendant had no authority to indorse any check made out to the order of the milling company or to deal with either money or checks received in payment of flour except to deposit the same to the account of the milling company in the Merchants' National Bank. The testimony shows, however, that several checks made out to the order of the milling company were deposited by the defendant to his own account in the Industrial Trust Company of Providence, the defendant indorsing them "Bay State Milling Company, Harry A. McAvoy, Agent," and that the amounts represented by such checks were never reported to the milling company as collections.

In July, 1914, the milling company wrote to the warehouse in Providence in which the flour was stored requesting an inventory of the flour of the milling company then in its possession. The defendant, visiting the office of the warehouse company and seeing the letter requesting an inventory, told the representatives of the warehouse company that he would take care of that matter, and accordingly prepared an inventory on a sheet of letter paper headed with the name of the warehouse company, which paper had in some unexplained manner come into the defendant's possession. The inventory thus prepared by the defendant was typewritten and without signature. There was nothing upon it to indicate that it was not compiled by employes of the warehouse company. The amounts given in this inventory corresponded with those given by the defendant in his reports, but exceeded by about 300 barrels the amount of flour which was actually in the hands of the warehouse company.

The defendant made some explanation of this matter of the inventory to the effect that an employé of the warehouse company asked him to make out the inventory and that he copied the figures from his previous reports. Although the milling company later wrote to the defendant referring to this report as the report of the warehouse company, the defendant did not advise the milling company that such report had been made by himself.

There was also testimony that on November 14, 1914, the milling company was notified by the Merchants' National Bank that its account was overdrawn. This turned out to be due to the fact that the defendant had deposited in that bank a check against his own account in the Industrial Trust Company which did not prove to be good. Mr. Harris of the milling company came to Providence and telephoned the defendant that he would like to see him at the Narragansett Hotel. Harris testifies that defendant stated to him over the telephone that he would be at the hotel in a few minutes. The defendant, however, went to New London, Conn. Harris, after waiting for a time, telephoned the defendant's father, who in turn telephoned the defendant at New London, suggesting to the defendant that he return to Providence, and he accordingly came back the next day. The defendant, however, testifies that he told Harris over the telephone that he had made arrangements to go to the southern part of the state to see prospective customers and could not see him that day. On cross-examination the defendant admitted that he had never before solicited business in Westerly, and that he could not remember the name of a single person upon whom he called. He said that he went to New London because there was no decent hotel in Westerly where he could spend the night. The defendant further admitted on cross-examination that he knew nothing whatever about the hotels at Westerly, and had no reason whatever for being dissatisfied with them. Witnesses for the state testified that the defendant admitted at the start that he had gone to Connecticut because he was afraid to face Harris; that he had appropriated money collected to the extent of some \$8,000, including about \$2,000 of the sales which he had not reported to the milling company; that he had made out a false inventory on the letter paper of the warehouse company, and that he had paid out most of the money which he had taken to make up for losses in speculating in wheat; that the defendant, without making any attempt to justify the taking of the money, told the representatives of the company that they could put him in jail if they wanted to, and when arrested by Inspector Maguire he said he had been a fool to give up his ledger to the company. In October, 1914, in answer to some complaints of the milling company that he was behind in the collection of his accounts, the

defendant wrote to the milling company that in a few weeks an estate in which he was interested would be settled, and that he would then have the money to remit, but he admitted on cross-examination that this story was a falsehood, and that there was no such estate.

The only exceptions pressed by the defendant, as stated in his brief, are those numbered, 1, 2, 3, 32, 33, 34, 36, 53, 54, 57, and 58.

[1] The defendant's exceptions 1, 2, and 3 relate to the admission of certain testimony of Fay G. Hicks. Hicks was the predecessor of the defendant as the Providence agent of the milling company. The defendant was told to get from Hicks instructions as to the method of carrying on the business. The defendant went to Hicks, and Hicks spent the greater part of a week in giving him instructions as to making and reporting sales and collections and also taking him to interview customers. The defendant objected to the testimony of Hicks in reference to the instructions he gave to the defendant on the ground that such instructions were given in April, 1913; that the contract under which he was then employed by the milling company ended in November, 1913, previous to the embezzlement set forth in the indictment; and that the arrangements from November 1, 1913, to the conclusion of his dealings with that company were very different, and it was immaterial what the arrangements were prior to 1914, the time laid in the indictment.

We do not think that the contract between the defendant and the milling company can be said to have ended in November, 1913. The contract was added to or modified in some respects at that time, but such additions or modifications did not relate to the reports, collections, and deposits which the defendant was instructed to make and under which instructions he undertook to act.

The modifications referred to related to the defendant's compensation, the guaranteeing of accounts, and to the payment of interest on accounts after the same had been overdue for a certain period. The duties of the defendant in the matter of reports, collections, and deposits were those given to him by Hicks at the instance of the milling company, and we think that such testimony was properly admitted, and that the defendant's exceptions 1, 2, and 3 must be overruled.

The defendant's exceptions 32, 33, and 34 relate to the same matter, and may be considered together.

In July, 1914, the milling company wrote to the warehouse company for an inventory of the flour on hand. This inventory, as before stated, was made up by the defendant, type-written upon the letter paper of the warehouse company, was without signature, and bore no indication that it emanated from the defendant. It was sent by the defendant to the milling company purporting to be a correct statement by the warehouse company of the amount of flour on hand. The state, in its endeavor to show the falsity of this state-

ment and that the amount of flour in the possession of the milling company was much less than that represented in the report, offered in evidence an inventory of the flour in the hands of the warehouse company on July 30, 1914, made up by the bookkeeper of that company. In making such inventory the bookkeeper started with the balance of flour as shown by the inventory of the month preceding, and deducted therefrom the deliveries during the month as reported to him by the teamers. These reports of the teamers were made from time to time upon slips used for that purpose which were filed in the office of the warehouse company. Some of these slips were offered in evidence in verification of the inventory of the bookkeeper. Another employé of the warehouse company testified that he actually counted the stock of flour on hand, and found that his figures corresponded with the figures of the inventory made by the bookkeeper. Besides this, Mr. Harris of the milling company counted the barrels of flour on hand in the warehouse and found a shortage of 575 barrels.

[2] The defendant contends that the introduction of the slips referred to showing deliveries of flour made by the teamers of the warehouse company and the introduction of the inventory of flour made therefrom by the bookkeeper of the warehouse company amounted to nothing more than the introduction of hearsay evidence, the admission of which was error. The apparent purpose of the testimony was to show that the defendant had deceived the milling company by conveying to that company a false report of the flour on hand. If we take the view that the admission of such testimony was erroneous, it would not constitute reversible error in view of the fact that there was other testimony establishing the falsity of the defendant's inventory which he did not dispute. The defendant's exceptions 32 and 33 must be overruled.

[3] The defendant's exception 34 is to the ruling of the court allowing the bookkeeper of the warehouse to testify as to the number of whole barrels of flour on hand as shown by the report of the defendant made to the milling company. The defendant objected to the question on the ground that the issue was not the embezzlement of flour. We see no merit in this exception. The number of barrels disposed of and unaccounted for by the defendant would naturally form a basis for ascertaining the amount of money covered by the embezzlement. The defendant's exception 34 is overruled.

[4] At the conclusion of the testimony for the state the defendant moved that he be discharged, and his exception 36 is to the refusal of the trial court to grant that motion. The basis of this motion was that under the facts as presented the defendant was a *del credere* factor, and that the relations between himself and the milling company were simply those of debtor and creditor. Passing over

the contention of the state that the disposition of such a motion is within the discretion of the court and is not the subject of exception, two questions present themselves for consideration: (1) Was the relation of the defendant with the milling company that of *del credere* factor? and (2) if such relation existed, could the defendant be found guilty of embezzlement under the indictments brought against him?

In determining the first of these questions, we must consider the agreement between the parties and apply thereto the familiar rules of construction, all of which are subordinate to the leading principle that the intention of the parties must prevail unless inconsistent with some rule of law. And such intention must be gathered not from a portion or portions of the contract but from the whole taken together. 11 R. C. L. 755; 1 Clark & Skyles on Agency, 24.

In the case at bar the flour was never consigned by the milling company to the defendant. It was shipped direct to the warehouse in Providence, where it was held as the property of and in the name of the milling company and was at all times subject to its orders. The defendant, after making a sale of flour, was permitted by the milling company to withdraw from its stock in the warehouse a sufficient number of barrels to fill the order. A bill was rendered to the purchaser in the name of the milling company, there being stamped upon such bill a notice to pay the amount due thereon to the defendant as its agent. Upon the receipt of the money the defendant was obligated, under his contract, to deposit it in full in the Merchants' National Bank to the credit of the milling company without any deduction therefrom for salary, commission, or expenses.

We cannot find any intent of the parties, either expressed by the contract itself or by the methods in which their respective duties under it were discharged, that would warrant us in drawing the conclusion that the defendant was acting otherwise than as the agent of the milling company.

The defendant seems to place much reliance upon the fact that under certain conditions he was to be held responsible to the milling company for interest upon accounts overdue for a certain length of time, and in some instances for the payment of the principal sum. The reason for this arrangement is quite apparent from the record. The milling company had expressed its dissatisfaction at the seeming indifference of the defendant regarding the prompt collection of the accounts due and his want of care in the selection of responsible customers. The arrangement was doubtless made for the purpose of stimulating the defendant to look more closely after the collections and to be more careful about making sales to irresponsible parties. It could hardly be inferred

that the milling company was seeking to secure itself against loss through the liability of the defendant, who does not appear to have been a person of any financial standing.

[5] If we assume that the defendant was a factor, we do not see how it could help him in the present case. The defendant does not deny that he was at all times an agent of the company, nor does he claim that he had any right to take the money which he appropriated to his own use. A factor or any other agent does not acquire the right to keep and appropriate to his own use the money which he collects, even if he has guaranteed the account. The statute (General Laws 1909, c. 345, § 16) is explicit, and provides that:

"Every officer, agent, clerk, or servant * * * who shall embezzle or fraudulently convert * * * any money or other property which shall have come into his possession or shall be under his care or charge by virtue of such employment * * * shall be deemed guilty of larceny."

This statute has been interpreted by this court in *State v. Taberner*, 14 R. I. 272, 276, 51 Am. Rep. 382, in which case the court said:

"The obvious meaning is that any agent who has money in his possession, which has come into his possession by virtue of his agency, is punishable under the statute if he embezzles or fraudulently converts it."

The defendant argues that he was acting under a *del credere* commission; that the relations between himself and the milling company were those of debtor and creditor, and therefore he cannot be prosecuted for embezzlement. As this court said in *Balderston v. National Rubber Co.*, 18 R. I. 338, 347, 27 Atl. 507, 511 (49 Am. St. Rep. 772):

"The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay."

In 9 Am. & Eng. Encyc. (2d Ed.) 183, the law on this subject seems to be well summarized as follows:

"The fact that an agent or factor is acting under a *del credere* commission does not affect the ordinary relations existing between him and his principal. Save for the additional security afforded the principal, their reciprocal rights, duties, and liabilities remain the same. * * * A person who consigns his goods to a *del credere* agent for sale does not part with his title. He remains the owner of such goods until sold; and when the proceeds of the sale are received by the agent or his assignees, they belong specifically to the principal, and do not become a part of the agent's assets, the principal being an ordinary creditor for the amount."

In *Wallace v. Castle*, 14 Hun (N. Y.) 106, it was held that the consignment of goods to a factor acting under a *del credere* commission does not necessarily destroy the fiduciary relation existing between himself and the consignor, and that when he is in fact paid by the debtor, the money so received is the money of the consignor and not of the factor, and for a conversion thereof the latter is liable to arrest. The court in its opinion said:

"The defendant was a factor, and, although entitled to *del credere* commission, his character was not changed. His responsibility and his compensation were enlarged, but that was in fact and in law the only change accomplished by the agreement *del credere*. He guaranteed the payment of the sum for which the goods were sold, but his liability did not accrue until the purchaser failed to pay. In this case the payment was made, and the contract of liability therefore occurring through the *del credere* commission was not called into existence. The relation of factor continued with all its obligations and burdens. The money received was the plaintiff's money, and not the defendant's. It came from the plaintiff's debtor, and should have been paid to the plaintiff as his fund. * * *

This case goes further than the exigencies of the present controversy demand, because the consignment was there made to the factor, while in the case at bar the consignment was made to the warehouse in the name of the milling company. See, also, *Commonwealth v. Smith*, 129 Mass. 104; *Audenried v. Betterley*, 8 Allen (Mass.) 302, 307; *Moore v. Hillabrand*, 37 Hun (N. Y.) 491; *Stanwood v. Sage*, 22 Cal. 516; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972.

The case of *Leverick v. Meigs*, 1 Cow. (N. Y.) 645, from which the defendant appears to quote in his brief, although the apparent quotation is not in the exact language of the opinion, seems to us to sustain the principle that while a *del credere* agreement may make the agent liable in the event of the purchaser's default, it will not operate to deprive the principal of his right to insist upon the performance of the agent's duty in other respects. The court in its opinion said:

"The only difference between a factor acting under a *del credere* commission or without one is as to the sales made. In the former case he is absolutely liable, and may correctly be said to become the debtor of his principal, but it is not strictly correct to say he is placed in the same situation, as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. This shows that the effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay."

The case of *Gindre v. Kean*, 7 Misc. Rep. 582, 28 N. Y. Supp. 4, which the defendant cites, seems to us to be in line with the authorities to which we have already referred. In the course of its opinion the court speaking of the defendant, said:

"That he was answerable for the purchase price under his *del credere* agreement in the event of the purchaser's default in payment did not operate to deprive his principals of the right to insist upon performance of his duty as factor."

We think that defendant's exception 36 must be overruled.

The defendant's exception 53 does not seem to us to possess sufficient merit to warrant particular discussion.

[6] The defendant's exception 54 was taken to the ruling of the trial court sustaining an

objection to the introduction of any correspondence received by the state board of tax commissioners. The objection came from the Attorney General at the request of the tax commissioners, and was based upon the ground that all information in possession of such commission was confidential, and that its disclosure would impede its workings. The purpose of the particular question was to ascertain if there had been any correspondence between the Bay State Milling Company and the tax commissioners as to whether said company was doing business in Rhode Island.

Under section 15, c. 769, of the Public Laws of 1912, this information could not be divulged except upon the order of the court. It would be the duty of the trial court, in the exercise of its discretion, to rule out the question unless it should appear that the information sought was material to the defendant's case. The materiality of the testimony was not apparent to the trial court, and it is not apparent to us. We think it was properly excluded. So far as appears, it could be of no assistance to the jury in determining whether or not the defendant was guilty of embezzling the money of the milling company.

[7] The defendant's exception 57 is as follows:

"Also will your honor note my exception to the charge of the court in which the court stated that the ownership of the flour was controlling as to his rights to the proceeds."

Supposing the exception to be a substantial statement of what the court said in its charge, it could hardly be claimed to be an erroneous statement of the law applicable to the case. If the flour was the property of the defendant, he could not be guilty of embezzlement. If, on the other hand, the flour was the property of the milling company, and the defendant appropriated the proceeds to his own purposes, when, under his agreement, he was bound to make deposit thereof in the Merchants' National Bank to the account of the milling company, then he would be guilty of embezzlement, and in that view of the case the ownership of the flour might reasonably be said to be controlling. An examination of the charge of the court satisfies us that the instructions given amount to a correct statement of the law. For instance, the court said:

"So you see, gentlemen, that it is necessary, in order to establish the crime charged against the defendant here of embezzlement, that he should either have been an officer, an agent, or clerk or servant, or a person to whom the money was intrusted, of the Bay State Milling Company. That is the reason that so much stress was laid upon the question as to whether or not he was the owner of this business and carrying on business on his own responsibility, owning this property, or whether or not he was the agent of the Bay State Milling Company, and being their agent, having this property given into his hands as their agent, or for a specific purpose, embezzled their money. If it was his

own money, he could not embezzle his own money. It must have been the money that came into his hands as the agent, etc., of the Bay State Milling Company. What the evidence is upon that point you have heard, both upon his side and upon the side of the prosecution, and you will determine for yourselves what the facts are."

These instructions were substantially repeated by the court in another portion of the charge. We do not find any error in the charge, and defendant's exception 57 must be overruled.

[8] The remaining exception 58 is to the denial of the defendant's motion for a new trial. The jury has found the defendant guilty, and the trial justice who saw, heard, and observed the witnesses has denied the motion for a new trial, and has found that:

"The evidence fully warrants the finding of the jury that the defendant is guilty of the crime of embezzlement as charged in the indictment."

An examination of the whole record convinces us that the conclusion of the trial court in denying the motion for a new trial was correct. A detailed discussion of this exception would be largely and substantially a repetition of what has already been stated, and would therefore be unnecessary. Exception 58 must be overruled.

All of the defendant's exceptions are overruled, and the case is remitted to the superior court for sentence.

(40 R. I. 425)

BUTLER et al. v. BUTLER et al. (No. 393.)
(Supreme Court of Rhode Island. July 3, 1917.)

1. WILLS §628—VESTED REMAINDER—DEFINITION.

The distinguishing feature of a vested remainder is that there shall be a person or persons in being, ascertained and ready to take possession when the preceding estate may determine, and in such case the interest vests at once, but enjoyment of it is postponed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1460.]

2. WILLS §628—CONTINGENT REMAINDER—DEFINITION.

In the case of a contingent remainder, whether or not any estate shall vest in either right or possession, or who shall take it, depends upon a future contingency, and in such case not only the time of enjoyment but the right to enjoy is uncertain.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1460.]

3. WILLS §629—VESTED REMAINDER.

The law favors vesting, and will not regard a remainder as contingent in the absence of very decisive terms of contingency, unless the provisions or implications of the will clearly require it, and words expressive of future time are to be referred to the vesting in possession, if they reasonably can, rather than to the vesting in right.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462.]

4. WILLS §634(18)—CONSTRUCTION—REMAINDERS.

Provision in a will creating trust to terminate upon the death of testator's wife, and when

a son named shall reach the age of 28 years, with remainder over to testator's children in shares stated, created a vested remainder, since any delay between the happening of the two events would not postpone the vesting, but only the enjoyment; there being persons in being at the time of the testator's death ascertained and ready to take possession whenever the preceding estate should come to an end.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1507.]

5. WILLS ⚡636 — CONSTRUCTION — REMAINDERS.

Where a will created a vested remainder in children of the testator and gave a daughter a larger share, but provided that if the daughter should die before the termination of the trust the shares of remaindermen shall be equal and her share will go to her children, the daughter took a vested remainder subject to being decreased in case she died before the termination of the trust, and each son took a vested remainder subject to being increased in case of the death of the daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518.]

6. WILLS ⚡684(7) — REMAINDER — CUMULATION OF INCOME.

Where a will created a trust terminating upon the death of the wife and when a named son should reach the age of 28 years, upon the death of the wife before the son reached the age stated, the accumulation of income, which would have been payable to the wife, should be paid as it accrues to the vested remaindermen, the general rule being that the right to accumulations of income directed by will may be vested, and the vested right will attach to each new amount as fast as it accumulates, and will, in general, be either vested or contingent according as the gift of the principal is vested or contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1625.]

7. WILLS ⚡634(8) — CONSTRUCTION — REMAINDERS.

Where a will created a vested remainder in two-fifths of the corpus in a daughter, and in contemplation of the decease of the daughter on termination of the trust provided that the "then trustee shall distribute all my estate equally, share and share alike, to my children, their heirs, administrators and assigns, the share of any deceased child to go to the heirs of the body of said child, if any, the children of [the daughter], if any, to take their mother's share," upon the death of the daughter before the termination of the trust her children, if any, would share equally with three sons and take one-fourth of the estate, or upon her death prior to the termination of the trust without issue the corpus should be divided equally between the three sons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1496.]

8. WILLS ⚡686(1) — CONSTRUCTION — TRUSTS.

Where a will created a trust to be terminated upon the death of the testator's wife, and when a named son should reach the age of 28 years, the trust would terminate upon the death of the son before reaching the age of 28 years, and after the death of the wife, and the corpus should be distributed as of the date of his decease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631, 1633, 1637.]

Certified from Superior Court, Providence and Bristol Counties.

Suit by Hayward M. Butler and others, trustees under the will of John J. Butler, against D. Forrest Butler and others. On

certificate from the superior court. Decree authorized in accordance with the opinion.

Gardner, Pirce & Thornley, of Providence, for complainants. Elisha C. Mowry, of Providence, for respondents Butler. Fred A. Otis, of Providence, guardian ad litem, pro se.

VINCENT, J. This is a bill in equity brought in the superior court by the complainants as trustees under the will of John J. Butler. It appearing that all parties interested, or who might become interested, were represented, and that the only questions of law raised by said bill involved the construction of a will, the cause was certified to this court for determination under section 35, chapter 289, of the General Laws of 1909. The testator died May 22, 1916, leaving a widow, Laura E. Butler, and four children, Hayward M. Butler, Nettie B. Rice, the complainants, and D. Forrest Butler and Ward E. Butler, two of the respondents. By the residuary clause of the will the testator left a considerable amount of property to the complainants, as trustees, with directions to pay all his debts and after deducting the expenses of the trust to pay the net income as follows:

"To my wife during her life three-fifths and to my said daughter Nettie during her life two-fifths."

Without making any further provision as to the payment of income, the will disposes of the principal of the trust estate as follows:

"On the death of my said wife, and when my said son Ward shall have reached the age of twenty-eight years, I hereby direct and empower my said trustees to terminate said trust and distribute all my said estate, two-fifths to my said daughter Nettie and, one-fifth each to my said three sons, to each of them, their heirs, administrators and assigns forever, free from all trust and obligation, giving to my said trustees, discretion as to the substance and manner of such distribution. If, however, my said daughter Nettie be not then living, the then trustee shall distribute all my estate equally, share and share alike, to my children, their heirs, administrators and assigns, the share of any deceased child to go to the heirs of the body of said child, if any, the children of Nettie, if any, to take their mother's share."

The widow of the testator, Laura E. Butler, died January 30, 1917. The four children are all living; the son Ward E. Butler being of the age of 24 years, and unmarried. The testator's daughter, Nettie B. Rice, has no children. The other sons, Hayward M. Butler and D. Forrest Butler, have each one child. Both of these children are minors and are represented by a guardian ad litem, who also represents the interests of persons not ascertained and not yet in being who may be interested in the trust declared by said will.

The questions which have arisen in the course of the administration of the trust and which this court is asked to determine are as follows:

(1) Are the equitable estates in remainder which shall take effect in possession upon the termination of the trust vested or contingent remainders?

(2) Should the complainants, as trustees, permit the three-fifths income of the trust estate—which would have gone to the testator's wife had she lived until the end of the trust—to accumulate and increase the corpus until the termination of said trust, or should they distribute said three-fifths income as it accrues? If the latter is correct, to whom and in what proportion should it be paid?

(3) In case said Nettie B. Rice should not be living at the time of the termination of said trust, would her children, if any, take collectively one-fourth or two-fifths of the corpus, and would the other three children of the testator—his three sons—if then living, each receive one-fourth or one-fifth of said estate?

(4) Would said trust terminate at once in case said Ward E. Butler should die before reaching the age of 28?

[1, 2] The primary and most important question to be determined is whether the equitable estates in remainder are vested or contingent. It will therefore be convenient, in the first instance, to designate the particular features which serve to distinguish a vested remainder from a contingent remainder. The distinguishing feature of a vested remainder is that there shall be a person or persons in being, ascertained and ready to take possession whenever and however the preceding estate may determine. In such case the interest vests at once, but the enjoyment of it is postponed. In the case of a contingent remainder, whether or not any estate shall vest in either right or possession, or who shall take it, depends on a future contingency. In such case not only the time of enjoyment, but the right to enjoy, is uncertain.

[3] In applying these definitions to the question which we are now discussing, it must also be borne in mind—

“that the law favors vesting very strongly, and will not regard a remainder as contingent, in the absence of very decisive terms of contingency, unless the provisions or implications of the will clearly require it, and that words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right.” In re Kenyon, 17 R. I. 149, 20 Atl. 294; Ross v. Nettleton, 24 R. I. 124, 127, 52 Atl. 676.

In *Storrs v. Burgess*, 29 R. I. 269, 273, 67 Atl. 731, 732, this court said, in quoting with approval from other authorities:

“Since contingent remainders have been recognized, the line between them and vested remainders is drawn as follows: A remainder is vested in A. when, throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding estates may determine,” citing *Johnson v. Edmond*, 65 Conn. 492, 499, 33 Atl. 503; *Starnes v. Hill*, 112 N. C. 1, 9, 16 S. E. 1011, 22 L. R. A. 598. “The uncertainty which makes a gift contingent may be in the capacity

of the devisee to take, or in the happening of an event upon which the gift is conditional.”

[4] The portions of the will of John J. Butler touching the matter of remainders providing that the trustees pay over the net income are as follows:

“To my wife during her life three-fifths and to my said daughter Nettie during her life two-fifths. * * * On the death of my said wife, and when my said son Ward shall have reached the age of twenty-eight years, I hereby direct and empower my said trustees to terminate said trust and distribute all my said estate, two-fifths to my said daughter Nettie and, one-fifth each to my said three sons, to each of them, their heirs, administrators and assigns forever, free from all trust and obligation, giving to my said trustees, discretion as to the substance and manner of such distribution.”

From this language, taken by itself, it could be easily determined that the remainders vested. The estate was certain and there were persons in being at the testator's death, ascertained and ready to take possession whenever the preceding estate should come to an end; that is, on the death of the testator's wife and when the son Ward E. Butler should reach the age of 28 years. The delay would not have postponed the vesting, but only the enjoyment. The daughter, Nettie B. Rice, would have taken a vested remainder in two-fifths and each of the three sons a vested remainder in one-fifth of the corpus, to come into their possession at the termination of the trust.

Storrs v. Burgess, supra, is similar to the case at bar in that two things must happen before the remainder vested in possession; that is, that the wife should die and the daughter should attain the age of 24 years. In the case at bar the wife must die and the son Ward reach the age of 28 years. The court held in *Storrs v. Burgess* that the daughter was given a vested remainder on the testator's death. See, also, *Staples v. D'Wolf*, 8 R. I. 74; *Kelly v. Dike*, 8 R. I. 436; *Rogers v. Rogers*, 11 R. I. 38; *Clarkson v. Pell*, 17 R. I. 646, 24 Atl. 110; *Spencer v. Greene*, 17 R. I. 727, 24 Atl. 742; *Morgan v. Morgan*, 20 R. I. 600, 40 Atl. 736.

[5] It is reasonably certain in view of the authorities cited that we would be justified in holding that, under the provisions of the will, last above quoted, the remainders were vested. There is, however, a further provision in the will which must be considered in this connection. The testator goes on to say:

“If, however, my said daughter Nettie be not then living, the then trustee shall distribute all my estate equally, share and share alike, to my children, their heirs, administrators and assigns, the share of any deceased child to go to the heirs of the body of said child, if any, the children of Nettie, if any, to take their mother's share.”

Do these words change the situation and make the remainder contingent instead of vested? They do not change the parties who would take at the expiration of the trust, except that it gives to Nettie's children, if any, in case of her death the mother's share and changes the proportion of the estate which

each remainderman would take. There seems to be sound authority that this would not change an estate already vested into a contingent estate. In 40 Cyc. 1670, the general rule is stated in this language:

"A gift over on death or failure of the beneficiaries in remainder does not render the remainder any the less vested, although it may be contingent from other reasons. A gift over on death leaving issue does not render the estate of the first taker contingent, and a gift to others on death without issue does not render the prior estate contingent; but the gift over on death without issue will itself be contingent."

R. I. Hospital Trust Co. v. Noyes, 26 R. I. 323, 58 Atl. 999: Here all the net income was to go to Y. after he reached 21 and before he reached 25, and upon his reaching 25 he was to get the whole corpus. But if he died before reaching 25, the corpus was to go to his issue. Y. died between the ages of 21 and 25 without issue. The court held that Y. took a vested interest in the fund, subject to being divested if he died without issue under 25.

Storrs v. Burgess, 29 R. I. 269, 67 Atl. 731: Here the whole income was to go to the wife until the daughter reached 25 when one-half of the income was to go to the daughter; if the wife died before the daughter reached 25, the whole income was to be held in trust for the daughter until she reached 25, and then the corpus was to be paid to her. If the daughter died before she reached 25 leaving issue, half was to go to her issue, etc. The daughter died before reaching 25, without issue, the mother living. The court held that the daughter took a vested equitable remainder in fee, subject to be divested by her death under the age of 25 or before her mother.

Hayes v. Robeson, 29 R. I. 216, 69 Atl. 686: Here there was a trust to apply the income for the education of two grandsons; if either died before 21, the whole income to the other; if both died before 21, then over. The court held that the grandsons took a vested interest in the funds, liable to be divested by death under the age of 21.

In the case at bar remainders are given with the provision that if one of the remaindermen, Nettie, dies before the end of the trust the proportion of the amounts given will be changed and her share will go to her children. In the above three cases (*R. I. Hospital Trust Co. v. Noyes*, *Storrs v. Burgess*, and *Hayes v. Robeson*) the trust provided for gifts over under somewhat similar contingencies, and in all three cases the court held that the remaindermen took a vested remainder subject to be divested on the happening of the contingency.

We think that these provisions of the will must be construed as giving to Nettie B. Rice a vested remainder in two-fifths of the corpus, subject to being decreased to one-quarter in case she died before the termination of the trust, and to each of the three sons a vested remainder in one-fifth of the corpus, subject to being increased to one-

quarter in case Nettie died before the trust terminated. In reaching this conclusion we are not hampered by anything in the will which appears to us to be an intention on the part of the testator to make the remainders contingent rather than vested.

[§] We now come to the consideration of the question as to what disposition should be made of the three-fifths of the income of the trust estate given to the testator's wife for life, from the time of her death to the expiration of the trust, that is, when the son Ward shall have reached the age of 28 years or shall have deceased prior thereto. Should this income be allowed to accumulate and be added to the corpus until the termination of the trust, or should it be paid out as it accrues and if the latter to whom and in what proportion? The general rule is stated in 40 Cyc. 1659, as follows:

"The right to accumulations of income directed by will may be vested, and the vested right will attach to each new amount as fast as it accumulates, and will, in general, be either vested or contingent according as the gift of principal is vested or contingent."

In *Rogers v. Rogers*, 11 R. I. 38, the residue of the estate was left in trust as a guaranty for the payment of an income of \$3,000 to the testator's wife for life, and after her death to divide all the residue equally between the trustee's eight children, and when the income during the life tenancy exceeded the necessary \$3,000, it was held that the remainder over was vested, and that the remaindermen were entitled to the excess income during the life tenancy. In discussing the question of accumulation or payment of the income, the court said:

"The will contains no traces of a wish to aggrandize a property which was already ample, by mere accumulation, until the division; and the inference is easily drawn that the testator supposed that the income, instead of accumulating, would be enjoyed by the objects of his bounty. Indeed, he probably had the idea that a trust ordinarily means an arrangement by which the trustee safely keeps the corpus of the property, while the beneficiaries enjoy its income."

In *Wakefield v. Small*, 74 Me. 277, the testator directed his trustees to set aside from the corpus \$30,000, and to pay the whole annual income to his wife for life. If any income from the corpus remained, he directed it to be divided equally among his children until the youngest child reached 21 years, and then the trustees were to divide the unexpended residue set aside for the maintenance of the children, and also the \$30,000 set aside for the support of the wife if she was not then living. If the wife were living, the trust estate of \$30,000 was to continue until her death, and then to be divided. She died before the youngest child reached 21. It was held that upon the death of the wife the \$30,000 falls into the balance of assets, the annual income of which was paid to all the children of testator, and each child received the same proportionate part of the income of the \$30,000 that the will provided

they should receive of the balance of the assets; the court saying:

"It is the opinion of the court that under the will, upon the death of the widow, the application of the income of the \$30,000 to her use during life having served its purpose, that sum, the \$30,000, falls into the balance of assets mentioned in the fourth section of the tenth clause of the will, the annual income of which is to be paid to all the children of the testator, 'each receiving his or her equal share, until the youngest of my said children that shall live to arrive at the age of twenty-one years, shall arrive at said age.' * * * Nothing indicates that the testator intended the income to be invested and accumulate during such a period."

The will under consideration fails to furnish anything which can be said to indicate any wish or desire, on the part of the testator, that accumulations should go to increase the corpus of the estate and the disposition of the whole income under the trust would seem to some extent to support the contrary view. We think that the income from the three-fifths of the estate given by the testator to his wife for life should not accumulate to increase the corpus, but that it should be paid as it accrues to the vested remaindermen, Nettie B. Rice, Hayward M. Butler, D. Forrest Butler, and Ward E. Butler in the proportion of two-fifths thereof to Nettie B. Rice and one-fifth each to Hayward M. Butler, D. Forrest Butler, and Ward E. Butler.

[7] In the event that Nettie B. Rice should decease prior to the termination of the trust, leaving children, would such children take one-fourth or two-fifths of the corpus of the estate is the next question for consideration. It would be but natural for the testator to feel that his daughter would be less capable than his sons of earning an income, and it is fair to presume that he may for that reason have been desirous of favoring her to some extent in the disposition of his property. But, however that may be, it seems reasonably clear from the will that he did not desire to extend the same consideration to children that might possibly be born to her in the future. In contemplation of the decease of his daughter, prior to the termination of the trust, the testator provides that:

"The then trustee shall distribute all my estate equally, share and share alike, to my children, their heirs, administrators and assigns, the share of any deceased child to go to the heirs of the body of said child, if any, the children of Nettie, if any, to take their mother's share."

This language seems to us to indicate an intent on the part of the testator that in the event of the death of his daughter, before the termination of the trust, her children, if any, should share equally with his three sons and take one-quarter of the estate. We do not think that the testator, by the words "the children of Nettie, if any, to take their mother's share" intended that Nettie's children should take two-fifths of the estate, but rather that they should take the portion that would go to the mother upon the basis of an equal division of the estate

into four parts. Such intent is borne out by the words which precede those above quoted, "the then trustee shall distribute all my estate equally, share and share alike, to my children, their heirs, administrators and assigns."

We now come to the final question, Would the trust terminate at once upon the decease of Ward E. Butler before reaching the age of 28 years?

[8] The whole object of the trust was to protect the corpus of the estate during the life of the testator's wife and until his son Ward became 28 years of age. Upon the death of the son Ward, the wife having already deceased, there would not be anything remaining upon which the trust could further operate, and it would therefore terminate. In *Sammis v. Sammis*, 14 R. I. 123, there was a provision that the trust should continue until the youngest of three sons should attain the age of forty years, and the court held that the death of all three before reaching that age would end the trust, and said:

"This is because there is no reason for keeping the trust or term alive, and it cannot be kept alive until the arrival of the time named for its termination, for that time never will arrive. * * * The death of all the sons, therefore, before either of them attains the age of 40 years, will not defeat the remainders, but will only accelerate their taking effect in possession."

Our conclusions may be specifically stated as follows:

(1) That Nettie B. Rice on the death of the testator took a vested remainder in two-fifths of the corpus of the estate subject to being decreased to one-fourth in the event of her death before the termination of the trust.

(2) That Hayward M. Butler, D. Forrest Butler, and Ward E. Butler on the death of the testator each took a vested remainder in one-fifth of the corpus of the estate subject to be increased to one-quarter in the event that Nettie B. Rice should decease prior to the termination of the trust.

(3) That Nettie B. Rice should be paid two-fifths, and Hayward M. Butler, D. Forrest Butler, and Ward E. Butler one-fifth each of the ~~three-fifths~~ income that would have been payable to the testator's wife from the date of her death to the end of the trust.

(4) That if Nettie B. Rice should decease prior to the termination of the trust without leaving issue the corpus of the estate should be divided equally between her three brothers Hayward M., D. Forrest, and Ward E., but if Nettie should decease as aforesaid leaving issue the corpus of the estate should be divided into four equal parts, one of which should go to the child or children of Nettie, and one to each of the testator's sons.

(5) That if the said Ward E. Butler should not reach the age of 28 years the trust would terminate upon his death, and the corpus of the estate should be distributed as of the date of his decease.

The complainants may present to this court, for approval, a decree in accordance with this opinion.

(40 R. I. 376)

CARR v. CRANSTON PRINT WORKS CO.
(No. 5072.)

(Supreme Court of Rhode Island. June 19, 1917.)

1. APPEAL AND ERROR §—656(1)—PETITION TO ESTABLISH TRUTH OF EXCEPTIONS AND CORRECTNESS OF TRANSCRIPT—AFFIDAVIT — RULE OF COURT.

Under rule 13 of the Supreme Court (62 Atl. ix), providing that every petition to establish the truth of exceptions shall be verified by affidavit accompanying the petition, setting forth the rulings on which the exceptions are based, and that every petition to determine the correctness of a transcript of testimony shall be accompanied by affidavit setting forth that the transcript certified by the court's stenographer is correct or incorrect, and, if incorrect, in what particulars, etc., where defendant failed to comply with the rule, and did not specifically set out the rulings on which its exceptions were based, and did not set forth that the transcript was correct or incorrect, and, if incorrect, in what particulars, plaintiff's motion to dismiss defendant's petition to establish the truth of its exceptions and the correctness of the transcript of evidence should be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2826, 2828.]

2. APPEAL AND ERROR §—656(1)—PETITION TO ESTABLISH TRUTH OF EXCEPTIONS AND CORRECTNESS OF TRANSCRIPT—JURISDICTION — ADDITIONAL AFFIDAVITS.

Under rule 13 of the Supreme Court (62 Atl. ix), concerning petitions to establish the truth of exceptions and the correctness of transcripts, if the Supreme Court has not acquired jurisdiction by the steps taken within the 30 days next after the filing of the bill of exceptions in the superior court, it cannot acquire jurisdiction after the expiration of 30 days by the filing of additional affidavits with petition to establish truth of exceptions and correctness of transcript of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2826, 2828.]

3. APPEAL AND ERROR §—656(1)—TRANSCRIPT — ESTABLISHING TRUTH OF — RULE OF COURT.

The Supreme Court would not deem it advisable to change an apparently reasonable and salutary rule relative to petitions to establish the truth of exceptions and the correctness of the transcript of evidence, which has been considered, explained, and enforced by the court in numerous decisions, in response to the mere allegation of a defeated litigant that its enforcement in his case will work an injustice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2826, 2828.]

Action by Marion Carr against the Cranston Print Works Company. There was verdict for plaintiff, and defendant filed motion for new trial, which was denied, and filed its bill of exceptions in the office of the clerk of the superior court. On plaintiff's motion to dismiss defendant's petition to establish the truth of its exceptions and the correctness of the transcript of evidence. Defendant's petition to establish the truth of its exceptions dismissed, and papers ordered to be returned to the superior court.

Flynn & Mahoney, of Providence, for plaintiff. Herbert Almy, of Providence, for defendant.

BAKER, J. This case is before the court on plaintiff's motion to dismiss the petition of the defendant to establish the truth of its exceptions and the correctness of the transcript of evidence.

This is an action of trespass on the case for negligence. It appears from the papers in the case certified to this court that it was tried before Mr. Justice Stearns and a jury on the 30th and 31st days of October, 1916, and that a verdict was rendered for the plaintiff in the sum of \$5,000. The defendant filed a motion for a new trial, which was heard and denied. Thereafterwards it duly filed a notice of its intention to prosecute a bill of exceptions, its request for a transcript of the entire record accompanied with a deposit of the estimated fee therefor, and within the time allowed therefor by the court the transcript of said record on March 24, 1917, and said bill of exceptions on March 26, 1917, were duly filed in the office of the clerk of said court.

Owing to the election of Mr. Justice Stearns as a member of this court before either of the dates last named, it became impossible for him to perform the duties devolving upon him under section 19 of chapter 298 of the General Laws relative to the allowance of the bill of exceptions and the transcript.

After the lapse of more than 20 days following the filing of said bill of exceptions and within 30 days thereafter, to wit, on April 18, 1917, the defendant filed in this court its said petition, in which it sets forth the foregoing facts, and prays:

"That the truth of its exceptions be established and the transcript of the evidence and the rulings thereon and of the instructions to the jury be allowed by this court as filed."

Attached to the petition was this affidavit:

"I, Herbert Almy, of the city and county of Providence, in the state of Rhode Island, on oath say I am the attorney of record in the case of Marion Carr v. Cranston Print Works Company, and as such am familiar with the travel of said case through the superior court; that the statement of the travel of said case contained in the foregoing petition is true to the best of my knowledge and belief. And I further say that the exceptions contained in the bill of exceptions in said petition referred to were duly taken at the trial of said case before a jury and noted by the judge who presided at the trial, and said bill of exceptions, transcript of evidence, etc., were duly filed in the office of the clerk of said superior court within seven days after notice of decision denying defendant's motion for a new trial.

Herbert Almy.
"Subscribed and sworn to at Providence this 18th day of April, 1917.

"Charles H. McKenna, Notary Public."

The grounds of the plaintiff's motion to dismiss are stated as follows:

"(1) Said petition is not verified by affidavit accompanying the same, as required by rule 13 of this court (62 Atl. ix).

"(2) Said defendant has not set forth in its petition the rulings upon which the exceptions are based, as required by rule 13 of this court.

"(3) Said defendant has not set forth in its affidavit accompanying its petition the rulings upon which the exceptions are based, as required by rule 13 of this court.

"(4) Said defendant has not accompanied its petition to determine the correctness of its transcript of the evidence by affidavit setting forth that the transcript certified by the court stenographer is correct, as required by rule 13 of this court.

"(5) Said defendant has not accompanied its petition to determine the correctness of its transcript of the evidence by affidavit setting forth that the transcript certified by the court stenographer is incorrect, and, if incorrect, in what particular, as required by rule 13 of this court."

So much of rule 13 of this court as is pertinent to the questions now raised is as follows:

"Every petition to establish the truth of exceptions shall be verified by affidavit accompanying the petition, setting forth the rulings upon which the exceptions are based; and every petition to determine the correctness of a transcript of testimony shall be accompanied by affidavit setting forth that the transcript certified by the court stenographer is correct or incorrect, as the case may be, and, if incorrect, in what particular; and the petitioner shall within 24 hours after the filing of his petition deliver to the adverse party or his attorney of record a copy of the same and of the affidavits."

The petitioner in its brief admits:

"That the affidavit accompanying the petition when filed did not specifically set out the rulings upon which the exceptions were based."

It is also apparent by inspection that said affidavit does not set forth:

"That the transcript * * * is correct or incorrect, as the case may be, and, if incorrect, in what particular."

The first question for consideration is as to the effect of these omissions.

The provisions regulating the prosecuting of bills of exceptions are found in sections 17 to 22, inclusive, of chapter 298 of the General Laws (first enacted in May, 1905, as part of the Court and Practice Act), and in certain rules of the superior and Supreme Courts. In numerous cases litigants have been held to a strict observance of this statute and these rules.

In *Hartley v. R. I. Co.*, 28 R. I. 157, on page 159, 66 Atl. 63, on page 65, the court said:

"A strict construction of statutes relating to bills of exceptions everywhere prevails. After a litigant has had his day in a court of general jurisdiction, with all the presumptions which exist in favor of the decision of a jury instructed by an educated and experienced judge, if he desires a review of the case in an appellate court, he must apply for it in the time and in the manner prescribed by the statutes."

In *Smith v. Haskell Mfg. Co.*, 28 R. I. 91, 93, 65 Atl. 610, 611, it appeared that a litigant had failed to give the opposite party notice of filing his bill of exceptions within the time required by rule 32 of the superior court. This court said:

"Upon the adoption of the rule so authorized, the same became a part of the law of the state,

and governs the subject-matter to which it relates, and cannot be ignored. As it is of statutory origin, it can be changed, modified, or repealed only in the manner provided by the statute. Obedience to its mandate became a necessary step in the procedure to be taken in the prosecution of bills of exceptions."

And it held that it had no jurisdiction to consider the bill of exceptions.

In *Cole v. Davis Automobile Co.*, 33 R. I. 143, 80 Atl. 268, the petitioner, seeking to establish the truth of his exceptions by petition, failed to show compliance with rule 13 of this court in delivering to the adverse party a copy of his petition and the affidavits. The court on page 149 of 33 R. I., page 270 of 80 Atl., after quoting from *Smith v. Haskell Mfg. Co.*, supra, the citation above given, said, "This statement is equally applicable to the rule under consideration in this case," and dismissed the petition.

Vassar v. Lancaster, 30 R. I. 221, 74 Atl. 711, was heard upon defendant's petition to establish the truth of the exceptions, and the provisions of said rule 13 were considered, as the petition did not ask to have the correctness of the transcript determined, and there was no affidavit as to its correctness or incorrectness. The court said (30 R. I. on page 225, 74 Atl. 712):

"Although the question has not been raised by the parties, still, as the jurisdiction of this court in the matter depends upon the regularity of the steps taken in bringing the exceptions here, it is necessary to consider it."

And (30 R. I. on page 228, 74 Atl. 713) it also said:

"The defendant could have proceeded by petition, verified by affidavit, to establish the correctness of the transcript of testimony. He has not done so, however, but has contented himself with an attempt to establish only the truth of the exceptions claimed. This leaves the truth as to the rest of the proceedings at the trial unestablished."

And the petition was dismissed. See, also, *Paull v. Paull*, 30 R. I. 253, 74 Atl. 1016, *Matteson v. Benjamin F. Smith Co.*, 30 R. I. 198, 74 Atl. 225, *First Baptist Society v. Wetherell*, 29 R. I. 331, 71 Atl. 66, *McLean v. Wheelwright*, 31 R. I. 562, 78 Atl. 261, and *Beaule v. Acme Finishing Co.*, 36 R. I. 74, 89 Atl. 73, as further illustrations of the strictness with which the provisions for prosecuting bills of exceptions have been construed.

[1] As the defendant has failed to comply with the provisions of rule 13, it seems apparent that in conformity with the rules of construction stated in the decisions above cited the motion to dismiss should be granted.

The defendant, however, raises one other question. At the hearing on April 30, 1917, on the motion to dismiss the defendant offered two affidavits, which are called supplemental affidavits, one made by its attorney of record, the other by the court stenographer reporting the case in the superior court, for the purpose of covering the omissions in the affidavit on file and to comply with the re-

quirements of rule 13. The defendant urges that this is permissible, if not under the rule as it stands, at all events by the exercise of the power of the court to alter its own rules at will. The citations from decisions of this court above given make it plain that since the passage of the Court and Practice Act this court has uniformly held that its jurisdiction as to bills of exceptions, and a transcript of testimony depends upon the regularity of the steps taken in bringing the exceptions and transcript here, both as to time and manner.

[2] Under the rule as it stands, if this court had not acquired jurisdiction of the case by the steps taken within the 30 days next after the filing of the bill of exceptions in the superior court, it could not acquire jurisdiction after the expiration of 30 days by the filing of additional affidavits. On April 30, 1917, more than 30 days had elapsed since the filing of the bill of exceptions on March 26, 1917. In some of said decisions the court has said that rule 13 in proceedings like these has the effect of a statute. Of course, the court has the power to alter it as it has in fact once done. We think, however, that it is by no means certain that the court at this late day can so change the rule as to give life and legality to the steps already taken and to itself jurisdiction.

[3] In any event we would not deem it advisable to change an apparently reasonable and salutary rule, which has been considered, explained, and enforced by the court in numerous decisions, of which all the members of the bar by the exercise of reasonable care and diligence can readily inform themselves, in response to the mere allegation of a defeated litigant that its enforcement in his case will work an injustice.

The defendant's petition to establish the truth of its exceptions is dismissed, and the papers in the original case are ordered to be returned to the superior court for Providence county.

BRANIGAN v. LEDERER REALTY CORP. et al. (two cases). (Nos. 5011, 5012.)

(Supreme Court of Rhode Island. July 3, 1917.)

LANDLORD AND TENANT §164(1)—INJURIES TO TENANT—LIABILITY OF LANDLORD.

Where, in an action against a landlord for injuries to a tenant from a fall due to the rolling of a step nailed on the roof and on which she placed her foot in order to throw out garbage, it appeared not only that the lease required defendant to keep the roof in proper repair, and that defendant or its agents knew of the use made of the roof and the step, but that the step had been moved by defendant's agent on the day of the accident, and then replaced without being nailed down, defendant was liable, regardless of whether plaintiff was on the roof by the invitation, express or implied, of defendant, or was a mere licensee, and though the step and the door leading to the roof had been placed

there by the owner from whom defendant leased the entire building.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630, 634-637.]

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Actions by Mary Branigan and William B. Branigan against the Lederer Realty Corporation and others. Verdict for plaintiffs, and the defendant named excepts. Exceptions overruled, and cases remitted, with directions.

Philip S. Knauer and George Hurley, both of Providence, for plaintiffs. J. Jerome Hahn and Raymond P. McCanna, both of Providence, for defendant.

PER CURIAM. The above-mentioned cases by order of trial court were tried together, and resulted in a verdict against the Lederer Corporation for the plaintiff Mary Branigan for \$3,600, and for William B. Branigan, her husband, for \$1,800, which latter verdict by action of the trial court was reduced to \$600. The cases were brought to this court by the defendant, the Lederer Corporation, by bill of exceptions, in which objections are raised to various rulings of the court, and more particularly to the refusal of the trial court to direct a verdict in favor of the said Lederer Corporation, and also to the refusal to grant a new trial.

After a review of the record in this case and upon consideration of the testimony, we are of the opinion that there is sufficient evidence to sustain the finding of the jury and the subsequent approval thereof by the trial court.

The evidence shows that the roof in question was the only place in the nature of a yard which the plaintiffs, who were the occupants of the second story tenement, had. On this roof were board walks and clotheslines running from one building to another, which had been there for a number of years before plaintiffs occupied the tenement and had been used by former tenants. Some time prior to the occupancy of the tenement by the plaintiffs a window looking out upon the roof and through which tenants had formerly passed in order to go onto the roof had been changed into a door, and a wooden step had been nailed to the side of the house between the threshold of the door and the roof to make the approach to the roof more convenient. There is some question whether the door and step were placed there by the plaintiffs' landlord, or by the defendant, the owner of the building from whom the plaintiffs' landlord leased the entire building, with the exception of the roof, which was reserved to the defendant. By the terms of the lease it was the duty of the defendant to keep the roof in proper repair. Assuming that the defendant did not open the door in

question and build the step, it is clear that the defendant or its agents knew of the use made of the roof and the door and step referred to. In attempting to go onto the roof in order to throw some garbage into a garbage can, which was kept there by the plaintiff, she placed her foot on the step referred to. The step rolled out from under her and she had a severe fall. There was evidence which would warrant the finding that this step, which had been securely nailed to the side of the house, had been moved on the day of the accident by the agent of the defendant, in order that he might examine the roof for leaks, and that it had been replaced and left unattached to the house. If this is the fact, and the plaintiff was injured as a result of the interference of the defendant's servant with the step, the jury were warranted in finding that defendant was liable, and it is not material whether the plaintiff was on the roof by the invitation, express or implied, of the defendant, or even if she were a mere licensee. She was lawfully on the roof, and as held in the case of *Knowles v. Exeter Mfg. Co.*, 77 N. H. 268, 90 Atl. 970 (1914):

"The defendant, having assumed to act toward a known situation, was bound by the usual rule of reasonable conduct."

The statement of the law to the jury by the trial judge was clear and correct, and the damages awarded are not excessive.

We find no reversible error in the case.

The defendant's exceptions are overruled in each case, and the cases are remitted to the superior court, with direction to enter judgment for the plaintiff Mary Branigan upon the verdict and to enter judgment for the plaintiff William B. Branigan upon the verdict as reduced by the remittitur.

(40 R. I. 463)

REDDINGTON v. GETCHELL. (No. 4926.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. NEGLIGENCE ⇨136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action for death of plaintiff's intestate from overturning of his automobile in a gully on defendant's land, whether deceased was negligent in driving his automobile outside the traveled part of the highway on defendant's land was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 286, 333.]

2. TRIAL ⇨140(1)—COURT AND JURY.

Credibility of witnesses is for the jury, and not for the judge presiding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334.]

3. TRIAL ⇨171—DIRECTING VERDICT.

A justice may not direct a verdict in accordance with what he thinks is the preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 396.]

4. TRIAL ⇨168—DIRECTING VERDICT.

Although on motion for new trial a judge may, and should, consider the credibility of witnesses and preponderance of evidence, he should

direct a verdict only when there is no legal evidence justifying a contrary verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380.]

5. NEGLIGENCE ⇨136(15) — QUESTIONS FOR JURY.

In action for death of plaintiff's intestate from overturning of his automobile by a gully on defendant's land, the extent of the permission or invitation of defendant and his predecessor in title for the public use of a street on his land, near or on which deceased was driving, was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 319.]

6. NEGLIGENCE ⇨32(1) — DUTY OF LAND-OWNER.

If the owner of land by invitation, express or implied, induces a person to come upon his land and to cross over it, he must use ordinary care to keep that part of the land, to which such person is invited safe for the passage.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 42.]

7. NEGLIGENCE ⇨136(15) — QUESTIONS FOR JURY.

In action for death of automobile driver, whose automobile was overturned at night in gully on defendant's land, whether defendant's implied invitation to use the highway on his land was limited to daytime because, by ordinances, an adjacent parkway was open to the public only between sunrise and sunset was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 319.]

Exceptions from Superior Court, Providence and Bristol Counties; John W. Sweetney, Judge.

Action by Mary E. Reddington against Waldo I. Getchell. Verdict for defendant, and plaintiff excepts. Exceptions sustained in part and overruled in part, and case remitted.

Reargument denied 102 Atl. 88.

Tillinghast & Collins, Easton, Williams & Rosenfeld, and Charles R. Easton, all of Providence, for plaintiff. Mumford, Huddy & Emerson and Charles C. Mumford, all of Providence, for defendant.

SWEETLAND, J. This is an action brought under the statute to recover damages for the death of the plaintiff's son, Joseph Reddington, which death is alleged to have been caused by the wrongful act of the defendant. The case was tried before a justice of the superior court sitting with a jury. At the conclusion of the evidence said justice directed a verdict in favor of the defendant. The case is before us upon exception to said action of the justice and upon exceptions to certain rulings of the justice made in the course of said trial.

It appears that the plaintiff's son Joseph Reddington was, on and before the early morning of September 30, 1913, the driver of an automobile for hire in the city of Providence. The plaintiff claims that there was a way, known as "Bangor street," laid out over the defendant's land in said city, and that the defendant, for a long time previous to said September 30, 1913, had invited the

public to use said way. The alleged wrongful act of the defendant consisted in negligently permitting a gully or deep depression to remain across the easterly portion of said way, which gully extended beyond the line of said way and on other land of the defendant. The existence of said gully was unknown to Joseph Reddington. While said Joseph was driving along said way, or across land of the defendant to the east of and near said way, shortly after midnight on September 30, 1913, the wheels of his automobile went into said gully, said automobile was overturned, and he was killed. It appears that said way known as Bangor street was 50 feet in width. At the southerly end it intersected, but did not cross, Chalkstone avenue, a public highway of the city of Providence: from Chalkstone avenue it ran northerly for about 250 feet to the north line of the defendant's land, and thence was continued as Rosebank avenue. In the trial of said case and in the argument before us Rosebank avenue has been spoken of as part of a public park of the city of Providence known as the "Pleasant Valley Parkway." From such evidence as was introduced in the superior court and certified to us it appears that said Rosebank avenue for a considerable distance beyond the northerly line of the defendant's land was a highway of the city of Providence. Said Rosebank avenue from its southerly end, at the north line of the defendant's land, proceeds upon a curve toward the northwest and then westerly in a straight line to River avenue, a highway of the city of Providence. There are other highways of said city which run into Rosebank avenue from the north. Just before the occurrence which caused his death Joseph Reddington with five passengers in his automobile drove said automobile from the village of Centredale through some highway and came upon Rosebank avenue, intending to go to Chalkstone avenue, and proceeded around said curve in Rosebank avenue toward Bangor street. Said accident occurred just after the automobile came upon the land of the defendant. The defendant claims that while on said curve Joseph Reddington left the roadway and drove upon the land of the defendant to the east of the way. The plaintiff claims that Joseph Reddington came upon the land of the defendant within the roadway of Bangor street, and that said automobile was overturned by reason of its wheels going into said gully on Bangor street. The ordinance of the city of Providence with reference to "Parks" was introduced in evidence. Section 1, c. 410, of the Ordinances of 1909, now section 7, c. 40, of the Ordinances of 1914, is as follows:

"Sec. 7. That portion of the Pleasant Valley Park and parkway, which extends from Oakland avenue to Academy avenue, shall be open to the public only from sunrise until sunset each day."

Said justice in directing a verdict in favor of the defendant said:

"I will grant the motion on two grounds—the ground that the ordinance rendered the passing through the parkway between sunset and sunrise illegal and therefore there can be no implied invitation on the part of the defendant to travel over that part of Bangor street. Also on the ground of contributory negligence of the plaintiff in driving his automobile out of the traveled part of the highway on to the sidewalk."

[1-4] We have frequently held that a verdict should not be directed for a defendant if on any reasonable view of the testimony the plaintiff can recover. *Baynes v. Billings*, 30 R. I. 53, 73 Atl. 625. After an examination of the evidence we are of the opinion that said justice was not warranted in directing a verdict upon the second ground stated by him. There was testimony upon which the jury might find that at the time the wheels of the automobile first went into said gully Joseph Reddington was driving his automobile in the traveled part of Bangor street, and not on the sidewalk thereof or on land east of the sidewalk. No witness except two of the women who were passengers in the automobile testifies that he was present at the time of the accident. Certain witnesses for the defendant, who examined the ground near said gully after the accident, testified that they saw wheel tracks to the east of the roadway, which wheel tracks they inferred were made by said automobile. From this testimony and from the position of the automobile in the gully after the accident an inference might be drawn that just before the accident the automobile was being driven outside the traveled part of Bangor street. Apparently in the opinion of said justice these circumstances produced a preponderance of the evidence in favor of the defendant upon that issue. Witnesses for the plaintiff, however, testified to their examination of the place shortly after the accident, and state that wheel tracks in the roadway which ran from the north to the edge of the gully clearly appeared to them to have been made by the automobile lying in the gully. It was for the jury to say from the testimony whether wheel tracks of the automobile were visible upon the ground, and to determine what inferences, if any, might properly be drawn from their existence and location. There was also before the jury the testimony of two witnesses who were in the car at the time of the accident, Rose Marner and Jennie Sief. These witnesses testified that the automobile was in the roadway at the time of the accident, and that they could see the road extending ahead of them in front of the automobile. At the trial the defendant attacked the testimony of Rose Marner on the ground that she had made statements, soon after the accident, which were inconsistent with testimony given by her at the trial. The defendant also criticized the testimony of Jennie Sief, and claimed that her state-

ments regarding the accident were exaggerated and unreliable. Apparently said justice did not place much value upon the testimony of either of these witnesses. The question, however, as to the credibility of witnesses is, in the first instance, for the jury, and not for the judge presiding; nor is the justice warranted in directing a verdict in accordance with what he thinks is the preponderance of the evidence. Upon motion for a new trial made by a party who is dissatisfied with the verdict rendered by a jury, a justice who presided at the trial is justified in considering, and it is his duty to consider, the credibility of witnesses and what, in his view, is the preponderance of the evidence; if he believes the verdict to be unjust, he should set it aside and grant a new trial; he should not, however, direct a verdict upon such grounds, but only upon the ground that there is no legal evidence which would justify a contrary verdict. Under our Constitution and law, when the testimony is conflicting the questions of the credibility of witnesses and the preponderance of evidence must, in the first instance, be determined by a jury; as also they must be finally determined by a jury. *Carr v. American Locomotive Co.*, 31 R. I. 234, 77 Atl. 104, Ann. Cas. 1912B, 131.

[5, 6] We will now consider the first ground given by said justice for directing the verdict, and also the claims of the defendant with reference to his duty in the premises. There was evidence from which it might properly be found that Bangor street was laid out in the same manner as an ordinary public street in that locality, with a sidewalk slightly raised above the surface of the roadway, retained by a curbing of edgestones, with a paved gutter of regulation width; that its roadway had a hard, even-rolled surface, save that for a week or two before the accident said gully had extended into the roadway; that upon a post at the westerly corner of said street and Chalkstone avenue there was a sign of the same size as an ordinary street sign, with the words "Bangor Street" painted thereon; that said street had remained in that same general condition for about six years previous to the accident; that it was generally regarded as a public highway by persons having occasion to use it; that it had been constantly used, both by day and at night, by persons desiring to pass back and forth from Chalkstone avenue to the Pleasant Valley parkway and to sections of the city lying to the north of said parkway; that the defendant and his predecessor in title had never given notice to the public, by signs or otherwise, that Bangor street was a private way, or that free passage over it was not permitted by the owners. The existence of some of these conditions testified to by the plaintiff's witnesses was denied by the defendant. The evidence presented proper issues to be submitted for the determination of the jury as to the extent of the permission or the invitation given by the

defendant and his predecessor in title for the public use of said Bangor street. The defendant had been the owner of the premises for more than a year before the accident, and he must be held to know of the public use which was being made of said street by day and at night. If the evidence presented by the plaintiff which we have set forth above was believed by the jury, it may be found that the owner knew that the condition in which he maintained this way created the natural belief in the public that it was invited to use the way. From these circumstances there may be found an implied invitation from the defendant to the public to continue the use of Bangor street in the manner in which it had been used for six years at least before the accident. If the owner of land by invitation, express or implied, induces a person to come upon his land and to cross over it, he must use ordinary care to keep that part of the land, to which such person is invited, safe for the passage. *Sweeny v. Old Colony R. R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22; *Furey v. N. Y. R. R. Co.*, 67 N. J. Law, 270, 51 Atl. 505; *Barry v. N. Y. R. R. Co.*, 92 N. Y. 280, 44 Am. Rep. 377.

[7] Said justice must have held as a matter of law that because, by the ordinances of Providence, the Pleasant Valley parkway was open to the public only between sunrise and sunset any implied invitation of the defendant for the public use of Bangor street was limited to the same period. We do not agree with that conclusion of the justice. Whatever may have been the status of a person while he was in said parkway between sunset and sunrise, the duty of the defendant would remain unchanged to use reasonable care for the safety of a person whom he had expressly invited after sunset and before sunrise to pass out of said parkway onto Bangor street or to pass across Bangor street and into said parkway. An implied invitation may be as broad and unrestricted as any which might be expressed, if from the circumstances it appears to be unlimited. The invitation which the law might imply in this case would arise because it was found that Bangor street had for years been maintained by its owners with the appearance of an open public highway at night as well as in the daytime; that the defendant knew that said way was being used at all hours by many persons who desired to pass across said parkway to the highways at the north of it; that the defendant from these circumstances and by his acquiescence in such unlimited use led the public to believe that they were invited to so use it. If such conditions are found—and nothing is found in the conduct of the defendant to limit the invitation to be implied therefrom—a person who came upon said way in response to such implied invitation is in no different position from one who has been expressly invited by the defendant.

The defendant claims both that the evidence offered by him and the circumstances shown to exist there rebut the implication of invitation and also if any implied invitation could be found it was clearly restricted to the hours when the parkway was open to the public. Such evidence raises issues which should have been submitted to the jury.

As the evidence stands before us, however, the ordinance of the city of Providence with regard to Pleasant Valley parkway is immaterial. It appears that Bangor street did not extend from Chalkstone avenue to a drive of the Pleasant Valley parkway, but to Rosebank avenue, a public highway. The defendant introduced evidence which shows that in 1906 one Frederick E. Shaw entered into a contract with the city of Providence; one of the provisions of said contract was that said Shaw should cause to be conveyed to the city a certain strip of land shown on a plat annexed to said contract "for highway purposes"; that in compliance with said agreement on the part of said Shaw the Valley Company, a corporation of which said Shaw was president, did convey to the city of Providence said strip of land. One of the provisions of this deed with reference to said strip was as follows:

"Said strip is hereby conveyed for the especial purpose of being used and improved as a highway and for no other use or purpose whatever."

Said deed was approved as correct in form and satisfactory by the assistant city solicitor of Providence, and said deed was duly recorded. It appears by plats introduced in evidence that said strip so conveyed to the city of Providence for a highway is that part of Rosebank avenue which extends from the north line of Bangor street about 700 feet to another portion of Rosebank avenue which runs into River avenue, a public highway. This is the only evidence with relation to Rosebank avenue which we find among the papers certified to us. It does appear in the transcript of evidence that the defendant introduced and read to the jury a resolution of the city council dedicating certain lands for park and parkway purposes and providing for the care of Pleasant Valley parkway, and also introduced certain plats showing the extent of Pleasant Valley parkway. By stipulation of counsel said resolution and plats were withdrawn from the papers in the case at the close of the trial. Whether the resolution and plats so withdrawn throw light upon the present condition of Rosebank avenue we do not know. If Rosebank avenue is a public highway running through said park the first ground upon which said justice directed a verdict has no foundation in fact. If said Rosebank avenue is not a public highway, but a part of said Pleasant Valley parkway, from the facts which the jury might find from the testimony, it cannot be said as a matter of law that any im-

plied invitation of the defendant for the public use of Bangor street was limited by the terms of the ordinances of the city of Providence with reference to parks.

After examination we find no merit in any of the other exceptions taken by the plaintiff. The plaintiff's exception to the direction of a verdict is sustained; her other exceptions are overruled.

The case is remitted to the superior court for a new trial.

(40 R. I. 402)

NORMAN et al. v. PRINCE et al. (No. 387.)

(Supreme Court of Rhode Island. June 27, 1917.)

1. WILLS \Leftrightarrow 540—CONSTRUCTION—RESIDUE OF INCOME.

A will directing that trustees pay the sum of \$20,000 annually to testator's wife and "divide the residue of said net income * * * of said trust estate into nine equal shares" showed that it was testator's intent that payment of the income to his wife should be personal to her, and should not continue to her estate; and hence, on decease of the widow, the annual payments from the income to which she would have been thereafter entitled had she lived followed the destination of the several shares of the residuary income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1164, 1302-1309.]

2. WILLS \Leftrightarrow 693(1)—CONSTRUCTION—POWER OF DISPOSITION.

A provision of a will that payment of a share of the residuary income should be made "as the trustees hereof for the time being in the uncontrolled absolute discretion or pleasure of said trustees shall see fit" created a valid and absolute power of disposition; the word "trustee" being descriptive, and not controlling as to his character in the disposition of such share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1655.]

Case Certified from Superior Court, Newport County.

Suit by Guy Norman and another, trustees, against Abby Norman Prince and others, for construction of will and for instructions. Case certified. Instructions according to opinion.

Baker & Spicer, of Providence, for complainants. Elliot G. Parkhurst and Edwards & Angell, all of Providence (Walter F. Angell, of Providence, of counsel), for certain respondents. James B. Littlefield, of Providence, guardian ad litem of minor defendants. Royal H. Gladding, of Providence, representative of contingent interests. Robert T. Burbank, of Providence, for respondent Dorothy P. N. Metcalf.

SWEETLAND, J. This is a suit in equity brought by the trustees under the will of George H. Norman, late of Newport, for the construction of said will and for instructions.

The questions involved relate to the construction of the provisions contained in the twelfth clause of said will. By said clause the testator devises and bequeaths his re-

siduary estate to his son George H. Norman, Jr., and his heirs in trust. By the terms of the trust the trustee is directed to dispose of the net income of the trust estate as follows:

(1) To pay from said net income the sum of \$20,000 annually to the testator's wife, Abby D. K. Norman, in equal quarter yearly installments; (2) to divide the residue of said net income into nine equal shares, and as often as once in six months to pay one of said shares to each of eight of the testator's nine children, excluding from said provision the testator's son Hugh K. Norman, and upon the decease of each of said eight children to pay the share of income to which said child would have been entitled as said child shall by will appoint, in default of appointment, to the lawful issue of said child, and in default of appointment and issue, to the testator's then next of kin, omitting and excluding, however, the testator's son Hugh and his descendants, if any; and (3) to pay the remaining or ninth share of income in whole or in part at such time or times as the trustee shall select to testator's said son Hugh or to Hugh's wife or to any child or children of Hugh or to any other person or persons whomsoever, as the trustee for the time being in the uncontrolled absolute discretion or pleasure of said trustee shall see fit.

In said will the testator directs that upon the decease of the survivor of his widow and all of his nine children and when the youngest living grandchild shall have reached 21 the whole principal of said trust shall be divided by the trustee into eight equal shares, said shares to be set apart so that they shall appertain or relate to said eight children, one share to each child, each share so appertaining to each child to be paid absolutely and in fee simple, free from every trust, as said child may by will appoint, in default of appointment, to the lawful issue of said child, and in default of appointment and issue, to the testator's then next of kin; the descendants of said Hugh, however, being specifically excepted.

It was further provided in said will that said George H. Norman, Jr., might at any time or times appoint one or two persons to act as trustee or trustees under said will, both with him and after he should have ceased to act as trustee by death or otherwise, and they and the survivor of them and every other person appointed under the provisions of said will should have every right, power, privilege, and authority conferred by said will on George H. Norman, Jr., as trustee.

George H. Norman, Jr., duly qualified and acted as sole trustee under said will until February 13, 1908, upon which date, in accordance with the provision of the will, he duly appointed his brothers Guy Norman and Maxwell Norman as trustees to carry out said trust. On said February 13, 1908, the said George H. Norman, Jr., died, and since that date the said Guy and Maxwell Norman, the complainants here, have acted and

are now acting as trustees. On October 30, 1900, the said Hugh K. Norman died, leaving no issue. His widow, who was the sole beneficiary under his will, and who was duly appointed administratrix with the will annexed of his estate, individually and as such administratrix has executed a release of all claims to the estate of the testator, George H. Norman. Abby D. K. Norman, widow of George H. Norman, the testator, died on September 6, 1915. Certain of the grandchildren of the testator have not yet reached the age of 21 years.

The present trustees and their predecessor as trustee, said George H. Norman, Jr., up to the time of the decease of the testator's widow made the annual payments from income to her in accordance with the provisions of the will, and also, as directed, paid the share of income to each of the eight children of the testator named in his will as aforesaid, the share of income of George H. Norman, Jr., being paid after his death to the appointees under his will; also said trustees distributed said ninth share of income from time to time in varying amounts and proportions with the knowledge, consent, and acquiescence of the defendants to the widow and children of the testator, including Hugh K. Norman and said George H. Norman, Jr., during their respective lives, and after their respective deaths to the widow and surviving children of the testator, to the widow of Hugh K. Norman, and to the appointees of income of said George H. Norman, Jr.

Upon the decease of the testator's widow the question arose as to the future disposition of the annual payments of \$20,000 to which she would be entitled if still alive, and also the question arose as to the possible invalidity of the provision of said twelfth clause of the will providing for the disposition of said ninth share of income. In their bill the trustees pray that their action in disposing heretofore of said ninth share of income in accordance with the directions of the will be approved, and they further pray that the court construe said will and determine the following questions: (1) To whom the annual payments of \$20,000 directed by the twelfth clause of said will to be paid "annually to my wife in equal quarter yearly installments" from "the net income, dividends, and profits of said trust estate" became payable (until the distribution of principal) upon the decease of the testator's widow, said Abby D. K. Norman; (2) what disposition the trustees are authorized and empowered to make (until the distribution of principal) of "the remaining [or ninth] share of the said nine shares or parts" of the income, dividends, and profits of said trust estate.

The first question involves a consideration of whether upon the decease of said Abby D. K. Norman the annual payments of income to which she would have been thenceforth entitled had she lived should: (a) Follow the destination of the several shares of income

directed by the testator to be divided from the "residue of said net income, dividends, and profits of said trust estate"; or (b) follow the estate of said Abby D. K. Norman and be payable as her intestate property to her next of kin; or (c) be deemed intestate property of George H. Norman and payable to his next of kin.

[1] In our opinion, upon the decease of the testator's widow the annual payments from the income of \$20,000 to which she would have been thereafter entitled had she lived followed the destination of the several shares of residuary income. The trustees by the twelfth clause of the will are directed to pay "the sum of \$20,000 annually to my wife" and "to divide the residue of said net income * * * of said trust estate into nine equal shares." It was the obvious intent of the testator that the payment of income to his wife should be personal to her, for her comfort and support during her life, and should not continue to her estate. The testator directed the trustees after the annual payment of \$20,000 from the net income of the trust estate to his widow to divide the residue of said net income into nine equal shares. The residue intended is all that part of the net income which shall remain annually after the payments directed have been made to the testator's widow.

After the death of the widow the annual payment to her of \$20,000 ceased, and said \$20,000 each year falls into and should itself be regarded as part of the residue of said net income after all payments to the widow have been made in accordance with the provisions of the trust. In *Weston v. Weston*, 125 Mass. 268, where the residue was given to trustees to pay an annuity of \$1,000 to N. and L. during the continuance of the trust, it was held after L.'s death during the continuance of the trust that the annuity was not payable to her administrator. The court said:

"The clause creating it [the annuity], being without words of inheritance or succession, must be construed as giving an annuity during * * * the term of the trust, if (L.) should live so long, and, if she should not, for her own life only."

In *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207, where a testator had directed that "five hundred dollars per year for ten years be paid over to my niece A.," it was held that upon the death of A. within the ten years her administrator was not entitled to further payment, the court saying:

"As there are no words of inheritance or succession in the bequest, it must be construed as giving an annuity for ten years, if the annuitant should [live] so long; and if she should not, for her life only."

See *Butler v. Butler*, 40 R. I. —, 101 Atl. 115; *Wakefield v. Small*, 74 Me. 277; *Sandford v. Blake*, 45 N. J. Eq. 248, 17 Atl. 812.

[2] As to the second question presented by the bill, we are of the opinion that the provision relating to the disposition of the ninth

share of income is valid and amounts to the creation of an absolute power of disposition. The will provides for the payment of said ninth share of the residuary income "as the trustee hereof for the time being in the uncontrolled absolute discretion or pleasure of said trustee shall see fit." Said provision imposes no trust or obligation with respect to the disposition of said ninth share of income. By the twelfth clause of said will the testator's residuary estate is given to his son George H. Norman, Jr., in trust. As trustee the said George H. Norman, Jr., or the trustees for the time being, are directed to pay \$20,000 of the net income of said trust estate annually to the widow, to make division of the residue of said income into nine shares, and to pay eight of said shares to persons definitely designated. From the very broad language of the provision as to the disposition of the said ninth share of net income the testator's intent can readily be found not to bequeath said share in trust for indefinite beneficiaries; but the provision should be regarded rather as a bequest of said share to the trustees with an arbitrary power of disposition. The use of the words "trustee" and "trustees" in this clause of the will is not controlling as to his or their character in the disposition of said ninth share, but said words must be regarded as descriptive. In *Gibbs v. Rumsey*, 2 Ves. & B. 294, the testatrix bequeathed certain estate, real and personal, to two persons named upon trust to sell; and, after making certain bequests out of the money derived from such sale the testatrix, "proceeded thus, 'I give and bequeath all the rest and residue of the moneys arising from the sale of my estate and all the residue of my personal estate after payment of my debts, legacies and funeral expenses and the expenses of proving this my will unto my said trustees and executors (the said Henry Rumsey and James Rumsey) to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient.'" The Master of the Rolls held that this provision created a purely arbitrary power of disposition according to a discretion which no court can either direct or control, and not a trust for an indefinite purpose. Although the testator in the case at bar has coupled this power of disposition of a portion of the income of the trust estate with certain trust provisions, we feel warranted in construing this provision as we have in accordance with the testator's obvious intent. See 5 *Harvard Law Review*, 389.

We accordingly approve the action of George H. Norman, Jr., and of the complainant trustees in the disposition which he and they have made of said ninth share of income. We instruct said trustees that the net income of the trust estate arising after the death of the testator's widow shall be divided into nine equal shares, that eight of

said shares are to be disposed of in accordance with the provisions of said twelfth clause of the will, and that the remaining share is held by the trustees to be disposed of by them in their discretion in accordance with the power of disposition given to them by the testator. We also find that the provision relating to said power of disposition is valid.

On July 2d the parties may present to us a form of decree in accordance with this opinion.

(40 R. I. 348)

MCGINN v. B. H. GLADDING DRY GOODS CO. (No. 5024.)

(Supreme Court of Rhode Island. June 18, 1917.)

1. LANDLORD AND TENANT ⇨47—CONDITION OF LEASE.

Where the lessor of a stable, prior to execution of the lease, stated that the lessee dry goods company need not take the stable unless it was high enough to accommodate any delivery wagons, the lessor, 15 days later, on execution and delivery to him of an unconditional lease, might assume that the letting was complete and unconditional.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113.]

2. LANDLORD AND TENANT ⇨231(6)—CONDITION OF LEASE—SUFFICIENCY OF EVIDENCE.

In an action for rent by the lessor of a stable, evidence held insufficient to show that the lease was executed and delivered on condition that the stable entrance was high enough to accommodate delivery wagons ordered by the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 933, 934.]

3. WITNESSES ⇨37(1)—KNOWLEDGE—EXECUTION OF LEASE.

In an action for rent, where the officer who signed the lease for defendant corporation died before suit, testimony of a witness not present at execution and delivery of the lease attempting to show that the person who signed the lease signed in reliance on statements previously made by the lessor at an interview between him and the witness in the presence of the person who signed was incompetent and inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80, 83, 87.]

4. EVIDENCE ⇨441(4)—PAROL EVIDENCE AFFECTING WRITING—LEASE.

In an action for rent of a stable, where there was an unconditional delivery of the lease by the lessee corporation to the lessor, evidence, on behalf of the lessee, relating to statements made by the lessor prior to execution and delivery of the lease, tending to show that the lessee's obligation was conditional, was inadmissible as varying a writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1736-1744, 2037.]

5. LANDLORD AND TENANT ⇨28(1)—MISREPRESENTATION BY LANDLORD.

Where the lessor of a barn said that he would "guarantee this barn is high enough to carry any ——— delivery wagon that ever was built," the statement was not a misstatement of fact within the lessor's knowledge, he never having seen delivery wagons ordered by the lessee dry goods company, and the agents of the dry goods company negotiating the lease knowing that he had no more actual knowledge

of them or their height than they had; the lessor's remark being merely dealer's talk.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 82, 83.]

6. LANDLORD AND TENANT ⇨109(5) — SURRENDER BY TENANT.

The mere sending of the key to a leased stable by the lessee to the lessor without more was not a surrender by the tenant and acceptance by the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 865.]

7. LANDLORD AND TENANT ⇨109(4) — SURRENDER BY TENANT — ACCEPTANCE — RELET-TING.

Where the lessor of a stable, after the lessee sent the key to him, relet to a third party without notice to his lessee, without knowledge on the lessee's part, and without its assent, the reletting operated as an acceptance of a surrender by the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 364.]

8. LANDLORD AND TENANT ⇨232—RENT—INTEREST.

A lessee liable for rent is liable for interest at the rate of 6 per cent. from the date of judicial demand, that is, the date of service of the writ; there having been no prior demand.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 935-939.]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Albert T. McGinn against the B. H. Gladding Dry Goods Company. There was a decision for defendant, and plaintiff excepts. Exceptions sustained, and case remitted to superior court, with direction to enter judgment for plaintiff in a sum stated, with interest.

Cooney & Cahill, of Providence, for plaintiff. Claude R. Branch and Edwards & Angell, all of Providence, for defendant.

PARKHURST, C. J. This is an action for breach of a covenant to pay the rent covenanted and agreed to be paid in a certain lease from the plaintiff to the defendant corporation. The lease in evidence bears date June 11, 1907, but appears to have been signed by the parties on June 26, 1907, and to have been acknowledged by the plaintiff before a notary public June 26, 1907, and to have been duly recorded in Providence on July 15, 1907. The premises are described as "a certain stable at rear of No. 386 Fountain street, in said city of Providence, comprising twenty (20) stalls and one (1) box stall and all the floor space above the same." The lease is in common form, containing the usual covenants, and is for the term of three years from July 1, 1907, to July 1, 1910. The amended declaration in the first count alleges nonpayment of rent in the sum of \$1,158; in the second count, alleges breach of the covenant to keep the interior of the premises in repair and claims damages therefor. No evidence in support of this second count was offered, and it is therefore immaterial.

Defendant's first plea to first count says that the lease is not its deed. Defendant's second plea to first count alleges payment of rent up to July 12, 1907, and a surrender of the premises to the plaintiff and his acceptance thereof on the 12th day of July, 1907. The suit was brought after the expiration of the term, by writ of summons dated and served March 31, 1911. Thereafter, jury trial having been waived, the case was tried before the presiding justice of the superior court in Providence without a jury September 27, 1916, upon the issues tendered by the first count of the amended declaration and the pleas thereto. September 29, 1916, the presiding justice filed his decision, in favor of the defendant, and thereafter in due time the plaintiff prosecuted his bill of exceptions to this court, and the case is now before us upon said bill of exceptions. The exceptions alleged in the bill are six in number. Exceptions first to fifth, inclusive, are based upon the admission of evidence offered by defendant and objected to by the plaintiff. Exception sixth is based upon the decision of the justice in favor of the defendant.

It appeared in evidence that negotiations between the plaintiff and certain officers representing the defendant corporation were begun some time in June, 1907, looking to a lease of the plaintiff's stable above described to the defendant, and the plaintiff put in evidence a certified copy of the recorded lease above described. None of the witnesses on either side were able to fix the exact date of such negotiations, but all admitted that they were in June, 1907. We are left to infer that these negotiations were about the 11th day of June, 1907, since that is the first date appearing in the lease, which was admitted to have been signed and delivered by the parties. It also appears that the lease was prepared by plaintiff's attorney and sent to defendant by plaintiff; and it appears by said lease that the same was signed by both parties and acknowledged by the plaintiff June 26, 1907. It is not disputed that the lease was signed by the defendant's proper officer, duly authorized, that he held it in his possession about a week before returning it to plaintiff, and that it was delivered to the plaintiff by mail; but the defendant claimed and attempted to prove that, although the lease is absolute on its face, and was delivered to the plaintiff himself, it was nevertheless executed and delivered upon the condition that it was not to be binding upon the parties, unless it later appeared that the stable would permit of the entry therein of certain new delivery wagons which the defendant had ordered to be built for it, and as to the exact height of which at the time of the negotiations in June, 1907, the defendant was not fully advised. It appears that certain officers and employes of the defendant, including William E. Aldred, then president of the defendant and who afterwards executed the lease, and Arthur L. Aldred,

then vice president, and the defendant's superintendent and delivery clerk, went to inspect the plaintiff's stable, and there met the plaintiff, presumably about June 11, 1907; that they examined the premises very carefully, and found that the location and size of the stable and its general accommodations were quite suitable for their purpose; and they admit that they needed to use the stable at once and were very anxious to get it. It is claimed by the defendant's witnesses and denied by the plaintiff that at that time mention was made of the fact that new delivery wagons had been ordered and not yet received, and that it was a question whether or not the entrance to the stable was high enough to admit of the entry of these new wagons. And the defendant's witnesses further claim that at that time the plaintiff assured them, emphatically, with certain profane words, that he would "guarantee this barn is high enough to carry any ——— delivery wagon that ever was built." And Mr. Arthur L. Aldred testifies that after considering all other phases of the situation he (A. L. Aldred) said, "All right; under those conditions, barn is high enough to carry delivery wagons, we will take it;" and that McGinn then said, "All right, you don't have to take it, if it isn't, because it wouldn't be any good to you." All of this is denied by the plaintiff. This interview is the only interview which the evidence shows to have taken place between the plaintiff and the defendant's officers with reference to the negotiations for a lease and prior to the execution thereof and its delivery to the plaintiff by mail on or about June 26, 1907. The admission of the testimony recited above from several witnesses in support of the defendant's claim that the lease was executed and delivered by the defendant upon condition as above set forth was objected to on behalf of plaintiff, and exceptions thereto were duly taken, and these form the basis of exceptions first to fifth, inclusive, in the bill of exceptions.

The evidence shows that the defendant was in great need of this stable, and that by its agents and servants it took possession of the stable immediately after the above interview to clean up and make repairs and placed several horses in the stable without waiting for the execution of a lease; that thereafter on the 26th of June, 1907, the lease without any condition was executed and acknowledged by plaintiff, and was executed by defendant and delivered to plaintiff as above shown, and that, without any protest or mention as to the absolute and unconditional terms of the lease, the defendant continued after the execution and delivery of the lease to occupy and use the premises for several horses and at least one wagon; that nothing was said at the time of execution and delivery by defendant or any one on its behalf to plaintiff about any conditional execution and delivery. It thus appears that some two

weeks elapsed between the interview on or about June 11, 1907, and the execution and delivery about June 26, 1907, during which time, for all that appeared to the plaintiff, the defendant might have ascertained that the height of the stable entrance was sufficient for the entry of the new wagons. There is nothing to show that at the time when the unconditional lease was executed and delivered between the parties, the plaintiff had any idea that the delivery then made by the defendant was supposed by the defendant to be conditional. The talk about the height of the delivery wagons was preliminary. It was within the defendant's power to have ascertained their exact height and to have informed itself in the time which intervened whether the stable entrance was high enough to admit them. The plaintiff had no knowledge or means of knowledge as to the height of the wagons.

[1] Assuming that the plaintiff in fact said on or about June 11, 1907, all that the defendant's witnesses testified, plaintiff might, on June 26, 1907, upon the execution and delivery to him of the unconditional lease, assume that the letting was complete and unconditional. There was no meeting of the minds of the parties upon the subject of conditional letting at the time of the execution and delivery of the lease. It further appears that defendant continued to occupy the stable with horses and at least one wagon after the execution and delivery of the lease up to some time in July or August, 1907, which does not definitely appear. It further appears that at some date not definitely fixed between the 10th and 15th of July, 1907, one of the new delivery wagons arrived in Providence, and that on such arrival an attempt was made to put the new wagon into the stable, and it was found after several trials that the height of the entrance was not sufficient to allow the wagon to enter; that thereupon the representatives of the defendant, Mr. A. L. Aldred, Mr. Steed, the superintendent, and Mr. Joslin, superintendent of delivery, who had been present at the stable when it was attempted unsuccessfully to place the new wagon therein, went back to the store of the defendant, and talked the matter over with Mr. W. E. Aldred, president, and decided that they could not use the stable for the new wagons; that within a day or two afterward, Mr. A. L. Aldred and Mr. Steed again went up to the stable and saw the plaintiff there and told him they could not get the new wagons into the stable, and so that the stable would be useless to the defendant, and they would have to give it up. Both Aldred and Steed in substance testified that the plaintiff said:

"That is all right. * * * I don't ask you to take anything * * * that you can't use. * * * That will be all right."

It further appears that the stable was at that time, and had been since some time in June, in continuous use by the defendant, as

above set forth, for its horses and one wagon; that this last interview was about the 15th day of July, 1907; that the plaintiff went on that day to his attorney, who advised him to put his lease on record, and who wrote to the defendant, at plaintiff's request, a letter to the effect that he would hold the defendant on the lease; that the defendant did not at this last interview with plaintiff on or about July 15, 1907, at once abandon the premises, but continued to occupy them for a time which is nowhere definitely fixed by the evidence. It does appear, however, that the defendant without any letter or notice sent to the plaintiff the key of the stable by registered mail received by the plaintiff on the 8th day of August, 1907; that the plaintiff thereafter without further communication with or notice to defendant rented the stable for one month from September 1, 1907, for \$30; that October 21, 1907, he sent a bill to defendant for rent for three months, July 1–October 1, 1907, \$117.99, and gave defendant credit for amount received for September \$30, balance \$87.99. It does not definitely appear that this bill was ever received by defendant or that any reply thereto was ever made, but it does appear that this bill was not paid and nothing was ever paid under the lease by the defendant. It further appears that plaintiff again rented the stable to another party for five months, February–June, 1908, inclusive, and that he received therefor \$150; and that there was no further rental during the period covered by the lease.

Upon this state of the evidence the defendant claimed: (1) That then the delivery of the lease was conditional as above set forth; (2) that even if this were not so found, there was a surrender by the defendant and acceptance thereof by the plaintiff, in fact on or about July 15, 1907; or, if that were not found to be the fact, that in any event there was a surrender and acceptance by operation of law, by reason of the abandonment of the premises by the defendant, the sending of the key to the plaintiff August 8, 1907, and the subsequent letting of the property by the plaintiff on September 1, 1907, to a third party. The presiding justice of the superior court, in his rescript filed September 29, 1916, stated that he was of the opinion "that the preponderance of the evidence shows that the lease was never actually executed, but was to take effect only upon the condition that the premises proved to be high enough to admit the defendant's new delivery wagons. It turned out that the premises would not admit said new delivery wagons."

[2, 3] This court is not able to agree with this finding of fact. From our analysis of the evidence above set forth, we are unable to find that the lease was executed and delivered upon any such condition. It is not disputed that it was executed and delivered by a duly authorized officer of the defendant corporation, its president, William E. Aldred,

and sent by mail to plaintiff; that the lease, unconditional upon its face, was in defendant's possession for about a week before it was delivered to the plaintiff, and it is not claimed by any one that anything was said to the plaintiff at the time when it was delivered to him that any condition was insisted upon. It further appears that William E. Aldred died some time prior to the institution of this suit, and it does not appear that any person was present at the time he signed the lease except the witness to his signature. It was attempted to be shown through the witness Arthur L. Aldred that his brother signed the lease in reliance upon the statements theretofore made at the interview above recited (some time between June 11 and June 26, 1917) between the plaintiff and this witness in presence of said William E. Aldred. This testimony was objected to on behalf of plaintiff, on the ground that this witness, not being present at the execution and delivery of the lease, could not know whether or not the lease was delivered upon any condition. We are of the opinion that this evidence was incompetent and inadmissible, and should have been excluded. Exception third, which is based upon the admission of this testimony, is sustained.

[4] We are also of the opinion in view of our analysis of the testimony above that exceptions first, second, fourth, and fifth must be sustained. These all relate to the admission of evidence on behalf of the defendant over plaintiff's objection relating to the statements made by plaintiff at the interview in June prior to the execution and delivery of the lease. In view of what we have said as to the unconditional delivery of the lease on or about June 26, 1907, all these statements were immaterial and inadmissible in accordance with the general rule stated in *Abney v. Twombly*, 39 R. I. 304, 317, 97 Atl. 808 et seq., where it was attempted to prove by evidence of certain prior oral conversations and statements between the parties to a sale and conveyance of land that the grantor had in fact agreed to convey a certain exclusive right of way as appurtenant to the land afterwards conveyed, although the deed itself did not by its terms convey an exclusive right of way. As to the evidence this court said (39 R. I. 318, 97 Atl. 812):

"We think that all this evidence was immaterial and incompetent. The deed is in no way ambiguous on its face, and is to be construed without reference to any prior understandings or promises on the part of the grantor or his agent; and parol evidence as to such matters is not to be considered."

The general rule that contracts in writing shall not be modified by testimony relating to prior oral conversations, etc., is well stated in *Putnam Foundry & Machine Co. v. Canfield*, 25 R. I. 548, 552, 56 Atl. 1033, 1034 (1 Ann. Cas. 726):

"The rule invoked * * * is a most salutary one, and this court has uniformly adhered to it. *Gardner v. Chace*, 2 R. I. 112; *Sweet v. Stevens*, 7 R. I. 375; *Vaughan v. Mason*, 23 R. I.

348 [50 Atl. 390]; *Martin v. Clarke*, 8 R. I. 389 [5 Am. Rep. 586]; *Dyer v. Print Works*, 21 R. I. 63 [41 Atl. 1015]; *Watkins v. Greene*, 22 R. I. 34 [46 Atl. 38]; *Myron v. Railroad Co.*, 19 R. I. 125 [32 Atl. 165]. It is based upon the common sense theory that, 'when parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed or afterwards (as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties) is rejected.' 1 Greenl. Ev. (16th Ed.) § 275."

See, also, *Wolf v. Megantz*, 184 Mich. 452, 151 N. W. 622, Ann. Cas. 1916D, 1146 (lease); *Ryan v. Cooke*, 172 Ill. 302, 309, 50 N. E. 213; *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829 (lease); *Findley v. Means*, 71 Ark. 289, 73 S. W. 101; *Caufield v. Hermann*, 64 Conn. 325, 30 Atl. 52; *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380 (lease).

Very many cases have been cited by plaintiff's counsel in support of the same general doctrine as applied to leases and other conveyances of real estate, as well as to other contracts in writing. All of them have been examined; but it would unduly extend this opinion to cite and comment upon them. Those which we have cited are typical cases, and those of them which relate to leases are quite in point under the facts of this case.

This court is not unmindful that there are many cases relating to leases where it has been held admissible to prove by oral testimony that, at the time of delivery of a lease even though delivered directly to the party or parties thereto and not to a third party in escrow, there may be such a condition imposed by a contemporaneous oral agreement as will prevent the lease from becoming binding and effectual between the parties until such condition has been fulfilled, and that such condition may be proved by oral testimony, even though the lease upon its face is absolute. Several such cases have been cited on behalf of the defendant, in the attempt to support its first defense that the lease in the case at bar was delivered upon condition.

[5] *Hinsdale v. McCune*, 135 Iowa, 682, 113 N. W. 478, cited for defendant, was a suit for rent under a lease, where the defendant pleaded and was allowed to prove false and fraudulent misrepresentations of facts within the plaintiff's knowledge as to the suitability of the premises for defendant's business, made by plaintiff at the time of the letting as an inducement to defendant to take the lease. The proof of the fraud was ample and uncontradicted, and the case was determined upon this point. In the case at bar there was no fraudulent misrepresentation of facts within plaintiff's knowledge, which misled the defendant. If the plaintiff

said that he would "guarantee this barn is high enough to carry any ——— delivery wagon that ever was built" (as claimed by defendant's witnesses), that was not a misstatement of fact within plaintiff's knowledge. He had never seen the intended new delivery wagons of the defendant, and defendant's agents knew that he had no more actual knowledge of them or their height than they had. His remark, as shown by its very language, was no more than mere "dealers' talk" (*Handy v. Waldron*, 18 R. I. 567, 569, 29 Atl. 143, 144 [49 Am. St. Rep. 794]), not worthy to be relied upon by prudent business men. The case of *Hinsdale v. McCune*, *supra*, is not in point under the facts of the case at bar.

Metzger v. Roberts, 26 Ohio Cir. Ct. R. 675, was a suit for rent where defendant pleaded a contemporaneous parol agreement made at the time a written lease was executed, by which the lease was only to be used in organizing a corporation, and transferring the same to it, and was under no circumstances to be a valid lease between the original parties. And it was further pleaded that to allow the plaintiff to collect rent from defendant would be a fraud on him under the facts. Parol evidence of the oral agreement was held admissible both to prove a condition, and also to prove the fraud pleaded.

Donaldson v. Uhlfelder, 21 App. D. C. 489, was a suit to collect rent, wherein the defendant was allowed to prove that at the very time of the tender of the lease to him he refused to accept it unless upon the express promise of the lessor to make certain repairs; that the lessor then and there promised to make the repairs and the defendant then signed the lease and delivered it to lessor's agent, and that the repairs were never made; and it was held proper evidence and a good defense.

Cartledge v. Crespo, 5 Misc. Rep. 349, 25 N. Y. Supp. 515, and *Davis v. Jones*, 17 C. B. 625, were cases very similar in legal effect to the two previous cases. There was a contemporaneous oral agreement to repair, as a condition precedent to the validity of the lease, and as an inducement to get it signed. Some other cases are cited on the same point on behalf of the defendant. Such of them as are in any way applicable here are similar in effect to those above set forth. Some of them relate to contracts other than leases, and in some of them the delivery of the contract was expressly in escrow to a third person.

It is enough to say that while we do not now find it necessary to further discuss the cases cited by defendant on this point, we do find that such cases as support the proposition that a lease absolute on its face and actually delivered between the lessor and lessee may be shown by oral testimony to have been delivered upon a condition precedent not to become valid unless the condition is

fulfilled, are based upon facts showing that such oral agreement was in fact contemporaneous with the delivery and shown by competent evidence of witnesses knowing the fact to be so, and to be the inducement whereby the lessee at the time of the delivery was influenced to execute the lease. We are of the opinion that the evidence offered that the lease in this case was delivered upon a condition as claimed by the defendant fell far short of proving such conditional delivery, and was incompetent and inadmissible for the reasons above set forth. The plaintiff's exceptions based upon the admission of such evidence (exceptions first, second, fourth, and fifth) are therefore sustained.

[6] We now come to the question whether there was at any time a surrender by the defendant and an acceptance thereof by the plaintiff. From our analysis of the evidence above set forth, we are unable to find that there was any surrender in fact by the defendant in July, 1907, and consequently there could have been no acceptance of surrender at that time by the plaintiff. The defendant continued to occupy the premises for such purposes as it saw fit after it found that the new wagons would not go into the stable. There is no evidence to show just when it removed its horses and other property from the stable; and the only act of abandonment at a definite time appearing in the record was its sending of the key of the stable to the plaintiff by registered mail on or about August 8, 1907. It does not appear that defendant occupied the stable after that time. It does definitely appear that the plaintiff notified the defendant in writing on July 15, 1907, that he would hold it on the lease. The key was sent by defendant to plaintiff on August 8, 1907, without any letter or notice, and plaintiff kept the key. There is no evidence that plaintiff took possession of the stable or did any act in relation thereto, until September 1, 1907, when he rented it to a third party without notice to defendant. There is nothing to show that defendant in any way gave its consent to such letting, nor is there any conclusive evidence that the defendant ever received notice at any time that the stable was let to other parties.

The mere sending of the key to the plaintiff without more has been frequently held in this state not to be a surrender and acceptance; and this is in accord with the authorities elsewhere. *Smith v. Hunt*, 32 R. I. 326, 330, 70 Atl. 826, 35 L. R. A. (N. S.) 1132, Ann. Cas. 1912D, 971, and cases cited and cases *infra*.

The sole question now remaining is whether the reletting by the plaintiff on September 1, 1907, worked an acceptance of the surrender as a matter of law. This bald question as to the effect of a reletting by the landlord after abandonment by the tenant and without notice to him or assent, express or implied on his part, and without other acts

and circumstances from which an acceptance of the surrender in fact or as a matter of law may be inferred, has not heretofore arisen in any reported case in this state. In the case of *White v. Berry*, 24 R. I. 74, 79, 52 Atl. 682, there were many acts on the part of the landlord, from which it was found that the landlord's acceptance of surrender was to be implied; among these acts was the actual reletting of the premises without consulting with the defendant. 24 R. I. 79, 52 Atl. 682. In *Smith v. Hunt*, 32 R. I. 326, 79 Atl. 826, 35 L. R. A. (N. S.) 1132, Ann. Cas. 1912D, 971, there was no reletting during the time for which rent was claimed, and it was held that the facts proved showed only such acts on the part of the landlord after abandonment by the tenant as the landlord was entitled to do for the protection of the abandoned property, and with a view to reletting it; that these acts were done with full knowledge of the defendant; and that there was no acceptance of surrender.

The plaintiff has cited several cases in support of his claim that the reletting by plaintiff, although without notice of such reletting to defendant, and without notice that such reletting would be on the lessee's account, was not as a matter of law an acceptance of the surrender. *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969; *Alsop v. Banks*, 68 Miss. 664, 9 South. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294. In these cases there was express refusal to accept surrender; and notice was given to the lessee that the lessor would rent the property for the account and risk of the lessee, and hold the lessee for any loss.

In *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467, cited by plaintiff, there is nothing in the report of the case to show that there was any reletting during the time covered by the suit for rent accrued; and the court found nothing to show any acceptance of surrender by the landlord. The key was sent by the lessee to lessor by mail without notice or comment. The lessor simply took possession and undertook to rent the property; but it does not appear that he was trying to recover rent for any period of time after he actually rented the property. In *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673, cited in *Joslin v. McLean*, supra (but not referred to in plaintiff's brief), it does appear that the court held that the lessor, after abandonment which was not accepted, could relet for account of the abandoning lessee, and hold him for the loss, and that notice of intention to relet was not essential or material. In *Scott v. Beecher*, 91 Mich. 594, 52 N. W. 20, also cited in *Joslin v. McLean*, supra, the recovery sought was only for the time during which the property remained vacant, and it was held that the reletting did not operate as an acceptance of surrender by operation of law so as to relieve the lessee from payment of the rent under the lease for the portion of

the year during which the property remained vacant. In *Auer v. Penn.*, 99 Pa. 370, 44 Am. Rep. 114, there was an express refusal to accept the surrender, and there was express and repeated notice in writing to the surety of the lessee that he would be held for the rent, and that the premises would be rented at his risk. In *Higgins v. Street*, 19 Okl. 45, 92 Pac. 153, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086, there was reletting after notice of a similar nature. In *Rose Mercantile Co. v. Smith*, 139 La. 217, 71 South. 487, the holding upon this point was merely incidental and whether or not notice of reletting was given or whether the reletting was done under such circumstances as to imply the assent of the lessee does not appear.

Holden v. Tanner, 6 La. Ann. 74, seems to hold that reletting without notice to the lessee does not release the surety on the lease, and is not evidence of the acceptance of the surrender. This case is not in accord with the cases cited *infra*. This case, and that of *Stewart v. Sprague*, supra, are the only cases cited by plaintiff which seem to go to the extent claimed by plaintiff in his brief. It appears in the case at bar that there was no sufficient proof of an abandonment and surrender of the premises by the lessee prior to the sending of the key to the landlord on August 8, 1907. At that time under the evidence it may be assumed that there was evidence of intention on the part of the tenant to surrender the premises to the landlord. At that time, however, the landlord did not attempt to notify the lessee that he would not accept surrender of the premises, nor did he ever at any time notify the lessee that he would rent the premises for account of or at the risk of the lessee and would hold the lessee for the balance of the agreed rent over and above what he should be able to get by way of rent of the premises for the balance of the term. It does not appear that the plaintiff as landlord, after the receipt of the key on August 8, 1907, gave any notice of any kind to the lessee refusing to accept the surrender. It does appear that on September 1, 1907, he rented the premises to a third party for one month, and that on October 21, 1907, after this reletting, he sent a bill to the defendant for three months' rent, and gave the defendant credit for \$30 received from his tenant. It is not shown that the defendant ever received this bill, but it does appear at least that it never was paid. After this reletting there was a further reletting for five months to still another party, and as to this reletting there was no notice or attempt at notice to the defendant, so far as the evidence shows, either before or after the reletting.

The defendant contends that under these circumstances the reletting by plaintiff was, as a matter of law, an acceptance of the surrender; that the creation of this new tenancy was "of such a character as to have been in-

consistent with the defendant's continued possession and use of the property"; and cites in support of such contention a number of cases where a reletting after abandonment by a lessee has been held to be, as a matter of law, an acceptance of surrender, although the lessor, at the time of abandonment by the lessee, had refused to accept surrender and release the lessee.

In *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 388, 56 N. E. 903, 49 L. R. A. 580, 76 Am. St. Rep. 327, there was a lease from plaintiff to defendant of certain premises in New York City for a term of ten years from August 1, 1893, and the lessee entered into possession, and remained and paid rent to November 1, 1893, and then moved out and abandoned the premises, and sent the keys to the plaintiff by mail. The plaintiff received the keys about November 2, 1893, and on November 3, 1893, sent the following notice to the defendant:

"Yesterday I received the keys of 787 Eighth avenue by mail. I hereby notify you that I do not accept a surrender of the premises, and that I intend to hold you responsible for the rent under the lease. I shall let the premises on your account, and I hold you for any loss which may be sustained."

The defendant made no answer to this notice; but there were further personal negotiations between the parties looking to a compromise or arrangement whereby the matters in dispute would be settled. On or about December 1, 1893, the plaintiff let the premises to a third party, but it did not appear that this reletting was on account of the defendant or with its consent. It did appear that the reletting was in plaintiff's own name. The gist of the opinion is well stated in the headnote, viz.:

"A surrender of leased premises is created by operation of law, although the landlord has declined an offer of surrender, where after the tenant has abandoned them the landlord lets them in his own name to a third person for a new term, without the tenant's consent."

It was further held that the case was distinguishable from the case of *Underhill v. Collins*, 132 N. Y. 269, 270, 30 N. E. 576, where there was a reletting of premises leased after abandonment by the lessee, and where it appeared in evidence that there was such a reletting pursuant to a conversation between the parties, a few days before the lessee vacated the premises, wherein the lessor refused to accept a surrender at request of the lessee, but then and there insisted that he would hold the tenant for the rent and would lease the premises for and on his account. In this latter case there was held to be an implied assent on the part of the lessee to the reletting for and on the lessee's account. In the case of *Gray v. Kaufman, etc., Co.*, supra, it was found upon all the evidence that there was no such assent. The same general doctrine is supported by

other cases cited on defendant's brief, viz.: *Daggett v. Champney*, 122 App. Div. 254, 106 N. Y. Supp. 892; *Coe v. Haight*, 95 Misc. Rep. 603, 159 N. Y. Supp. 666, 669; *Ladd v. Smith*, 6 Or. 316; *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145; *Pelton v. Place*, 71 Vt. 430, 438, 46 Atl. 63; *Haycock v. Johnston*, 97 Minn. 289, 106 N. W. 304, 114 Am. St. Rep. 715; *Matthews' Adm'r v. Tobener*, 39 Mo. 115; *Rice v. Dudley*, 65 Ala. 68; *Nickells v. Atherstone*, 10 Q. B. 944; *Thomas v. Cook*, 2 B. & Ald. 119. See, also, 2 *Tiffany, Land. & Ten.* 1338-1342; 19 *Am. & Eng. Enc. Law* (2d Ed.) 364, 365.

[7] In the examination of the many cases cited, we have found some confusion and conflict of authority upon the question whether the reletting by the landlord after abandonment by the tenant amounts to an acceptance of surrender as a matter of law. As above shown we have found only two cases where it has been baldly held that the landlord, after refusing to accept a surrender, can, as a matter of right, without notice to the lessee, or without his assent, either express or implied, relet the premises for the account and risk of the lessee and can hold the lessee for the loss, if any. In all the other cases cited by plaintiff, above referred to, it either appears that the landlord gave notice of his intention to relet for account of the lessee or at his risk, or that there was an assent either express or implied on the part of the lessee that such reletting could be made for his benefit and on his account or at his risk. We find, therefore, that the weight of authority, so far as the facts of the case at bar are concerned, is to the effect that the reletting to a third party by the plaintiff without notice to the defendant, without knowledge on its part or without its assent, operated as an acceptance of the surrender by the defendant from and after September 1, 1907, and that after that date the defendant was no longer bound by the lease.

[8] We also find that the defendant was bound for the rent under the lease from July 1 to September 1, 1907, and that the plaintiff is entitled to recover the sum of \$78.67, being two months' rent under the lease, with interest at the rate of 6 per cent. thereon from the date of judicial demand, being the date of service of the writ, March 31, 1911, there being no evidence of demand made at any prior date. The plaintiff's exceptions are sustained; but in our opinion there is no need of a new trial, in view of the above findings. We think that the case should be remitted to the superior court sitting in Providence, with direction to enter its judgment for the plaintiff for the sum, with interest as above stated.

The defendant may show cause, if any it has, why this order should not be made, on Monday, June 18, 1917, at 10 o'clock in the forenoon.

ANDERSON et al. v. NELSON. (No. 5030.)
(Supreme Court of Rhode Island. July 5, 1917.)
VENDOR AND PURCHASER — 79—CONTRACT—
CONSTRUCTION.

A land sales contract, providing that its building restrictions were imposed for the benefit of the vendor's remaining land and premises heretofore conveyed by him, and containing a provision regarding "no undesirables," is solely for the vendor's benefit, and a purchaser cannot complain of a breach thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127–131.]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Assumpsit by Carl E. Anderson and others against Alfred E. Nelson. Verdict for defendant, and plaintiffs except. Exceptions overruled.

Hugo A. Clason, of Providence, for plaintiffs. Wilson, Gardner & Churchill, of Providence, for defendant.

PER CURIAM. This is an action in assumpsit to recover money paid by the plaintiffs to the defendant upon a certain agreement for the purchase of a lot of land situated on a plat belonging to the defendant in East Providence. It appears that the parties entered into a written agreement for the purchase of said lot. By said agreement the plaintiffs undertook to pay to the defendant the sum of \$50 and further sums of \$5 each month until the principal sum of \$475, with interest, had been paid; and the defendant agreed to deliver to the plaintiffs a warranty deed of said lot when said principal sum, with interest, had been paid to him by the plaintiffs. In said agreement was the following clause:

"Sixth. That the following restrictions which shall terminate on the first day of January, A. D. 1935, and which are imposed for the benefit of the remaining land of said party of the first part, and of any premises heretofore conveyed by said party of the first part, and which restrictions said party of the second part hereby agrees shall be binding upon him, heirs and assigns, and shall be made a part of the deed herein provided for, viz.: First, that all buildings erected or placed thereon shall be placed and set back not less than fifteen (15) feet from the street line, provided that steps, windows, porticoes and other projections appurtenant thereto may be within said distance. Second, that no dwelling house costing less than fifteen hundred dollars (\$1,500.00) for a one family house, or twenty-five hundred dollars (\$2,500.00) for a two family house, shall be built on said land. Third, no trees shall be cut, or material moved from said lot, or objectionable structure erected thereon without a special permit in writing from Alfred E. Nelson. Fourth, no undesirables."

The plaintiffs alleged that the defendant failed to keep his promises contained in said agreement, and the same became void, and that they were entitled to the return of \$60, the amount paid by them on the agreement. The defendant pleaded the general issue, and

also in set-off claimed an indebtedness of the plaintiffs to him amounting to the sum of \$13.75 for merchandise delivered by him to the plaintiffs. The case was tried before a justice of the superior court sitting with a jury. At the conclusion of the testimony said justice directed a verdict for the defendant for \$13.75 on his plea in set-off. The case is before us upon the plaintiffs' exception to said action of the justice, and also upon exceptions to certain rulings of said justice made during the course of the trial. The plaintiffs contend that by said agreement the defendant bound himself to sell none of the remaining lots upon said plat to persons of a certain nationality, and that he has disregarded this promise and has made such sale. They base this contention upon the expression contained in the sixth clause of said agreement quoted above, "Fourth, no undesirables." At the trial the plaintiffs sought to show by parol evidence what the parties intended by the expression, "No undesirables," contained in said agreement. The plaintiffs' exceptions, other than that taken to the direction of a verdict, relate to the refusal of said justice to permit the introduction of such evidence. There was no error in said rulings. It would not avail the plaintiffs if they had been permitted to explain said ambiguous expression. It is contained in a clause imposing restrictions upon the plaintiffs for the benefit of the defendant, and is binding only upon them. Such restrictions form no part of any promise or undertaking of the defendant contained in said agreement.

There was no testimony upon which plaintiffs were entitled to recover the amount claimed by them; and the defendant was clearly entitled to the amount allowed by said justice in set-off.

The plaintiffs' exceptions are all overruled. The case is remitted to the superior court for the entry of judgment upon the verdict.

CURTIS-YOUNG CO. v. CROWN GARAGE CO. (No. 5062.)

(Supreme Court of Rhode Island. June 28, 1917.)

Exceptions from Superior Court, Providence and Bristol Counties; John W. Sweeney, Judge. Action by the Curtis-Young Company against the Crown Garage Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled, and case remitted, with direction.

Barney, Lee & McCanna, of Providence (Walter H. Barney and Francis I. McCanna, both of Providence, of counsel), for plaintiff. Mumford, Huddy & Emerson and George H. Huddy, Jr., all of Providence, for defendant.

PER CURIAM. We have given full consideration to the very elaborate briefs and arguments of counsel in the above cause, and have also given due consideration to the evidence in the cause. The evidence was sharply conflicting upon the issues of the case, as appears from the

very extended quotations from the testimony in the briefs of counsel. The jury returned a verdict for the plaintiff, and this verdict has been fully approved by the justice before whom the case was tried. We find that there was ample evidence to support the verdict of the jury, both as to defendant's liability and as to the damages awarded, and there was no error on the part of the trial justice in denying the defendant's motion for a new trial.

We have carefully examined all of the defendant's exceptions, based upon the rulings of the trial justice in admission and exclusion of testimony, and as to such admissions and exclusions we find no reversible error.

We have also examined the defendant's exceptions based upon the refusal of the trial justice to submit certain special findings to the jury, and in our opinion the submission of the special findings referred to was properly refused, for the reason that such special findings would have raised issues immaterial to the decision of the case, and would have tended to confuse and mislead the jury.

We have also examined all of the defendant's exceptions based upon the court's refusal to charge the jury as specially requested, and in doing so we have examined the whole charge of the court to the jury. We are of the opinion that, so far as such special requested instructions were warranted in law and based upon facts in evidence, they were substantially included in the charge to the jury. We find that the jury was properly instructed in the law of the case, and that the trial justice was not in error in refusing to instruct the jury as specially requested.

We find no reversible error in respect of any of the exceptions urged on behalf of the defendant. The defendant's exceptions are all overruled, and the case is remitted to the superior court sitting in Providence, with direction to enter judgment for the plaintiff upon the verdict.

(130 Md. 559)

BERGEN v. TRIMBLE et al. (No. 40.)

(Court of Appeals of Maryland. May 9, 1917.)

1. **BILLS AND NOTES** §396—INTEREST ON DEMAND AND NOTICE TO INDORSER—"ACCOMMODATED INDORSER."

Although a loan for which notes were given was not made for the sole benefit of indorsers, they were still "accommodated indorsers" within the meaning of Code Pub. Gen. Laws 1904, art. 13, §§ 99, 134, providing that demand for payment and notice of dishonor are not required to charge such indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022-1028.]

For other definitions, see Words and Phrases, Second Series, Accommodation of Indorsers.]

2. **BILLS AND NOTES** §537(7) — ACTION AGAINST INDORSERS — ACCOMMODATION OF OFFICER—QUESTION FOR JURY.

Evidence showing that notes were indorsed by defendants in accordance with express agreement made in presence of payee, and that it was upon them alone that payee relied for payment, held sufficient to go to jury as tending to show that note was made for the accommodation of the indorsers within meaning of Code Pub. Gen. Laws 1904, art. 13, §§ 99, 134.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1882-1884, 1887-1890.]

Appeal from Superior Court of Baltimore City; James M. Ambler, Judge.

Suit by De Witt Bergen against Frank W. Trimble and another. Judgment for defend-

ants, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Edgar Allan Poe, of Baltimore (Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellant. John D. Nock, of Baltimore (Benson & Karr, of Baltimore, on the brief), for appellees.

PATTISON, J. The suit in this case was brought by the appellant, De Witt Bergen, against Frank W. Trimble and John H. Trimble, copartners, trading as F. W. Trimble & Bro., as indorsers upon the following promissory note:

"\$4,000.00. Baltimore, June 1st, 1910.

"Three months after date I promise to pay to the order of F. W. Trimble & Bro. four thousand dollars, at with interest.

"John Cowan."

This note was indorsed by F. W. Trimble & Bro. to the plaintiff, De Witt Bergen, the present holder, who at its maturity instituted suit thereon. At the conclusion of the plaintiff's testimony the court, at the instance of the defendant, granted the following prayer:

"The court instructs the jury that there is no evidence legally sufficient to entitle the plaintiff to recover, and the verdict must be for the defendant."

The jury, in obedience to such instruction, rendered a verdict for the defendant, and upon that verdict a judgment was entered for defendant's costs. It is from that judgment this appeal was taken.

The note was not presented for payment at maturity, and no notice of its dishonor was given to the indorsers. The only question involved in this appeal was whether the plaintiff was entitled to recover without presentation of the note for payment at maturity, and without notice to the indorsers of its dishonor. In the determination of this question the following sections of article 13 of the Public General Laws of this state are involved:

Section 99:

"Presentment for payment is not required in order to charge an indorser, where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented."

Section 134:

"Notice of dishonor is not required to be given to the indorser * * * where the instrument was made or accepted for his accommodation."

It is contended by the plaintiff that the evidence offered shows, or at least tends to show, that the promissory note in question was made for the accommodation of the defendants, within the meaning of the statute, and therefore to entitle the plaintiff to recover it was not essential that the note should have been presented for payment, or notice of its dishonor given to the indorsers, and that the instruction of the court direct-

ing a verdict for the defendant was erroneously given.

The facts and circumstances leading up to and surrounding the execution of the note, as disclosed by the record, are briefly as follows:

The defendants were in 1908 largely interested in a corporation known as the Dudley Adding Machine Company. As expressed by one of the witnesses, this company "was practically F. W. Trimble & Bro., who held certain patent rights, with the inventor, Dudley, subject to a royalty agreement held by the Numerograph Company," by which the Numerograph Company was to be paid a royalty of \$10 on each and every machine manufactured by the Dudley Company.

The defendants, with Cowan and others, became interested in the formation and organization of another company for the manufacture and sale of adding machines, which was to take over the Dudley Adding Machine Company, with its above-mentioned patent rights, subject, as we have said, to the royalty rights of the Numerograph Company.

The new company, it seems, had been incorporated, though its stock had not at such time been distributed or disposed of. It was at this stage in the promotion of the company that those interested therein, including the defendants and Cowan, proceeded to sell its stock, but found they could not do so owing to the royalty rights of the Numerograph Company. It was then decided to purchase such rights.

Five thousand dollars were required to purchase these rights, and this amount, in addition to the sum of \$1,000, which was needed for the payment of certain expenses to be incurred in launching the enterprise, was borrowed from the plaintiff, and to secure the payment of said loan a note of \$6,000, signed by Cowan payable to F. W. Trimble & Bro., and indorsed by said firm, was delivered to the plaintiff. Payments were made upon this and renewal notes given therefor, until the amount of said indebtedness was on June 1, 1910, reduced to \$4,000, at which time the note in question was executed and delivered to the plaintiff.

The amount of the loan, \$8,000, secured by the original note, was paid by two checks both drawn by the plaintiff to Cowan, one for \$5,000 and the other for \$1,000, and sent to Harry E. Karr, counsel for Trimble & Bro., and also for them and others in the promotion and organization of the new corporation. Cowan called at the office of Mr. Karr, and there indorsed the checks. Five thousand dollars of the amount realized on said checks were paid by Karr to the Numerograph Company for the purchase of its aforesaid royalty rights, but it is not shown to whom such rights were assigned, and the remaining \$1,000 was applied either by Karr or Cowan to the payment of certain expenses to which

we have already alluded. The payments upon the original and renewal notes were made by Cowan, but whether from his own individual money or from money derived from other sources it is not disclosed, except as to \$300, which is said to have been received "from the creditors' committee of John Cowan." The character of this committee or how or for what purpose it was created is not disclosed by the evidence. The testimony, however, discloses that before the note of \$4,000 became due and payable Cowan informed the indorsers that he would not be able to pay the note at maturity, and that it would have to be renewed, but the indorsers refused to renew it.

Bergen testified that the money was loaned by him to Cowan and Trimble Bros. for the purpose of putting it into an adding machine business, made simply as a loan to them, as they were short of funds at that time. Miller, who acted for Bergen in the negotiation of the loan, testified:

"The Trimbles, with Mr. Cowan, Mr. Davis, and Mr. Karr, wanted some money. They asked me if I could get it from Mr. Bergen, and I presented the matter to Mr. Bergen and got the money."

Davis, it seems, was in some way interested in the transaction.

Miller further testified that:

These people, "in order to go ahead with their promotion, were obliged to pay \$5,000 (for the royalty rights of the Numerograph Company), and they did not have the money, so they stated. They wanted the money for that purpose, together with an extra \$1,000 for equipping offices in Philadelphia."

He was then asked was anything said at the time that you arranged the loan as to the form that that loan was to take; as to whether it was to be evidenced by a note or a bond or otherwise.

"A. They were to give a note. Q. What was the arrangement as to who was to give the note and the amount of same when you say they were to give a note to Mr. Bergen? A. Mr. Cowan, indorsed by defendants. Q. Was anything said at this conference, and, if you remember, by whom, as to this \$5,000? A. Yes. Q. By whom was it said, if you remember? A. By all of them. It was a general conversation. Q. What was said? A. That the money was to be raised by the Trimbles to clear their title to hold the patent."

If the money was loaned to the defendants for their sole benefit, the note, though signed by Cowan as maker, was made for their accommodation, and no demand of payment of the note at maturity was necessary and no notice of its dishonor was required to be given the defendants as indorsers. If the loan was made to Cowan and the defendants for their joint benefit, and the repayment of that loan was to be secured by a note executed by agreement between them in the manner and form shown by the record, there was an obligation on the part of both the defendants and Cowan to pay the note at maturity.

[1] The fact that the loan was not made

for the sole benefit of the defendants does not change the character of the indorsement in respect to demand for payment or notice of dishonor. They were nevertheless, in our opinion, accommodated indorsers within the meaning of the statute; and the plaintiff was not required to make demand upon Cowan or give notice to the defendants of the nonpayment of the note. *Bank of Washington v. Way*, 2 Cranch, C. C. 249, Fed. Cas. No. 957.

[2] The evidence offered, we think, was legally sufficient to go to the jury as tending to show that the note was made for the accommodation of the indorsers within the meaning of the statute, and that their indorsement thereon was that of accommodated indorsers, who had no reason to expect the note would be paid by the maker if presented for payment.

The cases of *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790, and *Luckenbach v. McDonald*, 170 Fed. 434, 95 C. C. A. 604, which were cited to us by the defendants in support of their contention, in which the indorsers were held to be entitled to notice of dishonor, differ widely from the case before us. In each of those cases the loan was made to the corporation, and to secure the repayment of the loan, the note of the corporation, payable to the plaintiff and signed by its president, and indorsed by him and other directors of the corporation, was delivered to the plaintiff. In the latter case Judge Gray, speaking for the court, said:

"There is no evidence disclosed by the record, tending to show that anything else was contemplated by those who negotiated this loan than that it was to be a loan to the corporation for the promotion of its business, for which the corporation was to be primarily bound by the promissory note which it made, and that the directors who loaned their credit by indorsement assumed the secondary liability of indorsers, and none other. * * * All the evidence tends to show that the payee of the note had no other thought than that the security he held for his note was what it purported to be on its face; i. e., the primary liability of the corporation, as maker, and the secondary liability of the defendant and his two colleagues, as indorsers."

In the case before us, as the evidence tends to show, the loan was not made to either of the corporations mentioned in the record, but to Cowan and the defendants, and the note given to secure such loan was signed, not by either of said corporations, but by Cowan as maker, and indorsed by the defendants in accordance with an express agreement between them made in the presence of the plaintiff, to whom it was thereafter delivered; and it was upon them alone that the plaintiff relied for the repayment of said loan.

It follows from what we have said that the judgment of the court below will be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded, with costs to the appellant.

(130 Md. 474)

AGRICULTURAL SOC. OF MONTGOMERY COUNTY v. STATE. (No. 20.)

(Court of Appeals of Maryland. May 4, 1917.)

1. GAMING ⇨71 — BOOKMAKING — PROSECUTION.

Under Code Pub. Civ. Laws, art. 27, §§ 217-221, prohibiting gambling on the result of horse races unless the grounds are licensed by the circuit court for the county in which they are located, an agricultural association which suffers its grounds to be used for such purpose without license is not excused from failure to apply for such license by the fact that such license had been previously refused.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 166, 167.]

2. STATUTES ⇨64(1)—PARTIAL INVALIDITY—TEST.

If different sections of a statute are independent of each other, unconstitutional ones may be disregarded and valid sections may be enforced; but, if the valid sections without the obnoxious would cause results not contemplated or desired by the Legislature, the entire statute is inoperative.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58, 195.]

3. STATUTES ⇨64(6)—PARTIAL INVALIDITY—LEGISLATIVE INTENT—HISTORY.

Where the history of legislation on horse racing shows that its main object has been to curb it, the prohibitory section of the statute is severable from the license portions, and will stand even if the latter portions are unconstitutional.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 63, 195.]

Briscoe, J., dissenting in part.

Appeal from Circuit Court, Montgomery County; Edward O. Peter, Hammond Urner, and Glenn H. Worthington, Judges.

The Agricultural Society of Montgomery County was found guilty of suffering its grounds to be used for the purpose of making, selling, and buying books on the result of horse racing, and appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Robert B. Peter, of Rockville, for appellant. Albert M. Boule, State's Atty., of Rockville, and Ogle Marbury, Asst. Atty. Gen. (Albert C. Ritchie, Atty. Gen., on the brief), for the State.

CONSTABLE, J. The appellant, which conducts an annual fair in Montgomery county, was indicted by the grand jury of that county by an indictment containing two counts, the first of which charged that it on the 25th day of August, 1916, unlawfully and knowingly suffered its grounds to be used for the purpose of making, selling, and buying books and pools thereon upon the result of a running race of horses held within the said grounds on the said date. The second count charged the same offense, with the addition that the appellant was not licensed by the circuit court for Montgomery county to suffer its grounds to be used for

the purpose of making, selling, and buying books and pools thereon upon a result of a running race of horses to be held thereon.

The appellant pleaded not guilty, and the case was submitted to the court upon an agreed statement of facts. *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596; *Salfner v. State*, 84 Md. 209, 35 Atl. 885. The court found the defendant guilty, and imposed a fine of \$50 and costs, from which judgment this appeal was taken.

The statute which it is charged the appellant violated is that which was enacted by Acts 1898, c. 285, and which is now codified in Bagby's Code, vol. 3, as sections 217, 218, 219, 220, and 221 of article 27.

Section 217 is as follows:

"It shall not be lawful for any person or persons, or association of persons, or for any corporation within the state of Maryland, to bet, wage or gamble in any manner, or by any means, or to make or sell a book or pool on the result of any trotting, pacing or running race of horses or other beasts, or race, contest or contingency of any kind, or to establish, keep, rent, use or occupy, or knowingly suffer to be used, kept or rented or occupied, any house, building, vessel, grounds or place or portion of any house, building, vessel, grounds or place, on land or water, within the state of Maryland, for the purpose of betting, wagering or gambling in any manner, or by any means, or making, selling or buying books or pools therein or thereon upon the result of any race or contest or contingency, or by any means or devices whatsoever, to receive, become the depository of, record or register, or forward or purpose, or agree or pretend to forward any money, bet, wager, thing or consideration of value, to be bet, gambled or wagered in any manner, or * * * device whatsoever, upon the result of any race, contest or contingency, and any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, one-half of said fine to go to the informer, and shall be subject to imprisonment in jail for not less than six months nor more than one year, or be both fined and imprisoned, in the discretion of the court."

Section 218 provides that nothing in the preceding section shall render it unlawful in any county in the state for any persons to make a pool or book, or to bet within the grounds of any agricultural association, race course, or driving park upon the result of any trotting, pacing, or running race of horses which shall be held within the said grounds, race course, or driving park upon which said persons shall make a pool or book or shall so bet upon the same day on which said race shall be held, provided the grounds be licensed by the circuit court for the county within which such grounds or tracks may be located. Section 219 provides for the application for the license and the advertisement of the application. Section 220 provides for what the application shall contain. Section 221 provides for what the license shall contain, such as the name of the grounds and the number of days and the month within which such license shall be operated, and further provides what number of days in any one year betting can be carried on, and also

what months during which betting shall not be permitted, and further names certain counties to which this section shall not be applicable, including Cecil, Washington, and Anne Arundel counties. Sections 219, 220, and 221 are no longer applicable to Baltimore and Harford counties, for which, by Acts 1912, cc. 77, 132, racing commissions were created to control horse racing in those counties.

By the said agreed statement of facts it appears:

(1) That the defendant is a corporation and owns a fair ground at Rockville, in Montgomery county, upon which there is a race course.

(2) That on the 25th day of August, 1916, the defendant did knowingly suffer its said grounds to be used for the purpose of making, selling, and buying books and pools therein upon the result of a running race of horses held within the said grounds on the said 25th day of August, 1916.

(3) That the defendant is an agricultural association, and annually holds a fair for four days upon its said grounds, and that the "fair" for the year 1916 was actually being held upon its grounds on said 25th day of August, 1916, when said running race took place.

(4) That the defendant's said race course is the only race course or driving park in Montgomery county upon which horse races were to be held during the year 1916, and that the racing on this course was for only four days, and they were the days the defendant was actually holding its fair.

(5) That the defendant did not apply to the circuit court for Montgomery county for a license to suffer its grounds to be used for the making, selling, and buying books and pools thereon upon the result of horse racing in the year 1916, and that no license was issued to the defendant for that purpose in that year.

(6) That in the year 1910 the defendant made application to the circuit court for a license to permit bookmaking and pool selling upon horse racing upon its said fair grounds for four days during its fair for the year 1910, but that a license was refused by a full bench, and that the defendant has not made application for a license since said refusal; that the circuit court for Montgomery county in said year 1910 convicted a certain Arthur J. Mark of gaming and bookmaking at the fair grounds of the defendant at its annual fair held for the year 1910, and he was fined \$400 and costs.

(7) It is further agreed that the court should have power to enter up judgment in conformity with its findings.

It is contended on behalf of the appellant that the sections of the act providing for the granting by the circuit court of the different counties of the state of licenses to agricultural associations, race courses, and driving

parks are void, for the reason that the duties therein attempted to be imposed upon the courts are nonjudicial duties, and by reason of those sections being of no effect the remainder of the act becomes also void and of no effect. It is then claimed that, because of the failure of this act, then chapter 232 of the Acts of 1894, which was attempted to be repealed by the present act, again becomes the law of this state upon this subject.

For the disposition of this case we do not deem it necessary to either discuss or decide whether or not the sections mentioned impose a judicial or a nonjudicial duty upon the courts, and are therefore void, because, if the duty imposed should be held by this court to be a judicial duty, and therefore not affect the validity of said sections, then, of course, it must follow that the appellant was guilty as charged in the second count of the indictment; for the statute requires that, before any agricultural association, race course, or driving park shall be entitled to the exemption from the provisions of section 217 (the prohibitory section), it should make application and be granted a license before it could permit books or pools to be made and sold on its grounds.

[1] By the agreed statement of facts it is admitted that the appellant made no such application for dates for the year 1916, and that no license was issued to it for that purpose and for that year. The fact that the appellant did make application for dates in the year 1910, and was refused a license for those dates by the court, could have no effect, under the statute, toward excusing its failure to make application for dates in 1916, and therefore, under this view of the law and facts, the appellant would clearly have been found guilty. If, on the other hand, it should be held that the duty imposed upon the courts is a nonjudicial duty, and therefore void, nevertheless we are of the opinion that the prohibitory portion of the act still remains in force, and that a verdict of guilty as charged in the first count would be correct.

[2] As to what is the effect upon other and valid portions of a statute when certain parts of the same statute are held to be invalid and unconstitutional has several times been considered by this court, and there should not now be any difficulty in stating the general rule, but the difficulty arises rather in its application. In *Storck v. Baltimore City*, 101 Md. 476, 61 Atl. 330, this court adopted the language used by the Supreme Court of the United States in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, in saying:

"If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the

entire statute must be held inoperative." *State v. Benzinger*, 83 Md. 481, 35 Atl. 173; *Stiefel's Case*, 61 Md. 144.

Assuming only for the purpose of a disposition of this case that the licensing sections are void and inoperative, the inquiry then must be as to whether or not the whole of the act thereby is rendered void and of no effect. The authorities cited above, and in fact the authorities practically everywhere, hold that the test is whether or not one section can stand alone as expressing the legislative will; whether or not the lawmaking body would have enacted one without enacting both or all as a whole.

[3] To arrive at the legislative intent in reference to the subject with which it was dealing, it may be profitable to review the race track history of this state as applying to gaming. Speaking generally, there was no statute seeking to control or limit such until the adoption of chapter 206 of the Acts of 1890. This act, among other things, sweepingly prohibited gaming upon the result of any horse race, unless such was done upon the track where the race was actually being held. The provisions of that act were amended by enacting chapter 232 of the Acts of 1894, providing that gaming within the grounds of agricultural associations, driving parks, and race courses on the result of horse races on the same day as the races were actually run, as provided by the said act of 1890, should be limited to 30 days in any calendar year. This act was amended by the act now under consideration, and thus has stood the law of the state up to the present, with the exception of several counties to which certain local laws are applicable. It is thus apparent that since the year 1890 the tendency of the Legislature has been towards restricting and limiting what to a great number of persons has seemed a great evil.

If the contention of the appellant is correct, in that the license portions of the act are void, and that the act is not severable, and that thus the whole act should fall, the result would be that the act of 1894 would be revived. *State v. Benzinger*, *supra*.

We cannot lose sight of that which is a part of the legislative history of the state. It must be remembered how under the act of 1894 six race tracks were located in one county of the state, upon each one of which racing and gaming were carried on for 30 days, or for a total of 6 months during the winter months of each calendar year. At the session of the same Legislature which passed the act now before us there was passed a statute, chapter 13, Acts of 1898, absolutely prohibiting race track gaming in the county just mentioned, without any qualifications at all, and thus relieved the deplorable conditions that had arisen from the practical working of the act of 1894. With the expressed opinion of that Legislature as to the abuses which were permitted under cover of

that statute, it can fairly be assumed that the same Legislature did not intend that like abuses should spring up in the other counties. It attempted to accomplish this end by passing the present act, and making the dates for racing and gaming subject to the control of the courts. The main object of all legislation on horse races since 1890 has been to curb this form of gaming. The various statutes clearly prove this, and we are satisfied that the prohibitory section is severable from the license portions of the act, and can therefore stand.

It follows, therefore, that whichever view is taken as to the constitutionality of the license section, the appellant was properly found guilty as held by us in a *per curiam* opinion heretofore filed.

BRISCOE, J., concurs in the conclusion, but dissents from the reasons assigned therefor.

(130 Md. 506)

BRADY et al. v. MAYOR AND CITY COUNCIL OF BALTIMORE. (No. 34.)

(Court of Appeals of Maryland. May 9, 1917.)

1. MUNICIPAL CORPORATIONS \S 648—STREETS—ADVERSE POSSESSION—COLOR OF TITLE.

Where city of Baltimore widened Dock street and remained in possession for 40 years, under authority of Acts 1836, c. 63, vesting in it title to street so widened provided that vested rights of individuals who owned fee in street subject to easement were not interfered with, it acquired title to fee by adverse possession, since agreement whereby proprietors relinquished all interest in the street, though not sufficient to convey fee, showed that city occupied street in the belief that fee vested in it, and therefore its occupancy was under a claim of supposed right and was adverse.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. $\S\S$ 1421, 1422.]

2. ADVERSE POSSESSION \S 4—PRESCRIPTION AGAINST PUBLIC.

Prescription will not run against the city or the public.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. $\S\S$ 7-10, 12-67.]

Appeal from Superior Court of Baltimore City; James P. Gorter, Judge.

Action by the Mayor and City Council of Baltimore against Lizzie J. Brady and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, STOCKBRIDGE, and CONSTABLE, JJ.

R. E. Lee Marshall and Edgar Allan Poe, both of Baltimore, for appellants. Alexander Preston, Deputy City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellee.

CONSTABLE, J. This is an action of ejectment brought by the Mayor, etc., of Baltimore against the appellants, in which the appellee recovered a judgment for the land described in the declaration and damages.

The land in controversy is located at the northwest corner of Caroline and Dock streets, and forms a part of Dock street. In 1814, at which time the events began which gave rise to this controversy, all of this land was under the waters of the Patapsco river. Queen street runs in the same general direction as Dock street, east and west, and is south of that street. In 1814 John Cunyngham and John Briggs were the separate owners of two contiguous lots of land, both of which formed a lot designated on a plot as lot No. 28. In 1823 Cunyngham purchased the lot of Briggs, and thus became the sole owner of the whole of lot No. 28. In 1843 John Cunyngham and wife, Margaret, conveyed in fee simple all of their title in lot 28 to their daughter, whose executors conveyed, in 1889, the same to E. S. Brady, who was the immediate predecessor in title of the appellants herein. Lot No. 28 was situated on the north side of Queen street with a frontage of 60 feet and a depth of 40 feet towards what is now Dock street.

All the land involved in this case was situated in a part of the city called Fells Point, and for the most part was covered by water. In 1814 the port wardens submitted to the city council a plan for improving that part called the Cove, by making a dock with streets and alleys leading thereto. That plan was delineated on a plat which was filed with the city librarian, and a copy of which is in the present record. The mayor, etc. passed on March 25, 1814, an ordinance adopting the plan and appropriating \$6,000 to enable the port wardens to proceed with the work as soon as the proprietors of land adjacent to the water should signify their assent thereto. The wardens proceeded with the work and built the city dock and the different streets, including Dock and Caroline streets. Dock street had a width of 50 feet, and its northern boundary was the southern boundary of the dock. And all the land under water between the fast land to the rear of the properties facing on Queen street and the dock was filled with earth and made fast land, and Dock street laid out. It does not certainly appear when this work was completed, but by the agreed statement of facts it was agreed that such was the fact prior to 1836, and prior to the act of assembly next to be mentioned. By chapter 63 of the Acts of 1836 it was enacted as follows:

"Section 1. Be it enacted by the General Assembly of Maryland, that the mayor and city council of Baltimore shall have full power and authority to increase the width of Dock street in said city, to eighty feet, and to fill up and make said street of the width aforesaid; and that the title thereto, when so made, shall be vested in the mayor and city council of Baltimore.

"Sec. 2. And be it enacted, that the mayor and city council of Baltimore shall be and hereby are vested with the right and title to any land made, or to be made by them, out of the water, in making and completing the improvement of

the city dock, according to the plan heretofore adopted by them: Provided nevertheless, that nothing in this act contained, shall be construed to interfere with the vested rights of individuals."

By Ordinance No. 56, approved March 29, 1837, the city commissioners were authorized and directed to widen Dock street 30 feet from its northern boundary line into the dock, thus making its width over all 80 feet, and appropriating over \$6,000 for the purpose, provided the proprietors should assent to a relinquishment of all rights they may have in Dock street. On April 25th following the proprietors executed an agreement whereby they signified their full assent to the improvements made under the Ordinance No. 12 of the year 1814, and, in the language of the agreement, "herely absolutely renounce and relinquish, abandon, and make over to the corporation of the city of Baltimore forever all the right, title, and interest which we, or any of us, our or any of our heirs or assigns, may or can have in or to all the following streets, wharves, block or pier, etc., to wit: * * * All Dock street." They therein obligated themselves to execute a more formal assignment to the corporation upon its request or whenever required. This agreement was signed by all the proprietors; Margaret Cunyngham signing for John Cunyngham. The work of widening was then carried to completion in 1839. Numerous ordinances have been passed looking to the care and maintenance of the dock and Dock street. The first 50 feet of the street have been paved, it has been lighted, and water and sewer pipes have been installed. As we have seen, the lot in controversy is within the lines of lot No. 28 extended to the water, and is separated from the original extension of said lot by the original 50 feet of Dock street.

[1] The contention of the appellants is based upon the rights claimed to have been conferred upon their predecessors in title by chapter 9, § 10, of the Acts of 1745. This act, for the purpose of encouraging persons owning water front properties in Baltimore to make improvements in front of their properties, provided:

"That all improvements of what kind soever, either wharves, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever."

And reasoning from that act and the decisions thereon, they argue that the title to all improvements made by the city under the ordinance of 1814 became vested in their predecessors as the owners of the fast land as soon as they were completed, and further argue that, such being the case, the further extension of the limits of their lot by the improvement by the city, under the act and ordinance of 1837, vested in them title to the land in question.

Many interesting and instructive cases are

to be found in the decisions of this court as to the rights secured to property owners by virtue of this statute, such as that the riparian owner had no vested title to the land covered by water immediately in front of his property, nor to the improvements built out of the water, until the improvements had been actually completed (*Giraud v. Hughes*, 1 Gill & J. 249), and that, before the riparian owner had made any improvements in front of his property, the state could intercept his right to make them by a grant of the land covered by water (*Casey v. Inloes*, 1 Gill, 430, 39 Am. Dec. 658; *Linthicum v. Coan*, 64 Md. 439, 2 Atl. 826, 54 Am. Rep. 775). This right of the state was taken away by chapter 129 of the Acts of 1862, which forbade the issuance of any patent for land covered by navigable water, and that the rights given to a riparian owner under the act was a valuable one, of which he could not be deprived by another person without his consent. *Casey v. Inloes*, supra.

For the disposition of this case, we do not find it necessary to enter into a discussion of any but one point, for, in our opinion, the question of whether or not the appellee had secured title to the entire bed of Dock street, as it exists to-day, by adverse possession settles this case.

In the ordinance of 1814 it was made a condition precedent to the making of the improvements that the proprietors should signify their assent to the plan. This by its terms could be verbal as well as written. It does not appear from the record whether or not this assent was secured. But it does appear that the money appropriated for the work on the above condition was expended and the work done. Of course, at this far day, there is no person who could testify as to that, but the presumption is that the public officials secured such assent in conformity with their expressed duties. From the plan drawn on the plat it appeared to any one interested in the improvement that the streets around the dock formed a very important feature of the improvement, and they must have known that the dock would be of very little use as a public improvement without these streets were opened to the public as public highways. When we consider that the plan provided for an extension of lot 28 of approximately 250 feet, thus converting a shallow lot into one of good depth, and making entrance possible from the front and rear, is it not an irresistible presumption that the then two owners of that lot gave their assent readily? After making this street, the city has treated it just as any other thoroughfare of the city. They have exercised complete control over it ever since until the present. They have lighted it, paved it, put in water mains and sewers, cared for it in the way of maintenance, and at all times has it been open to the public. Not since it was constructed until the present time has there been a claim made by any one that the

city had not acquired an easement in said 50-foot street for a public thoroughfare over it. In fact, such a concession was made by the counsel for the appellant during the taking of testimony.

The situation of Dock street prior to the passage of chapter 63 of the Acts of 1836, so far as the title to Dock street was concerned, was that the fee to the bed of that street was in John Cunyngham, subject to the right of travel by the public thereover; the fee in John Cunyngham having been acquired, of course, by virtue of the provisions of the act of 1745. It was during this situation of the title that the Legislature of 1837 passed the act just referred to, by which the city was given the authority to widen the street to the extent of 30 feet, and granted to it not only the fee in the same when it should be constructed, but also the fee to the original 50 feet already constructed and then in use and occupancy, but nevertheless saving to any individuals any rights with which they might be vested under the act of 1745 or otherwise. It was after this that the ordinance of March 29, 1837, was passed directing that the improvement provided for under the act of 1836 should be carried into effect, provided that first the proprietors of ground bounding on the dock should execute a deed of conveyance of the right of wharfage and the bed of the street to the city. It was for the purpose of accomplishing that result that the city obtained on April 25, 1837, the paper which we have referred to above. While this paper is very informally drawn and could hardly be considered of such legal effect as to convey the rights which it purported to assign, yet nevertheless it does have the effect of showing that the city thought that it was carrying out the duty imposed upon it by the ordinance, and believed that it was obtaining a fee-simple title to the bed of the street already built and about to be built, in consideration of making the additional improvement. Acting on the belief that title had been obtained by it, the city proceeded with the work, and completed it in 1839, and entered into possession of it and continued in the possession of the original 50 feet.

[2] As we have said above, while this paper would have no legal effect to change the title to the street, yet it does have a great effect in showing that the appellee was occupying the street under the belief that the fee to the same was vested in it, and that therefore their occupancy was under claim of a supposed right, and therefore adverse. The city continued from 1839 to so occupy the whole of Dock street until the year 1880, a period of over 40 years, before claim was made by any one to any portion of the 30-foot strip. We are then of the opinion that there was abundance of evidence from which it could be found that the appellee had obtained a fee-simple title to the whole of Dock

street through adverse possession. Therefore the lower court was correct in refusing to rule as a matter of law that there was no evidence in the case legally sufficient to show that the plaintiff had acquired any title, interest, or estate in or to the strip of land in controversy. The ruling of the court in rejecting the prayers of the appellant dealing with their claim to the benefit of the law of adversary possession as applied to their occupancy, was correct, for the reason that this court has held that prescription will not run against the city or the public. *Cushwa v. Williamsport*, 117 Md. 318, 319, 83 Atl. 389; *Ulman's Case*, 83 Md. 144, 145, 34 Atl. 366.

Finding no error in the rulings of the learned court below, we will affirm the judgment.

Judgment affirmed, costs to the appellee.

(78 N. H. 426)

TOWN OF TILTON v. CITY OF CONCORD.

(Supreme Court of New Hampshire. Belknap. June 5, 1917.)

1. PAUPERS \S 39(3) — SETTLEMENT — REQUISITES.

Where the paupers had no settlement in Concord, except through the father, who had not wholly gained his settlement during the ten years preceding, they were county charges in view of Laws 1903, c. 106, providing that: "No town shall be liable for the support of any person unless he, or the person under whom he derives his settlement, shall have wholly gained a settlement therein during the ten years preceding the last date of application for support."

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. \S 164.]

2. PAUPERS \S 41 — DUTIES OF OVERSEERS — SPECIAL REQUEST.

Under direct provisions of Pub. St. 1901, c. 84, \S 1, it is the duty of the overseers of the poor of a town to relieve all persons therein unable to support themselves, and no special request need be shown.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. \S 182, 183.]

3. PAUPERS \S 52(6) — FURNISHING RELIEF — PRESUMPTION.

Where relief is actually furnished to a person in distress, it is presumed to be done at his request.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. \S 229-231.]

4. PAUPERS \S 52(2) — LIABILITY FOR SUPPORT — RESIDENCE.

Where at the date of the application the paupers had no settlement in Concord, there could be no recovery from it for relief given by plaintiff town.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. \S 216, 219, 220.]

5. PAUPERS \S 52(2) — LIABILITY FOR SUPPORT — RESIDENCE.

There could be no recovery from the city where alleged paupers had a settlement if there was no existing necessity for the relief given by plaintiff town.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. \S 216, 219, 220.]

6. PAUPERS \Leftrightarrow 52(6) — RELIEF TO PAUPERS — PRESUMPTION.

Each item of pauper support legally furnished is presumed to be furnished upon application then made.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 229-231.]

Transferred from Superior Court, Belknap County; Kivel, Judge.

Assumpsit by the Town of Tilton against the City of Concord. Transferred on an agreed statement of facts. Judgment for defendant.

Assumpsit for aid furnished paupers. The paupers are the widow and minor children of one Moses Ayotte, who acquired a settlement in Concord by the payment of poll taxes for the years 1906 to 1912, inclusive. In 1912 or 1913 Moses removed to Laconia, where he died February 22, 1914. His widow and children shortly thereafter moved to Tilton, where July 1, 1914, they applied to the overseers of the poor of Tilton for aid, which has since been continuously furnished them. The city of Concord reimbursed Tilton for all sums expended for the paupers up to April 1, 1916, and then refused further payment. The action is to recover for sums expended in support of the paupers between June 19 and September 19, 1916, of which due notice was given the defendant.

Fletcher Hale, of Laconia, for plaintiff. Hollis & Murchie, of Concord (Alexander Murchie, of Concord, orally), for defendant.

PARSONS, C. J. [1] "No town shall be liable for the support of any person unless he, or the person under whom he derives his settlement, shall have wholly gained a settlement therein during the ten years preceding the last date of application for support." Laws 1903, c. 106. The paupers had no settlement except that derived through the husband and father, Moses Ayotte. It is conceded his settlement in Concord was not wholly gained during the ten years preceding the time when the support sued for was furnished. The paupers therefore at the time the aid was furnished had no settlement in Concord and were county charges. *Lancaster v. Coos County*, 74 N. H. 439, 68 Atl. 867; P. S. c. 84, § 1. July 1, 1914, they applied for aid, which has since then been continuously furnished them. The plaintiff argues that July 1, 1914, was the last date of application for aid, and that the true construction of the statute is that the city of Concord, being then liable to support the paupers, continues liable as long as support is furnished under such application. But the fact stated is that the application, July 1, 1914, was the first not the last application for aid. April 1, 1916, Concord denied further liability. If the paupers thereafter made formal application for the assistance subsequently furnished between June 19th

and September 19th, the defendant is not liable upon the plaintiff's construction of the statute.

[2] It was the duty of the overseers of the poor of Tilton to relieve and maintain all persons in the town unable to support themselves. P. S. c. 84, § 1. No special request was required if assistance was necessary. *Rumney v. Keyes*, 7 N. H. 571, 577.

[3] "Where relief is actually furnished a person in distress, it is presumed to be done at the request of him who had it, and no special request or application need be shown." *Moultonborough v. Tuftonborough*, 43 N. H. 316, 320. That the supplies furnished in the summer of 1916 were furnished in good faith because then requested or applied for or because the situation at the time implied such request or application was the foundation of the plaintiff's case. *Moultonborough v. Tuftonborough*, supra. As to the necessity for the aid and the good faith of the town officials no facts are agreed.

[4-6] If it is assumed the aid was furnished in good faith because then needed and expressly or impliedly applied for, there can be no recovery because at the date of the application the paupers had no settlement in Concord. If the facts are otherwise, and the aid was furnished because applied for two years before without existing necessity, there could be no recovery even if the recipients had a settlement in Concord. Each item of pauper support legally furnished is presumed to be furnished upon application then made. Judgment for the defendant. All concurred.

(78 N. H. 379)

COGSWELL v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. April 3, 1917.)

1. CANCELLATION OF INSTRUMENTS \Leftrightarrow 37(5)—RELIEF IN EQUITY—MISTAKE—BILL—SUFFICIENCY.

A bill, alleging that injuries resulting in death of the releasor were unknown to both parties when the settlement evidenced by the release was made, and that the release agreed on was only intended as compensation for the damage to releasor's vehicle and his personal injury of lameness in the shoulder, is sufficient to authorize a decree setting aside the release.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 68, 74, 77, 79, 80.]

2. RELEASE \Leftrightarrow 16—RELIEF IN EQUITY—MISTAKE—NATURE OF MISTAKE.

Where the releasor at the time he was injured was suffering from chronic Bright's disease and received an injury to his shoulder and his back and gave a release which the defendant secured for the purpose of avoiding litigation, without fraud or compulsion, a subsequent aggravation of his disease by his injury, though both parties were ignorant of such condition, did not show such a mutual mistake as to warrant setting aside the release, which was conclusive.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 31.]

3. RELEASE ¶16—RELIEF IN EQUITY—MISTAKE.

Ignorance of a fact which, if known, would have prevented the making or altered the terms of a release does not alone authorize rescission, since the release cannot be disturbed, unless the fact of which the parties were ignorant was a material ingredient in the contract and disappoints their intention by mutual error.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 31.]

4. CANCELLATION OF INSTRUMENTS ¶37(1)—RELIEF IN EQUITY—PLEADING—GROUNDS.

A claim that a release, if valid against the releasor, is not an answer to the suit by his executor, claiming damages for the injury as to which the release was given, which resulted in death of the releasor, is an answer at law to the plea, and presents no ground for equitable intervention.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-68, 71.]

5. DEATH ¶25—SURVIVAL—TORT ACTIONS—RIGHTS OF EXECUTOR.

Where an injured person had given a release from all litigation arising from the injuries, his executor could not maintain suit for death resulting from such injuries, since Pub. St. 1901, c. 191, §§ 8-12, provides for survival of existing causes of action, but not for causes which have been extinguished.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 27.]

Exceptions from Superior Court, Merrimack County.

Bill by Edward N. Cogswell, executor of Josiah W. Emery, deceased, against the Boston & Maine Railroad. On exceptions by plaintiff and defendant to the orders of the judge. Plaintiff's exceptions overruled, and bill dismissed.

Bill in equity in aid of an action at law. The plaintiff brought action against the defendants, claiming the death of his testator, Josiah W. Emery, was occasioned by the defendants' negligence. The defendants pleaded the general issue, with a brief statement setting up a release, under seal, of all claims against the defendants in consequence of the accident and injury referred to in the plaintiff's declaration and executed by the plaintiff's testator, December 26, 1913. Thereupon the plaintiff brought this bill to have the release set aside upon the ground that it was executed upon a mutual mistake as to the identity, character, and extent of the injuries which had been received by Emery, and in entire ignorance of the principal injuries which resulted in his death and on account of which the action was brought. The defendants answered, denying the allegations of the bill. The plaintiff then claimed in an amendment to the bill that the release executed by Emery before his death was not a bar to the suit brought by his executor, claiming damages for the death resulting from the injury. The cause was heard upon the pleadings by Branch, J., who found the following facts: December 24, 1913, Josiah W. Emery was struck upon a grade crossing by the defendants' motor section car, and thrown out of the sleigh in which he was

riding. The only injury of which he complained was a lame shoulder, side, and back. He drove home, and then drove to Henniker village, a mile and a half, for liniment and alcohol, which his wife applied for several days. There was a large black and blue spot below his right shoulder and a small one in the small of his back above his right hip. The deceased did his farm work as usual the day of the accident and the following day. On December 28th, as he was driving to Henniker, he met the claim agent of the railroad, who drove with him to the railroad station, and on the way talked about a settlement. The only claim of personal injury then made by Emery was a little lameness of the shoulder. Twenty-five dollars was agreed upon to settle the claim for both personal and property damage. A release was drawn up, which was read by Mr. Emery, was read over to him, and was fully understood by him. There was no fraud.

Some time in January, Mr. Emery began to be troubled with shortness of breath. About the middle of February, he gave up all work, and died March 1, 1914. February 16th he first consulted a doctor, who thought him afflicted with Bright's disease, a diagnosis which was subsequently confirmed. The plaintiff claimed that Bright's disease resulted from the injury. From the medical testimony the court found that Emery's death was caused by chronic Bright's disease, which he must have had for a considerable time before the accident, and that the accident could in no way be regarded as the cause of the disease, but the effect of the fall was to accelerate the course of the disease and to hasten death.

Neither Emery nor the claim agent had knowledge of Emery's bodily condition, which rendered the results of the accident more serious to him than they might otherwise have been. The claim agent, for the purpose of avoiding litigation, intended to settle once and for all every claim which Emery had or might have in the future growing out of this accident. The release so stated, and it was so understood by Mr. Emery. The railroad intended to buy its peace.

The court ruled that these facts present a case where a contract was fairly entered into by both parties, and where the terms of the contract were themselves fair, in view of the facts which the parties knew at the time, but a case where both parties contracted in ignorance of an important fact which, if known, would have materially altered the terms of the agreement, and found that this is not a case where the parties "negotiated upon a mutual understanding that it was doubtful who was to blame for the accident and what the plaintiff's injuries might turn out to be," and where "both parties intended to take the risk of loss as it might thereafter appear," but that it is rather a case where without reference to the question of liability the amount paid depended upon, and

was intended "in some degree to be commensurate with, existing injuries," and made the following orders: (1) That the prayer of amended bill be denied as matter of law, and the plaintiff excepted. (2) That the release be set aside upon the ground that it was executed by reason of a mutual mistake of fact, and the defendants excepted. The defendants also excepted to the denial of their motion for the dismissal of the bill made at the close of all the evidence, and to the findings as to the character of the case upon the ground that they were unsupported by the evidence and were inconsistent with prior special findings.

Joseph S. Matthews and Martin & Howe, all of Concord, for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord, for defendant.

PARSONS, C. J. The plaintiff's testator, Emery, was thrown from his sleigh December 24, 1913, by a collision with the defendants' motor section car upon a highway grade crossing of the defendants' road. He died March 1, 1914. The plaintiff brought suit against the defendants, claiming the death was caused by the collision, which was alleged to have been due to the defendants' negligence. In answer, the defendants pleaded a release under seal executed two days after the accident. This purported to be a release and discharge of all causes of action arising out of the accident. Thereupon the plaintiff, in accordance with the procedure suggested in *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769, brought this bill to set the release aside.

[1] The bill alleges that the injuries which resulted in Emery's death were unknown to both parties when the settlement evidenced by the release was made, and that the contract of settlement then agreed upon was only intended as compensation for the damage to Emery's sleigh, and the only personal injury of which Emery then complained, "a little lameness in the shoulder." The allegations are sufficient to authorize a decree for the plaintiff within the rules laid down in *McIsaac v. McMurray*, in which the subject of reformation or rescission for mistake is fully considered. It was there pointed out that a release under seal was the written evidence of a contract made by the parties, and that if by mistake in a material matter the documentary evidence failed to state accurately the intention of the parties—i. e., the contract—equity had power in a proper case to give relief. In that case, which was also a suit for personal damages caused by negligence, it was claimed that the real contract between the parties was not for the settlement of all controversy between them in reference to the defendants' liability for the plaintiff's injuries, but was merely to give the plaintiff compensation for certain known injuries, and that at that time plaintiff had received a serious injury, a broken hip, of

which injury both parties were in ignorance at the time of the contract of settlement. It was held that these facts, if so proved as to overcome the weight of the written document as evidence, would authorize the rescinding of the release so far as it was in conflict with the contract of the parties.

The mistake claimed being mutual ignorance at the time of the contract of the serious injury to the plaintiff's hip, it was said:

"Upon these facts, the question arises whether the mistake related to a matter that was material to the contract of settlement. The fact that the parties were justifiably ignorant of the serious injury to the plaintiff's hip does not alone show that the mistake was in respect to a material matter. Whether it was or not depends upon the intention of the parties in making the contract. If their purpose was to terminate all dispute and litigation between them in reference to the defendant's liability for negligence in causing the plaintiff's injuries, * * * the mistake as to the extent of his injuries would be immaterial." *McIsaac v. McMurray*, 77 N. H. 466, 472, 473, 93 Atl. 115, 118 (L. R. A. 1916B, 769).

The question in that case arose upon the pleadings, and it is clearly stated that the matter to be determined by proof was the actual contract. What did the parties intend? What was the proposition upon which the minds of the parties met? Was it the release of the defendant from all further liability to answer for the consequences of the accident, or the amount of compensation that ought to be paid for a certain known injury?

[2] In this case the plaintiff failed upon hearing to establish a tangible, independent injury existing at the time of the settlement of which the parties were ignorant. The fact found of which the parties were ignorant was that at the time of the accident Emery was afflicted with chronic Bright's disease which he had had for some time before. This disease caused his death. The disease was not caused by the accident, but the effect of the fall was to accelerate the course of the disease and thus to hasten death. The settlement which the release was offered to prove was made between Emery and the defendant's claim agent. It is found that the claim agent, for the purpose of avoiding litigation, intended to settle once and for all every claim which Emery had or might have in the future growing out of this accident. The release so stated. It was so understood by Emery. The railroad intended to buy its peace. This was an offer of a certain sum in full of all claims which could arise out of the accident, knowingly accepted, without fraud or compulsion by the party to whom the offer was made. Emery's acceptance of the offer which he understood completed the contract. *McDaniels v. Bank*, 29 Vt. 230, 235, 70 Am. Dec. 406. The contract proved by parol is the precise contract proved by the written evidence, the release pleaded. There is no evidence to support the conclusion that the railroad intended to pay \$25 in compensation for

the lame shoulder and fractured sleigh, leaving open the question of liability to make compensation for other injury or other results than temporary lameness, or that Emery so understood. The conclusion that such was the contract is not supported by evidentiary findings which establish a different contract.

[3] Upon these facts the trial court ruled that the facts presented a case where a contract was fairly entered into by both parties, and where the terms of the contract were themselves fair in view of the facts which the parties knew at the time, but a case where both parties contracted in ignorance of an important fact, which, if it had been known, would have altered the terms of the agreement. But ignorance of a fact which, if known, would have prevented the making or altered the terms of an agreement does not, of itself, authorize the rescission of an agreement. In this case both parties knew that Emery had sustained a fall, necessarily causing more or less shock to his system. What the result would be they could not know. If they had known of his bodily condition, they might, with the aid of medical advice, have anticipated more serious consequences from the shock than they would have anticipated in the case of a similar person in good health. Whether their ignorance related to a past or existing fact or to a future uncertain result need not be determined. *McIsaac v. McMurray*, supra, 77 N. H. p. 475, 93 Atl. 115; s. c., L. R. A. 1916B, note page 777.

The most favorable view of the findings for the plaintiff is that, unknown to the parties, Emery at the time of the settlement had received from the accident a shock to his system liable to be followed by serious results. Conceding for the purpose of the discussion that this constitutes an additional injury of which the parties were justifiably ignorant at the time the contract was made, does such ignorance authorize the cancellation of the contract? The contract may not be disturbed unless the fact of which the parties were ignorant was—

“a material ingredient in the contract of the parties, and disappoints their intention by a mutual error. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*.” 1 Story, Eq. § 151; *McIsaac v. McMurray*, supra, 77 N. H. 473, 93 Atl. 115, L. R. A. 1916B, 769.

“There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and, if known, might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much em-

barrassment. As to all such facts, a party must rely upon his own circumspection, examination, and inquiry; and, if not imposed upon or defrauded, he must be held to his contracts.” *Dambmann v. Schulting*, 75 N. Y. 55, 64.

“The fact concerning which the mistake is made must be material to the transaction affecting its substance, and not merely its incidents. * * * If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms * * * the mistake will not be ground for any relief affirmative or defensive.” 2 Pom. Eq. Jur. § 856.

“The fact involved in the mistake must have been as to a material part of the contract, * * * an intrinsic fact; that is not * * * material in the sense that it might have had weight if known, but that its existence or non-existence was intrinsic to the transaction, one of the things actually contracted about.” *Kowalke v. Electric Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877.

See *Kerr on Fraud and Mistake*, p. 433; *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214; *Hecht v. Batcheller*, 147 Mass. 335, 338, 17 N. E. 651, 9 Am. St. Rep. 708.

Whether the fact now in question is material, intrinsic, a part of the subject-matter, is answered by the finding what the contract was. If the contract was to make compensation to Emery for injuries received in the accident, the unknown injury was a material part of the contract. In such case the subject-matter was the injuries received. This position was well put by counsel in argument in the claim that what Emery sold was a lame shoulder, not a death-hastening shock. The same argument was made in *McIsaac v. McMurray*, that the sale was of certain bruises, not of a broken hip.

But the fact as found is that the subject-matter of the contract was the avoidance of future litigation. The offer to pay a certain sum to settle once and for all every claim growing out of the accident, knowingly accepted by Emery, was the contract. Emery having accepted the money tendered on such conditions, is bound by his acceptance of the terms. It is found as a fact that the railroad intended to buy its peace. The subject-matter of the contract, that which the parties bought and sold, using the language of counsel, was not Emery's injuries, but the railroad's peace. The extent of Emery's injury did not affect the subject-matter of the contract.

It may be the amount paid or to be paid was determined with reference to the injuries understood to have been received, but the manner in which the compensation considered sufficient was arrived at is not necessarily part of the subject-matter. Doubtless the parties, although intending to settle the whole matter, might have made their settlement dependent upon the receipt by Emery of adequate compensation for past and future damage resulting from the injury, but the explicit finding that the subject of the contract was the avoidance of all future

litigation renders impossible such interpretation of the contract in this case.

The subsequent general findings or rulings made by the court are inconsistent with the special finding what the contract was. The exceptions thereto, to the denial of the motion to dismiss, and to the decree setting aside the release are sustained.

[4] There was no error in the order denying the prayer of the amended bill. The claim therein set up that the release, if valid against a suit by Emery, is not an answer to the suit by his executor claiming damages for an injury resulting in death, if sound, is an answer at law to the plea, and presents no ground for equitable intervention.

[5] As to the question of law which has been argued, it seems sufficient to say that, Emery's cause of action having been discharged before his death, none was in existence at his death upon which his executor can maintain a suit. P. S. c. 191, §§ 8-12, provides for the survival of existing causes of action in case of the death of one of the parties. No action is given the executor upon a cause which has been extinguished by judgment or contract in the testator's lifetime. See *Louisville Ry. v. Raymond*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176, and notes. The plaintiff's exception is overruled.

Bill dismissed. All concurred.

(91 Vt. 391)

STATE v. WARNER.

(Supreme Court of Vermont. Windsor. May 1, 1917.)

1. CRIMINAL LAW §384—DEFENSES—INSANITY—EVIDENCE—ADMISSIBILITY.

Where one accused of murder defended on the ground of insanity, and offered testimony tending to show that a diseased mental condition began two years before the alleged offense, testimony of persons who knew him, as to his sanity, for a considerable period prior to the offense, was not inadmissible as too remote.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848.]

2. HOMICIDE §179 — DEFENSES — INSANITY—EVIDENCE—ADMISSIBILITY.

When one accused of murder puts his mental condition in issue by evidence tending to show insanity, his whole life may be canvassed for evidence bearing upon that question, and his ancestry and family history may be investigated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380.]

3. HOMICIDE §179 — DEFENSES — INSANITY—EVIDENCE—ADMISSIBILITY.

One accused of murder cannot, by limiting his own evidence as to his alleged insanity to a certain period of time, circumscribe the inquiry on behalf of the prosecution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380.]

4. HOMICIDE §151(2) — DEFENSES — INSANITY—EVIDENCE—ADMISSIBILITY.

When one accused of murder introduces evidence tending to show that he was insane, the burden is upon the state to show all the circumstances affecting the question of sanity; since it

is the state's duty as well to prevent conviction of an insane person as to prevent a sane person from escaping punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 277.]

5. CRIMINAL LAW §1169(2) — APPEAL — HARMLESS ERROR.

Admission of improper evidence to establish an undisputed fact is harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

6. HOMICIDE §151(2)—DEFENSES—INSANITY—BURDEN OF PROOF.

Where one accused of murder defends on the ground of insanity, the burden is on the state to establish his sanity as an intrinsic element of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 277.]

7. HOMICIDE §151(2)—DEFENSES—INSANITY—BURDEN OF PROOF.

Sanity being the normal condition of the human mind, the law presumes that one accused of murder is sane; but insanity is not an affirmative defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 277.]

8. HOMICIDE §151(2), 237—DEFENSES—INSANITY—INSTRUCTIONS.

In prosecution for murder, defended on the ground of insanity, instruction that it is the burden of the defendant, in the first instance, to make proof on the issue of his sanity, but that when it was in the case his sanity must be proved beyond a reasonable doubt, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 277, 500.]

Exceptions from Windsor County Court; Frank L. Fish, Judge.

George Warner was convicted of murder, and he excepts. Affirmed.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

H. G. Barber, Atty. Gen., and Bert E. Cole, State's Atty., of Windsor, for the State. Fred G. Bicknell, of White River Junction, for respondent.

POWERS, J. [1] George Warner has been convicted of murder in the first degree. The homicide was committed in the town of Andover on November 4, 1914, and Henry Wiggins was its victim. The respondent brings here but two questions, neither of which requires any particular statement of the evidence. He introduced some evidence tending to show that he was insane at the time of the homicide, and that this mental unsoundness developed about two years before that event. Thereupon the state produced various witnesses, who had known the respondent for many years preceding the trial, and after they had testified to certain facts, circumstances, and observations, they were allowed, subject to the respondent's exception, to predicate thereon opinions of his mental soundness. The only question raised below or made here regarding the admissibility of this testimony is that it was too remote, in view of the evi-

dence of the respondent, and it is insisted that these witnesses should have been limited to opinions based upon facts observed within the two years preceding the crime—the period covered by the respondent's evidence. The exception is without merit. Remoteness is ordinarily a question addressed to the discretion of the trial court. *State v. Bean*, 77 Vt. 384, 60 Atl. 807; *Smith v. C. V. Ry. Co.*, 80 Vt. 208, 67 Atl. 535; *Belka v. Allen*, 82 Vt. 456, 74 Atl. 91; *Perkins v. Perley*, 82 Vt. 524, 74 Atl. 231. There is nothing in the record before us to take the case out of the rule.

[2-5] When a respondent puts his mental condition in issue by the introduction of evidence tending to show his insanity, he opens an inquiry that may take a very wide range; how wide depends upon the circumstances of the case in hand. *Undh. Cr. Ev. § 160*; 1 *Wlg. Ev. § 233*. Broadly speaking, his whole life may be canvassed for evidence bearing upon the question, and his ancestry and family history may be investigated. In this very case, the respondent properly introduced evidence tending to show insanity in his ancestors, and asked the jury to believe that the seeds of the malady came to him by inheritance. In these circumstances, if not otherwise, it was proper for the state to show that mental disease had not appeared in the respondent during the time covered by its witnesses. For this very fact was, of itself, a circumstance bearing upon the probability that it developed at all. Nor can a respondent, by limiting his own evidence to a certain period of time, thereby circumscribe the inquiry or affect the right or duty of the prosecution. Moreover, sound public policy and a proper regard for the rights and interests of a respondent in a capital case, whose mental responsibility is an issue at his trial, forbid that he should be allowed to concede away his rights by admitting that he was sane at any previous date or time. When the issue is once raised, it is the duty of the state to produce sufficient relevant evidence to establish his legal responsibility by the measure of proof required by the law. It is as much the duty of the state to protect an insane man from conviction, as it is to prevent a sane man from escaping that result. We cannot say from the record that the ruling complained of resulted in a wider range of inquiry than was allowable. Besides, the respondent's position only amounts to this: Improper evidence was admitted to establish an undisputed fact—which is harmless error. *McKindly v. Drew*, 71 Vt. 138, 41 Atl. 1039; *Coolidge v. Taylor*, 85 Vt. 39, 80 Atl. 1038; *First Nat. Bank v. Bertoll*, 88 Vt. 421, 92 Atl. 970; *State v. Saidell*, 70 N. H. 174, 46 Atl. 1083; 85 Am. St. Rep. 627; *Dietz v. Big Muddy C. & I. Co.*, 263 Ill. 480, 105 N. E. 289; *Watters v. Brown*, 177 Ala. 78, 58 South. 291; *Standard Life & Ac. Ins. Co. v. Schmaltz*, 66 Ark. 538, 53 S. W. 49, 74 Am. St. Rep. 112.

[6] At the close of the charge, the respondent excepted to the failure of the court to instruct the jury that:

"The burden of proof as to sanity, in cases of murder of the first degree, and with premeditation, enters in as an element of the crime."

From the course of the trial as shown by the record, it is manifest that the meaning of this somewhat obscure exception was that the respondent was entitled to an instruction that the burden was on the state to establish the respondent's sanity as an intrinsic element of the crime, and to establish it beyond a reasonable doubt. This is unquestionably the law.

[7] Sanity is the normal condition of the human mind. Consequently, the law, in reliance upon this self-proving assertion, presumes at the outset of the trial that the respondent in any given case possesses the requisite degree of mental capacity to make him criminally responsible. And this presumption answers the administrative requirements of the law until evidence comes into the case from some source tending to show otherwise. But, if such evidence appears, it then becomes the duty of the prosecution to establish the respondent's sanity as an essential ingredient of the crime, and to establish it beyond a reasonable doubt. A frequent way of stating this rule, and one made use of below in a part of the charge unexcepted to, is this: The law presumes the respondent to be sane until the contrary is shown by evidence; and this presumption continues until overcome by evidence to the contrary. Even so accurate a legal writer as Judge Cooley uses language much like this in *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162. Nevertheless, we consider this form of statement unfortunate and calculated to mislead. The expression "overcome by evidence" naturally indicates that the respondent must overcome the presumption, must produce evidence to outweigh it. Such is not the law. It is not the law of Judge Cooley's opinion. It is not the law of the charge below, taken as a whole. Insanity is not an affirmative defense. It is a means of meeting the case made by the prosecution and weakening one of its essentials; beyond this it need not go. "Sanity is an ingredient in crime as essential as an overt act," is the way Chief Justice Breese correctly puts it in *Chase v. People*, 40 Ill. 352. It is necessarily involved in every criminal trial, and the burden of proof is always and at all times on the state. The presumption of sanity answers the requirement of this burden until countervailing evidence challenges it; but then, upon all the evidence in the case, sanity must be affirmatively established beyond a reasonable doubt. Otherwise, there can be no conviction. The duty of going forward on this subject is on the respondent, but nothing more. *State v. Doherty*, 72 Vt. at page 403, 48 Atl. 658, 82 Am. St. Rep. 951; 2 *Chamb. Ev. § 974*; 1

Whart & Stillé, Med. Jur. § 315; Davis v. United States, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, and cases cited. The charge of the court below was in harmony with the foregoing views. While it did not follow the exact language of the respondent's request on that point, it recognized the rule of law contended for, and adequately placed the same before the jury. Nothing more was required. *State v. Eaton*, 53 Vt. 574.

[8] The court gave a supplemental instruction on this subject as follows:

"The defense of insanity is made by the respondent. He brings it here, and it is for him, in the first instance, to make proof on that issue. But when it is in the case, * * * and you are considering the right and wrong of that issue, you must find the guilt of the respondent established beyond any reasonable doubt; which means, as applied to insanity, that at the time of the killing the act was not the result of insanity."

Complaint is now made of the expression "make proof on that issue," and the respondent treats it as meaning "make proof of that issue." It is apparent, however, that it was only intended to mean that the respondent was required to produce proof or evidence on that issue. The instruction as a whole "breathes the true spirit and doctrine of the law," and, especially in view of the context, there is no fair ground to say that the jury was misled by it. *Fassett v. Roxbury*, 55 Vt. 552; *Idle v. Boston & Maine Railroad*, 83 Vt. 66, 74 Atl. 401.

We have no occasion to give further consideration to the character and effect of the presumption of sanity to inquire whether it is in the nature of evidence or a mere administrative expedient that becomes functus officio as soon as evidence of insanity comes into the case; for, though the charge gave it evidential effect, no exception was taken, and no question thereon is made here.

We have patiently examined the transcript and have carefully considered the arguments of counsel on all points presented; we find no error and are satisfied that the respondent had a fair and impartial trial, and that the result was fully warranted by the evidence.

Judgment that there is no error in the record and that the respondent takes nothing by his exceptions. Let sentence pass and execution be done.

(91 Vt. 425)

VERMONT MARBLE CO. v. EASTMAN et al.

(Supreme Court of Vermont. Rutland. May 1, 1917.)

1. APPEAL AND ERROR § 265(1)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

The findings of the chancellor stand like the report of a special master within P. S. 1268, providing that no question as to the admission or rejection of evidence by a special master shall be heard in the Supreme Court, unless rais-

ed by exception to the report filed in the court of chancery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1536, 1538, 1543-1551.]

2. APPEAL AND ERROR § 265(1)—EXCEPTIONS—SERVICE ON ADVERSE PARTY.

Although plaintiff had no knowledge of exceptions to findings of fact filed by defendant until briefs were exchanged, the exceptions will be considered where it does not appear that at the time of filing a copy was not left with the clerk of court, in view of rule 48, requiring the clerk to notify the adverse party of such filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1536, 1538, 1543-1551.]

3. APPEAL AND ERROR § 522(1) — RECORD — MATTERS INCLUDED—TESTIMONY.

Where the transcript of the testimony was not made a part of the chancellor's report, that it was referred to by defendants in their exceptions and made a part thereof would not bring it before this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367, 2368, 2370, 2371.]

4. APPEAL AND ERROR § 1078(1) — EXCEPTIONS—WAIVER.

Exceptions not briefed were waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

5. APPEAL AND ERROR § 694(1)—FINDINGS—PRESUMPTION.

Where exceptions to findings of fact involve the consideration of evidence not before this court, it cannot say that the evidence did not support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915.]

6. APPEAL AND ERROR § 1071(1)—FINDINGS—HARMLESS ERROR.

Defendants' exceptions to findings will not be considered where, if it be conceded that the court was wrong, the defendants were not harmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234.]

7. BOUNDARIES § 6—COURSES.

The two first calls in a deed which determined the others were as follows: "(1) Commencing at a point on the first stone wall west of the highway leading past the residence of the said Mead 20 rods south of said Mead's north line, the north end of said stone wall being 55½ rods westerly from said highway, and said point being on said stone wall 20 rods from said Mead's north line; (2) thence southerly on said stone wall to the end of the same, and thence southerly on the fence that joins on the same, in all 20 rods to a maple tree." The highway leading past M. ran almost due north and south, and the north line of his land ran almost due east and west, while the stone wall extended from the north line somewhat southwestwardly. *Held*, that the first call was to be determined by measuring south at right angles with M.'s north line to the place where the measurement of 20 rods just meets the stone wall, and not by measuring that distance from said north line along the stone wall, while the second call should be measured from the point thus determined southerly along the stone wall to the end thereof and in the direction thus started 20 rods from the point first determined.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57.]

8. BOUNDARIES § 6—COURSES.

Where a boundary line is described as running toward one of the cardinal points of the compass, it should be considered as running directly in that course, unless other words are

used for the purpose of qualifying its meaning or its direction is controlled by some object.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57.]

9. BOUNDARIES §3(4)—COURSES.

In description "thence southerly on said wall ten rods," the words "on said wall" show that the course of the line is controlled by the course of the wall.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 14-18.]

10. BOUNDARIES §6—COURSES.

The distance of a course being definitely stated in a deed, without any monument as its termination, the course and distance must govern.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57.]

11. DEEDS §95, 110—CONSTRUCTION—QUESTIONS OF LAW.

Where the language of a deed, when interpreted in connection with, and in reference to, the nature and condition of the subject-matter at the time it was executed, and the obvious purpose the parties had in view, is clear and unambiguous, its meaning is a question of law for the court, and the intent cannot be altered by evidence, or findings, of extraneous circumstances.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 238, 241-255, 293.]

12. DEEDS §99—CONSTRUCTION—EVIDENCE.

Deeds, surveys, and plans not referred to in the deed in question can neither restrict nor extend the import of the terms used.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 261-265.]

13. DEEDS §101 — PLEADING §36(1) — FACTS ADMITTED — PRACTICAL CONSTRUCTION.

Where the effect of the pleadings is to admit defendants' ownership of a narrow strip of land along the boundary in dispute, and such is also the practical construction which has always been given to the deeds through which defendants trace title, such strip will be considered as a part of defendants' grant.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 233; *Pleading*, Cent. Dig. §§ 81, 84, 85.]

14. BOUNDARIES §40(1) — CONSTRUCTION — QUESTION OF FACT.

The location of the division line on the land described in the deeds was a question of fact to be determined on the evidence.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-203.]

15. EQUITY §389—FINDINGS—CONCLUSIONS OF LAW—"DECISION."

Chancellor's finding that "the decision is that the line between the properties involved in this case is the so-called pin line" is not a conclusion of law; as a "decision" of the court is its finding upon either a question of law or fact arising in a case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 830.]

For other definitions, see *Words and Phrases*, First and Second Series, *Decision*.]

16. BOUNDARIES §3(3)—DISCREPANCY—LATENT AMBIGUITY.

That the length of the course required by the second call in the deed, the southerly terminus of which is given as the maple tree, was about 1.8 rods shorter than the distance given in the deed, held not to constitute a latent ambiguity.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 6-19.]

17. BOUNDARIES §3(1)—COURSES—ABUTTALS AND MONUMENTS.

As between courses and distances, on one hand, and abutments and monuments, on the other, the latter, when identified, must control; the reason being that mistakes in the former are more probable.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3, 5.]

18. BOUNDARIES §6—COURSES—PLACE OF BEGINNING.

The place of beginning being well known and ascertained, it must govern, and the grant must be confined within the boundaries given in the deed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57.]

19. BOUNDARIES §6—UNCERTAINTY IN DESCRIPTION—CALLS.

There being no uncertainty in the description, to locate the lines, the regular order of the calls should be observed and followed, and a posterior line cannot be controlled by a reverse survey.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57.]

20. EVIDENCE §390(3)—EXTRINSIC EVIDENCE TO VARY DEED.

Extrinsic evidence held not admissible to show that, by mistake, one tract of land instead of another was inserted in either of two deeds, thereby establishing a different contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1723, 1724.]

21. FRAUDS, STATUTE OF §100—MEMORANDUM—SUFFICIENCY.

Signed statements referring to land were insufficient to answer the requirements of the statute of frauds where they did not contain substantial terms of a contract for sale expressed with such certainty that they could be understood from the statements alone or from some other writing to which they referred.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 189.]

22. BOUNDARIES §48(6)—ACQUIESCENCE—ADVERSE POSSESSION—ESSENTIALS.

Recognition of and acquiescence in a boundary line is of no force unless followed by such possession of the land beyond the true divisional line for the period of 15 years as shall give a perfect title by adverse possession.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 240.]

23. ADVERSE POSSESSION §13—OCCUPANCY WITHOUT CLAIM OF RIGHT.

That a strip of land was used for dumping refuse from a quarry, that marble blocks were placed thereon, or that guys and ropes or cables were maintained upon the same would not give title by adverse possession where such occupancy was not under a claim of right.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 65, 67-76.]

24. ADVERSE POSSESSION §43(4)—TACKING POSSESSION—EVIDENCE.

Where each prior grantee did not transfer to his successor his possession of the land without the calls of his title deeds, and the land adversely held has never been covered by the description in any of the deeds within defendant's claim of title, there can be no tacking so as to make continuity of possession; as no privity of estate or of possession between the successive decisions is shown.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 218.]

25. ADVERSE POSSESSION ¶40—**TIME REQUIRED.**

Where defendants had not occupied that part of the boundary in dispute for 15 years, they could not of themselves have acquired any adverse rights.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 148-183.]

On Motion for Reargument.**26. VENDOR AND PURCHASER** ¶61—**DESCRIPTION OF PREMISES**—"ADJACENT TO."

Recital in a bond for a deed that "said Mead having this day executed a bond to them thereby agreeing to convey * * * the piece of land north of and adjacent to said premises" held no part of the description previously made in the bond; the words "adjacent to" not necessarily implying "adjoining" or "contiguous."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 97, 98.]

For other definitions, see Words and Phrases, First and Second Series, Adjacent.]

27. DEEDS ¶94—**BOND FOR DEED—MERGER.**

Where the bonds were executory contracts for deeds, and were executed and consummated by the deeds subsequently given, they were conclusively merged in the deeds, and, not being incorporated by reference, could not be looked to in determining the rights of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266.]

28. EVIDENCE ¶414—**PAROL EVIDENCE—TIME OF GIVING BOND.**

Parol evidence was admissible to show the true time of the giving of each bond.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1858.]

29. APPEAL AND ERROR ¶931(1)—**FINDING OF CHANCELLOR—REVIEW—PRESUMPTION.**

This court will not assume, for the purpose of finding error, that the evidence did not support the chancellor's finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762.]

30. APPEAL AND ERROR ¶934(1)—**REVIEW—INTENDMENT.**

Every reasonable intendment should be made in favor of the decree under review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777, 3780-3782.]

31. BOUNDARIES ¶24—**BOND FOR DEED—RECORDING—PRIORITY.**

That one of two bonds for a deed was recorded before the other gives it no priority as a contract for title in determining boundaries.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 136.]

32. BOUNDARIES ¶53—**DETERMINATION—SURVEY AND PLAN.**

A survey and plan not being participated in, authorized, or ratified by all the parties to either contract to convey, and not being referred to therein nor in either deed, cannot be considered in the construction of the bonds for the deeds or the deeds.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 264-267.]

33. BOUNDARIES ¶46(2)—**DISPUTED BOUNDARY—AGREEMENT BY CO-OWNER.**

An agreement by one of several co-owners establishing a doubtful or disputed boundary is not binding on the others unless they consent thereto.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 219, 220.]

34. TENANCY IN COMMON ¶15(7, 8)—**ADVERSE POSSESSION—EXCLUSIVE OWNERSHIP.**

To render the possession of a cotenant adverse, it must affirmatively appear that the others had knowledge of his claim of exclusive ownership which was accompanied by such acts of possession as would amount to an ouster as between landlord and tenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 49.]

35. ADVERSE POSSESSION ¶85(4)—**CLAIM OF RIGHT—EVIDENCE.**

That defendant, who owned land adjoining plaintiff's, purchased from plaintiff for a valuable consideration an interest in a part of the land within plaintiff's title deed, was evidence tending to show that defendant's previous use by way of anchoring guys on the land was not adverse or under a claim of right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 503, 688.]

36. EASEMENTS ¶36(1)—**ACQUISITION—BURDEN OF PROOF.**

The burden of establishing the prescriptive right of easement was with the defendants who claimed title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 89.]

Appeal in Chancery, Rutland County; Frank L. Fish, Chancellor.

Bill by the Vermont Marble Company against George P. Eastman and another. From a decree for orator, defendants appeal. Decree affirmed, and cause remanded.

This case was heard before, and facts found by the chancellor. Among other things reported and noticed in the opinion, the chancellor states the following facts:

The defendants did not at first claim to own as far north as they now claim. At the beginning of the trial and before finding some old plans (known as the Brown, the Green, and the Murphy plans) and surveys of the properties between which the dividing line is in dispute, they claimed to a line 20 rods (measured along the line of a fence and wall on the easterly side of the premises) north of the maple tree at the southeast corner of the defendants' land, which is nearly 2 rods south of the line now claimed. The plaintiff claimed to own to a line 20 rods southerly at right angles with Mead's north line and parallel therewith; and, if it failed in establishing this line, it claimed to the so-called "pin line" which is a few feet further north and is obtained by measuring 10 rods south from Mead's north line and then 10 rods along the east wall. Each side introduced evidence tending to establish its claim as then made, and the hearing was about to close when the defendants, having discovered the old plans and surveys mentioned above, asked and were granted leave to file a cross-bill. Thereupon they filed an amended answer and cross-bill in which they claimed the true line to be a line parallel with Mead's north line and 20 rods north of the maple tree, at right angles to said north line. The line so claimed is 33.6 feet further north, measured along the easterly wall, than the

line to which defendants before claimed, 3 rods $7\frac{1}{2}$ feet north of a line 20 rods south of Mead's north line, and only 16 rods and 9 feet south of this north line. The area of defendant's quarry lot south of a line measured at right angles 20 rods south of Mead's north line is 7.184 acres; south of the "pin line" it is 7.436 acres; and south of the line now claimed by them it is 8.69 acres.

The chancellor states that the old surveys and plans which caused the defendants to claim the line to be 20 rods north of the maple tree, measuring at right angles to Mead's north line, and the evidence taken in connection therewith, induce findings as follows:

"In the fall of 1866, negotiations having been entered into between Andrew J. Mead and prospective purchasers of the quarry property, at the request of said Mead and Alanda W. Clark, one of the prospective purchasers, James Brown, of Rutland, a surveyor, on September 26th went to West Rutland for the purpose of laying out the boundary lines of the marble property under consideration.

"Accompanied and directed by said Alanda W. Clark and Mr. Mead and his son, Eugene, Mr. Brown ran a line at right angles to the north line of the Mead farm, northerly from the point where two fences corner at the north side of a large maple tree. On this line he measured off 20 rods and then set a stake. Through this stake he ran a line parallel to the Mead-Blanchard line easterly to a stone wall, where he set a stake, and westerly to an old rail fence running northerly and southerly, and there set a stake. From the stake first set he continued the right angle line northerly 10 rods, and there set a stake, and from that stake ran easterly parallel with the Mead-Blanchard line to the said stone wall. From the maple tree he ran westerly along the line of a board fence 56 rods to the north bar post of a barway then standing, and there set a stake, and then turned a right angle to the north and ran a line to meet the line parallel with the Mead-Blanchard line.

"On the same occasion a small piece of land was surveyed lying east of the parcel above referred to, its westerly boundary being a part of the easterly boundary of the large parcel, and the northwest corner being a point on the wall 18 feet southerly from the butternut tree. * * *

"No other parcels of land were surveyed by Mr. Brown. * * *

"On September 27, 1866, the day following Brown's survey, a rough sketch or plan of the premises was prepared, and Mr. Mead made and retained a copy thereof for himself, showing in detail the boundaries, corners, monuments, and distances, and containing complete directions for drawing the conveyance as shown thereon. * * *

"By this survey and Mead's plan the boundary lines of the property bonded to Oliver and associates were indicated as follows: The east side of the property was bounded by a stone wall running in a northerly and southerly direction from a point near the maple tree referred to, to the north farm line between the Mead and Blanchard lots. From the southerly end of the wall there was a rail fence extending to the maple tree, and from the maple tree westerly in the south line of the premises surveyed was a board fence. About midway between the maple tree and the north farm line there was a small butternut tree standing on the east side of the stone wall. The northeast corner of the parcel surveyed and measured by Brown was 27 feet 3 inches north of the butternut tree and 143 feet 2 inches east of the 20-rod point. The northerly line [of the property] was a line beginning at the stone wall on the

east at the point 27 feet 3 inches north of the butternut tree, extending westerly through the 20-rod point and parallel with the Mead-Blanchard division line until it intersected a rail fence, which was the westerly [of the property], at which place there was a stake and stones."

Following the giving of the bond to Oliver and others, the corporation known here as the American Marble Company was organized and began to operate the property in the way of opening and developing a marble quarry thereon and excavating the loose earth. In excavating and opening the quarry the loose dirt from the top and part of the stone taken out by blasting was dumped on the easterly side of the ledge north of the northeast corner of the quarry opening. This company continued its operations down to the early part of the year of 1871, when it became insolvent, and its property was assigned by the court of insolvency to Charles Woodhouse as assignee on the 7th day of April of that year. On the 21st day of July following Woodhouse, as assignee, conveyed the property, subject to all incumbrances, to A. N. Russell and others, who on the 23d of August, same year, conveyed the same to the New American Marble Company. At the March term, 1871, of the court of chancery Mead brought proceedings to foreclose a mortgage of January 4, 1869, given by the American Marble Company on the property, and a decree was entered in his favor, which decree became absolute April 27, 1872. On the 1st day of July, 1873, Mead conveyed a one-eighth interest in the premises to Stillman C. White, and seven-sixteenths interest to Isaac M. Hillman, and seven-sixteenths interest to Lyman A. Bardin. At the March term, 1875, of the court of chancery Bardin and Hillman, assignees of another mortgage on the property given by the American Marble Company, foreclosed the same against the New American Marble Company and Stillman C. White; the decree becoming absolute March 27, 1876. In 1875 Bardin and Hillman mortgaged their seven-eighths interest in the property to one Thrall, who, at the March term, 1878, of said court, obtained a decree of foreclosure which became absolute April 12, 1879. On the 16th day of the same month Thrall conveyed said seven-eighths interest to said Bardin.

At the time the property was being operated by the American Marble Company there was a wooden post set at the point located by Brown as the northeast corner of the property, which post was on the west side of the stone wall before mentioned and 27 feet 3 inches north of the butternut tree. Westerly of this post and between the post and the ledge was a large square cut marble block in the center of which was an iron pin, bent to hold a guy from the derrick, and westerly over the ledge there was a row of large iron pins of various heights about $1\frac{1}{4}$ inches in diameter and from 1 foot to $2\frac{1}{2}$ feet above the ledge, and west of the ledge was an apple tree standing in the line. These objects

were practically in the line, and, except the apple tree, were apparently intended to mark a boundary.

During the time that company was operating the property a boarding house had been erected a considerable distance west of the quarry opening and about halfway between the ledge and the west fence line of the property. This boarding house was occupied during this period by a man named Burr, an employé of the company, and with whom some of the other employés boarded. While these premises were occupied by Burr, a portion of the land west of the ledge was inclosed as a garden in connection with the boarding house; the northerly fence of such garden beginning at a point on the west line fence and running easterly to the ledge. The easterly end of this fence was connected with the east end of the fence below referred to on the Brown and Green line, and also to the south line fence of the property, by a fence running northerly and southerly across the property. The inclosure in which stood the boarding house was used and occupied by Burr as a garden, and the small inclosure north of the garden fence was used as a night pasture for Burr's cattle. The garden fence or board fence was about 30 or 40 feet north of the boarding house, and the rail fence on the north line was some 50 or 60 feet further north. At the time of Green's survey mentioned below he found these fences as above set forth.

After the said Bardin obtained an interest in the property under this deed from Mead on July 1, 1873, he and Mead caused the premises to be resurveyed by G. E. Green, a civil engineer, in the latter part of July, same year. Green surveyed the entire premises, including the small lot lying to the east, and which had been sold by Mead for a dumping ground for the refuse from the mill. Prior to the time of this survey the wooden post at the northeast corner of the premises had disappeared, and a marble post had been set on the opposite side of the wall, which post Green found to be 27 feet 7 inches north of the butternut tree and 146 feet east of the 20-rod point, or, as designated on Mead's plan, "point No. 1."

Green ran the northerly line of the property beginning at the marble post designated on Mead's plan as "corner A" westerly through "point No. 1," or the 20-rod point, found the iron pin in the large square-cut block to be in line, and in running over the ledge found five large iron pins in a row, two of which were exactly on the line, and in running westerly over the ledge along the fence before referred to found that the line passed over a point projecting from a peculiar large flat rock, and continuing the line westerly to the west line fence, where he found a stake in stones in the center line of the old rail fence which was the westerly boundary of said premises. A short distance westerly of the large flat rock, and

some 10 or 12 feet north of the line, he found a marble post which Mead said was set to mark the original southwest corner of the Clark lot or "second lot B." At this time there was a marble post on the east side of the stone wall before referred to and 39 feet south of the apple tree. This post was at the end of a line drawn parallel with the Mead-Blanchard divisional line, and intersected the continuation of the right angle line before referred to running northerly from the maple tree at a point 10 rods north of the Brown and Green line. The post at the time of the hearing had apparently been buried many years. There was no evidence that it was ever above the ground, and, if it was, it was buried before 1890.

Green discovered and called to the attention of Woodhouse, Clark, and Mead the fact that the calls in the deed concerning the boundary did not correspond with the monuments and objects on the land, and that the marble post marking the northwest corner of the 96-rod piece was 8 feet farther south of the butternut tree than Brown had found and Mead's plan shows. Green located points on the Clark lot where derrick guys were fastened, and, having completed his survey, made a scale drawing of the same, showing in detail the monuments, courses, distances, buildings, fences, outline of the quarry opening, outline of the quarry dump, and the guy hitches located on that lot, and also made complete notes of the plan with regard to the various points and matters relating thereto. After the plan had been completed and the parties had verified the work, the following statement was placed on the plan:

"July 29, 1873. Boundaries, corners, measurements and notes made hereon are agreed to and witnessed as correct."

This statement was signed by A. J. Mead, who at that time owned a one-tenth interest in the Clark lot, by one Marcellus Newton, who was familiar with the property, by Charles Woodhouse, who was secretary of the American Marble Company, and at that time one of the owners of the small parcel or dumping ground, and was also signed by J. E. Manley, who was Mead's attorney.

A statement was made and signed by H. G. Clark (who at the time owned a three-tenths interest in the Clark lot, or "second lot B," and was also one of the owners of the small parcel or dumping ground) as follows:

"July 28, 1873.

"This is to say whereas myself and others purchased options on two adjoining pieces of property, one on September 29, 1866, and one on October 2, 1866, both being owned by one A. J. Mead and which were both later on deeded on January 1, 1869; and whereas, in both deeds it has since been found out that the way in which the said parcels were described in the records is not equivalent to the parcels as originally laid out and marked by one Jas. Brown and agreed to by the said Mead and ourselves: Now, therefore, for \$1.00 lawful money to me in hand paid, I hereby agree that the said properties shall be and remain as originally laid out by said Brown,

and that the survey by one G. E. Green signed by A. J. Mead and M. Newton on July 29, 1873, and now in possession of one J. E. Manley, is accordingly correct and satisfactory to us. Together with the agreements cited thereon especially as to our acknowledging the sale of the right to attach three guys at or about the points on our ten-rod lot as now in use.

"[Signed] H. G. Clark.

"Witness:

"Charles Woodhouse."

In making the foregoing survey and plan, Green was employed by both Mead and Bardin, and each paid one-half of his charges therefor.

The line from corner "A" through "point No. 1" and the pin in the marble block extended westward passes over a large flat rock with a peculiar jagged point extending upward in the line. At the westerly extremity of this line in the bottom of the old rail fence now remaining there was found evidence of a stake with stones around it. The position of this line is shown on plaintiff's plan exhibit 118 as the line marked "C," and is further shown on defendants' plan, Exhibit 38.

The distance from the Mead-Blanchard divisional line to the maple tree, measuring at right angles to said line, is 36 rods $6\frac{1}{2}$ feet, and, measuring along the wall, is substantially 39 rods. The marble monument standing east of the wall 27 feet 7 inches northeasterly of the butternut tree, the wooden post standing west of the wall 27 feet 3 inches northeasterly of the butternut tree, the marble post on the flat standing at point No. 1 on the Brown, Mead, Green, and Murphy plans, the large square marble block with the iron pin leaded into it, the row of five large iron pins, the fence running westerly from the blazed apple tree, and the stake and stones in the west line, were for the purpose of marking the northerly boundary of the American Marble Company property.

At some time after Eastman began operations the old derrick was replaced by a new one, the latter being guyed at substantially the same locations as the former, excepting that there were not so many guys on the new mast as there had been on the old. The guy which had formerly been fastened to the marble block with the line pin was moved slightly to the rear of the block, and the guy theretofore fastened to the walnut tree was moved a little to the west and fastened to an anchor set in the ground as the tree was considered unsafe for that purpose. The defendants are maintaining upon the premises which the plaintiff claims to own three guy attachments. These are north of the so-called "pin line."

Lyman A. Bardin died in June, 1887, and the property, including the dumping ground lot on the east, passed under his will to his widow, Phoebe J. Bardin.

In 1884-85 Lyman A. Bardin wrote letters to his son, who was then operating the quarry at West Rutland. These letters were introduced in evidence, and (in part) are quoted

in the findings of fact. Therein Bardin said, among other things:

"We call for a right of way to pass and repass and also twenty rods in front of our mill. * * * We want our number of rods in front as specified upon the records, and also our right of way. I will send you a copy of the mortgage decree which is the same word for word as Mead's deed to the American Marble Company reads, and I want you to keep the copy, as it contains the survey of our property."

"We want our lines established as our deeds and titles specify. * * * We want our twenty rods as our title specified. * * *

"In surveying the premises I should make right angles to all the corners on the west side of our lot made parallel with Mead's north line after I had taken our twenty rods from the twenty-rod point south of Mead's north line. I should then run down and see where it would locate the corner by the maple tree; and I would commence and run the line from the twenty-rod point on the east side and see if they two would agree. What we want is our twenty rods and the right of way."

"Now as to the survey of our quarry I think the way you propose is the correct way, i. e., run out the line from starting point [underscored by Bardin] and plant your corners as the title reads, and if Mr. Mead is not satisfied, let him move them by law. * * *

Neither of the defendants ever occupied or possessed land north of a line parallel with, and 20 rods south of, Mead's north line, before the deed from Howe to Eastman, May 29, 1903. It is further found that none of the following persons: John W. Howe individually or as trustee, the Rutland White & Blue Marble Company, the Rutland White Marble Company, A. L. Burbank as trustee or individually, J. W. Howe, H. T. Buck, M. H. Murphy, O. H. Bardin, the Rutland County Marble Company, Charles H. Barbour, Phoebe J. Barbour (the record indicates that this last name should be "Bardin"), Lyman A. Bardin, Isaac N. Hillman, Sarah A. Hillman, or Ransom B. Hillman—ever occupied land north of the present "pin line," unless it may have been in the way of dumping some refuse from the quarry now owned by the defendants, or by placing marble blocks on the land.

The plaintiff became the owner of an undivided nine-tenths interest in the land immediately north of the line in question by deed from Walter W. Fant dated May 27, 1890; of an undivided two-thirds interest in an undivided one-tenth part of this land by deed from John Mead, Charity Burr and her husband, dated July 6, 1905; and of the other one-third interest in an undivided one-tenth part by deed from defendant Eastman (under order of the court of chancery) dated November 15, 1911. This land has sometimes been spoken of or referred to as the "Fant lot," or "Fant property." It has also sometimes been called the "Clark lot," and on Brown's plan it is marked "Second Lot B."

Argued before MUNSON, C. J., and WATSON, HASELTINE, POWERS, and TAYLOR, JJ.

John G. Sargent, of Ludlow, and Walter S. Fenton, of Rutland, for appellants. F. O.

Partridge, of Proctor, and Lawrence, Lawrence & Stafford and T. W. Moloney, all of Rutland, for appellee.

WATSON, J. The primary question in this case is as to the true location of the divisional line between land owned by the plaintiff and land owned by defendant Eastman, the legal and record title to which latter is held by defendant Clement in trust, the same being in the nature of an equitable mortgage, and not otherwise.

[1] Both sides discuss, more or less, questions regarding the admission or rejection of evidence; but no such objection was made by either side by exception to the report filed in the court of chancery, and consequently no question of that character can be heard. The statute is peremptory that no such question shall be heard in this court unless the objection is made by exception to the report duly filed in that court. P. S. 1268. And this statute is construed to be alike applicable when the cause is heard before a chancellor. *Barber v. Bailey*, 86 Vt. 219, 84 Atl. 608, 44 L. R. A. (N. S.) 98; *Rowley v. Shephardson*, 90 Vt. 25, 96 Atl. 374; *Osha v. Higgins*, 90 Vt. 130, 96 Atl. 700.

[2] Defendants filed 18 exceptions to findings of fact; but the plaintiff urges that these exceptions should not be considered, because, as shown by affidavits, neither the company nor any of its solicitors received a copy of the exceptions, nor had any knowledge or notice that they had been filed, prior to the time when a copy of defendant's brief was received in exchange for a copy of plaintiff's brief, late Sunday afternoon, a week and two days before the case was argued in this court. The affidavits do not show that at the time of filing the exceptions a copy thereof was not left with the clerk of the court for the adverse party, as required by chancery rule 47. By rule 46 it was the duty of the clerk, when these exceptions were filed, forthwith to notify the plaintiff or its solicitors of such filing. According to the affidavits, this was not done. Such negligence on the part of the clerk being shown, we cannot say that it was not due to his neglect also that plaintiff or its solicitors did not receive a copy of the exceptions. In these circumstances it would be doing the defendants an injustice to deprive them of the benefit of their exceptions on the ground stated, when, so far as appears, the fault was not theirs.

[3] The transcript of testimony was not made a part of the chancellor's report. It was referred to by the defendants in their exceptions and made a part thereof; but this does not bring it before us. *Royce v. Carpenter*, 80 Vt. 37, 86 Atl. 888; *Child v. Pinney*, 81 Vt. 314, 70 Atl. 566; *Barber v. Bailey*, cited above.

[4, 5] Exceptions 10, 11, and 13, not being briefed, are waived. Exceptions 1, 4, 5, 7, 8, 9, 12, 14, 15, 16, and 17 involve the examina-

tion and consideration of evidence not before the court; hence we cannot say that the evidence did not support the findings. *Fraser v. Nerney*, 89 Vt. 257, 95 Atl. 501.

[6] Exception 2 is to the finding that the deed from Walter W. Fant to the plaintiff is a warranty deed, for that its legal character is a question of law, not of fact; and exception 3 is to the finding that the deed from Phoebe J. Bardin to Charles H. Barbour is a quitclaim deed, on the same ground. We give these two exceptions no consideration; for, if it be conceded that in each instance the court was wrong, the defendants were not harmed thereby in the view we take of the case.

Exception 6 is to the language in article 70 of the findings, "unless there was something in the record title to put the orator upon notice at the time it bought of Fant, of a claim by the adjoining owner on the south to a line north of the present 'pin line,' there was nothing sufficient to give it such notice," for that the matter there stated is a question of law, and not of fact, and the determination of what is sufficient to give such notice is a question of law for the court upon all the facts in the case. However this may be, the disposition we make of the case renders the question here raised immaterial.

The question presented by exception 18 is determined below.

Findings to which no exception was taken show that the lands between which is the divisional line in question were formerly owned by Andrew J. Mead, under whom, as common grantor, through divers conveyances, both the plaintiff and the defendants claim their titles, going back to the same day, September 29, 1866; that there is no dispute as to the location of Mead's north line, it being correctly shown in plaintiff's plan, Exhibit 118, dated September, 1914. The record shows that the stone wall mentioned in the deeds from the common source and made the easterly boundary of the lands thereby conveyed (as far as the wall extends), now owned by the plaintiff and by the defendants, respectively, and between which the location of the line is now in dispute, is still there. This wall may well be treated as a permanent object in its original location on the ground. The deeds and the decrees in the chain of title of each of the parties were made exhibits in the case, and are before us as a part of the chancellor's report.

On September 29, 1866, Andrew J. Mead gave a bond for a deed of a certain part of his farm, particularly describing it, in favor of Horace G. Clark, Alanda W. Clark, Norman Clark, Gardner L. Gates, and Hiram L. Briggs, giving them and their assigns the right to enter upon the premises for the purpose of opening, developing, and working any and all marble quarries thereon, within the time therein limited. At the same time Mead gave a bond for a deed of another certain part of his farm, particularly describing it,

in favor of Willard N. Oliver, Horace G. Clark, Alanda W. Clark, and Norman Clark, giving them similar rights as to entering upon the premises for the purpose of opening, developing, and working marble quarries thereon within the time therein limited. Within a few days after the giving of these bonds they were recorded in the town clerk's office of the town in which the land is situated. On January 1, 1869, Mead and his wife gave a warranty deed in favor of the obligees in the bond first mentioned, the description therein of the land conveyed being identically the same as the description in that bond, complete in itself, and as follows (we number the calls for convenience):

"(1) Commencing at a point on the first stone wall west of the highway leading past the premises of the said Mead, 10 rods south of said Mead's north line, the north end of said stone wall being $55\frac{1}{2}$ rods westerly from said highway, and said point being on said stone wall 10 rods south of said Mead's north line; (2) thence southerly on said wall 10 rods; (3) thence westerly parallel with said Mead's north line fifty-six rods to a stake and stones; (4) thence northerly at right angles with said last-mentioned line to a point 10 rods south of said Mead's north line; and (5) thence easterly to the place of beginning."

Through this deed the plaintiff traces its chain of title from the common grantor; and in the successive subsequent conveyances the description of the land is the same as the foregoing, either given in full or by reference to this deed. On the same day Mead and his wife gave a warranty deed in favor of the American Marble Company, the description therein of the land conveyed being identically the same as the description in the bond secondly above mentioned, complete in itself, and as follows (we number the calls for convenience):

"(1) Commencing at a point on the first stone wall west of the highway leading past the residence of the said Mead 20 rods south of said Mead's north line, the north end of said stone wall being $55\frac{1}{2}$ rods westerly from said highway, and said point being on said stone wall 20 rods from said Mead's north line; (2) thence southerly on said stone wall to the end of the same, and thence southerly on the fence that joins onto the same, in all 20 rods to a maple tree; (3) thence westerly 56 rods to a stake and stones; (4) thence northerly at right angles with said last-mentioned line to a point 20 rods south of said Mead's north line; and (5) thence easterly in a line parallel with said Mead's north line to the place of beginning."

Through this deed the defendants trace their chain of title from the common grantor; and in the successive subsequent conveyances the description of the land conveyed is the same as the foregoing, either given in full, or by reference to this deed, or to some other deed in the chain of title.

[7] The question arises as to the true interpretation of the boundaries contained in these two deeds from Mead. Mead's north line runs practically east and west. The stone wall mentioned extends from this north line somewhat southwesterly for a distance of approximately $22\frac{1}{2}$ rods. No uncertainty

in the description, so far as the reading of the deeds goes, is claimed. And the only part of the boundary contained in the deed in the plaintiff's chain of title concerning which any real question can arise as to its meaning when applied to the land is the point of commencement; whether this is to be found by measuring at right angles (practically south) from said north line at a place where such a measurement of 10 rods just meets the stone wall, or by measuring that distance from said north line along the stone wall. The plaintiff's plan, Exhibit 118, drawn to a scale, shows that the right-angled triangle, having for its perpendicular a line 10 rods long drawn from said north line south to the point of its meeting the stone wall, and for its hypotenuse a line drawn from this point of meeting, along the wall to said north line, has its base on this north line, approximately 35 feet long. There is nothing in the deed indicating that the hypotenuse line, running to such an extent southwesterly, rather than the perpendicular line running practically south, is the course of measurement from the north line mentioned, in locating the point of beginning.

[8] It is a rule of construction that, where a boundary line is described as running toward one of the cardinal points of the compass, it should be considered as running directly in that course, unless some other word or words are used for the purpose of qualifying its meaning, or its direction is controlled by some object. *Sowles v. Minot*, 82 Vt. 344, 73 Atl. 1025, 137 Am. St. Rep. 1010; *Jackson v. Lindsey*, 3 Johns. Cas. (N. Y.) 86; *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Frat v. Woodward*, 32 Cal. 219, 91 Am. Dec. 573. In *Currier v. Nelson*, 96 Cal. 505, 31 Pac. 531, 31 Am. St. Rep. 239, this rule was applied, as in the instant case, in interpreting the language of the boundary as to the point of commencement. There the first descriptive call in the deed was "commencing at a point on the northwesterly line of" the street named, so many "feet north of the northeasterly line of" another street named, and the court was called upon to determine the meaning of the word "north" as there used. The word was held to mean due north, unless qualified or controlled by other words, and this was its meaning in the deed under consideration.

[9] In the case at bar, if the intention had been to fix the point of beginning at the distance given southerly of Mead's north line, measured along the wall, it was easy to indicate in language plainly to that effect, the same as was done in the second call, "thence southerly on said wall 10 rods." There the words "on said wall" show that the course of the line is controlled by the course of the wall. In *Park v. Pratt*, 38 Vt. 545, the line was described as beginning "on the south line of land owned by Lafayette Lyon," and running "east 15 degrees south on

said Lyon's line," etc. The referee found that the true divisional line ran $13\frac{3}{4}$ degrees south, instead of 15, on Lyon's line, so that the difference between the course of Lyon's line and the line as described by the compass in the deed was $1\frac{1}{4}$ degrees. It was held that "on said Lyon's line" was the controlling description, and that this made Lyon's land an abuttal, a boundary, and in effect the same as if the deed had bounded the land granted north by Lyon's land.

[10] The distance of this course being definitely stated in the deed, without any monument as its termination, the course and distance must govern. *Bagley v. Morrill*, 46 Vt. 94; *Grand Trunk Ry. Co. v. Dyer*, 49 Vt. 74. And the call requires the line to be 10 rods long from the point of commencement named in the deed. *Owen v. Foster*, 13 Vt. 263; *Day v. Wilder*, 47 Vt. 583.

The importance of right conclusions regarding the first and second calls is readily seen when we observe their controlling effect upon the third call, the line in dispute so far as it rests on the plaintiff's title deeds. The third call requires the line to run westerly from the southerly terminus of the 10-rod line of the second call, parallel with Mead's north line 56 rods to a stake and stones. By the course there given the land conveyed has a uniform width north and south, corresponding with its width at the easterly end, and answering the fourth call, "thence northerly at right angles with said last-mentioned line to a point 10 rods south of said Mead's north line," and the fifth call, "thence easterly to the place of beginning," the land between the last-named line and Mead's north line is of the same width throughout as at the east end, where the measurement of 10 rods south from this north line is to be made in locating the point of commencement.

[11] The language of this deed, interpreted in connection with, and in reference to, the nature and condition of the subject-matter of the grant at the time the instrument was executed, and the obvious purpose the parties had in view, is clear and unambiguous, its meaning is a question of law for the court, and the intent cannot be altered by evidence, or findings, of extraneous circumstances. *Crosby v. Montgomery*, 38 Vt. 238. The language being clear and unambiguous, the deed is to be interpreted by its own language, and the court is not at liberty to look at extraneous circumstances for reasons to ascertain its intent, and the understanding of the parties must be deemed to be that which their own written instrument declares. *Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604; *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; *Marsh v. Fish*, 66 Vt. 213, 28 Atl. 987; *New York Life Ins. & Trust Co. v. Hoyt*, 161 N. Y. 1, 55 N. E. 299.

It is to be borne in mind that on the day of giving the deed just examined Mead also

gave the deed (to the American Marble Company) under which the defendants derive title from the common source. The boundaries in the two deeds are so essentially alike in form as to the first call and as to the course required by the second call that the legal interpretation of the first one mentioned in these respects is for the same reasons the legal interpretation of the other also. The point of commencement on the stone wall is to be found by measuring at right angles south from Mead's north line, at the place where such measurement of 20 rods just meets the stone wall; and by the second call, "thence southerly on said stone wall to the end of the same, and thence southerly on the fence that joins onto the same in all 20 rods to a maple tree," the course of the line follows the course of the wall and the course of the fence, terminating at the maple tree. The length of this course is discussed further on. The northerly terminus of the line answering the fourth call, "a point 20 rods south of said Mead's north line," is definitely fixed as at a specific distance south of an object concerning the location of which there was, and is, no misunderstanding. The fifth call requires not only a line easterly to the place of beginning, but one that is parallel with said north line. This indicates a purpose to make it doubly sure that the north line of the property conveyed shall be throughout the same specified distance, measured at each end, south of Mead's north line; for, unless it be made conformable thereto in its location on the ground, its parallelism must be wanting. *Graves v. Mattison*, 67 Vt. 630, 32 Atl. 498. The description contained in this deed, like that contained in the other deed from Mead of the same date, is definite, certain, unambiguous; and hence we interpret it, as a matter of law, without noticing any extrinsic evidence (by way of exhibits before us) introduced on the basis of defendants' claim of latent ambiguity, or any extrinsic facts reported. Thus it is seen that the north line of the premises conveyed in the deed from Mead in the defendants' chain of title in no wise conflicts with the south line of the premises conveyed from the same source in the plaintiff's chain of title. The fact that by such interpretation of these two deeds there may be a very narrow strip of land between the properties conveyed, consequent on the fact that the width of plaintiff's land is governed by its east line of 10 rods measured from the point of beginning, southerly on the wall, instead of at right angles with Mead's north line, cannot affect the legal meaning of either instrument.

[12, 13] Deeds, surveys, and plans not referred to in a deed in question can neither restrict nor extend the import of the terms used. *Butler v. Gale*, 27 Vt. 739. So far as this case is concerned, however, such narrow strip is to be considered as a part of defendants' grant; for not only is such the

effect of the allegations in the bill, admitted in the several answers of defendants, but it is manifest that this is according to the practical construction which has always been given to the deeds through which defendants trace their title in their application to the land itself.

[14] The location of the divisional line on the land was a question of fact to be determined on the evidence. Grand Trunk Ry. Co. v. Dyer, cited above. As a part of his findings the chancellor states that on the west side of the stone wall which runs along the east side of the land of the plaintiff and of the land of the defendants there is now a marble post about 4 inches square, substantially 10 rods south of the north line of the Mead farm, and shows above ground; that there is another such post on the same side of the same wall, substantially 10 rods measured southerly along the wall from the first post, and standing several inches above ground; that there is another such post about 56 rods west of the last, measuring in a line substantially parallel with Mead's north line, also standing several inches above ground; that there is another such post north of the one last mentioned, substantially 10 rods south of Mead's north line; that these posts were put there before 1890; that there is now in the ledge three iron pins in a line between the southerly marble posts mentioned, which iron pins are three-fourths of an inch in diameter, and are driven firmly into the ledge, standing 4 or 5 inches above it. The line of these two southerly marble posts and the three iron pins is marked on plaintiff's plan, Exhibit 118, as the "pin line." In 1890 these marble posts and iron pins appeared the same as they do now, and did not have the appearance of having been recently put there.

[15] "On the findings," as reported by him and in connection therewith, the chancellor states, "the decision is that the line between the two properties involved in this case is the so-called 'pin line.'" This statement seems to be considered in defendants' brief as a conclusion of law; but such consideration is hardly warranted. It devolved upon the chancellor, as before indicated, to determine as a fact the location of the true divisional line on the ground itself. Without doubt this is what he undertook to do, as he well might, by drawing an inference to that effect from the other facts reported, and in this sense used the word "decision." "A decision of the court is its finding upon a question of law or fact arising in a case." See quotation given in Webster's International Dictionary; *Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692; *Wilson v. Vance*, 55 Ind. 394; *Gates v. Baltimore*, etc., R. Co., 154 Ind. 338, 50 N. E. 722; *Corbett v. Twenty-Third St. R. Co.*, 114 N. Y. 579, 21 N. E. 1033. The conclusion of law is stated by the chancellor in appropriate language in the decree:

"It is hereby ordered, adjudged and decreed that the line dividing land of the orator from land of defendants * * * is the line marked by three iron pins * * * in the marble ledge and marble monuments at the east and west ends. * * *"

This in effect disposes of defendants' eighteenth exception to findings.

It is said by the defendants that the original bonds and the deeds following them by which the land of the defendants and the land of the plaintiff were carved out of the lands of Mead by their terms placed the boundary line between them, that is, the north line of defendants' land 20 rods north from the maple tree (a known monument at which defendants' land corners) and 20 rods south of the north line of Mead's farm (a known monument not on or adjacent to any of the land in either bond or the deed following it); that, so far as the reading of the bonds and deeds goes, this description is clear, and not ambiguous, but upon applying them to the land it at once appears that the distance between the maple tree and the north line of Mead's farm is only 36 rods 6½ feet. Consequently (it is further said) the north line of the land bonded to Oliver and others, and conveyed to the American Marble Company in the formation of which they were associated, could not be both 20 rods north from the maple tree and 20 rods south from Mead's north line; and so here is a latent ambiguity to cure which resort may be had to extrinsic evidence.

[16, 17] The description contained in the bond is not different from that contained in the deed. It appears (from the plaintiff's plan, Exhibit 118) that the length of the course required by the second call in the deed, the southerly terminus of which is given as the maple tree, is about 18½ rods shorter than the distance stated in the deed. Yet this discrepancy, appearing in the application of the description to the land, does not constitute a latent ambiguity. The maple tree is a natural object then and now on the ground, directly in the course and made to mark the southeasterly corner of the land conveyed; and there is nothing by reason of which the description in this respect is taken out of the general rule that as between courses and distances, on the one hand, and abutments and monuments, on the other, abutments and monuments, when identified, must control, the reason of the rule being that mistakes in courses and distances are more probable and more frequent than in abutments and monuments capable of being clearly designated and accurately described. *Bundy v. Morgan*, 45 Vt. 46; *Fullam v. Foster*, 68 Vt. 590, 35 Atl. 484; *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355. Moreover, it is erroneously said that the second call in the deed in terms places the north line of defendants' land 20 rods north from the maple tree. As already observed, this call requires the course to be southerly along the wall and along the fence

extending from the end of the wall, the distance given being of the course going in the direction stated, which by rule of construction is limited by the location of the natural object (maple tree) designated as the terminus.

[18, 19] The place of beginning being well known and well ascertained, it must govern, and the grant must be confined within the boundaries given in the deed. *Gilman v. Smith*, 12 Vt. 150. And there being no uncertainty in the description, to locate the lines the regular order of the calls should be observed and followed; and a posterior line cannot be controlled by a reverse survey. *Tucker v. Satterthwaite*, 123 N. C. 511, 31 S. E. 722.

It is contended by the defendants, however, that the dividing line as now claimed by them was established by recognition and acquiesced in by the owners of the land on both sides for more than 15 years, and that the owners and occupants of defendants' lot occupied and used the land in question, treating it as their own, in which occupancy, use, and treatment of the lot to this line the plaintiff and its predecessors in title acquiesced, sometimes expressly, sometimes by inaction and license, for the entire period from 1866 to 1911, 45 years. This raises the question of title in the defendants by adverse possession of the strip of land between the true divisional line as found and adjudged by the chancellor and the line now claimed by them.

This action does not involve the reformation of any instrument of conveyance given by Mead; and it can serve no good purpose to conjecture why, in making the description of the land in the bonds and in the deeds given pursuant to the bonds, the survey and the plan made by Brown were not followed. The departure therefrom in each instance is so material and so marked as to indicate a change of purpose. The descriptions adopted show unusual care and precision in their framing. Whatever may have been previously done or said by the parties to the transactions, relative to that survey and plan, such acts and declarations were merged in the written instruments subsequently executed on the one hand and accepted on the other; and neither the survey nor the plan can have any force in this case, beyond what bearing it may have, if any, by reason of its subsequent use by the parties in connection with the asserted recognition of, or acquiescence in, the line now claimed by defendants.

[20] Extrinsic evidence is not admissible to show that, by mistake, one tract of land instead of another was inserted in either of those deeds, thereby really establishing a different contract. *McDuffie v. Magoon*, 26 Vt. 518; *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114.

After the giving of the bonds, there was no survey made of the premises until July,

1873, when the Green survey was made as shown in the statement of the case. It is manifest that in making this survey no attempt was made to follow the boundaries contained in either of the deeds from Mead, nor even to locate the point of beginning according to the requirements in either. The whole purpose was to establish the corners and follow the boundaries as shown by the Brown survey and the plan made pursuant thereto. That this is so, and that the description in the respective deeds did not correspond therewith, appear from the plan made by Green (Defendants' Exhibit 39), whereon it is stated:

"July 29, 1873. Boundaries, corners, measurements, and notes made herein are agreed to and witnessed as correct"

—being signed by Mead, Marcellus Newton, and Charles Woodhouse, and from the statement made and signed by H. G. Clark in connection therewith, wherein he states that:

"Whereas, in both deeds [from Mead] it has since been found out that the way in which the said parcels [of land] were described in the records is not equivalent to the parcels as originally laid out and marked by one Jas. Brown and agreed to by the said Mead and ourselves: Now, therefore, * * * I hereby agree that the said properties shall be and remain as originally laid out by said Brown, and that the survey by one G. E. Green signed by A. J. Mead and M. Newton on July 29, 1873, * * * is accordingly correct and satisfactory to us."

The notes (on Green's plan) agreed to as stated above are particularly significant to the same effect. Furthermore, when making his survey, Green called to the attention of Woodhouse, Clark, and Mead the fact that the calls in deed did not correspond with the monuments and objects on the land.

Thus it is seen, and by intendment it will be taken that the chancellor found, that the line which defendants contend was then recognized and thenceforth acquiesced in by the successive owners and occupants on each side thereof for a period of more than 15 years was not then understood to be, and is not, the south line of the land now owned by the plaintiff, as described in its title deeds, nor the north line of the land now owned by the defendants, as described in their title deeds. But it was then understood to be, and is, another line which is 3 rods and 7½ feet further north and only 16 rods and 9 feet south of Mead's north line, which increases the size of defendants' quarry lot approximately 1½ acres from what it is according to their paper title. We need not discuss the rule where the true divisional line between lands of adjoining owners, according to the calls in their respective deeds is uncertain and in doubt, and its location is agreed upon and established by parol as the line to which the title of each extends, followed by the acquiescence of such owners, for that is not this case. Here, it having been ascertained that the two parcels of land described in the two deeds mentioned were "not equivalent to the parcels as originally

laid out and marked" in Brown's survey, an attempt was made some years afterwards, by some of those (at least) who participated therein, to extend the title of defendants' grantors northerly by establishing the divisional line as marked by Brown and by Green on their respective plans.

[21] The statements before mentioned made and signed in connection therewith were not sufficient as a memorandum to answer the requirements of the statute of frauds. They do not contain the substantial terms of any contract for the sale of land, or of an interest in land, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. *Buck v. Pickwell*, 27 Vt. 157; *Adams v. Janes*, 83 Vt. 334, 75 Atl. 799.

[22] The so-called recognition of and acquiescence in this line is without force, unless followed by such possession of the land north of the true divisional line and up to the line thus recognized for the period of 15 years as shall give a perfected title by adverse possession. *Lewis v. Ogram*, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; *Vosburgh v. Teator*, 32 N. Y. 561.

[23] It is urged that the facts found show that the American Marble Company occupied the land up to this line, though previous to the date last named, and that this occupancy, as well as the similar occupancy by the successive subsequent owners of the land within the defendants' grant, is to be considered in determining defendants' ownership by adverse possession of the land mentioned without their grant. Yet this position cannot be sustained. Neither the American Marble Company nor any of its successors had any color of title to the strip of land in question; and it is observable from the statement of the case that of such successors none prior to the defendants ever occupied that strip, unless it may have been in the way of dumping refuse from the quarry now owned by defendants, or by placing marble blocks on the land. Whatever occupancy that company or its successors in the way mentioned had of the land, there is no finding that the occupancy by any of them was under a claim of right. Their several possessions therefore do not appear to have been adverse. *Demeritt v. Parker*, 82 Vt. 59, 71 Atl. 833. Indeed, in 1884-85 Bardin, then the record owner of the land south of the dividing line, wrote his son (who was operating the quarry), "We want our lines established as our deeds and titles specify," and that he thought the correct way to have the quarry lot surveyed was to "run out the line from starting point and plant your corners as the title reads, and if Mr. Mead is not satisfied, let him move them by law." See *Day v. Wilder*, 47 Vt. 583, 593, 594.

[24] But if the record before us be con-

strued as showing such possession to have been severally adverse, as defendants urge, the result is the same. The land so adversely held has never been covered by the description of the land contained in any of the deeds within the defendants' chain of title. Nor is it found that each prior successive grantee in writing, or by parol agreement or understanding, transferred to his successor his possession of said land without the calls of his title deeds, accompanied by an actual delivery of the possession of the premises. No privity of estate or of possession between the successive dispossors is shown. Without some privity between them, the several possessions cannot be tacked so as to make continuity of possession. *Winslow v. Newell*, 19 Vt. 164; *Sheldon v. Michigan Cent. R. Co.*, 161 Mich. 506, 126 N. W. 1056; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 48 L. R. A. 830, 80 Am. St. Rep. 54; *Rich v. Naffziger*, 255 Ill. 98, 99 N. E. 341. Since there was no privity, upon the termination of the possession of each dispossor, the seisin of the true owner revived and was revested, and a new distinct disseisin was made by each successive dispossor. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1028, 86 Am. St. Rep. 486.

Regarding the placing and maintaining of guys and ropes or cables on the land north of the true divisional line by the defendants' predecessors in title, it is enough to say that such acts are not found to have been under a claim of right; and consequently, for reasons already stated, they cannot be considered on the question of a prescriptive right in the nature of an easement in favor of defendants' land, as the dominant tenement, to such use of the land first named, as the servient tenement.

[25] The defendants' ownership of their quarry lot began May 29, 1903. Hence in point of time they cannot of themselves have acquired any adverse rights in or to the land north of the dividing line between their land and the land of the plaintiff, as found and adjudged by the chancellor.

Decree affirmed, and cause remanded.

On Motion for Reargument.

WATSON, J. The foregoing opinion being promulgated, the defendants moved for leave to reargue the case, and were permitted to file a brief upon that motion, the plaintiff to have leave to submit a brief in reply.

[26] It is said in defendants' brief so submitted that the opinion shows that the court understood that the two deeds from the common grantor (dated January 1, 1869) do not refer to each other, and that their construction must be separate and distinct because of that fact, citing *Butler v. Gale*, 27 Vt. 739, and that this would seem to be a misunderstanding of the court where it re-

cites the description in each of the deeds. In each instance it states that the description is "complete in itself." Whereas "in the case at bar each of the deeds refers to the other," says the brief, "and makes one property an abutter of the other." We are here referred to the findings, articles 1 and 2, also to orator's Exhibits C and O. Articles 1 and 2 relate exclusively to the giving of the two bonds for deeds of the properties now owned by the plaintiff and by the defendants, respectively. These findings say nothing as to the relative situations of the properties described in the bonds; but the bonds are made exhibits in the case, and the description of the land now owned by the plaintiff, as contained in the bond marked Exhibit C, and as contained in the deed subsequently given by Mead in performance of the provisions of that bond, is correctly copied into the opinion, except in the latter the calls are numbered for convenience. After the description this bond contained a clause as follows:

"And the said Mead also hereby further agrees to convey at the same time * * * the right of way across his land from the highway to said premises to the said Horace G., Alanda W., Norman, Gardner L., and Hiram L., their heirs and assigns, in common with Willard N. Oliver, the said Horace G., Alanda W., and Norman, they having this day taken a bond for a deed of the piece of land south of and adjacent to said premises."

The other bond, Exhibit O, contains the description of the land now owned by the defendants, exactly as contained in the deed subsequently given by Mead in performance of the provisions of that bond, and as copied into the opinion (excluding the numbers of the calls as in the other instance). This bond then contained a clause as follows:

"And the said Mead also hereby further agrees to convey at the same time * * * the right of way across his land to said premises from the highway to the said Willard N., Horace G., Alanda W., and Norman, their heirs and assigns, in common, with the right of the said Horace G., Alanda W., Norman, and one Gardner L. Gates to the use of said water, the said Mead having this day executed to them the said Horace G., Alanda W., Norman, and Gardner L. Gates, thereby agreeing to convey to them upon certain terms therein mentioned the piece of land north of and adjacent to said premises."

Neither the recital in the bond first mentioned, that the parties named "having this day taken a bond for a deed of the piece of land south of and adjacent to said premises" nor the recital in the bond last mentioned that "Said Mead having this day executed a bond to them [the obligees named in the other bond] thereby agreeing to convey to them * * * the piece of land north of and adjacent to said premises" was any part of the description of the land thus mentioned. Moreover, the words "adjacent to" do not necessarily imply "adjoining" or "contiguous." Mr. Webster says "objects are adjacent when they lie close to each other, but not necessarily, in actual contact." To the

same effect is *Bacon v. Boston & Maine R. R.*, 83 Vt. 528, 77 Atl. 858. In each bond the recital was general and only a statement showing why the right of way agreed to be granted for the benefit of the premises therein described was to be in common with a like use agreed in the other bond, to be granted for the benefit of the premises therein described. The statement thus made in either bond was not intended to affect the description of the premises previously made in that instrument, and is not to be used for such purpose. *Grand Trunk Ry. Co. v. Dyer*, 49 Vt. 74.

[27] But there is another well-established principle of law by which the recitals quoted above from the bonds cannot be considered in the interpretation of the deeds. The bonds were executory contracts for deeds, and were executed and consummated by the deeds subsequently given on January 1, 1869. Neither of the deeds so given contains any such recital, and neither makes any reference to the bond in performance of the provisions of which it was given. In each instance the deed was delivered and accepted as performance of the previous contract to convey, and therefore the contract was conclusively merged in the deed, and even though the terms of the deed may vary from those contained in the contract, the deed, so far as its construction is concerned, must be looked to alone to determine the rights of the parties. In *Carter v. Beck*, 40 Ala. 599, it was held that the acceptance of a deed is considered as a full compliance with the contract to convey, and as annulling it. In *Howes v. Barker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526, it is said:

"The contract between the parties, according to the articles of agreement (under their hands and seals), was executory, and, having been executed and consummated by the deed subsequently given, the agreement became null and of no further effect."

In *Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499, it is said:

"No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed."

And:

"This is so although the deed thus accepted varies from that stipulated for in the contract."

To the same effect are *Kerr v. Calvit*, Walk. (Miss.) 115, 12 Am. Dec. 537; *Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632; *Portsmouth, etc., Refining Co. v. Oliver Refining Co.*, 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924; 2 Devlin on Real Est. (3d Ed.) § 950a. Such a contract, not referred to, cannot contradict or control the operation of the deed. *Clifton v. Jackson Iron Co.*, 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621. Nor is the general rule any different where the previous contract was in the form of a bond conditioned for the conveyance of the property, as in the case at bar. *Shontz v. Brown*, 27 Pa. 123; *Manspeaker*

v. Pipher, 48 Pac. 868¹; 2 Devlin on Real Est., cited above. The foregoing general principle is the same as has been declared by this court regarding the merger of prior parol agreements when a deed or other written instrument has been subsequently executed, delivered, and accepted. *Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604; *In re Perkins' Estate*, 65 Vt. 313, 26 Atl. 637.

It is said by defendants in their brief for reargument that the language of the opinion "is such as to show that the matter lies in the mind of the court as if the plaintiff's title to its property were prior in origin, or at least contemporaneous with the defendants' title," and that "this must be a misapprehension, for the defendants' title (equitable title at least) begins in an instrument on record six days before the plaintiff's." It is true that the court did understand when writing the opinion, and it understands now, that the rights given by the common grantor by his two bonds mentioned were contemporaneous. The bonds bear the same date, they purport to have been acknowledged by the grantor before the same justice of the peace on the same day, and the chancellor found that they were given "at the same time." Exception was taken to this finding for that it "is not supported by the evidence and is contrary to the evidence." It is said in defendants' brief for reargument that the determination of this question "does not require examination and consideration of evidence not before the court, but of the findings of fact made and filed by the chancellor."

[28-31] The chancellor has not reported on what evidence he made that finding. Parol evidence was admissible to show the true time of the giving of each bond. 4 Wig. Ev. § 2410; *Bellows v. Weeks*, 41 Vt. 590; *Wilnot v. Lathrop*, 67 Vt. 671, 32 Atl. 861. It does not appear that such evidence was not before the chancellor, and we cannot, for the purpose of finding error, assume that the evidence did not support the finding. *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790. The evidence, other than exhibits, not being before us, it does not appear that the finding was not made upon sufficient evidence. *Sowles v. Hall*, 73 Vt. 55, 50 Atl. 550. In the circumstances shown, including the fact that some of the obligees in the two bonds were the same persons, and the further fact of the recital in each bond noticed above, there can be no doubt that each set of obligees, when receiving the bond to them, had knowledge of the giving of the other bond. It should be borne in mind that every reasonable intentment is to be made in favor of the decree under review. The fact that one of the bonds was placed on record before the other

gives it no priority as a contract for title. *Hill v. Murray*, 56 Vt. 177.

It is further said in defendants' brief for reargument that the court in its opinion states that the description in defendants' deed, like that in the plaintiff's, is definite, certain, unambiguous, and therefore it is interpreted as a matter of law without noticing exhibits or extrinsic facts reported. In that connection defendants state it to be their belief that further discussion must make it clear to the court "that the existence of a monument on the land, placed there and understood by all the parties as marking the 'point' of beginning of the description, is not extrinsic matter, but must be considered, as a matter of law, in connection with and in reference to the nature and condition of the subject-matter of the grant at the time the instrument was executed and the obvious purpose which the parties had in view," and that, "so interpreting the deed, with the fact found that monument was actually set by the parties to designate the 'point' of beginning described in the deed, in applying the description to the land it must start at that monument." Again, it will be seen that this claim that "a monument was actually set by the parties to designate the 'point' of beginning described in the deed" is not borne out by the record, not if "by the parties" is meant, as the language indicates all the parties to the proposed purchase or purchases. The findings show that, "in the fall of 1866 negotiations having been entered into between Andrew J. Mead and prospective purchasers of the quarry property," on September 26, 1866, the Brown survey was made "at the request of Mead and Alanda W. Clark, one of the prospective purchasers"; that, "accompanied and directed by said Alanda W. Clark and Mr. Mead and his son, Eugene, Mr. Brown" made this survey; that Mead paid Brown for his services, and Alanda W. Clark paid for a team for his use. It is further found that on the next day a rough sketch or plan of the premises was prepared, and Mead made and retained a copy of it for himself, showing in detail the boundaries, corners, monuments, and distances, and containing complete directions for drawing the conveyances as shown thereon; that "no survey or measurement except on the 20-rod parcel and the 90-rod piece had been made at that time, except to measure off the width of the '10-rod lot B.'" But the findings do not show that any of the other prospective purchasers (who became obligees in the bonds for deeds) had anything to do with causing or authorizing the Brown survey and plan to be made, nor that any of them thereafter ratified this survey or plan, except the statement made in writing by Horace G. Clark on July 28, 1873, at the time the Green survey was made, which was 6 years and 10 months after the bonds were given, and more than 4½ years after the

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 5 Kan. App. 679.

deeds of January 1, 1869, were delivered and accepted as performance of the contracts to convey. The defendants had the burden of proof upon the foregoing question, and, judged by the record, they failed to sustain it.

As seen by the statement of the case:

Brown, in making his survey, "ran a line at right angles to the north line of the Mead farm northerly from the point where two fences corner at the north side of a large maple tree. On this line he measured off 20 rods and then set a stake. Through this stake he ran a line parallel to the Mead-Blanchard line easterly to a stone wall where he set a stake, and westerly to an old fence running northerly and southerly and there set a stake. From the stake first set he continued the right angle line northerly 10 rods, and there set a stake, and from that stake ran easterly parallel with the Mead-Blanchard line to the said stone wall. From the maple tree he ran westerly along the line of a board fence 56 rods to the north bar post of a barway then standing, and there set a stake, and then turned a right angle to the north and ran a line to meet the line parallel with the Mead-Blanchard line."

[32] But the Brown survey and plan, not being participated in, authorized, or ratified by all the parties to either contract to convey, and not being referred to therein, nor in either deed of January 1, 1869, cannot be considered in the construction of either the bonds or the deeds. *Sanborn v. Clough*. 40 N. H. 316; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 30 Am. Dec. 575. The case last cited is much in point. The chief matter in controversy was the title to the summit of Mt. Washington, which the plaintiffs claimed, as owners of Thompson & Meserve's purchase, and the defendant as owner of Sargent's purchase. The plaintiff introduced as evidence of paper title, a resolution of the Senate and House authorizing the Governor to appoint a land commissioner, whose duty it was to sell certain lands of the state and execute deeds therefor, a copy of the proceedings of the Governor and council nominating and appointing one James Willey land commissioner, and a copy of quitclaim deed from Willey to Thompson & Meserve, conveying a tract of land "beginning," etc. Thompson testified to a survey made by him and Willey after negotiations between them for the sale, and a few days before the date of the Willey deed, and that their object was to fix the bounds of the land to be conveyed. The court said that the prior negotiations must be taken, so far as the construction of the deed was concerned, to have been merged in that instrument, the conclusive presumption being that the whole engagement of the parties and the extent and manner of it were reduced to writing; that the deed contained no reference to any monument established by Thompson or Willey, or to any survey by them, and the effect of the evidence, at most, could be merely to show that Willey and Thompson intended a different tract of land from that afterwards conveyed by the deed, if the lines of their exploration were found to differ from the calls of the deed, and its reception to con-

trol the deed would be in violation of a principle quite elementary; that, "besides, Meserve, who was one of the grantees in the deed, was not a party to this transaction by Willey and Thompson, and there is no evidence that he ever authorized or ratified it. *Prescott v. Hawkins*, 12 N. H. 27. This evidence was therefore incompetent to affect the construction of the deed."

It follows that, since all the parties in interest did not cause or authorize the Brown survey to be made, nor ratify it, the corners marked in the course of that survey, including the points of beginning, were not in a legal sense marked by the parties, and cannot be regarded as practical locations controlling the courses of the deeds or either of them.

It is further urged in the defendants' brief for reargument, as in their former brief, that the divisional line as claimed by them was subsequently recognized and acquiesced in by the parties; in other words, that the parties themselves, by their practical construction of the deeds, treated the location of the line as being where defendants now claim it to be. In connection with this claim particular reference is made to what they please to term by a misnomer, "the solemn declaration of Mead on the Green plan" that the northeast corner stake set by Brown correctly shows the place of the northeast corner of defendants' land. Notice was taken in the opinion of the so-called recognition and acquiescence of the divisional line as claimed by defendants, in connection with and consequent upon the resurvey and plan made by Green in July, 1873, and the statements placed on the plan, and the separate, written statement then made and signed by Horace G. Clark relating thereto, as far as was deemed necessary and proper in the determination of the case. But, in view of the arguments put forth why the motion for reargument should be granted, we discuss here more fully the significance of that survey, including the matters connected therewith, as bearing upon the question of recognition and acquiescence presented. At the time when that resurvey and the plan were made, and when the notes on the latter were agreed to and signed, Andrew J. Mead owned a one-tenth undivided interest in the property now owned by the plaintiff. Horace G. Clark, Norman Clark, and Alanda W. Clark owned the remaining nine-tenths interest therein. The property now owned by defendants was then owned, seven-sixteenths by Lyman Bardin, two-sixteenths by Stillman C. White, and seven-sixteenths by Isaac M. Hillman. The findings show that of the then owners of the property now owned by the plaintiff only Mead had to do with the making, or the causing to be made, of this resurvey and plan, and of the then owners of the property now owned by defendants only Bardin had to do with the causing of that resurvey and plan to be made. The record states that Green was em-

ployed to do this work "by both Mead and Bardin, and each paid one-half of his charges therefor." Furthermore, none of the other common owners of either property, except Horace G. Clark by his writing referred to above, ever authorized or ratified this survey or plan, so far as the case shows, and if the defendants claim otherwise, the burden was on them to show it. 4 R. C. L. 126. The conduct of Horace G. as president of the American Marble Company is referred to by defendants in connection with their claim in this behalf, but there is nothing in the findings showing his conduct in the position named to have this effect as a matter of law.

[33] The law is that an agreement by one of several co-owners establishing a doubtful or disputed boundary is not binding on the others unless they consent thereto, and so as a general rule all the parties interested in the lands must be parties to the agreement. 9 O. J. 236; *Strickley v. Hill*, 22 Utah, 257, 62 Pac. 803, 83 Am. St. Rep. 786; *Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971; *Smith v. Gilley* (Tex. Civ. App.) 135 S. W. 1107. See *Sawyer v. Coolidge*, 34 Vt. 303; *Silsby & Co. v. Kinsley*, 89 Vt. 263, 95 Atl. 634.

The finding that "Green discovered and called to the attention of Woodhouse, Clarks, and Mead the fact that the calls in deed concerning the boundary did not correspond with the monuments and objects on the land, and that the marble post marking the northwest corner of the 96 rod piece was 8 feet further south of the butternut tree than Brown had found and Mead's plan shows," is not sufficient to establish a practical location of the boundary line on the ground as against Alanda W. Clark and Norman Clark, construing the word "Clarks" as including them, in the absence of proof that they agreed to the survey as establishing the correct line. 9 C. J. 243; *Hruby v. Lonseth*, 63 Wash. 589, 116 Pac. 28. Nor in this respect is the standing of Alanda W. Clark affected by the fact that he participated in the making of the Brown survey; for, as observed in the opinion, that survey was not followed by Mead in describing the properties to be conveyed, and whatever was previously said and done concerning the survey was merged in the written instruments subsequently executed on the one hand, and accepted on the other, and it can have no bearing in the case unless it was afterwards used by the parties in connection with the asserted recognition of, and acquiescence in, the line now claimed by the defendants. There is no finding that Alanda W. made any such use of it. At the time that survey was made he was one of the prospective purchasers of each piece of property, and became one of the obligees in each bond for a deed. At the time of the Green resurvey he was interested only in the property now owned by the plaintiff. This shows a reason why at the latter time he may not have been willing to become a party to the so-called recognition and acqui-

escence, which, if it had the force now claimed for it, would deprive him and his co-owners of a strip of land within their title deeds approximately $2\frac{3}{4}$ rods wide, as the divisional line is located on the ground by the chancellor. As to Norman Clark, it is said that he recognized the line claimed by defendants by his conduct as superintendent of the American Marble Company. Suffice it to say that the record does not show what his conduct was as such superintendent, and no intendment is to be made against the decree.

Concerning the land outside the defendants' paper title, which they claim to own, the opinion states:

"Nor is it found that each prior successive grantee, in writing or by parol agreement or understanding, transferred to his successor his possession of said land without the calls of his title deeds, accompanied by an actual delivery of the possession of the premises."

Defendants say in their brief for reargument that it is clear from this statement in the opinion that the court does not have in mind the facts found and reported respecting the subject-matter, the brief stating:

"It appears from the findings that upon the giving of the bond to Oliver and others the American Marble Company immediately went into possession of this property. The land occupied by them and those claiming under them, namely, Burr, was inclosed and marked, first with a fence extending some 400 feet easterly from the west line, and, continued easterly, by the apple tree, the row of large, tall, iron pins, and square-cut marble block with the guy pin, the wooden post and the marble post; each of these objects being found by the chancellor to have been placed there for the purpose of marking the boundary, and to have marked the boundary from 1866 to 1885. This property passed back to Mead under his foreclosure, with this fence and those markers inclosing the land claim. Mead transferred it to Bardin, and Mead pointed out to Bardin on the ground the exact location of the land which he was proposing to convey, and delivered possession thereof."

The only transfer from Mead to Bardin was on July 1, 1873, and that was of a seven-sixteenths interest in the property within the defendants' title deeds. The fact asserted in the brief that Mead pointed out to Bardin on the ground the exact location of the land which he proposed to convey, and delivered possession thereof, is not borne out by the record; there is no finding to that effect. The facts shown by the record, of the nature of the others stated within the foregoing quotation from defendants' brief, may be considered as fairly warranting an inference that the possession of the strip of land outside the defendants' title deeds was by parol transferred by each of the grantees to his successor, accompanied by actual delivery of the possession of the premises, and yet that is not sufficient; for the decree rendered shows by intendment that such inference was not drawn; such facts not found. The land not being included in the several deeds, an actual transfer of possession thereof in each instance was necessary to be shown, and found as a fact. Without such fact being es-

tablished, the possession could not be tacked in making out privity of estate or of possession between the successive dispossessors essential to continuity of possession. Winslow v. Newell, 19 Vt. 164; 2 C. J. 92; Humes v. Bernstein, 72 Ala. 546; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751; Wishart v. McKnight, 178 Mass. 356, 69 N. E. 1028, 86 Am. St. Rep. 486; Id., 184 Mass. 283, 68 N. E. 237; Rich v. Naffziger, 255 Ill. 98, 99 N. E. 341.

In referring to what the opinion says upon the subject of guys, namely, that the acts of placing guys on the land now owned by the plaintiff are not found to have been under a claim of right, defendants say in their brief for reargument that the court must have overlooked some facts found and reported by the chancellor, naming as among such facts that these guys were placed upon the "Clark lot" (Fant lot) by the American Marble Company when it began its operations (quoting from the brief), "not only under a claim of right, but by purchase of the right to so place them." In this connection reference is made in the brief to Exhibits 38 and 41, and to article 96 of the findings. Exhibit 38 is defendants' plan; and Exhibit 41 is the statement in writing signed by Horace G. Clark in connection with the making of the Green plan, as already noticed. Article 96 contains no finding that any of the guys in question were placed on the "Clark lot," or maintained there, under a claim of right. The writing mentioned is copied into the record under the article named, but it is nowhere found that the statement in the writing relating to "the sale of the right to attach three guys at or about the points on the 10-rod lot as now in use," or the somewhat similar declaration stated on Exhibit 38 to have been made by Mead, was true in fact. Such a statement by Mead, if properly shown, and the statement in the writing by Horace G. Clark, though evidence against them respectively, were not evidence against their cotenants. *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. And the fact of such a purchase is not found. So the only right, if any, the defendants have to place and maintain their guys on the plaintiff's land rests on adverse enjoyment of the easement in connection with the use and occupancy of the land now owned by them; and in order to make out such a right it was necessary for defendants to prove an uninterrupted adverse enjoyment of the easement for a period of 15 years by themselves or their predecessors in title, or both combined. *Perrin v. Garfield*, 37 Vt. 304. The three Clarks who, with Oliver, were the obligees in the bond from Mead for a deed of the property now owned by the defendants, were associated in the formation and operation of the American Marble Company. Horace G. Clark was president of the company, and Norman Clark was superintendent. During all the time that company was in operation the three Clarks were also interest-

ed in the property now owned by the plaintiff, either as obligees in the bond for a deed thereof with the right to enter thereon to open, develop, and work all marble quarries on said premises, or as tenants in common (after the deed was given), the owners of the major part of the land conveyed. The Clarks being thus interested in the two properties severally, and in the operation and management of the company named, their relations in these respects were important matters for consideration in deciding whether the use of the property now owned by the plaintiff for anchoring or hitching guys or guy ropes thereon for the benefit of the other property was adverse or permissive.

"The general rule is that the enjoyment of an easement of this character is presumed to be adverse unless something appears to rebut that presumption. * * * There are some cases where the user is of such a character and the circumstances attending it are such as to show that it was a mere privilege enjoyed by leave of the proprietor of the servient tenement, express or implied, and not adverse"; and in some circumstances the use "would be presumed to be de gratia, or with the express or implied permission of the proprietor of the servient tenement." *Plimpton v. Converse*, 44 Vt. 158; *Perrin v. Garfield*, cited above; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

In the case last cited the plaintiff was a voluntary association and sued as such. The action was for obstructing an alleged right of way leading from the plaintiff's fish place over defendant's land to a public highway. A prescriptive right of way was claimed. The defendant insisted that the user upon the conceded facts could not be adverse, because the owners of the premises over which the way was claimed to be were themselves during the entire period of the user active members of the plaintiff association. The court stated the question to be whether one's own land may be subjected to an easement in favor of himself and another as joint owners of other lands. It was held that in such circumstances an easement may exist, but that the use ought, more than in ordinary cases, to appear to be under a claim of right. The court said the interest of the owners of the land over which was the alleged way in the business of their associates might lead them to permit a passage over their individual lands, and on the question of fact a jury might think the use should be referred to such permission rather than to a claim of right, that the relation in which the parties stand to each other may often serve to indicate the character of the use, and that the fact that the owner of the land over which the way was claimed was himself a member of the plaintiff association and largely interested in its business might be, and was, an important matter to be weighed in deciding whether the use was adverse or permissive.

On April 27, 1872, by decree of foreclosure becoming absolute, Mead again became the sole owner of the property previously owned and operated by the American Marble Company, and remained such owner until the 1st

day of July, 1873. During this same time he was a cotenant in ownership of the property now owned by the plaintiff, and he could gain a prescriptive right of easement therein only by user adverse to his cotenants. *Reed v. West*, 16 Gray (Mass.) 283.

[34] If a cotenant enter upon the whole or part of the common property, as he has a legal right to do, the law presumes that he intends nothing beyond an assertion of his right. In order to sever his relation as cotenant, and render his possession adverse, it must be affirmatively shown that the other cotenants had knowledge of his claim of exclusive ownership, accompanied by such acts of possession as were not only inconsistent with, but in exclusion of, the continuing rights of the other cotenants, and such as would amount to an ouster as between landlord and tenant. *Chandler v. Ricker*, 49 Vt. 128; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350; *Roberts v. Morgan*, 30 Vt. 319; *Leach v. Beattie*, 33 Vt. 195.

[35] A similar relation of the parties was created on June 14, 1905, when defendant Eastman, then the owner of the property within his present title deeds, took a conveyance by warranty deed of one-third interest in an undivided one-tenth part of the land within the plaintiff's title deeds, and on which the defendants' guys are anchored and fastened, and the same principles of law are applicable. Furthermore, the record before us shows that the aforesaid interest in the land was purchased by Eastman for a valuable consideration by him paid therefor. There is nothing in the case indicating that he made such purchase for the purpose of quieting his own title, or to protect him against litigation. Such purchase and acceptance of the warranty deed amounted to an acknowledgment that the title was in the common owners, the interest of one of whom he took by the purchase, and it was evidence tending to show that the previous use (by way of anchoring and fastening guys on the land) was not adverse, or under a claim of right. *Tracy v. Atherton*, 36 Vt. 508; *Perlin v. Garfield*, cited above.

Regarding such guy attachments between the time when Mead sold the property of the dominant estate on July 1, 1873, and the time when Eastman became a tenant in common in ownership of the servient estate in 1905, the findings show that Green, in making his survey in the latter part of July, 1873, "located points on the Clark lot where derrick guys were fastened, and having completed his survey, he made a scale drawing of the same, showing in detail the monuments * * * and the guy hitches located on the Clark lot"; that in 1890 the large stone with the guy attachment in the Brown and Green line was visible; that at some time after Eastman began operations the old derrick was replaced by a new one, and the new derrick was guyed

at substantially the same locations as the old one had been, excepting that there were not so many guys on the new mast as there had been on the old; and that defendants are maintaining upon the premises three guy attachments which are north of the so-called "pin line."

[36] It is quite evident from the record that the proof and inferences touching the question of the easement claimed are not all one way; and it cannot be said, as matter of law, that within the time asserted by defendants there was an uninterrupted user and enjoyment of the easement for a period of 15 years under a claim of right. Assuming that such a user and enjoyment might reasonably have been inferred from the facts reported, it must be intended that such inference was not drawn; for otherwise the decree rendered by the chancellor was not warranted. So the case stands in this respect that facts essential to the establishment of the prescriptive right of easement are not found; and thereon the burden was with the defendants. *Barber v. Bailey*, 86 Vt. 219, 84 Atl. 008, 44 L. R. A. (N. S.) 98.

The defendants' brief in support of the motion for reargument has been carefully considered, and no substantial ground for the motion is found.

The motion for reargument is denied.

Decree affirmed, and cause remanded.

(90 N. J. Law, 537)

NEW YORK & NEW JERSEY WATER CO. v. STATE BOARD OF ASSESSORS.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

TAXATION ~~§~~ 368—PUBLIC SERVICE CORPORATIONS—FRANCHISE TAXES—RATES.

Voorhees Franchise Tax Act (4 Comp. St. 1910, p. 5299) § 4, requires the owner of a franchise first to make return of the gross receipts of the business, and also requires every owner of a franchise having part of its transportation line on private property and part on public streets or places to make return showing the gross receipts for transportation. *Held*, that a water company having pipes in the public streets is not engaged in transportation within the act, and must make return on the whole of its gross receipts.

Appeal from Supreme Court.

Certiorari by the New York & New Jersey Water Company against the State Board of Assessors to review the assessment of a franchise tax against prosecutor's property. From a judgment dismissing the writ (88 N. J. Law, 595, 97 Atl. 153), and affirming the action of the assessors, prosecutor appeals. Affirmed.

Franklin W. Fort, of Newark, for appellant. Francis H. McGee, of Trenton, and Herbert Boggs, Asst. Atty. Gen., for appellee.

SWAYZE, J. One point raised by the appellants seems to require notice. It is argued that the franchise tax on a water com-

pany under the act of 1903 amending the Voorhees Franchise Tax Act of 1900 (P. L. 1903, p. 232; C. S. p. 5298) must be calculated only upon the gross receipt for transportation. Hence, it is said, it was erroneous to tax the prosecutor on the whole of its gross receipts, since it owned the water it transported, and to calculate the tax on the whole of the gross receipts was to calculate it, at least in part, on receipts for the sale of water, as distinguished from receipts for its mere transportation. The tax is fixed by section 5 (C. S. 5299, pl. 531) at 2 per centum of the annual gross receipts "as aforesaid." The reference is to section 4, and the difficulty arises out of the fact that by that section the owner of a franchise is first required to make return of the gross receipts of the business, and later in the same section every owner of a franchise having part of its transportation line on private property and part on public streets or places is required to make return showing the gross receipts for transportation. The appellants assume that a water company is within the last provision. The history of the legislation shows the fallacy of this assumption. The corresponding part of section 4 as originally enacted in 1900 (P. L. 503) applied only to oil or pipe line companies having part of their transportation line in this state and part in another state and to their receipts for transportation of oil or petroleum. At that time oil and pipe line companies transporting oil or petroleum having part of their lines in this state and part in another state were transportation companies called transit companies, and were soon after treated as common carriers by the act of Congress known as the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584). This view has recently been sustained by the Supreme Court of the United States. *The Pipe Line Cases*, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459.

The Legislature in the act of 1903 dealt with two classes of owners of franchises, one of which was required to make a return of the gross receipts of the business, the other a return of gross receipts for transportation. Probably all owners of franchises affected by the act—i. e., those having the right to use or occupy, and occupying the streets and public places—used the streets for the transportation of their product. Such are the owners of gas plants, electric light plants, telegraph and telephone plants, steam heating plants. If all these are to be dealt with as transportation companies under the later clause, there will be few or none left to make return on the whole of their gross receipts under the earlier clause. What was meant by the later clause was to tax the owners of franchises whose business was transportation, like the New York Transit Company and the National Transit Company. Others whose business was the sale of their commodities or

services, gas, electric current, electric communication, steam or water, with whom the means of transportation—wires or pipes—were only the necessary means of delivering their commodities; were taxable on their total gross receipts under the earlier clause. This disposes of the objection to the view of the Supreme Court that the error in apportionment affects only the municipalities, and they do not complain. It disposes also of the contention that the apportionment should be made not according to the length of the line, whether there was one pipe or more, but according to the number of feet of pipe. There is no apportionment necessary in ascertaining the amount of the tax, in which alone the appellants are interested. If there has been error in apportioning the amount among the taxing districts, the appellants are not injured thereby.

As to other points raised, we have nothing to add to what was said by the Supreme Court.

We find no error, and the judgment is affirmed, with costs.

(90 N. J. Law, 594)

GROSS v. COMMERCIAL CASUALTY INS.
CO. OF NEWARK. (No. 110.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

INSURANCE —524—INDEMNITY INSURANCE—
CONSTRUCTION OF POLICY—DISABILITY.

An insurance company by its policy contracted to pay the assured a weekly indemnity so long as he should be totally disabled and wholly and continuously prevented from performing any and every kind of business relating to his occupation. The business of the assured was that of a traveling salesman, which required a constant use of his feet, and during the term of the policy he was afflicted with a foot ailment which entirely prevented him from traveling and soliciting business, although during part of the term for which he claimed indemnity he was able to go to the office of his employer and conduct some business by writing letters and the use of the telephone. The trial court instructed the jury that the reasonable construction to be put upon the language used was, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, but that, if he be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, he was entitled to recover. *Held*, that such an instruction was not error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1310.]

Appeal from Circuit Court, Essex County.

Action by Rudolph Gross against the Commercial Casualty Insurance Company of Newark, N. J. Judgment for plaintiff, and defendant appeals. Affirmed.

William E. Holmwood, of Newark, and Edward L. Katzenbach, of Trenton, for appellant. Jacob L. Newman, of Newark, for appellee.

BERGEN, J. The plaintiff brought his action to recover on a policy issued to him by the appellant, assuring him certain payments in case of death or disability resulting from bodily injuries effected solely through accidental means, and it provided that if, by reason of disease or illness contracted during the term of this insurance by the assured, he be totally disabled, and "wholly and continuously prevented from performing any and every kind of business pertaining to his occupation and necessarily confined in the house," he should be paid as for total disability, "and if, immediately following such a period of total disability and confinement in the house, he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-fourths of said amount per week shall be paid to the assured."

The plaintiff recovered a judgment, from which the defendant has appealed. This appeal presents two questions: First, is the plaintiff entitled to recover? and, second, if entitled to recover, was the jury improperly instructed as to the extent of disability required by the policy?

The first was raised by motions to nonsuit and for a direction in favor of the defendant, and second by an objection noted to the instructions given to the jury. The solution of the first question favorably to the appellant depends upon a determination that the policy was invalidated because of a breach by the plaintiff of certain written warranties made by him, and made a part of the policy which was issued on October 11, 1911, and contained among other warranties the following:

"I have not been disabled nor have I received any medical or surgical attention during the past five years except as follows: In 1911 for eczema, lasting four months."

And:

"My habits of life are correct and temperate: my hearing and vision are not impaired; I am in sound condition mentally and physically, except as herein stated: No exceptions."

This policy expired October 1, 1912, and was renewed each year thereafter, the last being from October 1, 1914, to October 1, 1915. The renewals were manifested by a certificate continuing in force the original policy—"provided the statement in the schedule of warranties in the original contracts are true on this date and that nothing exists on the date hereof to render the hazard of the risk greater than or different than that shown by such schedule."

The testimony permits an inference:

That previous to the issuing of the last certificate the plaintiff had called upon a physician because, as plaintiff testified, he "got so easily tired in my feet. I went down there to consult because he once treated me before, about a few years ago. * * * I went down there, and he looked me over. He did not say anything. He said, 'You go home and take a little more care and take a little rest and rub your feet with alcohol.' Q. He did not tell you anything

was the matter with you? A. No. Q. And you had no trouble after that until this last illness? A. Yes."

This he testified happened six months or a year prior to the last renewal. As this branch of the case rests upon the motions to nonsuit and for direction of a verdict, the foregoing testimony must be taken as true, and the question is whether this testimony conclusively established the fact that when the last renewal certificate was issued the plaintiff's warranty that he had "not been disabled nor have I received medical or surgical attention during the past five years" was untrue, and therefore a breach of the warranty within the meaning of the policy, and also whether his condition made "the hazard of the risk different or greater than that shown by such schedule." The plaintiff's business required him to be on his feet most of the time, and finding that he tired easily, he went to the physician and represented his condition, but was not informed by him that he had any illness; was simply told to bathe his feet in alcohol. We do not consider this receiving medical attention of such a character as to require the plaintiff to state it to the defendant on the renewal, or that not doing so would invalidate the policy. Neither the physician nor the plaintiff had any idea that the symptoms might be an indication of the ailment which subsequently developed, or that it was a disease or sickness. Advising one to bathe his feet in alcohol simply because they are tired is not conclusive evidence that the plaintiff had received medical or surgical attention sufficient to forfeit the policy because it had not been made known to the defendant any more than if the ailment was temporary, such as an ordinary cold. Whether the plaintiff had knowledge that his condition was such that the hazard of the risk was different or greater than that shown by the schedule of warranties was a jury question. The court submitted to the jury the question whether the ailment was of so serious a character as to permanently affect his health and to make him a less desirable risk, and directed them that if they found in the affirmative then there could be no recovery. It was not error for the court to refuse to nonsuit, or to direct for the defendant, for the reasons urged.

The second branch of the case depends upon the construction to be given to the following part of the policy:

"If, immediately following such a period of total disability and confinement in the house, he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined to the house, three-fourths of the said amount for the week will be paid to the assured."

The trial court instructed the jury that the reasonable construction to be put upon the language used was, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupa-

tion, but that, if he be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, he was entitled to recover.

The proofs show that the occupation of the plaintiff was traveling for his employer from Newark, N. J., to New York, Boston, Philadelphia, and other places to sell and buy leather and hides and attend to the shipments; that he sometimes did office work, calling people on the telephone and dictating letters concerning business growing out of his traveling; that from January 4, 1915, to the 15th of October following he was not able to do any traveling because of a severe and persistent ailment affecting his feet; they were so swollen that he could not wear his shoes until nearly the end of the period, when he was able to wear a special shoe made for his use; he would go to the office with an automobile, and while there occasionally dictated a letter, the proofs showing that during the entire period he dictated about 80 letters, but that he did not do his regular work. We think that the instruction of the trial court was right. The indemnity contained in the policy included any and every kind of work appertaining to his occupation, not a part of his work, but any and every kind, and the policy makes the distinction between the total disability which confined him to the house, and the disability to do every kind of work pertaining to his occupation after he was able to go out of the house, and provided a lower rate for the latter disability.

In *Young v. Travelers' Ins. Co.*, 80 Me. 244, 13 Atl. 896, the Supreme Court of Maine dealt with a policy which had in it this clause:

"And wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured."

In that case the trial court instructed the jury that the meaning of this language was not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation or to any part of his business, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, and that there was a difference between being able to perform any part and any and every kind of business, and the appellate court sustained this instruction to the jury:

"If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform only one, he was as effectually disabled from performing his business as if he could do nothing required to be done."

In *Hooper v. Accidental Ins. Co.*, 5 Hurlstone & Norman, 546, where the plaintiff was an attorney, he sprained his foot while riding on horseback, and the claim by the insurance company was that it did not wholly disable him. In that case the covenant was that, if the injury be of "so serious a nature as to wholly disable him from following his

usual business, occupation, or pursuits," the company would pay, and the court held:

"If a man is so incapacitated from following his usual business, occupation, or pursuits as to be unable to do so, he is wholly disabled from following them. His usual business and occupation embrace the whole scope and compass of his mode of getting his livelihood. * * * They intended that when the insured was wholly incapable of performing a very considerable part of his usual business he should receive a compensation in respect of that disablement."

In construing a policy we should adopt the meaning of the words used most advantageous to the assured, and in the present case the indemnity runs during such period as the insured is disabled to perform any and every kind of his occupation. The proofs show sufficiently for the jury to so infer that the principal part of the occupation of the insured was traveling in which the use of his feet were absolutely necessary, and because of his peculiar illness he was disabled from performing the principal and major part of his occupation.

We see no error in this record, and think the judgment should be affirmed.

(90 N. J. Law, 680)

GRILLO et al. v. THOMAS A. EDISON, Inc., et al. (No. 119.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

1. TRIAL \Leftrightarrow 178—MOTION TO DIRECT VERDICT—QUESTION PRESENTED.

A motion to direct a verdict presents only the question of defendant's liability, and does not stir the question of the measure of damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403.]

2. WATERS AND WATER COURSES \Leftrightarrow 68—POLLUTION—MANUFACTURING PLANT—CONTRIBUTING CAUSE.

Where substances put into a stream by defendant manufacturing company created a condition injuring plaintiff's health and property, the fact that sulphuric acid, already in the stream, contributed to the result did not absolve the defendant, and it was immaterial whether such acid was a natural ingredient of the stream, or was artificially introduced by strangers to the suit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 59.]

Appeal from Supreme Court.

Action by Salvatore Grillo and others against Thomas A. Edison, Incorporated, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

In the Supreme Court the following per curiam was filed:

[1] "This case, which was tried before the district court without a jury, resulted in a judgment against the defendant, Thomas A. Edison, Incorporated. The trial court found from the proofs that substance flowing from this defendant's plant through its artificially constructed channel into the stream created a condition that was injurious to health and property. Touching this finding, the appellant says: 'The learned judge's finding of fact is

correct, but his conclusion of law is erroneous.' The legal ruling of the trial court that is complained of is the denial of the appellant's motion to direct a verdict in its favor. This motion does not stir the question of the measure of damages, and, its denial presenting only the question of the liability of the defendant, the motion was properly denied.

[2] "The substances put into the stream by the defendant were the proximate and efficient cause of the injury to the plaintiff. The circumstance that the sulphuric acid already in the stream contributed to this result does not absolve the defendant; and this is equally true whether the acid was a natural ingredient of the stream or was artificially introduced by strangers to this suit.

"Weidman Silk Dyeing Co. v. East Jersey Water Co. (Sup.) 91 Atl. p. 338, was an action for the unlawful abstraction of water from a stream. The contention there, as here, was that the injury was created in part by the acts of others than the defendant, in that they polluted the water. In that case, in declining to give the desired force to this argument, we said: 'The abstraction was a direct and proximate cause of the injury, though alone it would not have caused it' (citing *Newman v. Fowler*, 37 N. J. Law, p. 89; *Matthews v. D. L. & W. R. Co.*, 56 N. J. Law, p. 34, 27 Atl. 919, 22 L. R. A. 261, and referring to 38 Cyc. 488).

"The subsequent reversal of the judgment (88 N. J. Law, 273, 96 Atl. p. 60) was upon a totally different ground, and in the case upon which such reversal rested, viz. *Auger & Simon, etc., v. East Jersey Water Co.*, 88 N. J. Law, 273, 96 Atl. p. 60, it was said by Mr. Justice Bergen speaking for the Court of Errors and Appeals: 'It is no answer to an action * * * for a nuisance to show that a great many others are committing the same species of nuisance upon the stream, for, if the defendant's acts appreciably add to the pollution, they create a nuisance.' The difference between a nuisance created by the concurrence of pollution of the stream and the abstraction of its waters does not differ in principle from a nuisance created by a chemical reaction between a substance already in the stream and one placed therein by the act of the defendant. Upon the question, therefore, of liability, which is all that was presented by the motion to direct a verdict, the trial court committed no error in the denial of such motion.

"The question of the measure of damages is not before us upon an appeal from this ruling. The judgment of the district court is affirmed, with costs."

McCarter & English, of Newark, for appellants. John Larkin Hughes, of Passaic, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(87 N. J. Eq. 411)

CONDIT BEEF & PROVISION CO. et al. v. ARLISS et al. (No. 42/80.)

(Court of Chancery of New Jersey.

May 22, 1917.)

FRAUDULENT CONVEYANCES — 206(2) — "EXISTING CREDITORS" — SETTING ASIDE.

Defendant was indebted to plaintiff on running account when he made a voluntary conveyance to his wife. He continued to buy and items due at time of conveyance were satisfied by payments made, but account was never paid in full, but up to time of judgment the balance due was always great as debt at time of con-

veyance. *Held*, that plaintiff was an "existing," and not a subsequent, creditor, and entitled to set conveyance aside.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 630.

For other definitions, see *Words and Phrases*, First and Second Series, Existing Creditors.]

Suit to set aside a voluntary conveyance by the Condit Beef & Provision Company and others against Simeon W. Arliss and others. Judgment for plaintiffs.

Herbert J. Hanocho, of Newark, for complainants. Hugo Woerner, of Newark, for defendants.

STEVENS, V. C. This is a creditor's bill to set aside a voluntary conveyance.

In March, 1915, the defendant Arliss, a retail butcher, made such a conveyance to his wife. At the time he made it, he was indebted to the complainants, wholesale butchers, on a running account. He continued to buy from them for several months thereafter, and, from time to time, made payments on account. According to the rule relating to appropriation of payments, the debit items of the account, as they stood when the conveyance was made, were satisfied by the payments made subsequently, but the account was never paid in full; and it was not reduced to an amount less than that which was owing at the time of the conveyance.

The question is whether complainants were existing creditors, within the rule of *Haston v. Castner*, 31 N. J. Eq. 703. This question was answered in the affirmative by *Howell, V. C.*, in *Crane v. Brewer*, 73 N. J. Eq. 558, 68 Atl. 78. The argument now made is that the decision does not notice and does not accord with that of the Court of Errors in *Severs v. Dodson*, 53 N. J. Eq. 634, 84 Atl. 7, 51 Am. St. Rep. 641. I should hardly feel at liberty to disregard *Crane v. Brewer*, but I may say that it seems to me to be rightly decided. *Haston v. Castner* holds that a voluntary conveyance is presumed to be fraudulent as to debts antecedently due; and that, as a rule of evidence, no circumstances will be permitted to repel this legal presumption. *Severs v. Dodson* decides that an accommodation indorser of a promissory note is not a debtor within the meaning of the rule.

In the case in hand the complainants were creditors when the conveyance was made, and they continued to be, up to the entry of judgment. There was always, during the intervening period, a debt owing as great as that which existed at the time defendant conveyed. The debt, it is true, was from time to time increased and diminished, but it continued to be one debt, contained in one account and constituting a single cause of action. The situation was similar to that appearing in *Whittington v. Jennings*, 6 Sim. 493, a case in which a voluntary assignment,

made under like circumstances, was avoided.

The case in hand differs from *Severs v. Dodson* in the controlling circumstance that there was a contingent liability and not an existing debt. Beasley, C. J., said that the conclusive presumption only obtained when the conveyance was made by one indebted. In the case in hand it was so made. It was therefore voidable at the time. As the debt persisted until judgment, although the items of which it was composed underwent change, it would seem more reasonable to apply the rule of *Haston v. Castner* than that of *Severs v. Dodson*. That, it seems to me, would be putting the rule as to application of payments to a very unwarrantable use. It is argued that the partial payments were made with reference to particular items. I fail to see that it makes any difference, as far as the present question is concerned, whether the payments exactly equal the items or overpay them. In either case a part of the whole debt remains.

(87 N. J. Eq. 584)

WILSON et al. v. VOGEL. (No. 42/708.)

(Court of Chancery of New Jersey. May 19, 1917.)

1. VENDOR AND PURCHASER ⇐129(4)—SUFFICIENCY OF TITLE—QUESTIONS OF LAW—WILLS.

A will devised testatrix's property to two daughters to be divided equally between them, share and share alike, and in case either die without issue, and intestate, her share to go to the survivor. The devisees tendered a deed signed by them together with releases of their powers of disposition. *Held*, that there was a doubt as to whether the devise created a fee simple defeasible upon the first taker dying without issue and intestate whereupon the executory devisee might transfer her interest and release her testamentary power of disposal, or whether it created a life estate with power of testamentary disposition, and hence specific performance could not be decreed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 241.]

2. EQUITY ⇐39(2)—QUESTIONS OF LAW.

If a doubt raised depends upon a question of the application of general principles of law, equity will decide the question in a suit for specific performance, unless the question is not settled by previous decisions, or if there is dicta indicating that courts might differ.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 114.]

Suit for specific performance by Edna S. Wilson and others against George L. Vogel to determine the validity of a title. Bill dismissed.

Riker & Riker, of Newark, for complainants. Arthur R. Denman, of Newark, for defendant.

LANE, V. C. This is the familiar friendly suit in specific performance to determine the validity of a title. The conclusions I have reached render it unnecessary for me to express an opinion as to whether the title is

valid or not. Complainants derive their title from Esther C. Shelby, their mother. The will, so far as material, provides as follows:

"I give, devise and bequeath to my said daughter Edna L. and my said daughter Mabel E., their heirs and assigns to be divided between them, share and share alike (the property in question and also certain personal property).

* * * In case either of my said daughters dies without issue, and intestate, her share in said house lots and stable and contents thereof shall go to the survivor."

[1] A deed has been tendered, signed by Edna L. Wilson and Mabel E. Releases of the powers of disposition have also been duly executed by them and their husbands to each other and tendered. The sole question is whether the complainants can, with the aid of such releases, convey an estate in fee simple to the defendant. The residue of the estate is to be held by trustees not only for the benefit of the two daughters and their issue, but also a son.

[2] The rule appears to be settled that if a doubt raised depends upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in a suit for specific performance, but that in such cases specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous decisions, or if there are dicta of weight which indicate that courts might differ as to the determination of the point involved, and that one of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to convey a good title arises in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. This is almost precisely the language of Vice Chancellor Grey in *Richards v. Knight*, 64 N. J. Eq. 196, 53 Atl. 452. And see *Lippincott v. Wiloff*, 54 N. J. Eq. 107, 33 Atl. 305, and *Faby v. Cavanagh*, 59 N. J. Eq. 278, 44 Atl. 154. I have reached the conclusion that no construction which I can put upon this clause of the will is so free from doubt as to warrant this court in decreeing specific performance. The contention of the respective parties is, the complainant, that the devise creates a fee simple defeasible upon the first taker dying without issue and intestate, in which event the executory devise over would operate, and that the executory devisee being in esse and ascertained she may join in the deed and thereby transfer her interest, and that the testamentary power of disposal being a power in gross may be released and the result is a good title; the defendant, that, under the determination of the Court of Appeals in *Kellers v. Kellers*, 80 N. J. Eq. 441, 85 Atl. 340, *Cantine v. Brown*, 46 N. J. Law, 599, and *Kent v. Armstrong*, 6 N. J. Eq. 637, the devise is that of a life estate only with a power of testamentary disposition, and that inasmuch as the estate is one for life only, if

the first taker dies without issue and intestate, then the executory devise over would operate, and that if she dies with issue, either the issue will take or the estate will fall into the residue of first testator's estate. Defendant further contends that in view of *Thomson's Executors v. Norris*, in the Court of Appeals, 20 N. J. Eq. 480, that there is at least dictum in this state which would indicate that the power of disposal is not such a power in gross as may be released, with the result that the first taker might, notwithstanding her release, subsequently exercise her power of disposition by will. If the case of *Kent v. Armstrong* is to be given full force and effect, then there is no doubt but that the estate created by this will is a life estate only. It is said that the force of the case is weakened because it rests, to some extent at least, upon the fact that the effect of the words "should die without heirs" was to create at common law a fee tail and under our law a life estate at the time of the decision, but that subsequent to that case, in 1851, a statute was passed (Volume 4, C. S. of N. J. 1910, Wills, par. 27, p. 5870), which provides that in any devise or bequest of real or personal estate the words "die without issue" or "die without lawful issue" or "have no issue" shall be construed to mean a want or failure of issue, in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention should otherwise appear by the will, and that this statute has been considered in numerous cases, among others *Patterson v. Madden*, 54 N. J. Eq. 714, 36 Atl. 273; *Brazzalle v. Diehm*, 86 N. J. Law, 276, 90 Atl. 1128; *Dean v. Nutley*, 70 N. J. Law, 217, 57 Atl. 1089; *Steward v. Knight*, 62 N. J. Eq. 232, 40 Atl. 535; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Dilts v. Clayhaunce*, 70 N. J. Eq. 10, 62 Atl. 672; *Oondit v. King*, 13 N. J. Eq. 375; *Davies, Administrator, v. Steele's Administrator*, 38 N. J. Eq. 168; *McDowell v. Stiger*, 58 N. J. Eq. 125, 42 Atl. 575; and that such cases construe the statute as creating in the first taker a vested but defeasible fee-simple estate, the condition of the defeasance being the occurrence of the devisee dying without issue. *Cantine v. Brown*, 46 N. J. Law, p. 599, was decided, however, by the Court of Appeals subsequent to the passage of this statute. There the devise was to three daughters, their heirs and assigns, with a proviso that in case one should remain unmarried and should make no disposition of her estate by will her share should at her death be equally divided among her sisters, and the Court of Appeals said:

"The question presented is whether under that devise she takes a fee or merely a life estate, with power of testamentary disposition of the property. The decision of this court in *Kent v. Armstrong*, 6 N. J. Eq. 637, disposes of the question."

Again the Court of Appeals in *Kellers v. Kellers*, 80 N. J. Eq. 441, 85 Atl. 340, where

the devise was to testator's wife, her heirs and assigns, and should she acquire the estate and die without making a will, then that his will should operate and his estate be divided between his children as therein provided, said again, quoting *Kent v. Armstrong*:

"It was held in that case that the primary devisee took a life estate only, with a power of testamentary disposition, and that in the event of her dying intestate the executory devise over became operative. Thirty-five years later we again had before us in the case of *Cantine v. Brown*, 46 N. J. Law, 599, the question of the construction of a devise similar to that under scrutiny in *Kent v. Armstrong*, and declared that the decision in the earlier case must be regarded as the law of construction in this state on such devises."

If the estate taken by the first taker is merely a life estate, then if she dies with issue, but intestate, it would seem that either the issue take by implication or the property falls into the residue of the testator's estate. This result might be avoided by holding that the first taker took a fee defeasible upon the happening of the contingency, and I might be inclined if the matter was novel to so hold, but I cannot conceive that such a holding would be so free from doubt as to permit me to require specific performance. The Court of Errors and Appeals must have given some effect to the words "and intestate" in determining the nature of the estate created.

So with respect to the power to release the right of testamentary disposition. I have considered the numerous cases cited by the complainant, and *Norris v. Thomson's Executors*, 19 N. J. Eq. 307, in the Court of Chancery, and *Thomson's Executors v. Norris*, 20 N. J. Eq. 489, at page 524. Chief Justice Beasley in the latter case said that:

"I have not found any case in which it was maintained the power to appoint to strangers, after the expiration of an interest given to the donee of the power, was a power in gross."

There was in existence at that time *Albany's case*, 1 Coke, 110d, 76 Eng. Reprint, 250, which has been cited in the case below by the chancellor. To the same effect is *Smith v. Death*, 58 Eng. Reprint, 937. In *Grosvenor v. Bowen*, 15 R. I. 549, 10 Atl. 589, there was a bill for specific performance, the question of title being raised under a will which gave property to A. for life, on his decease to such person as he might appoint by his will, and in default of such appointment to the heirs of testatrix; it was held that he might release his power to appoint to the tenants in remainder or to extinguish it by joining with the other complainants in a deed conveying the bargained lot to the defendant in fee simple and therein releasing the power to him. There is a full discussion of the law in this case. There may also be a very clear distinction between a power to appoint among designated strangers and a general power to appoint among all the inhabitants of the earth. In

view of the dictum of Chief Justice Beasley in *Thomson's Executors v. Norris*, supra, it cannot, I think, be said that the law is so well settled on this point as to permit a decree for specific performance.

I will advise a decree dismissing the bill.

(83 N. J. Eq. 481)

CROPSEY v. CROPSEY.

(Court of Chancery of New Jersey. May 21, 1917.)

1. HUSBAND AND WIFE ⇨201—SETTING ASIDE CONVEYANCE—EVIDENCE—BURDEN OF PROOF.

The burden of establishing fraud is upon the complainant, and the rule that, in an action by a wife against her husband to set aside a conveyance of her property, a presumption of fraud arises which the husband must overcome does not apply to an action by the wife to set aside deeds by her to a third person and from the third person back to the husband and wife, where it was shown that the property was purchased with their joint savings, and the husband got from his wife that which in fact belonged to him.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 735.]

2. HUSBAND AND WIFE ⇨49½(7)—CONVEYANCE TO WIFE—PRESUMPTION.

As a rule, where a husband transfers his property to his wife or causes it to be transferred to her, there is a rebuttable presumption that the transfer was a gift.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 253.]

3. HUSBAND AND WIFE ⇨49½(7)—CONVEYANCE OF PROPERTY BY WIFE—REBUTAL OF PRESUMPTION.

The rule is less rigid to rebut the presumption that property conveyed to a wife was a gift, and to prove that it was a trust, where the trust is set up in defense of a deed alleged to have been given in discharge of the trust.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 253.]

4. HUSBAND AND WIFE ⇨201—SETTING ASIDE CONVEYANCE—EVIDENCE—SUFFICIENCY.

In an action by a wife against her husband to set aside a conveyance by the wife of their home to a third person and by the third person back to the husband and wife, evidence held not to show alleged fraud by the husband in procuring the deeds.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 735.]

Suit to set aside a conveyance by Eva P. Cropsey against Charles D. Cropsey. Bill dismissed.

Merritt Lane, of Newark, and Harry Lane, of Jersey City, for complainant. Robert Carey, of Jersey City, for defendant.

BAOKES, V. C. (orally after argument). The bill is filed by Mrs. Cropsey against her husband, Dr. Cropsey, to set aside conveyances of their home in Rutherford; one made by Mrs. Cropsey and her husband to Cook Conkling, and the other by Conkling to Mr. and Mrs. Cropsey, dated May 29, 1913. The cause for action is fraud imposed by the husband upon the wife, namely, that he co-

erced her into signing the deed by threats of abandonment, and induced her to execute it upon the fraudulent promise that he would cease attentions to another woman, mend his ways in other respects, and resume conjugal relations, all of which it is charged he failed to do.

[1] The burden of establishing the fraud is upon the complainant, although in actions of a certain class, by a wife against her husband, to set aside a conveyance of her property, a presumption of fraud arises, which the husband must overcome. For instance, if this deed were a pure gift by the wife to the husband of her property, the burden would be upon the husband to show that it was her voluntary act, and I incline that he would also be obliged to show that she had the benefit of independent advice, or at least, as the books lay it down, the burden would be upon him to prove that he did not deceive or oppress her, and that he dealt fairly with her, and that she understood the nature of the transaction. But this is not a gift case to which the rule applies, as I understand it. Here the husband got from his wife that which in fact belonged to him.

This couple were married, as I recall, in 1892, and for many years, during the struggling period, got along happily. Both worked and saved money together; he as a physician and she as a singer and music teacher. She was the treasurer; they had but one pocket-book, and this she controlled. She managed the finances and ran his books and bank accounts. With the accumulations they bought a lot and put the title in her name, and out of their savings they built their home in 1905, costing some \$6,000 or \$7,000, and later they paid off some of the mortgage incumbrance. The greater portion of the money came from the doctor's practice. Somewhere in the evidence it appears that the object of putting the title in Mrs. Cropsey was to protect it from the consequences of possible lawsuit against the doctor. Later in life, and some six or seven years ago, their relations became somewhat strained, largely due, as I take it, to his persistent demands and her refusal to transfer the home to the name of the two. The ill feeling gradually increased, and they drifted further apart, and when Dr. De Baun came into her life it reached an acute stage, which resulted in complete estrangement. After he came on the scene she was not as constant in wifely deportment, to put it mildly, as she ought to have been. For two years Dr. De Baun's attentions to Mrs. Cropsey were marked, which served to intensify the bitterness upon the part of her husband, whose close and intimate friend Dr. De Baun had been for many years. He was a free visitor at the house, calling almost daily, day and night, whether the doctor was home or absent, and their conduct and escapades finally led to the divorce courts, Dr.

Cropsey charging his wife with adultery with Dr. De Baun, in which she countercharged him with a like offense with two women whom she named. I tried that case, and dismissed the cross-petition because the charges were entirely unfounded, and also dismissed the doctor's petition. I denied him a decree, not that there was not an abundance of evidence calculated to arouse a strong suspicion of wrongdoing, but solely because the proof did not measure up to the legal requirements to justify judging her guilty. The final separation took place in July or August of 1913, after a Mrs. Thompson disclosed to Dr. Cropsey the misbehavior of his wife and Dr. De Baun at her home the summer before, and the impending scandal and exposure of a threatened divorce suit was followed shortly by the death of Dr. De Baun by suicide, as I understand. I do not know that, in drawing upon my memory, I am referring to the testimony in this case or the testimony in the divorce suit—I am unable to distinguish just now—but it does appear in the one or the other, and if it does not appear in the one I am trying, it must be disregarded.

[2, 3] As a rule, where a husband transfers his property to his wife or causes it to be transferred to her, it is presumed to be a gift, but this is a mere presumption, and, like all other presumptions, may be rebutted. Looking into the circumstances of this case—the singleness of purpose of husband and wife earning and saving in common to buy a home; his daily earnings and income contributing largely to the fund, the lifetime savings of the two, and the complete understanding that the home was to be the property of both, though title was put in the wife, and that upon the death of either it was to go to the survivor—we find there was in morals and common justice, at least, a most sacred trust; perhaps unenforceable because of the presumption of gift and the rule requiring resulting trusts to be definitely established by satisfactory and convincing proof. But the rule is far less rigid to rebut the presumption and to prove the trust, where the trust is set up in defense of a deed alleged to have been given in discharge of the trust.

[4] The doctor had been insisting upon this deed for years, because, as he says, they had no children, and if his wife should die first his rights would be lost; and indeed it appears from Mrs. Cropsey's testimony that to guard against such an event she had made a will in his favor. As between himself and his wife, things were going from bad to worse. Discord reigned supreme in the household. Dr. De Baun's attentions and presence in the house had become so objectionable to Dr. Cropsey that he ordered him to stay away, but despite this Mrs. Cropsey entertained him. The night before the day the deed was executed De Baun was a caller. This succeeded an occasion by two or three days when Dr. Cropsey found his wife and

De Baun in darkness in the house, and, according to his story, under most peculiar and suspicious circumstances. As I recall his testimony, her hair was disarranged, her face flushed. On the night in question, De Baun and Mrs. Cropsey returned home about 1 o'clock in the morning; the doctor says they had been drinking, and that they drank after they returned, and that he saw them from upstairs caressing and kissing. True, or not, he accused them of it and put De Baun out, with orders to stay away, which were promptly disregarded by De Baun's return the next evening or the evening after—to apologize, it is said. The anger of the doctor and the scene that night must have impressed Mrs. Cropsey that the climax, the point of separation, was near; and just how it came about that at this time Mrs. Cropsey yielded to her husband's longing for his share of the property the stories of the two differ. He says that the next morning at the breakfast table she made the offer; while, on the contrary, she says that he threatened to leave her, and, fearful that he would, and relying upon his promise to give up a named woman and that he would become fully reconciled, she agreed. At any rate, after breakfast they went to Mr. Conkling's office, a reputable lawyer in Rutherford, and detailed to him what was wanted, and after a full explanation of the effect and consequences, they were told to return at 2 o'clock, when the deed would be ready, and when it was signed and acknowledged before a Mr. Miller, a master of this court, and left with Mr. Conkling for recording. In the meantime, Dr. Cropsey returned to his house to fetch the title deeds for the draft. Later in the day, Mrs. Cropsey telephoned to the lawyer to withhold the deed from record, but on the following Monday she retracted by a note, directing that it be recorded. I cannot credit Mrs. Cropsey's story that she signed the deed under pressure of her husband's threat to abandon her, and that she signed it against her will, and that she told the lawyer, Conkling, that what she was about to do was against her will, and that the deed was not of her own free will, but was done to please the doctor. I doubt very much that Mr. Conkling, under such circumstances, would have consented to act as the conduit, and I am satisfied that he fully explained to her the consequences, and that she acted understandingly and willingly. If there had been any connivance between him and Dr. Cropsey, he certainly would not, later on in the afternoon, when Mrs. Cropsey telephoned to him, have kept the deed from the record. I doubt not that Dr. Cropsey many times upbraided his wife because of her conduct and threatened to leave home—and he could not be blamed if he had—but I have no confidence in her story that she was moved to sign the deed by his promise of future continence. Such threats, if we may believe her, had often been made before, and with the same de-

sign, and she always strenuously resisted, and therefore why capitulate at this time? As I review the situation, Mrs. Cropsey sensed her husband's suspicion of her misconduct with Dr. De Baun. His discovery of a few nights before had brought on a crisis, and to appease him, to avoid an open break, to maintain her status publicly as his wife, she relinquished. This was her gain. She was impelled by motives of self-preservation, conscious that she was simply restoring to him his own, and discharging the trust he put in her years before when love and affection and confidence ruled. Her attempted repudiation of the deed in the afternoon shows no more than that she regretted the step she had taken and does not argue that her action earlier in the day was unwilling; for, as I have said, Mrs. Cropsey's jealousy of the other woman was without foundation in fact, and her whim a mere subterfuge. That her action was deliberately considered and freely consummated, without haste or urgency on the part of her husband, is borne out by the fact that they first consulted counsel without taking with them their title deeds, which ordinarily would not have been the case had her conduct been precipitate and coerced; and, having placed her in dire fear and deluded her by false promises, as she says was the case, we would naturally expect he would supply himself with the means for a hurried accomplishment.

The complainant has not made out her case, and the bill will be dismissed.

(87 N. J. Eq. 811)

In re STRUBLE'S ESTATE. (No. 8680.)

(Prerogative Court of New Jersey. May 1, 1917.)

1. EXECUTORS AND ADMINISTRATORS ⇨129
(1)—DECEDENT'S REALTY.

Ordinarily, the administrator has no concern with decedent's realty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533, 534.]

2. COURTS ⇨198—ORPHANS' COURT.

The orphans' court cannot assume jurisdiction unless conferred by statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471-475, 478.]

3. JUDGMENT ⇨189—ORPHANS' COURT—
TRANSCENDING JURISDICTION—COLLATERAL
ATTACK.

If the orphans' court transcends its jurisdiction, its acts pass for nothing, and may be collaterally attacked, and if an administrator should account for rents in the orphans' court, and should thereafter be required to account elsewhere by some one dissatisfied by the orphans' court's order, certainly if by some one who did not appear in the orphans' court, the administrator, if the orphans' court had no jurisdiction, would be obliged to account again.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925.]

4. COURTS ⇨23—JURISDICTION—ORPHANS'
COURT—ACQUIESCENCE.

Acquiescence by an administrator and heirs in the administrator's accounting to the or-

phans' court for rents of decedent's realty will not confer jurisdiction on the orphans' court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81.]

5. EXECUTORS AND ADMINISTRATORS ⇨510(4)
—ACCOUNTING—JURISDICTION—APPEAL.

An administrator, who mistakenly accounted to the orphans' court for rents for decedent's realty, is not precluded from insisting, on appeal from an order of the orphans' court refusing to strike out exceptions filed to his accounting, upon his right to account in some tribunal whose decree will adequately protect him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2244.]

6. EXECUTORS AND ADMINISTRATORS ⇨504(7)
—ACCOUNTING—ORPHANS' COURT—LACK OF
JURISDICTION—MOTION TO STRIKE EXCEP-
TIONS.

Where the orphans' court had no jurisdiction to compel an administrator to account for rents from decedent's realty, motion to strike out exceptions filed to the accounting of the administrator, on the ground that the exceptions were based on the administrator's neglect to account for rents collected by him subsequent to intestate's death, should have been granted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2167.]

Appeal from Orphans' Court, Sussex County.

In the matter of the estate of August Struble, deceased. Appeal from an order of the orphans' court, refusing to strike out exceptions filed to the administrator's account on the ground that the exceptions were based on the administrator's neglect to account for rents collected by him subsequent to intestate's death. Order reversed.

Charles F. Kocher, of Newark, for appellant.

LANE, Vice Ordinary. This is an appeal from an order of the Sussex county orphans' court, refusing to strike out exceptions filed to an accounting of an administrator upon the ground that the exceptions were based upon the neglect of the administrator to account for rents collected by him subsequent to the death of the intestate.

[1] The orphans' court while admitting, as it was bound to do, that ordinarily the administrator has no concern with real estate, yet held that, because in fact the administrator had in previous accounts accounted for rents, and that there was a tacit agreement between the heirs that he should account for rents as assets of the estate, the administrator was estopped from denying the jurisdiction of the orphans' court to compel him to account. No answer was filed to the petition of appeal, and this court has not been favored with the views of counsel for the exceptants.

[2-5] The question is one of jurisdiction. The orphans' court cannot assume jurisdiction unless conferred by statute. If the court transcend its jurisdiction, its acts pass for nothing, and may be collaterally attacked. In re Alexander, 79 N. J. Eq. 226, 81

Atl. 732. If the administrator should account in the orphans' court and should thereafter be required to account elsewhere by some one dissatisfied with the order of the orphans' court, certainly if by some one who had not appeared in the orphans' court, he would, if the orphans' court had no jurisdiction, be obliged to account again. There may be cases where those interested in the rents are persons over whom the orphans' court has no claim of jurisdiction. Acquiescence will not confer jurisdiction. Certainly the mistaken prior accounting for rents does not preclude the administrator from now insisting upon his right to account in some tribunal, the decree of which will adequately protect him.

[6] The orphans' court not having jurisdiction to compel the administrator to account for the rents, the motion to strike out the exceptions should have been granted. The order of the orphans' court will be therefore reversed.

(87 N. J. Eq. 574)

POSSELT et al. v. D'ESPAUD et al.

D'ESPAUD et al. v. FRITZ SCHULZ JUNIOR CO.

(No. 43/244.)

(Court of Chancery of New Jersey. June 21, 1917.)

CORPORATIONS — 320(13) — RECEIVERS — APPOINTMENT — GROUNDS — ALIEN ENEMY STOCKHOLDERS.

The stock of a company for the manufacture of metal polish, incorporated in New Jersey, was entirely owned by a German corporation. The board of directors was composed of three Germans and two Americans. In the absence in Germany of two of the German directors, the two American directors called a meeting in the office of the remaining German director, ousted him from his position as general manager, and appointed other officers, thereby attempting to appropriate to their own uses the property of the company. *Held*, that, the ousted director being the only one representing the interests of the stockholders, there was no board competent to act, and a receiver would be appointed as the only method by which the interests of alien enemies could be protected.

Consolidated suits by Alfred Hugo Posselt and others against R. Seabury D'Espard and others and by R. Seabury D'Espard and others against the Fritz Schulz Junior Company for the appointment of a receiver. Application granted.

See, also, 100 Atl. 893.

Randolph Perkins, of Jersey City, for R. Seabury D'Espard and William Howard Hoople. Joseph Kahrs, of Newark, for Alfred Hugo Posselt, Fritz Junior Aktien Gesellschaft, and Fritz Schulz Junior Co.

LANE, V. C. (orally). I am going to decide the case of D'Espard v. Fritz Schulz Junior Company, on application for appointment of a receiver.

The following facts appear: In October, 1905, the company was incorporated under the laws of this state for the purpose of manufacturing a metal polish. The capital stock was owned wholly by a German corporation. No money was invested except that invested by the German concern. At that time the German company had a sales agreement with a company known as Raimés & Co., Limited, of London. The purpose of the incorporation of the Fritz Schulz Junior Company in this country was to avoid the necessity of transferring the manufactured product from Germany here. The Fritz Schulz Junior Company entered into a sales agreement with a company in New York, a concern incorporated by Raimés & Co. of London, Limited, for the purpose of acting in this country in the same manner as Raimés & Co., Limited., acted in Europe. The relations then existing between Raimés & Co. and the German corporation were extremely friendly. The board of directors of the Fritz Schulz Junior Company consisted, I think, of three Germans and two representatives of Raimés & Co. The directors held one share of stock each, but were pure dummies.

At the outbreak of the war in 1914 the rights of the German concern in England were by act of Parliament forfeited and were taken over by Raimés & Co. of London, Limited. When there was prospect of war between this country and Germany I think the conclusion is irresistible that the directors of the Fritz Schulz Junior Company, who were or had been representatives of Raimés & Co. of New York, conceived the idea, in view of the absence in Germany of one or two of the German directors, of consummating lawlessly in this country what is said to have been permitted by law in England. They thought that the time was opportune to take over the property of the Fritz Schulz Junior Company in this country, not, however, for the benefit of the government, but for the benefit of themselves. They attempted to do this by going to the office of the company in Lincoln, N. J., where the general manager, who was the resident director representing the German concern, then was, and, finding him there, calling a meeting of the board of directors of the Fritz Schulz Junior Company and proceeding to oust the representative of the German concern as general manager and as an officer of the company, and substituting officers of their own selection. They then directed the discontinuance of a suit which had been brought by the Fritz Schulz Junior Company against Raimés & Co. in New York for breach of contract. They were defeated in this in the New York courts, and a judgment was obtained for something like \$8,000. That judgment has not yet been collected. The assets of Raimés & Co. I understand have been put in such shape as to make it difficult of collection. In that situation the

resident representative of the German company appealed to this court for an injunction restraining the two directors representing Ralmes & Co. from acting as directors and officers, upon the ground that they had committed a breach of trust. The original bill prayed for the appointment of a receiver; subsequently an amended bill was filed, in which the prayer for the appointment of a receiver was omitted. I advised the injunction. The two American directors then filed a bill, praying for the appointment of a receiver upon the ground that the Fritz Schulz Junior Company had no board of directors competent to act, and it is upon that bill that the present application has been made.

There is no doubt but that the company at this time has no proper board of directors. The one director who really represents the stockholders is the general manager of the concern who was ousted by the vote of the two American directors. I think that the two other German directors are now in Germany, and cannot get here. That leaves the three directors in this country, one, who really represents stockholders, and two who really represent antagonistic interests. Because of the apparent legality on its face of the meeting of the directors which ousted the representative of the German company from control, it is necessary that this court should intervene for the protection of the interests of the company. The effect of my injunction will be practically to permit the concern to be run by one director, and he not a citizen of this country. I am unwilling to permit such a situation to exist. The appointment of a receiver is resisted by the representatives of the German interests. I think that it is not only in the interest of the German company that a receiver should be appointed, but that it is absolutely necessary for the conservation of the property of the company. It has been suggested that they would like to take their chances. They have the utmost confidence that if I enjoin the directors from acting, the one German (I think it is now said he is Austrian) director here would be able to continue business in the same manner as it has been continued. I can see that if I permit this it will only lead to endless litigation in other courts, and that it is really contrary to the interest of the German stockholders. Nor do I think that this court is justified, where a situation exists such as this in which the aid of this court must be obtained in order to protect the interests of alien enemies, and in which this court has undoubted jurisdiction to appoint a receiver, in granting the relief to the alien enemies without also going further and seeing to it that the effect of the relief granted will not be to permit the transfer of property from this country to an alien enemy.

I will appoint the present general manager as a receiver under a bond of \$25,000, and will associate with him as receiver Ed-

win Maxson, of Summit, under a bond of \$25,000. The active management of the company until further orders will be in charge of the first receiver mentioned. The duty of Mr. Maxson will be supervisory.

I also on my own motion will make an order consolidating these two causes. It is understood that the appointment of a receiver is not an appointment under the statute; it is a pure equity receivership, and will be continued only so long as the company shall be without a board of directors competent to act, or so long as the exigencies of the occasion require. The business will be directed to be carried on. Debts as they accrue will be paid. The business of the company is not to be interfered with in the slightest degree.

(90 N. J. Law, 574)

KITCHELL v. CROSSLEY et al. (No. 143.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. DAMAGES \S 121—ACTION FOR ARCHITECT'S SERVICES—AMOUNT OF RECOVERY.

Plaintiff, an architect, was employed to make plans and specifications for a new building. A dispute having arisen respecting the amount of his compensation, the parties agreed in writing that he should be paid \$1,500 for said plans and specifications and supervising the construction of the building, \$750 of which was payable upon the completion of the plans and specifications, \$375 when the building was half completed, and the remainder upon completion. The \$750 was paid upon the signing of the agreement, but the defendants never proceeded to the construction of the building. *Held*, in a suit by the architect to recover for his services, that the written contract was controlling as to the rate of compensation, and that the amount of same was to be determined according to the rule laid down in *Kehoe v. Rutherford*, 56 N. J. Law, 23, 27 Atl. 912.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 306-308.]

2. CASE DISTINGUISHED.

Stephen v. Soap Co., 75 N. J. Law, 648, 68 Atl. 69, distinguished.

Appeal from Circuit Court, Essex County.

Action by Bruce P. Kitchell against James E. Crossley and others. Judgment for plaintiff and defendants appeal. Reversed, to the end that a venire de novo issue.

Raymond, Mountain, Van Blarcom & March, of Newark, for appellants. Church & Harrison, of Newark, for appellee.

PARKER, J. The plaintiff's claim was for the "reasonable value" of his services as architect in drawing plans and specifications and receiving bids for a proposed new building which was never built according to such plans. Defendants undertook to meet this by setting up a written agreement signed by plaintiff and by James E. Crossley as defendants' agent whereby plaintiff stipulated to draw the plans, etc., and supervise the erec-

tion of the building for \$1,500, of which \$750 was to be payable on completion of plans, \$375 when building should be half completed, and the remainder on completion. Plaintiff attacked this as having been "abandoned," and claimed for what he had done at the architects' customary rate, as testified, of three-fifths of 6 per cent. on the estimated cost of the building, and had a verdict of \$2,757.26 besides the \$750 which had been paid to him at the time of executing the written agreement, or about \$3,500 in all. He did nothing after receiving bids, though he was ready to perform all needed services; the defendants having refused to go on according to his plans and having employed another architect. The decision turns upon the rule to be applied touching the amount of recovery.

When plaintiff was first employed there was no specific agreement or understanding as to the rate of his compensation, and after the plans were substantially ready he sent Mr. Crossley a bill for \$2,520 for services up to that point. This and later communications threatening suit brought Crossley to his office, and there was some disputing about the amount of compensation, which resulted in the preparation, by plaintiff, of the following paper in the form of a letter or proposal on plaintiff's letter head, and signed by him. Both parties agree that it was accepted by Crossley, and it is plain that his signature thereto was intended as such acceptance.

"Newark, N. J. October 27, 1914.

"Mr. J. E. Crossley, Newark, N. J.—Dear Sir: I propose to make the plans, specifications and supervise the works on the new four-story and basement building on the corner of Market and Halsey street, Newark, N. J., for the Peddie estate, for the sum of One Thousand Five Hundred (\$1,500.00) dollars, Seven Hundred and Fifty (\$750.00) on completion of plans. Three Hundred and Seventy-Five, \$375.00, when building is half erected. Balance as work progresses.

"Yours truly,

Bruce P. Kitchell.
"J. E. Crossley."

At the time this paper was signed by the plaintiff on his own part and by Crossley as representing the defendants, the plans and specifications had not been sent out to prospective bidders. The case shows that the \$750 stipulated for was paid at the time the agreement was made or almost immediately thereafter, and that plaintiff was instructed to get the bids. He did so, and according to his testimony, Crossley never came to his office to consider the bids, and did nothing further in the matter. As a result, the plaintiff was not only not required to complete the work he had stipulated to do by this agreement, but was actually prevented from completing it by the action of the defendants.

At the trial it was claimed by the defendants that this agreement was a compromise and settlement of plaintiff's claim for what he had actually done and a written agreement with respect to what he should be paid therefor, and that it was binding upon the plaintiff. The plaintiff's claim was that by reason

of the failure of the defendants to go on with the building, he was not bound by the agreement either for what he had done or with respect to what he was to do. The trial judge left it to the jury to say: First, whether the written agreement was a settlement for the work that had been done by the architect up to that time; whether (to quote his language) when they signed that agreement it was with an understanding between the architect and Mr. Crossley that what work had been done up to that time was included in the sum of \$1,500 which he was to receive, as well as the services which were afterwards to be performed by him, as the architect, in the construction of this building. He went on to say that if it was, a certain rule of law applied, and then stated the rule as laid down in *Kehoe v. Rutherford*, 56 N. J. Law, 23, 27 Atl. 912, and *Wilson v. Borden*, 68 N. J. Law, 627, 54 Atl. 815, and under that rule limited the plaintiff's recovery to three-fifths of the total price of \$1,500, stating that no claim, as he understood it, was made for profit on the work that still remained to be done by the plaintiff, and that there was no evidence of what the profit would be. He then further charged as follows:

"Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, then the architect, Mr. Kitchell, would be entitled to recover for his services whatever they were worth up to that time, less the \$750 which he received at that time."

This was followed by instructions as to the details of the amount recoverable under those circumstances. Defendants' counsel requested a charge laying down the rule of *Kehoe v. Rutherford* in the language of that case, which was refused, and an exception noted, both to this refusal and to the portion of the charge permitting a recovery for the value of the services as above set forth.

[1] We consider that there was error in the matters excepted to. There was no question but that the written agreement was made because of a dispute between the parties and for the purpose of settling that dispute. At that time, plaintiff had rendered some services for which he was perhaps then entitled to compensation, but at an amount not agreed upon, and therefore uncertain. It was evidently the desire of both parties that the amount that he should be entitled to receive should be fixed and settled between them, with a view of avoiding further controversy, both as to services already rendered and as to such as the parties contemplated should be rendered. If this agreement had been made before the plaintiff performed any services, and after he had finished the plans and specifications the defendants had refused to go further, we think there can be no question but that the rule of *Kehoe v. Rutherford* would apply, and the damages recoverable on a breach, whereby plaintiff was prevented from performing in

full, would be limited by that rule as applied to the contract price. The fact that the agreement was made after some work had been done and a dispute had arisen makes no difference in the result, except that the additional element is introduced of a compromise and settlement of the dispute, the legal consideration of which cannot be successfully challenged. *McCoy v. Milbury*, 87 N. J. Law, 697, 94 Atl. 621.

[2] Respondent relies upon the case of *Stephen v. Camden & Philadelphia Soap Co.*, 75 N. J. Law, 648, 68 Atl. 69, as authority for the claim that the contract now under consideration was abandoned, and that the rule of reasonable value for the services should be applied. There is no doubt that the plaintiff should have the reasonable value of his services, but the question is, How is that reasonable value to be ascertained? Is it to be ascertained by inquiry with respect to the usual and customary rate of compensation, in the absence of special contract, or are we to look to the contract itself as determinative of the rate of compensation? This question is not answered by the case cited. An examination of that decision fails to disclose how much the plaintiff recovered, or on what basis. The errors assigned were that the court below should have construed the contract so as to relieve the defendant from liability, and erred in refusing to grant a nonsuit, or, if not, then to direct a verdict in its favor. These were the only two questions considered. In deciding them the court had occasion to quote from authorities which, in laying down the rule that plaintiff was entitled to recover something for his services, also discussed the question whether the price fixed by the contract, if any, should be made the conclusive test of the value of the services rendered, or the real value of the services, though in excess of the contract price; but this court did not decide the question in that case, because it was not raised. The opinion concluded, however, by citing the cases of *Kehoe v. Rutherford*, supra, and *Ryan v. Remmey*, 57 N. J. Law, 474, 31 Atl. 766, in both of which the amount of recovery for work done under an uncompleted contract, terminated by the wrongful act of the defendant, was predicated upon the contract price.

We are unable to see that the circumstances of this case prevent the application of the rule laid down in *Kehoe v. Rutherford*, and *Wilson v. Borden*, or that there was any question for the jury as to whether the written contract between the parties applied. There was no fraud in its making, as the court itself expressly charged; its consideration was adequate, and, there being nothing to vitiate it, it stood as the agreement of the parties. It was therefore error for the trial court to permit the jury to pass on the question whether this contract was

controlling, and for this error the judgment must be reversed, to the end that a venire de novo issue.

(90 N. J. Law, 722)

STATE v. FLETCHER. (No. 5.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. WITNESSES \S 255(2)—RIGHT TO REFRESH RECOLLECTION—HOSPITAL HISTORY.

It was proper to allow a medical witness to use his hospital history to refresh his recollection, although it was dictated by him and not transcribed in his presence, where he identified it as a transcript of the notes he dictated at the time, and no more proof was necessary to justify its use.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 875.]

2. WITNESSES \S 277(3)—CROSS-EXAMINATION OF ACCUSED—FACTS SHOWING PROBABILITY OF GUILT.

Where defendant, accused of criminal abortion, testified that her patient told her she had come from a doctor in New York, cross-examination as to defendant's acquaintance with that doctor was permissible, since her knowledge of the doctor might throw light upon the probability that she would perform an operation on a girl who claimed to have been sent by such doctor.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 981.]

3. CRIMINAL LAW \S 404(3) — ADMISSION OF EVIDENCE—ABORTION—ILLUSTRATION.

In a prosecution for abortion, it was permissible to use the speculum offered in evidence to illustrate the kind of instrument which the girl said the defendant had used.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891, 893, 1457.]

4. CRIMINAL LAW \S 1172(7)—APPEAL—HARMLESS ERROR—INSTRUCTIONS FAVORABLE TO DEFENDANT.

Defendant, accused of criminal abortion, could not assign as error the giving of an instruction stating that the fact that the girl had had a previous miscarriage or visited some one else than defendant was immaterial in determining the defendant's guilt, since it was intended as a warning in favor of defendant that the jury was not to convict defendant because some one ought to be punished.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3160.]

5. WITNESSES \S 277(3)—CROSS-EXAMINATION OF ACCUSED—PROBABILITY OF DEFENDANT'S TESTIMONY.

Where defendant, accused of criminal abortion, stated she had refused to perform the operation and had offered to do nothing to alleviate the girl's pain, it was permissible to ask defendant if she could not have given the girl something to alleviate the pain; such question bearing upon the probability of defendant's testimony.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 981.]

Appeal from Supreme Court.

Jane Fletcher was convicted of crime, and appeals. Affirmed.

On appeal from the Supreme Court, in which the following per curiam was filed.

[1] "We think it was proper to allow Dr. Ill to use his hospital history to refresh his recol-

lection. Although it was dictated by him to another, and not transcribed in his presence, he identified it as a transcription of the notes he dictated at the time. We think he might well do so; and no more proof was necessary to justify its use.

"The evidence warranted the statement of the prosecutor that Dr. Ballentine became convinced that a criminal operation had been performed. The statement that the doctor made an examination perhaps was inaccurate, dependent on the sense in which the word 'examination' was used; but it was harmless.

[2] "The cross-examination of the defendant as to her acquaintance with Dr. Muttart was permissible. She testified on direct examination that her patient told her she had come from a doctor in New York. On cross-examination she said the girl gave her the name of Dr. Muttart. Her knowledge of the doctor might throw light on the probability that she would perform an abortion on a girl who claimed to have been sent by Dr. Muttart."

[3] "It was permissible to use the speculum offered in evidence to illustrate the kind of an instrument which the girl said the defendant had used."

[4] "The defendant was not injured by the charge that the fact that this young woman had a previous miscarriage or visited some one else is not finally to affect your minds in determining this defendant's guilt. If she had 99 other operations and somebody else had gone free, that is not the question." We infer that the judge was trying to warn the jury not to convict the defendant because they thought some one ought to be punished. It seems to be intended as a warning in favor of the defendant."

[5] "We think it was permissible to ask the defendant if she couldn't give the girl something to alleviate the pain. The defendant had testified that the girl had come to her suffering pains of pregnancy and wanting her to perform an abortion; that she had refused to do so, and offered to do nothing to alleviate the pain. The questions bore upon the probability of defendant's testimony, since the prosecutor might well argue that the natural instinct of humanity would lead the defendant to alleviate the pains if she was unwilling to perform the abortion.

"Part of the prosecutor's examination of the complaining witness was leading, but we cannot say there was any legal error or abuse of discretion.

"The judgment must be affirmed."

Hamill & Cain, of Jersey City, for appellant. Robert S. Hudspeth, Prosecutor of Pleas, of Jersey City, for the State.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(90 N. J. Law, 176)

ROUNSAVILLE v. CENTRAL R. OF NEW JERSEY. (No. 81.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT—§365—WORKMEN'S COMPENSATION ACT—INJURY IN INTERSTATE COMMERCE—RIGHT TO COMPENSATION.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), within its scope, viz. interstate commerce, deals with the same subject that is dealt with by the New Jersey Workmen's Compensation Act (Laws 1911, p. 134)

under which the duty of an employer to make compensation to an employé for injuries arising out of the employment may exist independently of the negligence of the employer; whereas the federal statute makes such duty to depend upon such negligence and excludes the existence of such duty in the absence of negligence. The federal act being thus comprehensive, both of those cases in which it excludes liability and of those in which it imposes it ousts the courts of common pleas of this state of jurisdiction under the New Jersey Workmen's Compensation Act to award the compensation to be paid by a carrier to its employé for injuries received by the latter while both were engaged in interstate commerce.

Appeal from Supreme Court.

Proceedings under the Workmen's Compensation Act by George A. Rounsaville, to obtain compensation for personal injuries, opposed by the Central Railroad of New Jersey, employer. From a judgment of the Supreme Court (87 N. J. Law, 371, 94 Atl. 392), on certiorari to a judgment of the common pleas denying compensation, reversing the judgment and remanding the case, the employer appeals. Judgment of the Supreme Court reversed, and judgment of the common pleas affirmed.

Charles E. Miller, of Jersey City, for appellant. Ellnor R. Gebhardt, of Jersey City, for appellee.

GARRISON, J. The respondent, a brakeman on the appellant's train under a contract made in this state, was injured in the course of his employment in Pennsylvania, while appellant and he were engaged in interstate commerce. His petition to the common pleas of Warren county for compensation under the New Jersey Workmen's Compensation Act was dismissed by Judge Roseberry upon the ground that the enactment by Congress of the federal Employers' Liability Act prevented the application of state legislation to an injury received in the course of interstate commerce. Upon appeal the Supreme Court held that this was not so, and the judgment of the pleas was reversed. *Rounsaville v. Central Railroad Co.*, 87 N. J. Law, 371, 94 Atl. 392. From the judgment of the Supreme Court this appeal was taken and argued before this court at the November term, 1915.

The decision of this appeal was held awaiting the decision by the Supreme Court of the United States of the case of *Erie Railroad Company v. Winfield*, which involved precisely the questions.

That decision has now been promulgated in an opinion filed by Mr. Justice Van Devanter, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, in which it is held that:

"The federal act (Employers' Liability Act) proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of

those instances in which it excludes liability as of those in which liability is imposed."

A further question decided was whether or not under the New Jersey Workmen's Compensation Act the interstate carrier might become bound contractually to make compensation to an employé, even though such injury came within the federal act as above construed. Upon this question Mr. Justice Van Devanter says:

"It is beyond the power of any state to interfere with the operation of that act (federal Employers' Act), either by putting the carriers and their employés" in interstate commerce "to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."

This decision by the highest federal court as to the construction of a federal statute is binding upon this court, and leads to the reversal of the judgment brought up by this appeal and the affirmance of the judgment of the common pleas of Warren county.

(90 N. J. Law, 653)

ROGERS v. WARRINGTON. (No. 70.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. HIGHWAYS ⇐80 — ABUTTING OWNER — FEE.

Lands in New Jersey over which highways have been laid, the fee of the land is in the abutting owner.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 288, 290.]

2. EJECTMENT ⇐9(6)—TITLE—FEE IN HIGHWAY.

The owner of the fee, for the soil in the highway, may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 26.]

3. PLEADING ⇐127(1)—PLEA OF NOT GUILTY — ADMISSION.

By the statute (Comp. St. 1910, vol. 2, p. 2056, par. 13), in an action of ejectment for land occupied by the defendant, a plea of not guilty admits such possession as excludes the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268.]

Appeal from Supreme Court.

Action in ejectment by Jerusha B. Rogers against Susan N. Warrington. Judgment for plaintiff, and defendant appeals. Affirmed.

Kaighn & Wolverton, of Camden, for appellant. G. M. Hillman, of Mount Holly, for appellee.

BLACK, J. This was an action in ejectment. The record shows, however, that the plaintiff was the owner of a lot of land, upon which her dwelling house was erected, situate on the south side of Main street, at the forks of the road known as Perkins Corner in Moorestown, Chester township. Bur-

lington county, N. J. The suit was brought to recover possession of the land, in the public highway, in front of the plaintiff's lot.

[3] The defendant erected a public drinking fountain or watering trough, in the highway, the fee of which was owned by the plaintiff. The suit was brought to recover that portion of the highway, thus appropriated by the defendant, by the erection of the drinking fountain or watering trough. The answer defends the action, as to a part of the premises claimed in the complaint, viz. the portion thereof, within the lines of Main street, occupied by the public drinking fountain, erected by consent of the municipal authorities, as to which part the defendant denies the truth of the matters contained in the complaint. By force of the statute, Comp. Stat. of N. J. vol. 2, p. 2056, par. 13, the plea for the purpose of this action is an admission that the defendant was in possession of the premises for which she defends. *French v. Robb*, 67 N. J. Law, 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; *Jacobson v. Hayday*, 83 N. J. Law, 537, 83 Atl. 902.

[1] The case was tried by the court at the circuit, without a jury, resulting in a judgment for the plaintiff; the damages being assessed at six cents. The plaintiff's title to the fee of the premises in question being conceded, the plea admitting the defendant was in possession, the ruling of the trial court was not error in giving judgment for the plaintiff.

It is the accepted law of this state that lands on which streets and highways have been laid, the fee is in the abutting owner. *Hoboken Land & Improvement Co. v. Mayor*, etc., of Hoboken, 86 N. J. Law, 540; *Starr v. Camden*, etc., R. Co., 24 N. J. Law, 592.

[2] It also has long been the settled law of this court that the owner of the soil in such cases may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same.

All the cases are in harmony on this point. *Wright v. Carter*, 27 N. J. Law, 76; *Hoboken Land & Improvement Co. v. Mayor*, etc., of Hoboken, 86 N. J. Law, 540; *French v. Robb*, 67 N. J. Law, 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; *Bork v. United New Jersey*, etc., Co., 70 N. J. Law, 268, 57 Atl. 412, 64 L. R. A. 836, 103 Am. St. Rep. 808, 1 Ann. Cas. 861; *Moore v. Camden*, etc., Ry. Co., 73 N. J. Law, 599, 64 Atl. 116; *Johanson v. Atlantic City R. Co.*, 73 N. J. Law, 767, 64 Atl. 1061.

Whether the drinking fountain or watering trough is an additional servitude on the land to that of the highway is not before us for consideration on this record. We therefore express no opinion on that point.

Finding no error in the record, the judgment of the Supreme Court is therefore affirmed, with costs.

(90 N. J. Law, 696)

KOENIGSBERGER v. MIAL (No. 75.)(Court of Errors and Appeals of New Jersey.
June 18, 1917.)**1. PLEADING \Leftrightarrow 366 — AMENDED PLEADING — NOTICE OF FILING — PRESUMPTION.**

Where 20 days after the filing of an amended complaint defendant moved to strike out certain portions thereof, she was presumed to have had notice that it was filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1145.]

2. PLEADING \Leftrightarrow 365(3) — MOTION TO STRIKE — ABANDONMENT.

Defendant's failure to enter a rule in accordance with a decision of the court in her favor on a motion to strike out certain parts of the amended complaint was an abandonment of her motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1168, 1169.]

3. JUDGMENT \Leftrightarrow 108 — DEFAULT — RIGHT TO ENTER.

Where defendant abandoned her motion to strike out certain parts of the amended complaint and failed to plead to such complaint within the time specified by the court's order, plaintiff was entitled to take judgment against her by default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 201.]

4. JUDGMENT \Leftrightarrow 145(2) — DEFAULT — RIGHT TO ENTER.

That defendant's failure to plead to the amended complaint as required by law was due to neglect of her attorney did not entitle her to have the default judgment opened, where she did not show that she had a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 293.]

Appeal from Supreme Court.

Action by Ferdinand H. Koenigsberger against Kate A. Mial, individually and as executrix of the last will and testament of Henry H. Hankins, deceased, builder and owner. From judgment for plaintiff, defendant appeals. Affirmed.

The following is the per curiam opinion of the Supreme Court:

"This is an appeal from a judgment entered by default against the defendant in an action brought by the plaintiff to recover for architect's fees alleged to be due him on a building operation. Originally the suit was brought against Kate A. Mial individually, and Leonidas L. Mial as executor of Henry H. Hankins, deceased. The complaint was filed in September, 1913. Subsequently, and in March, 1914, application was made on behalf of the defendants to compel the amendment of the complaint by striking therefrom the name of Leonidas A. Mial, and substituting that of Kate A. Mial as executrix. The rule directing the amendment required a copy thereof to be served upon Kate Mial within 20 days after its date, and allowed her 20 days after such service within which to file her answer. The date of this rule was March 30, 1914. The amended complaint was filed on the 15th day of April of that year. On the 15th of May following the defendant moved to strike out certain portions of the amended complaint, for reasons set forth in a notice of the motion which was served upon the plaintiff's attorney on the 5th day of that month. The court took time to consider the motion, and on the 19th day of June filed a memorandum,

stating that the defendant was entitled to have struck from the complaint the provisions referred to in her notice of motion. No rule was entered pursuant to this finding of the court, and on the 17th of November, 1914, the plaintiff entered judgment by default. The defendant, Kate Mial, thereupon applied for and obtained a rule to show cause why the judgment should not be opened as having been prematurely and improvidently entered. Testimony was taken in support of, and in opposition to, the making of this rule absolute, and in January, 1916, the matter coming on to be heard before the circuit court, the rule to show cause was discharged. The defendant thereupon appealed to this court."

[1-3] "We think the judgment under review should be affirmed. On its face it is regular. The defendant is presumed to have had notice of the filing of the amended complaint, because within 20 days after its filing she moved to strike out certain portions thereof. Her failure to enter a rule in accordance with the decision of the circuit court in her favor on the motion to strike out certain parts of the amended complaint was, we think, an abandonment of the motion. Having abandoned the motion, and having failed to plead to the amended complaint within the time specified by the order of the court, the plaintiff was entitled to take judgment against her by default. According to the theory of the defense, a suit might be perpetually stayed by a defendant by following the course pursued in the present case by Kate A. Mial, the appellant. Without stopping to consider whether, on an appeal from the judgment now under review, the appellant can attack the action of the lower court in discharging the rule to show cause, we are of opinion that the action complained of was proper."

[4] "If it be true, as counsel suggests, that the failure of the defendant to pursue her defense as required by law was due to the neglect of her attorney, that fact alone did not entitle her to the relief she sought under the rule. She was required, in addition, to show that she had a meritorious defense, and this the circuit court considered she had failed to do. Our examination of the testimony submitted under the rule to show cause leads us to the same conclusion. "The judgment under review will be affirmed."

Samuel A. Besson, of Hoboken, for appellant. Runyon & Autenreith, of Jersey City, for appellee.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(90 N. J. Law, 483)

FOX v. FORTY-FOUR CIGAR CO.

(No. 30.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)**(Syllabus by the Court.)****1. WITNESSES \Leftrightarrow 321, 380(5) — IMPEACHING OWN WITNESS—CONTRADICTING WITNESS.**

While a party cannot impeach a witness called by him, which is done by showing by general evidence that he is unworthy of belief, he may nevertheless show that such witness has made other and different statements from those to which he has testified. That is contradicting, not impeaching, the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100, 1214, 1219.]

2. WITNESSES **⇒199(4)—PRIVILEGE—ATTORNEY.**

A communication made by a party to an attorney after the latter's employment has terminated is not privileged, and the attorney may be compelled to disclose the information so acquired.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 766, 767.]

3. WITNESSES **⇒204(2)—PRIVILEGE—ATTORNEY.**

When a party writes a letter to a member of the bar, whose relation as counsel to the former had ceased, if, in fact, there ever had been such relationship between them, which letter contained statements tending to prove a fact concerning the question of master and servant, which was pertinent to the issue, the letter is not a privileged communication, and is competent evidence against the party writing it.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 762.]

Appeal from Supreme Court.

Action by Voris Fox against the Forty-Four Cigar Company. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed to the end that a venire de novo may be awarded.

Bourgeois & Coulomb, of Atlantic City, for appellant. Clarence L. Cole, of Atlantic City, for appellee.

WALKER, Ch. This was an action at law for damages growing out of an accident to the plaintiff by collision with an automobile while he and another were riding on a motorcycle along a public road in Atlantic county. On August 16, 1915, the plaintiff and his companion were traveling along the road in the motorcycle, when an automobile driven by a director and officer of the defendant company approached, and a collision occurred, which demolished the motorcycle and injured the plaintiff. One defense was that at the time of the accident the car was not being used for the purposes of the defendant company, and therefore the company was not liable to the plaintiff.

During the progress of the trial, for the purpose of showing that the car was being used for the purposes of the company, and for the purpose of showing an inconsistent statement made by Max Lipschutz, the assistant treasurer, certain letters to W. Frank Sooy, Esq., a member of the bar, were offered and admitted in evidence. After the testimony had been concluded, the letters were excluded by order of the court, to which an exception was noted. The judge then directed a verdict in favor of the defendant, to which exception was taken, and the plaintiff appealed.

The defendant company in its answer admitted that on the day of the accident it was the registered owner of a certain touring car which was being driven by Max Lipschutz, who was a stockholder, director and officer of the company, but denied that the car was being driven by him as such stockholder, officer, director, agent, or employé.

Max Lipschutz was called by the plaintiff and testified that he was assistant treasurer of the defendant company, whose president was his father, Benjamin Lipschutz, and whose assistant secretary was George M. Lex; that the defendant did quite extensive advertising through New Jersey by signs. He testified to the genuineness of a letter dated December 15, 1915, as to his own and Lex's signatures thereon. Asked what was the object of his tour through South Jersey on the day in question, he answered that he had promised his sister, who was sick, a little ride and outing for her friends, and it was for that purpose alone that he took them out that afternoon. Asked whether at that time he was engaged on the business of the company, he answered that he always looked around (meaning for and at the signs), but that the idea of taking them out that day was for pleasure alone. He could not remember whether he stated to the officers of the company that he was going out on the business of the company that day. Shown the letter again, and asked to tell whether he informed the secretary that he was out on business of the company that day, he first answered "No," and then "Yes." He afterwards said that he had not gone out to inspect the signs on that day.

W. Frank Sooy, Esq., counselor at law, was called by the plaintiff, and testified he was one of the firm of Bolte, Sooy & Gill; that he met Mr. Lipschutz, Sr., and Mr. Lipschutz, Jr., and talked the situation over with them; that he was notified by the defendant company that he was representing Max Lipschutz; that he was never formally employed by the company; that he handed the letter in question to Mr. Stern, who was associated with Messrs. Bourgeois & Coulomb, attorneys for the plaintiff, to carry out an agreement he had with Mr. Stern as to the form of answer that would be filed by the company, leaving out, as defendants, Max Lipschutz and his father.

Benjamin Lipschutz testified that he instructed his son, Max, on the day in question not to take his sister out, but to attend to certain business; that the car had been owned by the company for a couple of years, and was bought to entertain customers and for other business; that it was used by his son, by Mr. Funk (secretary of the company), and Mr. Lex; that it was primarily bought for the purposes of the company and the benefit and convenience of its officers, and also for the purpose of taking out his sick daughter.

In view of the testimony of the Lipschutzes, father and son, to the effect that the young man was not out on the business of the company that day, it became highly important to the plaintiff to have in evidence the letter from the assistant secretary to Mr. Sooy, in which it is stated, *inter alia*, that Max Lipschutz would testify at the trial that he was

driving the car, combining both business and pleasure. The following is a copy of the letter:

"Benjamin Lipschutz, President and Treasurer. Mahlon A. Funk, Sect'y and Sales Manager. Max Lipschutz, Assistant Treasurer. George M. Lex, Assistant Secretary. Forty-Four Cigar Company, Incorporated. Lipschutz's 44 Cigars. Adlon Cigars. Business Established by Benjamin Lipschutz 1893. Main Office and Factory, N. E. Cor. 11th and Wharton Streets, Philadelphia. P. O. Address, Southward Station. Address all communications to company. December 15, 1915. Bolte, Sooy & Gill, 21 Law Building, Atlantic City, N. J. Attention of W. Frank Sooy, Esq. Gentlemen: The writer has your letter of the 13th inst. addressed to Mr. Max Lipschutz. The answer as filed by the insurance company is about what we expected, nevertheless, the policy that they issued to us calls for business and pleasure, and as Mr. Max Lipschutz was an officer of the company, we feel, under the terms of the contract, that he had a perfect right to drive the car. You can rest assured that Mr. Max Lipschutz at the trial will testify. First. That the company owned the car. Second. That he was driving the car, combining both pleasure and business. Third. That he is an officer of the company. In order to fulfill your wishes in the matter, I am having a postscript in this letter which is signed by Mr. Max Lipschutz. Very truly yours, '44' Cigar Company, Inc., Geo. M. Lex, Asst. Sec. L-AH

"P. S.—W. Frank Sooy, Esq.: The facts as covered by Mr. Lex above will be testified to by me at the trial.

"Very truly yours, Max Lipschutz."

[1] The letter was offered to contradict Max Lipschutz, and as an admission by the company. Counsel for the defendant states in his brief that there is not the slightest evidence that the writer, who signed himself "Assistant Secretary," was such, or that he had authority to bind the company. This is evidently a misconception on the part of the learned counsel who argued the case for the defendant. Max Lipschutz testified that he was the assistant treasurer, and that Mr. Lex was the company's assistant secretary. As to whether they had authority to bind the company was, in all the circumstances of the case, at least inferable. The question remains: Was the letter properly excluded? We think not. It should have been admitted, and the case submitted to the jury.

Counsel for the defendant argues that the attempt to put the letter in evidence was for the purpose of impeaching the plaintiff's witness. This is not so. The attempt was to contradict the witness. The inhibition is only that a party calling a witness will not be permitted afterwards to impeach his general reputation for truth or veracity by general evidence tending to show him to be unworthy of belief. *Ingersoll v. English*, 66 N. J. Law, 463, 49 Atl. 737. A party to a suit is not precluded from proving the truth of any particular fact by competent testimony in direct contradiction to that to which any of the witnesses called by him may have testified. *Schreiber v. Pub. Serv. Ry. Co.*, 89 N. J. Law, 183, 98 Atl. 316. It is always allowable to show that a witness had made

other and different statements than those to which he testifies. *Vice Chancellor Pitney*, in *Thorp v. Leibrecht*, 56 N. J. Eq. 499, at page 502, 39 Atl. 361, states that the rule forbidding a party calling a witness to offer evidence for the purpose of impeaching his general character for truth and veracity falls far short of forbidding the party to show by any legitimate evidence that the witness has testified to what is not true in a matter material to the issue. This rule was approved by this court in *Buchanan v. Buchanan*, 73 N. J. Eq. 544, at page 546, 68 Atl. 780. Although in *Thorp v. Leibrecht* and *Buchanan v. Buchanan* the witnesses called by complainants were defendants, the rule is not restricted to such witnesses, that is, witnesses who are adversary parties, but is as broad as the statement in *Buchanan v. Buchanan*, at page 546 of 73 N. J. Eq., at page 781 of 68 Atl., that:

"The rule against impeachment denies the right to impeach the general reputation of the witness for truth, but does not deny the right to show that the whole or any part of the testimony of the witness is untrue."

In fact, counsel for defendant concedes this in his brief, where he says:

"While the law permits one who calls a witness to contradict him, it does not permit impeachment."

Impeachment, as shown, is an attack upon a witness' general reputation for truth and veracity; and as that which was attempted in this case was not such an attack, but only a contradiction of the witness' statement, the letter was admissible upon that score.

[2, 3] It is next objected on behalf of the defendant that the letter was a privileged communication by defendant addressed to the attorneys, Messrs. Bolte, Sooy & Gill. While addressed to them, it was marked for the "Attention of W. Frank Sooy, Esq.," who appears to have had charge of the matter so far as his firm was concerned with it, if at all. Mr. Sooy was called as a witness by the plaintiff, and asked whether he or his firm represented the defendant company, and answered that he would rather tell what they did; that he did not know how to answer the question rightly. He also stated that he was advised that he was representing Max Lipschutz, and that Judge Starr, he thought it was, would take care of the defendant company. As a fact, Judge Starr did represent the company, filed their answer, and tried the case. It is a fact also that Mr. Sooy's bill was made to Max Lipschutz and paid by him. Besides, if Messrs. Bolte, Sooy & Gill were retained by the defendant, their representative capacity ceased on December 11, 1915, when they received a letter from the defendant, signed by the assistant secretary, Lex, in which the company said:

"Please leave the insurance company attend to looking after the '44' Cigar Company's interests and you look after the interest of Mr. Benjamin Lipschutz and Mr. Max Lipschutz personally, as they no doubt have arranged for."

There is no privilege as to communications made to an attorney after his employment has terminated. 4 Wigmore on Evidence, § 2304; 40 Cyc. p. 2366.

These two letters were declarations by the company which were admissible in evidence, the one of December 11th to show that the firm of Bolte, Sooy & Gill did not represent the defendant company, at least after that date, and the one of December 15th that the company owned the car, and that Max Lipschutz was one of its officers who had a right to drive it, and was driving it in business as well as pleasure.

The remaining contention on behalf of the defendant is that the testimony failed to disclose that Max Lipschutz, the driver of the automobile at the time of the accident, was a servant of the corporation defendant, engaged on its business. Without deciding this question on the evidence which was before the court at the time of the direction of the verdict for the defendant, it is apparent, as stated, that if the letter of December 15, 1915, had been in evidence, it might have been inferred, if the jury found the other questions raised by the pleading and evidence in favor of the plaintiff, that the defendant company was liable for the consequences of the accident which was the subject of the controversy in the suit. No citation of authority is necessary to support so plain a proposition.

The letter of December 8, 1915, from the defendant company to Messrs. Bolte, Sooy & Gill, which is referred to in the letter of December 11th, and which indicates that that firm represented the Lipschutzes, father and son, and not the defendant company, was pertinent evidence, and should have been admitted; not so the letter of January 25, 1916, written to Messrs. Bolte, Sooy & Gill by Max Lipschutz personally, in which he inclosed his own check, with thanks to Mr. Sooy, or the firm (it not being stated which) for services rendered. This was properly excluded.

The judgment of the court below must be reversed, to the end that a venire de novo may be awarded.

(30 N. J. Law, 620)

LIGHTCAP et al. v. LEHIGH VALLEY R. CO. OF NEW JERSEY.
(No. 39.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — § 808(5), 819(2) —
DEFECTIVE SIDEWALK — INJURY TO PEDESTRIAN — LIABILITY.

The defendant owning a tract of land, upon which was located a freight shed, filled in the land so as to change its topography and the direction of the flow of surface water therefrom. Snow having accumulated on the retaining wall of the embankment erected, the water flowed therefrom over the adjacent sidewalk and froze

thereon. The plaintiff while walking on the sidewalk slipped, fell, and was injured. In an action to recover for the injuries, the trial court charged the jury that unless there was affirmative proof in the case, from which they could infer that the ice upon the sidewalk was caused by melting snow, which had been transported from another locality to the defendant's premises, there could be no recovery; and also that the mere presence of piles of snow upon defendant's wall presented no proof that the snow had been carried thereto from another place by the defendant or its agents. *Held*, that the instructions of the court in these particulars were correct.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1686.]

Appeal from Supreme Court.

Action by Ava Lightcap and others against the Lehigh Valley Railroad Company of New Jersey. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 87 N. J. Law, 64, 94 Atl. 35.

William C. Gebhardt, of Jersey City, for appellants. Smith & Brady, of Phillipsburg, for appellee.

MINTURN, J. While walking along Mercer street, in the town of Phillipsburg, the appellant fell and injured her kneecap. She attributed the accident to the dangerous condition of the walk, owing to the accumulation of ice thereon, caused as she alleges by the wrongful act of the defendant in causing to be brought an accumulation of snow upon its lands, adjoining the walk, which snow in the process of melting flowed upon the sidewalk, thereby creating a public nuisance, and causing the injury in question.

The facts elicited from the testimony show: That the defendant was owner of a tract of land which was used by it for a freight station. That it filled in the tract to such an extent as to work a change in the topography of the land, and to cause the surface water to run in a southerly, instead of, as formerly, in an easterly, course. The municipality caused a street to be opened along the easterly line of the defendant's property, thereby requiring the excavation of the earth along defendant's line, which in turn necessitated, upon defendant's part, the erection of a stone retaining wall along the line of the sidewalk. The snow which accumulated upon the property was precipitated over the wall in the form of water, and running upon the adjoining sidewalk became frozen, thereby producing the condition which caused the accident. The liability of the defendant was predicated upon the theory of alleged fact that it had caused quantities of snow to be carried upon or near its wall, which, having melted, produced the condition complained of.

It will be observed that the plaintiff sought to charge the defendant with liability upon the principle enunciated in the English *Exchequer*, in the cases of *Fletcher v. Rylands*, 1 L. R. Ex. 265, 3 H. L. 330, to the effect that

one who for his own purposes brings on his lands, and keeps and collects there, anything likely to do mischief if it escape, must keep it at his peril, and, if he fail to do so, is *prima facie* answerable for all damage which is the natural consequence of his act. While this doctrine has not been repudiated as a legal principle, it has been placed in the category of *vexatio questio*, both in this country and in England, by the criticisms of the courts and the text-writers, as a principle of law fundamentally unquestionable, but containing a statement too generic in form for practical application, as a test of legal liability, and consequently it has been definitely qualified, distinguished, and limited by the adjudged cases until the original statement has become quite attenuated. *Nicholas v. Marsland*, 2 Ex. D. 1, L. R. 10 Ex. 255, 1 Ex. R. C. 272; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Gorham v. Gross*, 125 Mass. 240, 28 Am. Rep. 224; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184; *Cooley on Torts*, 573; 14 Am. L. Rev. 1.

In this state, Chief Justice Beasley, in *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Dec. 394, criticizes it on the ground that it is a rule "mainly applicable to a class of cases which I think should be regarded as in a great degree exceptional." In the case in which it was applied in the Exchequer, the trend of opinion is that its application to the situation was proper and justifiable, but the consensus of opinion in later cases supports the criticism of Chief Justice Beasley that the doctrine enunciated "is amplified and extended into a general, if not universal, principle," and following the New York case of *Losee v. Buchanan*, *supra*, he held, speaking for our Supreme Court, in a case involving damages caused by the explosion of a boiler, that in principle the doctrine was inapplicable.

But if we assume that the doctrine might be applicable to the circumstances of the case at bar, from the plaintiff's conception of it, we are met by the controlling fact that in no aspect of the testimony can it be affirmed that the defendant brought upon its land the cause of the damage, so as to enable the plaintiff to invoke the rule referred to, and the doctrine therefore can have no application here.

The conclusion that the defendant transported the snow from another place to its premises, because the snow was heaped upon the wall, at a period of the year when snow was universal in the neighborhood, is manifestly a non sequitur, and rests entirely upon the obvious fallacy that because the snow was there the defendant, and not *vis major* or other extraneous cause, brought it there, for which act, under the many qualifying cases following *Fletcher v. Rylands*, legal responsibility could not be imposed upon a

landowner entirely quiescent, and guilty of no active tort-feasance.

An interesting and well-considered résumé of the doctrine herein discussed, particularly with reference to the liability which emanates from the application of the maxim, "*Sic utere tuo ut alienum non lædas*," and its many qualifications in practical use to a situation like the present, will be found in the May number of the *Columbia Law Review*, p. 388; *Nicholas v. Marsland*, 2 Ex. D. 1; *Penn Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; *Marshall v. Welwood*, *supra*.

In this aspect of the case, however, assuming the rule to be applicable to the plaintiff, she manifestly is in no situation to complain, since the trial court allowed the case to go to the jury, upon a charge which expressly left it to them to find, as the test of liability, whether or not the defendant had transported the snow to its premises, and they found to the contrary.

In contradistinction, however, to the doctrine of liability thus applied, the nonliability of the defendant, for damages resulting from the mere presence of the snow upon its premises, in the absence of proof of active tortfeasance, in bringing it there, has been settled beyond controversy by the pronouncements of the courts of this state.

This court, in *Jessup v. Bamford Bros. Co.*, 66 N. J. Law, 641, 51 Atl. 147, 58 L. R. A. 329, 88 Am. St. Rep. 502, in an opinion by the present Chief Justice, approving the doctrine enunciated by the Massachusetts Supreme Court in *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 87 Am. Dec. 625, declared that:

"The right of an owner of land to occupy and improve it in such manner, and for such purpose, as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it from the surface of adjacent lots, either to stand in unusual quantities on other adjacent lots or to pass into or over the same in greater quantities or in other directions than they were accustomed to flow."

And the general doctrine was enunciated that:

"The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

To the same effect are *Bowlsby v. Speer*, 31 N. J. Law, 351, 86 Am. Dec. 216; *Lightcap v. Lehigh Valley R. R.*, 87 N. J. Law, 64, 94 Atl. 35; *Sullivan v. Browning*, 67 N. J. Eq. 391, 58 Atl. 302.

The trial court, consistently with this conception of the law, instructed the jury that, unless they could find from the testimony that the defendant carried the snow from

another place to the premises in question, thereby causing the condition which superinduced the accident, there could be no recovery.

The jury having found for the defendant, the plaintiff argues that the trial court was in error, because it declined to charge that the defendant, by filling in the land, changed the topography of the premises, and incidentally the adjoining lands, so as to cause a change in direction of the previously existing water course, thereby causing the conditions complained of. As has been stated, there was no proof that the defendant or its agent had transported the snow, or that they had in any manner transposed its condition or its original status, further than the fact that it existed in piles upon the wall, which incident, as we have intimated, was neither convincing nor evidential to show its transference from elsewhere to the premises in question, and, as we have observed, the mere fact that the defendant exercised over his land an indubitable right of ownership in changing the grade or slope to suit the defendant's convenience or necessities in the use thereof presents no ground of liability for an incidental injury to another, but is clearly *damnum absque injuria*.

"Affirmative" evidence, the trial court declared, must be found in the case from which an inference could be rationally drawn that the snow on the wall was an accumulation transported to the premises from another locality, and to this direction exception is taken. When it is recalled that the gravamen of the action was the active interference by the defendant with the normal situation, by the transportation to its premises of an element, in which inhered the possibilities of danger and damage, in the absence of the exercise of due care in its management and control, it is not perceived in what aspect of the situation the use of the adjective in question can be characterized as either inappropriate or misleading, or as conveying any definitive meaning, unless it be considered as conveying a correct indication of the quantum and quality of the proof necessary to entitle the plaintiff to recover under the testimony, and the rules of law to which we have adverted.

The judgment will be affirmed.

(87 N. J. Eq. 471)

HEYNIGER et al. v. LEVINSOHN.
(No. 87/226.)

(Court of Chancery of New Jersey. May 29, 1917.)

1. INJUNCTION §62(3) — BUILDING RESTRICTIONS—ENFORCEMENT.

Where defendant had knowledge of a building line restriction by express covenants in his deed, and was familiar with a previous decision upholding the right to enforce the restriction, a mandatory injunction will be granted compelling

him to tear down so much of his building as is a violation of the restriction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 127.]

2. INJUNCTION §113 — LIMITATION AND LACHES.

Where complainants upon discovery of a violation of a building line restriction took steps to enforce it, they were not guilty of laches.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201.]

3. COVENANTS §103(3) — ACQUIESCENCE OR ESTOPPEL — VIOLATION OF BUILDING RESTRICTIONS.

Although the acts of the council in building a pavilion in violation of a building line restriction might estop the municipality from enforcing the restriction, it would not estop property owners not concerned therein.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169.]

Bills by George H. Heyniger and others against Abraham Levinsohn. Decree for complainants.

Henry H. Snedeker, of East Orange, and Harry R. Cooper, of Belmar, for complainants. Patterson & Rhome and Durand, Ivins & Carton, all of Asbury Park, for defendant.

LEWIS, V. C. The complainants in these cases ask that a mandatory injunction be granted, compelling the defendant to tear down or remove so much of his building as is erected nearer the line of Tenth avenue than 20 feet. Both actions were heard together.

The borough of Belmar includes all of the property originally owned by the Ocean Beach Association. The property of this association is located south of Shark river and west of the Atlantic Ocean. The association laid out the property in building lots, with streets running north and south, and avenues running east and west. The association also caused a map of its property to be made and filed in the office of the Monmouth county clerk. The streets and avenues on the map are the same to-day in Belmar. The Ocean Beach Association is now out of existence. It was incorporated on March 13, 1873. P. L. 1873, p. 1089. It was authorized to purchase and sell lands, and was especially empowered to require any grantee from it to make and maintain such style and character of improvements on the land conveyed, or on the streets fronting thereon, as might seem most expedient for securing a uniform system of development and improvement. The association, on June 9, 1873, passed a resolution as follows:

Resolved, that it is highly important to maintain uniformity in the line of buildings on the main avenues of this association, and for securing said object that no building be erected on said avenues nearer the line of the same than twenty feet.

The association executed and delivered 740 deeds, each of which, with the exception of those about to be referred to, contain this covenant:

Subject, nevertheless, to the covenants, conditions, and restrictions contained in the aforesaid act, entitled "An act to incorporate Ocean Beach Association"; and the said party of the second part, for himself, his heirs, and assigns, does covenant and agree to and with the said Ocean Beach Association, their successors and assigns, that the said party of the second part, his heirs and assigns, shall not sell, or suffer to be sold, on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in the said act of incorporation, by-laws, rules, or regulations made by the said association at any time.

The only deeds in which the covenant in the above form do not appear are: Two to the mayor and council of Belmar, for property for public parks; three on land not included in the map of the Ocean Beach property; two are deeds made in accordance with a decree in chancery (one of the property along the ocean, between Tenth and Eleventh avenues, for bathing purposes, and one a deed by the sheriff, pursuant to a judgment in an action in which the Ocean Beach Association is party defendant); one in which the covenant was omitted, but a prior deed in the chain of title contained it; one where the covenant appears, and also an additional covenant in regard to the removal of a building; one where the word "rules" was omitted; and two of property for railroad purposes.

Tenth avenue is one of the principal avenues included in the resolution of the Ocean Beach Association. However, all of the avenues have been construed to be main avenues, and the restriction applies to all of them. The general plan to obtain and compel uniformity in the building line for the benefit of every person to whom the said Ocean Beach Association sold a lot has been maintained. The testimony clearly shows this. It is established that most of the houses were erected with the main body of the building located with reference to the building line. That the restrictive covenant does not apply to open porches, bay windows, and eaves is a construction put upon it by those in authority and the contractors in the borough of Belmar. The late Vice Chancellor Emery, in *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369, held that immaterial violations of the restrictions, not showing an intention to abandon the plan, are no defense to an action. In other words, that slight and immaterial violations of the restrictive covenant would not be considered, unless they went to the extent of showing a general abandonment of the restrictions by the owners of the property along the line of the thoroughfare. I do not find from the evidence before me that there has been an abandonment. It is apparent that the original grantor who first imposed the restrictions upon the property has done nothing which would indicate an intention upon its part to disregard the covenant.

[1] The evidence clearly discloses that the defendant knew of the building restriction. The express covenant in his deed in itself would be sufficient to give him notice; and his testimony shows that before he commenced the erection of his building he had full knowledge of the building line restriction. He says in one part of his evidence that he asked the mayor, Mr. Poole, what he thought about his going over the building line in erecting his structure, and, further, if he would stand for it he would put it up in that way. He then claims that he obtained permission from the mayor to do so; but this is expressly denied by Mr. Poole. And the fact that he (Poole) immediately had a surveyor place stakes on the lot would seem to negative any consent. The defendant was thoroughly informed about the situation before he began operations on his ground. In fact, he states that he knew of the restrictions before he bought the land, and was familiar with the case of *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752, in which the late Vice Chancellor Howell had the same building line restriction under consideration and upheld the right to enforce it. The testimony of other witnesses also shows the defendant's knowledge of the restriction.

[2] I do not think the complainants have been guilty of laches, for steps seem to have been taken by them to enforce the restriction immediately upon discovery of the violation by the defendant. The defendant proceeded at his peril, in an apparent disregard of all other's rights. He took his chances on the effect of his conduct, with knowledge of the decision in the *Newbery Case*.

[3] It does not appear, although many new buildings that have been erected on Tenth avenue since the *Newbery Case*, that any of them have been located with the main foundation wall projecting beyond the building line. Barring the erection of these new buildings, the conditions remain about the same as at the time the *Newbery Case* was decided. I cannot find that the complainants are estopped by the erection of the Buhler pavilion. The evidence does not appear to disclose that it is located on Tenth avenue; but if it was, and the act of the council in this operated as a bar to the municipality, it could not estop its cocomplainants Wildman and Newman, and the complainant Heyniger.

There has been shown a general intention on the part of the borough and of the parties owning land along the avenues to keep alive and observe the building line restriction, and the *Newbery Case* is binding upon me.

The decree, therefore, will be for the complainant.

(7 N. J. Eq. 585)

HIRSCHBERG v. FLUSSER. (No. 43/368.)

(Court of Chancery of New Jersey. June 21, 1917.)

INJUNCTION \Leftrightarrow 50 — REMEDY AT LAW — REMOVAL OF ENCROACHMENTS.

Where defendant has encroached upon plaintiff's land by building a foundation wall, underneath the surface, of stones so large that they form part of defendant's building on defendant's land so that it is impossible to remove them without trespassing on his land and injuring his building, and plaintiff's title and right have been settled in an ejectment suit, there being no adequate remedy at law, a mandatory injunction will issue to compel defendant to remove the wall.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 103.]

Suit by Joseph Hirschberg against Benjamin Flusser. On motion to strike out bill. Motion carried over until final hearing.

Philip J. Schotland, of Newark, for complainant. Samuel Roessler, of Newark, for defendant.

LANE, V. C. This is a motion to strike out a bill. The bill alleges that complainant is the owner of certain property; that defendant, who is the owner of adjoining property, on or about May 3, 1911, intending to build an addition to his building, excavated to a depth of 24 feet, and in so doing excavated a portion of complainant's property substantially 26 feet 5 inches by 9 inches; that defendant then proceeded to build on his own land and also on the land of complainant his foundation and side wall up to the level of the ground, but that above the level of the ground the defendant continued with his building on his own land; that about the 3d day of July, 1911, complainant brought suit in the New Jersey Supreme Court to recover possession of the land occupied by defendant's foundation and side wall below the level of the ground, and on the 25th day of September, 1913, procured a judgment against the defendant, and it was therein found that the complainant was entitled to recover the possession of the premises referred to in the bill of complaint; that the defendant did not remove the foundation wall or side wall, and the complainant has been unable by means of execution to get the sheriff of the county of Essex to remove such encroachment, because a large part of the wall which encroaches on the complainant's land is built with stones so large that they not only encroach upon complainant's land but extend into and form part of the wall of defendant's building on defendant's land, and it is impossible to remove the part that encroaches without trespassing upon defendant's land and injuring his building.

I assume that the bill may be considered as charging that the complainant actually issued execution and that the sheriff has failed or re-

fused to remove the encroachment. The motion to strike out is based upon: First, that there is an adequate remedy at law; and, second, that there is laches. It is insisted by the defendant that the complainant by virtue of the judgment in ejectment has been awarded the possession of the property in dispute and may remove whatever may be thereon; further, that he may compel the sheriff, if the nature of the defendant's property on the land in question is such that it may be removed, to remove it and put him in an actual physical possession of the soil as it was prior to defendant's interference with it, that the sheriff may, however, require indemnity, and if any part of the defendant's building is injured by the action of the sheriff acting under the writ the complainant will be responsible; and, finally, that if the nature of the property of the defendant upon the land of complainant is such that it may not be removed without injuring defendant's property, then the complainant is entitled only to constructive possession.

Where the injury is irreparable, this court will enjoin continuous trespasses. In cases where the fundamental right of the complainant to equitable relief depends upon legal title in dispute, the Court of Errors and Appeals has said that it is the duty of the court to retain the bill and to send the complainant to law so that the legal title may be settled (*Todd v. Staats*, 60 N. J. Eq. [15 Dick.] 507, 46 Atl. 645, and cases following); the complainant in the meantime proceeding with the building at his peril. The logical result of *Todd v. Staats* is that, the legal right having been settled in favor of the complainant, a mandatory injunction will go to compel the defendant to remove the offending structure if equitable considerations do not prevent and if the remedy obtained at law be not adequate. In *Stanford v. Lyon*, 37 N. J. Eq. 94, Vice Chancellor Van Fleet held that the court would grant a mandatory injunction compelling defendants to remove portions of buildings erected by them which prevented complainant from exercising rights in a yard. The Court of Errors and Appeals, in 42 N. J. Eq. 411, 7 Atl. 869, modified the decree so as to define the complainant's rights as they were defined in an action at law which he had previously brought against the defendants and in which his rights had been determined. The Court of Errors and Appeals did not question the power of the court of equity to, after the right had been settled at law, protect the right by mandatory injunction if that were necessary. The first head of equitable jurisdiction stated in *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865, is that of cases where the legal right has been established in a suit at law and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not attainable by le-

gal procedure. And see the sixth and ninth head. In *Haitsch v. Duffy* (1914, Del.) 92 Atl. 249, the Chancellor, in a case in which an injunction was prayed against defendant enjoining him from asserting a right of air and light over complainant's land and compel the removal of a structure which interfered with complainant's rights, held that a court of equity had the power to grant such relief prior to the determination of the right at law. He said, referring to *Herr v. Bierbower*, 3 Md. Ch. 456:

"The court considered that it was no answer to say that by suit in ejectment the complainant would recover possession of the land encroached upon, and would so get any wall or building erected on the land so recovered. The structure would still remain, and in order that the complainant be restored to the full use of his land it would be necessary that the wall, or structure, be removed."

He further said:

"This equitable jurisdiction is probably based, not on the irreparable character of the damage by the aggression, nor to relieve the necessity for multiplicity of suits as if it were a continuous trespass. The right to a mandatory injunction to require the removal of an encroachment on land is based on the peculiar nature of the right invaded and the subject matter affected, viz. land."

I am inclined to think that the jurisdiction is in the last analysis based upon the impossibility of securing at law any adequate relief for the damage done, either by ejectment or by numerous suits in trespass. In *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804, opinion by Parker, Judge, the New York Court of Appeals, in an action to restrain the erection of a portion of a building on land of complainant, said:

"Assuming plaintiffs' title to be established, the authority of the court in a suit in equity to interfere and prevent an appropriation of their lands to the use of another for building purposes cannot be longer questioned, not only for the purpose of avoiding multiplicity of actions, but also because they were without adequate remedy at law. * * * The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches. (It is to be observed that the amount of land involved in that case was almost precisely what it is in this, at least so far as width is concerned.) But in equity the obligation to remove can be placed directly on the parties who caused the wall to be erected. * * *"

The court did not consider the question as to whether it was necessary that the title should first be determined at law, holding that the question had not been properly raised. Upon the authority of the foregoing cases, I think that the bill may be maintained. The title and right of complainant has been settled at law. The law courts are not by reason of the nature of their processes able to give complete and adequate relief. Neither the sheriff nor the complainant should be compelled to take the risk, on removal of this structure, of injuring property of the defendant. To give the complainant constructive possession is no remedy at all; he has al-

ways had that. To remit him to actions for trespass will not afford adequate relief. He is entitled to the enjoyment of the land in the position it was before the defendant encroached upon it. It is only by the process of mandatory injunction that the obligation to remove, in the language of the New York court, can be placed directly on the party who caused the wall to be erected. The case of *D. L. W. v. Breckenridge*, 55 N. J. Eq. 141, 35 Atl. 756, affirmed 53 N. J. Eq. 593, 39 Atl. 1113, is not in conflict with this holding, nor are the cases of *Boyden v. Bragaw*, 53 N. J. Eq. 26, 30 Atl. 330, and *Colloty v. Stein*, 80 N. J. Eq. 405, 84 Atl. 193. In the first, Vice Chancellor Emery, in dealing with an application for an injunction directing the removal of certain water pipes, did say that the equitable remedy could give no different relief from the execution in ejectment; but the inability to execute the execution without danger to complainant was not considered by him, moreover, the effect of his order was merely to retain the cause until the legal title had been settled at law. In the second, Vice Chancellor Bird held that there was an adequate remedy at law, to wit, damages measured by what it would cost the complainant to remove the offending monument and put the land back in the condition it was before the erection. Such relief cannot be granted here. In the third, Vice Chancellor Leaming merely held that prior to determination of the legal title at law equity would not intervene to prevent the erection of a building alleged to encroach on complainant's lands.

Second, on the question of laches: Whether the complainant has been guilty of laches depends, I think, upon a consideration of facts which are not before the court upon the present motion. The bill alleges that the construction was started on or about May 3, 1911, and that the ejectment suit was started on or about July 3, 1911, two months afterward. When the complainant knew of the encroachment is not disclosed. Nor is it disclosed to what extent the building had progressed at the time of the ejectment suit. By the commencement of the ejectment suit defendant had notice of the claim of complainant's right. The suit was not brought to judgment until September, 1913. Whether that was the fault of complainant or because of necessary delay in court is not disclosed. This bill was not filed until May 8, 1917. Whether this delay was occasioned by the complainant endeavoring to obtain relief at law is not disclosed. It may very well be assumed, I think, that no injury occurred to the defendant between September, 1913, and March, 1917, as the building had unquestionably been fully completed. Whether it was the duty of the complainant to file a bill in equity at the same time as commencing the suit in ejectment, applying to the court to retain the bill until the right at law had been settled, under the case of *Todd v. Staats*, may

depend upon circumstances which are not now before me. I will withhold consideration of the question of laches until final hearing.

In view of the fact that, if an order is made sustaining the bill and it is taken to the Court of Errors and Appeals and there affirmed, there will have to be a trial upon at least the question of laches, and the case may then again go to that court, I am inclined to think that the proper order in this case is an order carrying over the motion to dismiss the bill until final hearing.

I wish counsel would communicate with me as to their views on this point.

(87 N. J. Eq. 408)

LAUENSTEIN et al. v. LAUENSTEIN et al.
(No. 42/319.)

(Court of Chancery of New Jersey. May 10, 1917.)

1. WILLS §753—RIGHTS OF LEGATEES—SPECIFIC LEGACY.

A will devising the stock and equipment of an auto supply business, subject to its debts and obligations, absolutely to testatrix's son and not subject to restrictions on his share in the remainder of the will, is a specific legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944.]

2. WILLS §732(7)—CONSTRUCTION—GIFTS.

A will, reciting that part of the estate consisted of the stock, equipment, etc., of an auto supply business, bequeathed such property to the son of testatrix. The stock and equipment of the business did not belong to testatrix, but to her husband, who was indebted to his wife for advancements made to carry on the business. Held, that the gift of such sums due could not be sustained under the terms of the will in lieu of the bequest of the stock and equipment upon its failure.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1732-1737, 1811, 1812.]

Action by Augustus J. Lauenstein and others against Elizabeth Lauenstein and others for the construction of a will, under which Thomas J. Conlon makes a claim. Claim not sustained.

Charlton A. Reed, of Morristown, for executors. Elmer King, of Morristown, for Edward Kelly, guardian. B. W. Ellicott, of Dover, for Thomas J. Conlon.

STEVENS, V. C. This is a bill for the construction of the third paragraph of the codicil of the will of Julia Kelly. It reads as follows:

"Third. A part of my estate consists of the stock, equipment, etc., of the business known as Dover Auto Supply House located on Blackwell street in Dover, N. J.; this, subject to the debts and obligations thereof, I give and bequeath to my son Thomas Conlon, who is now associated in the management thereof.

"This is an absolute bequest to him and not subject to the restrictions placed on his share of the residue in my said will. It is my will however that this bequest to the amount of twenty-five hundred dollars be considered as paid

to him out of the residue of my estate and to said extent as on account of his share thereof."

[1] There can be no doubt that, looking only to the language of the bequest, the legacy is specific. It has, however, been judicially determined by this court that the "stock, equipment, etc.," of the business did not belong to the testatrix, but to her husband. Consequently the gift failed. *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307. *Marshall v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325.

[2] But it is said that, on the peculiar circumstances, if the legatee cannot have the business, he is entitled to have what the business owed his mother for advances. It appears that testatrix was desirous of giving her son a start. For this purpose she contributed the money with which a considerable part of the stock and equipment were, at the beginning, purchased. The business was to be carried on in the name of the "Dover Auto Supply House," and to this end Mrs. Kelly's husband, pursuant to the act of May 17, 1909, filed in the county clerk's office a certificate in which he stated that he (Edward Kelly) intended to conduct the business of dealer in auto supplies, etc., and that the true name of the person who was to transact it was himself. He was a man of pecuniary responsibility, and the goods, bought from time to time, were largely purchased on his credit. The legatee, Thomas, was made the active manager, and he conducted the business under the general supervision of his father. Mrs. Kelly received interest on the money advanced by her, a part of which was repaid. It was ascertained by the decree of this court that at the time of her death Mr. Kelly owed her estate a balance of \$2,029.40.

The contention is that Thomas Conlon is entitled to the immediate payment of this sum, as a substitute for the business which testatrix intended to give him—a business she, no doubt, believed to be hers, because of the money she had contributed. The legal aspect of the matter is this: The stock and equipment belonged to her husband. He was her debtor for the money lent. By her will she gave this stock and equipment expressly subject to "the debts and obligations thereof." Thomas, taking the business, was to take it subject to debts, one of which was the debt due to herself. The debt in question was not a benefit to the business, but a burden. Thomas was, according to the language of the will, not to receive it, but to pay it. To hold that a gift of the business, subject to its debts was a gift of the money which the legatee would have been under the necessity of thus paying, if he had taken it, would be impossible. He certainly would not take under the words of gift. In *Marshall v. Hadley*, supra, Vice Chancellor Van Fleet held that a gift of land, which neither at the time of the making of the will nor afterwards the testator owned, did not include a gift of a mortgage

upon the land which he did own; and in *McKinnon v. Thompson*, supra, Chancellor Kent decided that a devise of land not owned by testator could not operate as a bequest of a judgment debt charged upon the land in his favor. These cases are much more favorable to the contention than the one in hand. Here testatrix, so far from giving, imposed an obligation to pay.

I think that Mr. Conlon's claim to the money cannot be sustained.

NOLAN et al. v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. (No. 43/297.)

(Court of Chancery of New Jersey. June 21, 1917.)

INJUNCTION §137(4)—TEMPORARY INJUNCTION—WHEN GRANTED.

A temporary injunction will not issue where the law and facts are in substantial dispute; as to doubt is to deny.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 309.]

Application for a temporary injunction by Patrick J. Nolan and others against the United Brotherhood of Carpenters and Joiners of America. Application denied.

J. A. Kiernan, of Elizabeth, for complainants. Henry Carless, of Newark, for defendant.

LANE, V. C. I have concluded in this case to deny the application for a temporary injunction. The charge is that the complainant and several others are members of Local Union No. 167 of the United Brotherhood of Carpenters and Joiners of America, and have been such members since September 14, 1896; that that union is affiliated with an organization known as the Elizabeth District Council of Carpenters, and that both are subordinate organizations of the United Brotherhood of Carpenters and Joiners of America; that the general objects are to promote social relations, regulate laboring hours, unionize workmen, and to pay sick, disability, and death benefits; that as a member in good standing of the local union the complainant would be entitled to \$5 a week sick benefit, \$400 for total disability, and a certain sum to his next of kin as a funeral benefit, provided he was a member in good standing and had complied with the rules and regulations; that since May 3, 1916, he has been working as a carpenter continually at the plant of the Grasselli Chemical Company, at Tremley, Union county, N. J., and that shop is what is known as an open shop.

The bill alleges that he has practically received union wages, worked union hours, and that the place is desirable; that on or about March 12, 1917, at the instance of the general officers of the union, and particularly at the

instance of the business agent of the local union, charges were made against him that he was violating the constitution, rules, and regulations of the United Brotherhood and its council and local unions as a union member by working in an open shop. He alleges that charges were propounded against him and certain others, all employed by the Grasselli Company, and that there is unjust discrimination in view of the fact that there are other open shops in the neighborhood, and members of the organization working in such other open shops are not being proceeded against.

The affidavits of the defendant deny that the charge against the complainant is that he is working in an open shop, but that he has violated a trade rule of the organization which requires that union carpenters should work only 44 hours a week at 56½ cents per hour; that the complainant is receiving only 45½ cents per hour, with time and a half for overtime for a week of 52½ hours. The affidavits expressly deny that there is any desire to discriminate against complainant for the reason that he is working in an open shop, provided he receives union wages and works under union conditions.

Complainant when he joined the union agreed to abide by its constitution and by-laws. One of the provisions of the constitution and by-laws is that no member should be allowed to violate the trade rules of the locality in which he works. Another section provides that, if he does he may be fined, suspended, or expelled; as the Local Union may decide. There are further provisions for an appeal from the determination.

The affidavits show that the charge against the complainant is not that he is working with nonunion men in what is termed an open shop, but that he violated the trade rules with respect to the hours of work and the rate per hour. The complainant has not been tried by the local union and I have only his surmise as to what the result of such a trial will be. The Grasselli Company is not a party, so that we have not the situation presented by *Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226, and *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881.

I do not find it necessary on this preliminary application to pass upon the question as to whether or not individuals may surrender their right to contract, referred to by Vice Chancellor Stevenson in *Booth & Bro. v. Burgess*, 72 N. J. Eq. at page 197, 65 Atl. 226, nor whether the fact that complainant is entitled to a sick benefit and payment of disability and death claims constitute a property right which will be protected by this court, nor whether the complainant is obliged (and this depends upon the finding with respect to whether there is a property right) to pursue his remedy by appeal to the su-

perior body of the order. If the council shall proceed and expel him, and this expulsion shall be improper, either the Supreme Court or this court may grant relief. *Prices v. First Russian, etc., Society*, 83 N. J. Eq. at page 34, 89 Atl. 1036.

Where the law and facts are in substantial dispute, as in this case, to doubt is to deny. See the remarks of the present chancellor, then vice chancellor, in *Allman v. United Brotherhood of Carpenters, etc.*, 79 N. J. Eq. at page 155, 81 Atl. 116.

The result is that the application for preliminary injunction will be denied.

(90 N. J. Law, 670)

EDWARDS, Comptroller of Treasury, v. PETRY. (No. 77.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

CIVIL RIGHTS §2—CONSTITUTIONAL LAW §56—JURISDICTION—VALIDITY OF STATUTE.

The jurisdiction given to a justice of the Supreme Court by Act March 30, 1915 (P. L. p. 209), providing for an order by a justice to enforce rights under the Civil Service Act, is not invalid as interfering with the right of the Supreme Court to review the entire case by certiorari, but adds an additional step in a proceeding which may ultimately reach the Supreme Court as a reviewing tribunal.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. §§ 1-10; Constitutional Law, Cent. Dig. §§ 62-65.]

Appeal from Supreme Court.

Certiorari by Edward I. Edwards, Comptroller of the Treasury, against Frederick Petry, Jr. From judgment for defendant, prosecutor appeals. Affirmed.

On appeal from the Supreme Court, in which the following per curiam was filed:

"This is a writ of certiorari to review an order made by Justice Trenchard, under chapter 120 of the Laws of 1915, providing for an order by a justice of the Supreme Court to enforce rights under the Civil Service Act. The sole question argued by the prosecutor was as to the power of the Legislature to delegate to a justice of the Supreme Court this right to review.

"In the present case the defendant appealed to the civil service commission and met with an adverse decision, and thereupon applied to Justice Trenchard and secured an order reversing the action of the Commission. We do not find in the case that Justice Trenchard went further than to issue a rule to show cause on the comptroller, and the power to issue the writ was therefore challenged in limine. This involves the questions that were discussed in this court in *New Brunswick v. McCann*, 74 N. J. Law, 171, 64 Atl. 159; *Newark v. Kazinski*, 86 N. J. Law, 59, 90 Atl. 1010, and *Summit v. Inrusso*, 87 N. J. Law, 403, 94 Atl. 806. We think that, while the case presents some difficulty, we are bound, nevertheless, to follow the last two cases, which seem to us controlling.

"We think that the jurisdiction given to the justices of the Supreme Court by the act under consideration in no way interferes with the right of the Supreme Court to review the entire case by certiorari, but superadds an additional step in a proceeding which may ultimately reach

this court as a reviewing tribunal. We are not to be understood as approving of this character of legislation which quite insidiously results in unsettling the legal machinery of the court without gaining ultimately any substantial advantage to the litigant by the disarrangement. "We think this writ must be dismissed."

John W. Wescott, Atty. Gen., for appellant. Linton Satterthwait, of Trenton, for appellee.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(87 N. J. Eq. 578)

PRICE v. LONG et al. (No. 42/631.)

(Court of Chancery of New Jersey. May 11, 1917.)

TRUSTS §193½—SALE OF TRUST PROPERTY POWER OF COURT TO AUTHORIZE.

An equity court has jurisdiction to authorize sale of stock devised to trustees, to be held by them for 25 years, before expiration of that time, where business of the corporation has suffered seriously because of general business depression occurring since his death, and will be disastrously affected by entrance of the United States into the war, where the parties opposing the sale conceded its stock should be sold, and opposed sale on ground that price is not fair, since an emergency has arisen which could not have been in contemplation of testator.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 246, 248.]

Bill by Mathias J. Price, one of the trustees under the will of Philip H. Long, against Emily A. Long and others, beneficiaries under his will, asking court to direct the sale of stock belonging to the estate. Decree for complainant.

Lindabury, Depue & Faulks, of Newark (F. J. Faulks, of Newark, of counsel), for complainant. Cortlandt & Wayne Parker, of Newark (Cortlandt Parker, of Newark, of counsel), for defendants Walter L. Long and others. Lum, Tamblin & Colyer, of Newark (Ernest Lum, of Newark, of counsel), for defendants Emily A. Long and Fred W. Taylor, as trustee.

LANE, V. C. Philip H. Long died on December 9, 1908. Under his will he gave to his executors and trustees, Frederick W. Taylor and Mathias J. Price, 65 shares of stock of the Long & Koch Company, to be held by them in trust for a period of 25 years. The income or dividends from 27½ shares of such stock is to be paid to his wife, Emily A. Long, so long as she lived; if she dies prior to the expiration of the 25 years, then the income on such 27½ shares is to be paid to her brother Edmund Taylor, a sister, Kate Prosser, and her sister-in-law, Mrs. Emily Taylor, and such of her nephews and nieces as shall be living at the time of her death, except that if her nephew Harry E. J. Taylor should predecease her, the share that he would be entitled to if living is to be paid

to his wife and children. The income on the remaining 37½ shares is to be divided equally between testator's two brothers, Frederick T. Long and Walter L. Long, and such of testator's nephews and nieces as shall be living at the time of testator's death, and his cousin Philip J. Long also is to share in the income so long as he shall remain an employé of the company. At the end of 25 years the said 65 shares of stock are to be sold and disposed of, certain relatives having the first right to purchase. The proceeds are to be divided among certain charities and among certain relatives. Some of the beneficiaries are at this time unascertained; the residences of those that have been ascertained are widely scattered in this country and abroad; some are infants.

The Long & Koch Company is a manufacturing concern founded by Philip Long and to which he gave his attention up to the time of his death. Its chief business is the making of cheap jewelry, with a very small margin of profit. During the life of Mr. Long it was extremely successful, and for a few years after his death continued to be. Its dividends for several successive years were as follows: 1904, 80 per cent.; 1905, 100 per cent.; 1906, 130 per cent.; 1907, 175 per cent.; 1908, 100 per cent.; from 1908 to 1912, 100 per cent. In 1913 the dividends were reduced to 50 per cent., in 1914 further reduced to 20 per cent., and since 1914 no dividends have been declared. The testimony is to the effect that, although a dividend may be declared for the year 1917, it will be small. The corporation is a close corporation; it has but 150 shares of stock. Of this the estate holds 65; Mrs. Emily Long, 10; Julius Koch, 74; Mrs. Koch, one. The control is evenly divided between the Koch and the Long interests. Mr. Koch is now at the head of the concern, and Frederick W. Taylor, one of the trustees, is employed by the corporation at a salary.

The reason for the decline of the business is attributed to two sources: First, the loss of Mr. Long, whose genius had built up the business; second, the general depression in the jewelry trade. The book value of the stock is in excess of \$1,000 a share. Mr. Koch has offered to buy out the interest of the estate at a price of \$400 a share. Frederick W. Taylor, one of the trustees, is against the acceptance of the offer, whereas Mr. Price, the other trustee, considers it, not only advisable in the interest of the estate, but necessary, if great loss is not to be sustained, that the offer be accepted. He therefore, brings this bill asking this court to direct the sale, and make parties all persons whom he knows to have an interest in the estate. The application is resisted by certain of those entitled to income, among them the widow, and also by the cotrustee. Many of the parties have not appeared. The answering defendants, while admitting that because of the uncertainty attending the present in-

vestment, it may be desirable that the stock be sold, yet insist that the price is not adequate, and raise by their answers the question of the power of the court in the premises. Mr. Price is in no wise connected with the company, and he takes the position that it is his duty to bring the situation to the attention of the court. The attitude of Mr. Taylor is unconsciously affected by the fact that a sale of the stock may mean the loss of his position with the company, and will unquestionably lead to the loss of the influence which he now enjoys. While the book value of the stock is in excess of \$1,000, it is impossible to sell it to any one except Mr. Koch for any reasonable figure. Mr. Taylor frankly concedes this. Koch says \$400, considering all of the circumstances, is about fair value of the stock, and I think that under all the circumstances it is. Counsel for the complainant furnished me memoranda of the cases on both sides of the question, and I have considered them.

Chancellor Runyon, in *Fidelity Co. v. United Co.*, 36 N. J. Eq. 405, at page 408 says:

"It is the rule that the directions for investment contained in an instrument of trust are imperatively obligatory on the trustee; but by the direction of a competent court, he may depart from them. The court, however, should exercise its authority * * * only in view of the existence of a necessity. The power of this court to abrogate or annul any of the terms of the before-mentioned agreements should not be exercised except for clear and cogent reasons, and with full opportunity to the parties who are to be affected by such action to be heard."

Chancellor Vroom has said, in *Oliver v. Oliver*, 3 N. J. Eq. 368, at page 373:

"One thing is certain; this court will not interfere with the appropriation of this trust fund, so as to direct it differently from the intention of the testator, except in a very clear case."

In *Dodd v. Una*, 40 N. J. Eq. 672, 5 Atl. 155, the Court of Errors and Appeals held that this court had no power to impose its view upon the method in which the funds of a savings bank were to be dealt with where the details were specified by statute. In *Lister v. Weeks*, 61 N. J. Eq. 623, 47 Atl. 588, the Court of Errors and Appeals sustained an order made by the Court of Chancery, directing a certain investment to be changed, but put its decision upon the ground that the parties in interest, especially the appellants, had consented to it and could not thereafter withdraw their assent. In England the power of the Court of Chancery in the exercise of its general administrative jurisdiction to sanction or direct trustees to perform acts contrary to the provision of an instrument of trust where there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust, and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential in the interest of the beneficiaries that such act should be done,

has been sustained in England in the cases of *In re New et al.* (1901) 2 Ch. Div. 534; *In re Tollemache* (1902) 1 Ch. Div. 457. In the first case, Romer, J., said:

"The principle seems to be this: That the court may, on an emergency, do something not authorized by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the court has gone beyond the express provisions of the trust instrument, cases of emergency, cases not foreseen, or provided for by the author of the trust, where the circumstances require that something should be done."

—and, further:

"It is impossible, and no attempt ought to be made to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction; but it need scarcely be said that the court will not be justified in the sanctioning of every act desired by the trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the court will not be disposed to sanction transactions of a speculative or risky character."

I have grave doubt as to the power of this court, but because of the existence, I think, of the present emergency and the fact that if I should decline to exercise jurisdiction the applying trustee will have performed his duty and there will probably be no review by the Court of Errors and Appeals, whereas if I exercise jurisdiction the present defendants will have the opportunity to appeal, and the matter may be passed upon by that court, I am going to resolve the doubt as to jurisdiction in favor of the complainant. The situation is such that I cannot assume responsibility for the continuance of this investment in this stock. Not only has the business of the company suffered seriously because of the loss of Mr. Long and the general depression in the business, to such an extent that its dividends have been reduced from 175 per cent. per year to nil, a condition which I think was not in the contemplation of the testator, although it may be said that he must be presumed to have contemplated it; but a world war has, since his death, broken out, in which this country has now become involved, a condition which he certainly did not contemplate, and which, I think, it is not to be presumed he contemplated. As a matter of fact, no one contemplated it, except possibly the governmental authorities of Germany. It is impossible to determine how long the war will last, or what its consequences will be, or what the conditions will be upon a readjustment after its close. It must have a disastrous affect upon such businesses as that carried on by the Long & Koch Company, manufacturing, as I before stated, cheap jewelry at a very narrow margin of profit. Coming on the heels of the condition created by the loss of Mr. Long, and the general depression in the jewelry business, it may have a very disastrous effect upon the business of Long & Koch. It should also be kept in mind that

the control of the business is equally divided between the Koch and the Long interests, and this equal division must inevitably, if the business continues to lose money, lead to discord within the company itself. Under the circumstances I think that the offer of \$400 a share is a fair one; that it should be accepted, notwithstanding the opposition of the cotrustee and of certain other beneficiaries. Indeed, the cotrustee and the beneficiaries appearing concede in their answers, and conceded on the oral hearing, that it was advisable that the stock should be sold. The only question was the question of price. They all conceded that no more could be obtained. Dissolution cannot be forced. Unless this offer is accepted, it seems to me that this risky investment must be continued.

I will advise a decree permitting and directing the sale of the stock at \$400 a share, and at the foot of the decree application may be made for instructions as to the investment of the proceeds. Settle the decree on one day's notice.

HUGHES et al. v. HURLEY et al. (No. 41/3.)

(Court of Chancery of New Jersey. May 19, 1917.)

1. CONTRACTS \Leftrightarrow 189—CONSTRUCTION—FORBEARANCE TO SUE.

Where a party, heavily interested in a bond secured by a mortgage which covered a company's realty and personality, but was not effective as to the personality because it was not recorded as a chattel mortgage, agreed with certain general creditors of the mortgagor that, in consideration of their forbearance to press their claims, he and such creditors would conserve the interest of the mortgagee and creditors at large by buying up the claims of smaller creditors if necessary to prevent action on their part, such agreement bound the parties to join and purchase, if necessary to protect it from being dissipated, not the mortgaged realty, including machinery and appliances, but the personality which was freed from operation of the mortgage.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 811-845, 900-902, 906.]

2. TRUSTS \Leftrightarrow 231(2)—VIOLATION OF AGREEMENT—PURCHASE AT SHERIFF'S SALE.

The action of one party to such agreement in buying at sheriff's sale for \$900 part of the personality worth about \$100, together with an equity in the machinery and appliances which was of no value because covered by the mortgage and not subject to sale, was not fraudulent as to the other contracting creditors, or an act of which they could complain, where the proceeds were applied to the payment of preferential debts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 331.]

Suit by D. W. Hughes and others against William L. Hurley and others. Bill dismissed.

Bourgeois & Coulomb, of Atlantic City, for complainants. Stackhouse & Kramer, of Camden, for defendants.

BACKES, V. C. This case was tried thoroughly and very ably argued by counsel, and during the trial the various phases of it were discussed in such detail that I am able as well now to dispose of the matter as if I should give it further consideration. There are no involved legal principles, and there is only one issue of fact as to which the testimony is in sharp conflict.

The bill is filed by the three complainants, who are creditors of the Central Freezing Company, which in the early part of 1915 became financially embarrassed. This corporation was formed to operate an ice plant in or near Atlantic City, which had previously been the property of the Center-Freeze Realty Company, and was purchased from that company in December, 1912, for \$175,000, in payment of which the freezing company gave its bond for the full consideration of \$175,000, and executed a mortgage to secure this bond upon the property purchased. For commercial convenience, the mortgage was made to the Central Trust Company of Camden, as trustee; the scheme being to later replace the bond of \$175,000 by negotiable bonds in denominations of \$500 and \$1,000. The defendant Hurley was heavily interested in this bond and mortgage, either as a stockholder or a creditor of the realty company.

At the time of the financial embarrassment of the freezing company, the three complainants, or some of them, called upon Dr. Grace, the president of the trust company, who, at that time, also represented Mr. Hurley during his temporary absence on a vacation in Florida, for the purpose of conferring with reference to the condition of the freezing company, with the end in view, on the part of the complainants, of protecting their claims; and as a result of that conference, it was arranged that the complainants should not precipitate bankruptcy or otherwise further embarrass the situation or add to the precariousness of the freezing company, they agreeing to forbear prosecuting their claims, with the understanding that the property of the company was to be by the complainants and the defendant—Grace acting for the defendant—conserved in the interest of the mortgagee and the creditors at large of the freezing company, by buying up the claims of the smaller creditors, if necessary, so as to prevent action on their part. That, generally, was the agreement between the parties, as I think it was understood by all concerned, and to this Mr. Hurley was bound, because he admitted very frankly on the stand that Dr. Grace represented him and had the power to make such a bargain.

The realty company's mortgage of \$175,000 covered all of the real and personal estate of the freezing company, including after-acquired property, the personal property not being particularized. The realty company failed to record its mortgage as a chattel mortgage, and by this omission it had lost

the benefit of the personal security. Hurley, as one of its stockholders and creditors, was apprehensive lest the personal property be seized and sold and the value of the mortgage security upon the realty thereby diminished. Anxious to keep the property intact as a plant, and realizing that the mortgage would have to be foreclosed and the property bought in by the mortgagee, he hoped to sell it to better advantage as a unit; and at the time of the conference the parties were agreed that this course would be advantageous to all concerned. At the meeting it was understood that the property was incumbered by mortgages amounting to \$80,000, and that these mortgages were prior liens to the \$175,000 mortgage, and were to have been taken up by the proceeds from the sale of the \$175,000 of bonds, which never came to pass. It was also given out and fairly understood that there was an equity in the property over and above the \$80,000 mortgages, approximately of from \$30,000 to \$40,000, although the property had been previously sold to the freezing company for a much larger sum. The \$80,000 of mortgages were, as I recall them, purely real estate mortgages; and, although nothing was said at the meeting indicating or differentiating the personal from the real property covered by the realty company's mortgage, it may have been, and probably was, assumed by the complainants that all in excess of \$80,000 of realty mortgages represented personal property.

Shortly after the conference, two judgments were recovered against the freezing company, and under them the sheriff of Atlantic county levied upon certain machinery and appliances, part and parcel of the ice plant, and also upon a few articles strictly personal, but of very little value. The property, as levied upon, was advertised for sale, of which Mr. Hurley heard the day before the sale took place, and without notifying the defendants of what was about to happen, he attended the sale and bought in the property for the amount of the judgments—some \$900. Upon a subsequent denial to the complainants that he bought this property pursuant to the terms of the agreement and that he held it according to the arrangement, this bill was filed for the purpose of subjecting it to the engagement and to have it decreed that Mr. Hurley holds the property in trust for the benefit of the unsecured creditors of the freezing company. The prayer is for a receiver and an accounting, and for other relief.

[1] The case very much turns upon the scope of the agreement, which, in effect, undoubtedly was that, if occasion demanded, the parties were to join and purchase the property of their common debtor, so that it would not be dissipated, so that it would not suffer in value as a unit, and so that it would produce the greatest results by a sale as a plant; and the obligation to pre-

serve it was imposed upon no matter which of them might later on come into possession of the property by such a purchase. And right here the question is, What property was involved, and what was to be protected as against the action of other creditors? Surely, not the real estate incumbered by the lien of the realty company's mortgage, except, perhaps, the equity, and there was none, and obviously only the personal property of the freezing company, which, as to its common creditors, had been freed of the operation of the mortgage for failure to record, could have been the subject of the proposed concerted action. Further than this, that is, the chattels, the personal property, the agreement did not extend. The fact that the sheriff subsequently levied upon and sold as personal property machinery and appliances which were essentially part of the real estate did not enlarge the embracement. The machinery and appliances so sold by the sheriff to Hurley were annexed to and formed a part of the ice-making plant, and were installed by the realty company, and were used by it in operating the plant, and were annexed with intent that they should become a part of the realty, and as a going concern the plant was sold by the realty company to the freezing company, and as a whole was mortgaged by the latter to the former. The mortgage, as I have said, described the land and included the machinery and appliances and all personal property presently owned and thereafter to be acquired, without particularizing what was personal property, but it is perfectly plain that the legal status of the mortgage as a lien upon the real property and upon all that became realty by installation and annexation as a part of the plant was not disturbed nor the machinery reconverted by combining the real with, but without defining, the personal property, as security, in this document. The chattel feature of the mortgage was designed to cover such personal property as horses, wagons, tools, office furniture, etc., and was not intended to embrace that species of property already included and forming a part of the realty. So, to repeat, we have this situation at the time the agreement was made: The \$175,000 mortgage was a valid and subsisting and enforceable real estate lien upon the plant, which lien covered all that was conveyed by the realty company to the freezing company, as a part of that plant, viz. the land and the fixed machinery and appliances which went to make it up. The legal consequences of this lien, of course, were not, and could not be, affected by the arrangement, and besides there was no intention, as between the parties, to abridge its lawful sweep, and this is so regardless of the misconception of its force and effect, entertained, perhaps, by Dr. Grace and Mr. Hurley, or the complainants. It was clearly the property of the freezing company not covered by the

mortgage with which the parties were concerned, and with reference to which they bargained. There was none other upon which the agreement could operate, and there was no trust, except as to that property.

[2] The defendant sets up that the arrangement was abandoned before Mr. Hurley purchased at the sheriff's sale, and for that reason there was no breach of confidence. The parties again met before the sale, and Dr. Grace says that he gave them the name of the lawyer representing the two judgments under which the sheriff afterwards sold, and suggested that they place their claims in his hands, at the same time announcing that his agreement was at an end, and that they were free to act as they pleased, so far as he was concerned. The complainants admit being at the meeting, but emphatically deny that the arrangement was rescinded. The view I take of the case makes it unnecessary to pay upon the veracity of the witnesses. They are all truthful men, and undoubtedly related the facts and circumstances as they were impressed upon their minds, clouded somewhat by the efflux of time, as nearly as they could. Granting that Mr. Hurley's trusteeship remains, it is to be regarded as extending only to the property bought by him at the sheriff's sale, which was unincumbered by the \$175,000 mortgage, viz. one desk, two chairs, one work table, one lot of tools, one hand vise, one pipe vise, and one wagon, estimated to be worth \$100, and he having for these (and for the equity in the machinery and appliances, the value of which is nil) paid \$900, and as the proceeds were applied to the payment of preferential debts, the transaction is purged of the alleged fraud and the complainants are not aggrieved.

Complainants' counsel's argument differs materially from the attitude he assumed during the trial as I understood him then, and he now concedes that the machinery and appliances are a part of the plant and realty incumbered by the \$175,000 mortgage; and, as I now understand his position, he contends that, notwithstanding, his clients are entitled to recover to the extent of their value simply because they forebore prosecuting their claims, and that it makes no difference whether the machinery is real or personal or whether it was incumbered by the mortgage or not, it was held out to be personal property, or assumed to be, and that Hurley, in consideration of the forbearance and the benefits which would flow therefrom to the security of the realty mortgage, agreed that, as between the parties, the property was to be regarded as personalty. I cannot entertain this proposition of defendant's accountability, nor can the statement by Dr. Grace that the plant was worth \$90,000 or \$100,000, and that the mortgage indebtedness upon it was some \$60,000, and that there was an equity of approximately from \$30,000 to \$40,000 be interpreted as an undertaking that the differ-

ence was to accrue to the common creditors, if no action were taken, or that of this estimated amount the value of the machinery and appliances was to be so applied. As I have said before, that might have been the assumption of the complainants, but in the very nature of things, it seems to me, the agreement could not have been so contemplated by the parties. There is nothing in the testimony from which it might be even inferred that the realty company was to surrender any of its rights secured by its mortgage, whatever they might prove to be, and it is but reasonable to assume that the parties dealt with that understanding. The transaction will not admit of the construction that the machinery and appliances were to be considered as the subject of the trust, regardless of their legal character and the lien to which they were subject; nor, to repeat, can it be allowed that their seizure and sale as personal property, and their purchase by Hurley, worked a change. The sale was a mere incident, upon which the complainants have seized to measure their damage. To follow counsels' reasoning leads to a personal responsibility upon the part of Hurley, to the value of the machinery and appliances, admittedly wrongfully seized as personal property, wholly independent of any breach of trust, although breach of trust is the gravamen of the bill. In fine, the argument is that, even if the realty company, upon a foreclosure of its mortgage rightfully sold this property—a thing which it has done since this suit was begun—and Hurley failed to secure and hold it for the common creditors, by purchase or otherwise, his liability would be absolute; that is, having failed to wrest it from its true owner, he must respond. Suppose the plant had been sold by an insolvency receiver, free of the mortgage: Could he have been held, if the court declined to distribute the proceeds of sale, to the value of the machinery, amongst the unsecured creditors? Manifestly such a burden was not within the letter or spirit of the defendant's engagement, and the bill must be dismissed, with costs.

(90 N. J. Law, 219)

EISELE et al. v. RAPHAEL

✓Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(*Syllabus by the Court.*)

APPEAL AND ERROR 931(1)—STRIKING FRIVOLOUS PLEA—RULE OF COURT—CONCLUSIVENESS OF FINDING.

Rule 80 of the Supreme Court (100 Atl. 223) declares that a frivolous or sham plea may be stricken out, upon proper affidavit in support of a motion for that purpose, unless the defendant by affidavit or other proof shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. Under this rule, the finding of the judge must be taken as true until the contrary appears, and this is so when an appeal is taken from such

an order as permitted by section 15 of the Practice Act of 1912 (P. L. p. 380).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762.]

Gummere, C. J., and Swayze and Parker, JJ., dissenting.

Appeal from Supreme Court.

Action by John Elsele and Nathaniel King, partners trading as Elsele & King, against Elias Raphael. From an order of the Supreme Court striking out the answer and entering judgment, defendant appeals. Affirmed.

Levitan & Levitan, of Jersey City, for appellant. Edgar W. Hunt, of Lambertville, for appellees.

BERGEN, J. This action was brought by the plaintiffs to recover from the defendant a balance due on an account relating to the purchase and sale of the capital stock of certain corporations, bought and sold on what is commonly called a "margin," which it is alleged the defendant refused to take up and pay for, and thereupon plaintiffs sold the stocks on the New York Stock Exchange for less than they cost. The defendant had made a deposit to be applied on account of such purchases pledging the stock to secure the balance of the purchase price advanced by the plaintiffs, and recovery is sought for the difference between the sum of the proceeds of the sale and deposit, and the cost. The answer denied each paragraph of the complaint in such a manner as to amount to a general denial of all the allegations set out in it, and then stated, as separate defenses: (1) That the complaint did not state a cause of action. We think that the complaint does state a cause of action. (2) That defendant had on deposit with the plaintiffs certain shares of stock which they sold without sufficient notice to the defendant. (3) That when the deposit of the defendant was exhausted plaintiffs continued to buy and sell stocks for the defendant's account without demanding an additional margin. This, if true, would be no defense if the defendant gave orders to purchase and they were executed; for it was nothing more than extending him credit. Defendant also filed a counterclaim for the deposit and an alleged conversion of stock which the defendant claims the plaintiffs had purchased for him. The plaintiffs moved to strike out the answer and counterclaim as frivolous and sham, which motion was heard by a justice of the Supreme Court on affidavits read on behalf of plaintiffs and answering affidavit of the defendant. The justice struck out the answer and counterclaim and ordered a judgment for plaintiffs, from which the defendant has appealed.

That an order striking out an answer and the entering of a summary judgment rested in discretion and was not the subject of a writ of error, prior to the Practice Act of

1912, has been long settled in this state and is not open to argument (State Mutual B. & L. Ass'n v. Williams, 78 N. J. Law, 720, 75 Atl. 927); but it is claimed that the Practice Act of 1912 has altered the rule in this state. This is so to the extent of allowing an appeal and a review of such an order.

Section 15 of the new Practice Act provides that:

"Subject to rules, any frivolous or sham defense * * * may be struck out; or if it appear probable that the defense is frivolous or sham, the defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section."

This section, being made expressly "subject to rules," must be read in connection with rules 80 to 84, inclusive [100 Atl. xxiii, xxiv], relating to the entry of summary judgments. Rule 80 provides that:

"The answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

Rule 81 requires that the motion to strike out be made upon affidavit of "the plaintiff or that of any other person cognizant of the facts verifying the cause of action, and stating the amount claimed, and his belief that there is no defense of the action." Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, unless the defendant by affidavit or other proof shall show facts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendant, and his conclusion that they are not sufficient should not be set aside unless the sufficiency clearly appears. In the present case, the affidavits of the plaintiffs show that they were stock-brokers; that defendant deposited with them a margin to cover stock purchases; that he ordered purchases and sales, and they advanced to him the difference between the cost of the stock and the deposit holding the stock in pledge to secure the repayment of such advances; that each purchase and sale was reported to the defendant on a printed statement containing a notice that it was understood and agreed between the defendant and plaintiffs that all stock bought for the defendant, and so held in pledge, could be sold without demand for a further margin, or notice of a sale of the stock whenever such sale was deemed necessary by the plaintiffs for their protection; that defendant refused on demand to take up and pay for the stock purchased for him or to deposit additional money to protect the plaintiffs from loss; that they thereupon sold the stock in the open market at public sale on the New

York Stock Exchange to protect them from further loss; that the stock did not sell for a sum which, with the deposit added, was sufficient to cover the cost; and that, having exhausted the pledge, there still remained a balance due to them. Without further statement of plaintiffs' proofs submitted to the judge, it is sufficient to say that by them it was conclusively shown that defendant was liable to the plaintiffs for the amount claimed.

The facts set up by the defendant's affidavit are these:

(a) That he never read the agreement giving the plaintiffs the right to sell the stock without demand or notice. This, if true, would not be a defense, for the agreement was printed on every statement sent him for each purchase and sale, about 80 in number, and these he accepted and held as evidence of his contract of purchase.

(b) That he did not order plaintiffs to buy certain stocks which are specifically set out, but in the next paragraph of his affidavit he says that these purchases were not made in September, 1915, as he had previously testified, "but by the notices in my possession appear really to have taken place in October." This is an admission that he had notice of the purchase of this stock, and he says in one of his affidavits:

"I did not object when I found out, because I thought the said Pope was doing the right thing by me."

He now claims that these purchases were not made by his order, but, if this be true, it was his duty to object at once and not wait and have them held for him with the expectation of a profit, to be repudiated if he subsequently found that the purchase resulted in a loss. He had an account with the plaintiffs to whom he admits that he gave numerous orders to purchase and sell stocks, and, as soon as he found out that a purchase had been made for him which he had not ordered, it was his duty to promptly disavow it and not speculate on the result, which if favorable he could avail himself of and if unfavorable repudiate. Under the facts set out in his own affidavit, his conduct amounted to a ratification of the purchase.

(c) That he never ordered plaintiffs to purchase two lots of stock which he names, but as the purchase and sale of these two lots resulted in a profit to him he suffered no loss, for his account had been credited with the profit and does not enter into this controversy except to his advantage.

(d) That he was not given notice to make any additional deposit of a margin. This was not required under his contract, and he knew that at any time he could take up the stock purchased for him by paying the balance due.

There is nothing in the defendant's affidavit which entitles him to have this court reverse the finding of the judge that he

deemed the facts shown by the defendant to be insufficient to entitle him to defend.

The record shows that from September 7 to November 1, 1915, a period of less than two months, this defendant dealt in over 2,700 shares of stock at a total cost of \$134,821, and that over 80 purchases and sales were made for him by the plaintiffs from which he reaped a profit in nearly every case, except in the 5 transactions which he now seeks to repudiate, which shows that he was an active and rather a liberal speculator in stocks and in most instances a successful one.

The order of the judge in this case declares that the answer filed is frivolous and a sham, and that the defendant failed to show such facts as he deemed sufficient to entitle him to defend. The finding of the judge must be assumed to be true until the contrary appears, and, as it does not appear in this case, the finding must be taken as correct. Striking out a sham or frivolous plea is not an infringement of the right of trial by jury. A plea of general issue, although it denies the entire claim of the plaintiffs, and apparently raises a question of fact, is not protected for that reason against a motion to strike out as sham or frivolous. *Coykendall v. Robinson*, 39 N. J. Law, 98.

As to the counterclaim based upon the conversion of stock, we do not perceive how there could be a conversion to defendant's injury by the sale of stock to raise the money necessary to pay a loan for the security of which the stock was pledged.

The judgment will be affirmed, with costs.

GUMMERE, C. J., and SWAYZE and PARKER, JJ., dissenting.

(90 N. J. Law, 717)

ROSE v. FITZGERALD. (No. 89.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. APPEAL AND ERROR § 575—TRANSCRIPT—NECESSITY OF LEGAL APPOINTMENT OF STENOGRAPHER.

A stenographic transcript of testimony on appeal has no value, where the record does not show that the stenographer was appointed pursuant to the statute.

2. HUSBAND AND WIFE § 232(1) — ACTION FOR WIFE'S DEBTS—BURDEN OF PROOF—NOTICE.

In an action against a husband for bill incurred by his wife, the burden was on the husband to show that the plaintiff saw a notice on the husband's check that no more credit was to be given to the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 844, 981.]

3. APPEAL AND ERROR § 664(3)—UNOFFICIAL TRANSCRIPT — IMPEACHMENT OF COURT'S STATEMENT.

The silence of an unofficial transcript on appeal as to evidence will not be taken as impeaching a statement of the case settled by the

trial judge which included a stenographic transcript.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2858.]

4. APPEAL AND ERROR § 206(1)—NECESSITY OF OBJECTION TO EVIDENCE.

The ruling that evidence as to what were necessities for which the husband was liable was part of the defense will not be considered on appeal, where it was not objected to at the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1283-1285.]

5. APPEAL AND ERROR § 719(5)—NECESSITY OF SPECIFYING GROUNDS OF ERROR.

Where a ruling relating to evidence was not specified as a ground of error, it will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2974, 3490.]

6. APPEAL AND ERROR § 724(2)—SUFFICIENCY OF GENERAL OBJECTION.

The general objection that the defendant did not have a fair trial presents no question on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2997, 2998, 3022.]

Appeal from Supreme Court.

Action by Harry Rose against Benjamin G. Fitzgerald. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion below:

This was a suit against a husband to collect the amount of a bill for tailoring done for the wife. There was a judgment for the plaintiff below. The defense was mainly based upon the claim that the plaintiff had been notified by the husband not to give any credit to the wife and also that the articles furnished were not necessities. After the suit was begun, the wife paid a part of the bill, leaving a balance of \$45, which was the basis of the judgment.

[1] Appellant has put in what appears to be a stenographic transcript of the testimony taken in the court below, but there is nothing in the record to show that a stenographer was appointed pursuant to the statute, and, unless there was an appointment, the transcript has no value. On the other hand, there is a statement of the case settled by the trial judge, which naturally excludes a stenographic transcript. The alleged errors called to our attention are the following:

[2,3] First. That the court found against uncontradicted evidence that the plaintiff did not see a written notice upon the defendant's check that no more credit was to be given to the wife. The burden was on the defendant to show that the plaintiff did see this notice, and the judge certifies that the plaintiff testified that if the clause was there he did not see it, while the transcript is silent on this point. We think we should not take the silence of the unofficial transcript as impeaching the statement of the court to the contrary.

[4,5] The same may be said as to the court's finding that the defendant did not supply his wife with necessities. The ruling that evidence as to what were necessities was part of the defense is complained of in the brief, but was not objected to at the trial and was not specified as a ground of error.

[6] Third and fourth. It is objected generally that the defendant did not have a fair trial. A general objection of this character, of course, counts for nothing.

We find no error of the trial court properly assigned that should lead to a reversal, and the judgment will therefore be affirmed.

J. J. Crandall and James A. Lightfoot, both of Atlantic City, for appellant. Morris Bloom, of Atlantic City, for appellee.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(90 N. J. Law, 529.)

ARMBRECHT v. DELAWARE, L. & W. R. CO. (No. 111.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT \S 284(1), 286(1), 288(1) —FEDERAL LIABILITY ACT—QUESTION FOR JURY—EMPLOYMENT IN INTERSTATE COMMERCE—NEGLIGENCE—ASSUMPTION OF RISK.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, \S 8657-8685]), it was open to the jury to infer from the evidence that the plaintiff's intestate was engaged in removing snow from the tracks, both interstate and intrastate, of a railway; that the work had been only temporarily suspended; that the men were told by the boss to go in a covered car, as it was raining and freezing at the time; that to do so they walked along the tracks because they could not go otherwise, and decedent was struck and killed by a fast passenger train considerably behind time; that there was a failure to warn him that the passenger train was behind time and might be expected. *Held*, that it was for the jury to say whether the decedent was engaged in interstate commerce, whether there was negligence on the part of the railway company, and whether the decedent had assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1000, 1001, 1008, 1038, 1069, 1087, 1088.]

Appeal from Circuit Court, Hudson County.

Action by Augusta Armbrecht, administratrix, against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Maximilian M. Stallman, of Newark (Frederic B. Scott, of New York City, on the brief), for appellant. Alexander Simpson, of Jersey City, for appellee.

SWAYZE, J. This is an action under the federal Employers' Liability Act. There was evidence from which the jury might infer that the deceased was engaged in removing snow from the tracks both intrastate and interstate at the Port Morris yard; that after working for some time it became necessary to back the work train east some four miles to Chester Junction, for the purpose of getting back to the Port Morris yard on the west-bound tracks; that more snow was to be removed; that the train was held some minutes at Chester Junction; that the men were told by the "boss" to go in the covered car as it was raining and freezing at the time; that to do so, they walked along the tracks because they could not go otherwise; that a fast passenger train came along con-

siderably behind time, struck the men on the track, and killed plaintiff's intestate; that there was no warning that it was behind time and might be expected.

The trial judge left it to the jury to say whether the deceased was engaged in interstate commerce and whether there was negligence on the part of the defendant. We think the evidence required him to take this course. The fact that there was a temporary cessation in the work of removing snow, and a temporary rest from work, did not require a finding that the decedent at the moment of the accident was not engaged in interstate commerce; nor do we think that the fact that he was about to take refuge from the storm in the covered car makes any difference. That was a mere incident of the employment, which did not thereby change its general character. The work was the removal of snow from railway tracks, interstate as well as intrastate; it had merely suffered a temporary interruption due to the necessities of traffic on a busy railway and in some degree to the inclemency of the weather. It is enough to refer to *N. Y. Central R. R. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, and to *Shanks v. Delaware, Lackawanna & Western R. R.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, as showing the line of cleavage between the cases. Other cases are cited in the opinion in the *Shanks* Case. What we have said is enough to distinguish the present case from *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, and to bring it within the principle of *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119. Other recent cases on one side or the other of the line are *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; *Illinois Central R. R. Co. v. Peery*, 242 U. S. 292, 37 Sup. Ct. 122, 61 L. Ed. 809.

The question of negligence is more difficult. The failure of the engineer of the passenger train to blow a whistle until too late for any good does not indicate negligence, since he could not be supposed to anticipate that men would be walking on the track at that point. But we think the failure to warn the men that the passenger train was behind time and might be expected is sufficient to sustain the verdict, since the jury might have believed the evidence that the boss told the men to go to the covered car, and that there was no way to go except along the track. This disposes also of the question of the assumption of risk. No doubt a railroad employé or any one else assumes the risk of walking on the track, but it does not follow that he assumes the risk of being struck by a train which he may well think had gone by. The request to charge did not embody all the pertinent facts. We find it difficult to understand what the judge had in mind when he told the jury that they might take into consideration the

speed of the passenger train in considering the other charges of negligence, but as he had just charged that the speed of the train did not present a question of negligence, because the company had the right to exercise its judgment in that respect, we think no harm could have been done the defendant by that portion of the charge which is made a ground of appeal.

The judgment is affirmed, with costs.

(90 N. J. Law, 655)

PEOPLE'S NAT. BANK OF TARANTUM, PA., v. CRAMER.

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

BANKS AND BANKING ¶116(2) — NOTICE TO CASHIER AS NOTICE TO BANK.

Although cashier of bank discounting notes knew that payee indorser was in danger of going into receivership, he being an officer in that company, this did not prevent bank from becoming a holder in due course, where cashier did not know of the outstanding contract with the payee for which the note was given, and which the payee failed to perform in part, and it was immaterial that the payee went into the hands of a receiver two days following the discounting of the note, or that the cashier advised calling the meeting for that purpose.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 283.]

Appeal from Supreme Court.

Suit by the People's National Bank of Tarantum, Pa., against William E. Cramer. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph Beck Tyler, of Camden, for appellant. Grey & Archer, of Camden, for appellee.

WHITE, J. This is a suit upon a promissory note given by the defendant appellant, Cramer, as drawer, to the Fidelity Glass Company, as payee, in payment for a carload of glass bottles purchased and delivered, which note was discounted prior to maturity with the plaintiff respondent bank (the proceeds being duly placed to payee's credit) and upon maturity was not paid. The defense is that the carload of glass bottles in question was part of five carloads contracted to be delivered by the payee to Cramer at a fixed price; that the payee went into the hands of a receiver, and the remaining four carloads of the contract were never delivered, so that Cramer was compelled to buy elsewhere at a loss of more than the amount of the note; that the bank is chargeable with this defense because its cashier, Crawford, was given general authority by the directors to discount notes, and did in fact discount this note; that at the time he did so, which was two days before the receiver was applied for, he was also the treasurer and a member of the board of directors of the payee, Fidelity Glass Company, and as such knew that

that company had been losing money; that it was going from bad to worse; that the manager told him that it could not fill its existing contracts by reason of the advance in cost of materials, etc.; and that on the same day he was told this, which was the day he discounted the note, he advised the manager to call a meeting of the board of directors of the Fidelity Glass Company, at which meeting it was decided to apply for a receiver. Whether the payee was in fact insolvent is uncertain. Under the receivership it paid its creditors 92 cents on the dollar. The learned trial judge directed a verdict for the plaintiff for the full amount of the note, with interest on the ground that the cashier Crawford's knowledge of these facts was not imputable to the bank because he acquired it not while acting for the bank, and because in the transaction in which he was acting for the bank his interests as an officer of the payee, the Fidelity Glass Company, were opposed to those of the bank.

Upon this view we express no opinion because we do not find it necessary to do so, for the reason that, assuming that all the knowledge which the cashier was proved to possess was properly imputable to the bank itself, the latter still became a holder for value in due course without notice of the defense here set up, because it is not shown that the cashier, either as such or as treasurer and director of the Fidelity Glass Company, knew of the outstanding contract with the drawer, Cramer, for the other four carloads. The evidence shows that the running of the business of the Fidelity Glass Company was in the hands of a manager, and in fact the cashier testifies that he had no such knowledge, and he is not contradicted. Without such knowledge it is obvious that it made no difference whatsoever to the bank's standing as a holder for value in due course that it knew the payee indorser of this note, given for goods sold and delivered, was losing money, was in a bad way, and in danger of having to go into the hands of a receiver. If it were otherwise, much of the bank's usefulness in enabling people in financial difficulties to avoid disaster would be destroyed.

The judgment is affirmed.

(87 N. J. Eq. 287)

TIPTON et al. v. RANDALL et al. (No. 43/1.)

(Court of Chancery of New Jersey. April 27, 1917.)

(Syllabus by the Court.)

1. EQUITY ¶264—MOTION TO STRIKE OUT BILL.

A motion to strike out a bill is one substituted for, and takes the place of, a demurrer in the former practice, and is practically a demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 536-540.]

2. PLEADING ¶406(3)—DEMURRER.

The general rule is that a party will not be permitted to demur after he has pleaded to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1358.]

8. EQUITY ¶181—DECREE PRO CONFESSO—MOTION TO STRIKE.

Under the terms of an order striking out an answer the defendants were granted leave to file an amended answer within a given time, not to demur. Within the time so limited the defendants gave notice of a motion to strike out the bill on various grounds; and, the time for filing the amended answer having expired, the complainants entered a decree pro confesso which defendants now move to strike out as improvidently entered, claiming that rule 75 of this court (100 Atl. —) suspended the running of the time to file an amended answer. *Held*, that as the motion to strike out the bill was made after the defendants had submitted to answer, which answer was struck out with leave to file an amended answer, not to demur, the motion to strike out in lieu of demurrer is ineficacious, and that the rule did not suspend the time for filing an amended answer, and that, consequently, the decree pro confesso was properly entered and the motion to strike it out, for the reason relied on, must be denied.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 417.]

Bill by Arthur C. Tipton and others against John Randall and others. Motion to strike out decree pro confesso denied without prejudice.

William A. Lord, of Orange, for the motion. Stirling D. Ward, of Newark, opposed.

WALKER, Ch. The files in this case show that the defendants answered the complainants' bill, and that by an order made on March 23, 1917, the answer was struck out and defendants given 10 days within which to file an amended answer. Before the expiration of that time defendants' solicitor served a notice on complainants' solicitors of a motion to strike out the bill of complaint on various grounds, and claims that rule 75 of this court suspends the running of the time to file an amended answer. It does in terms, but the question is as to whether or not the rule applies at all in this case, under the given circumstances. And that depends upon whether the defendants had a right to move to strike out the bill after having submitted to answer. The time for answering under the order of March 23d expired on April 2d, and, for want of an amended answer being filed, the complainants' solicitors entered a decree pro confesso on April 4th. Motion is now made to strike out the decree pro confesso as improvidently entered, as a necessary step precedent to arguing the motion to strike out the bill.

[1] A motion to strike out a bill is one substituted for, and takes the place of, a demurrer in the former practice. It is practically a demurrer. This has been repeatedly decided.

[2] The general rule is that a party will not be permitted to demur after he has pleaded to the merits. 31 Cyc. 275. And demurrers come too late after the time limited for filing them has expired. *Id.* p. 274. Under the terms of the order to strike out the answer, the defendants were given leave to file an amended answer, not to demur. In England a defendant demurring along to any bill might do so within 12 days after his appearance, and not afterwards. *Dan. Ch. Pl. & Pr.* (6th Am. Ed.) *591. And a demurrer would not be received after the 12 days without a special order enlarging the time, and giving leave to file it, and if by inadvertence it was received, it would, on application of the plaintiff, be taken off the files. *Id.* *592.

[3] The question before me I regard as settled in this state by the decision of the Court of Errors and Appeals in *Hand v. Hand*, 60 N. J. Eq. 518, 46 Atl. 770, in which it was held that a defendant who had failed to file his pleadings within time and a decree pro confesso had been entered against him could not, under permission to answer, file a demurrer to the bill. The facts in that case and the one at bar are not the same, but the principle is. There a decree pro confesso had been entered before any defensive pleading was filed, and the defendants applied for and obtained an order opening the decree to allow them to file an answer in the cause. Under this permission the defendants filed an answer setting up *inter alia* that the bill was multifarious, and prayed the benefit of such defense by way of demurrer, and the court held (60 N. J. Eq. 521, 46 Atl. 770) that as the permission granted extended only to answering the bill, they were limited to the defense mentioned, and could put in no further or other defense without leave of the court.

From the foregoing it follows that the motion to dismiss the bill in this case, made after the time for answering had expired and when an answer already put in had been overruled, with permission only to file an amended answer, came too late, and the complainants had a right to disregard it and enter their decree pro confesso after the expiration of the time limited for filing an amended answer. The motion to strike out the decree pro confesso, on the ground that it was improvidently entered, must therefore be denied, with costs. But this will be without prejudice to an application to open the decree pro confesso for the purpose of filing an amended answer, if notice of such application be given within 5 days.

A defendant coming in without unnecessary delay after a decree pro confesso regularly taken will, upon reasonable ground, be permitted to answer upon payment of costs. *Dick. Ch. Prec. (Rev. Ed.)* p. 34, note (a). See, also, *Emery v. Downing*, 13 N. J. Eq. 61; *Williamson v. Sykes*, 13 N. J. Eq. 182.

(90 N. J. Law, 533)

STATE v. MONETTI. (No. 65.)(Court of Errors and Appeals of New Jersey.
June 18, 1917.)*(Syllabus by the Court.)***PERJURY §32(4) — PERSON ADMINISTERING OATH—PAROL EVIDENCE.**

Parol evidence that a certain person was foreman of the grand jury and administered the oath to defendant as such foreman at a session of the grand jury is competent, on the trial of an indictment for perjury before the grand jury, as evidence that he was in fact such foreman.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 111.]

Error to Supreme Court.

Mollie Monetti was convicted of perjury, and, from a judgment of the Supreme Court affirming the conviction, she brings error. Judgment affirmed.

Anthony R. Finelli, of Newark, for plaintiff in error. J. Henry Harrison, of Newark, for the State.

PER CURIAM. Plaintiff in error was convicted of perjury in falsely swearing before the grand jury of Essex county. At the trial it was objected that there was no proof of the administration of the oath to her by any one competent to administer it. The clerk of the grand jury was then called, and testified that the oath was administered (giving its language) by one T. F. who was then foreman of the grand jury.

This was sufficient. The question whether perjury can be assigned upon an oath taken before a de facto officer need not be considered. See *Izer v. State*, 77 Md. 110, 28 Atl. 282. In this state there is a line of cases holding that parol evidence that one is a public officer, or that he was acting as such, is prima facie evidence of his tenure of the office without resort to his written authority so to act. *Denn ex dem. Lee v. Evaul*, 1 N. J. Law, 286; *Denn v. Pond*, 1 N. J. Law, 379; *Stout v. Hopping*, 6 N. J. Law, 125; *Gratz v. Wilson*, 6 N. J. Law, 419 (Justice of United States Supreme Court); *Brewster v. Vail*, 20 N. J. Law, 56, 38 Am. Dec. 547 (sheriff); *Conover v. Solomon*, 20 N. J. Law, 295 (justice of the peace); *Reeves v. Ferguson*, 31 N. J. Law, 107 (overseer of the poor); *Vandegrift v. Melhle*, 66 N. J. Law, 96, 49 Atl. 16 (official chemist); *State v. Reilly*, 88 N. J. Law, 108, 95 Atl. 1005 (justice of the peace). We see no reason for excepting a foreman of the grand jury from the operation of this rule. There was no attempt to rebut the evidence, but the court was asked to direct an acquittal. This was rightly denied.

The other point argued in the brief (there was no oral argument) relates to a portion of the charge not challenged by any assignment of error or cause for reversal under

the statute, and therefore requires no consideration.

The judgment of the Supreme Court affirming the conviction is affirmed.

(116 Me. 255)

STAIRS v. BANGOR POWER CO.

(Supreme Judicial Court of Maine. June 25, 1917.)

ENTRY, WRIT OF §23—TITLE OF PLAINTIFF—DEED OF RELEASE.

On writ of entry seeking recovery of lands, that plaintiff had deed of release to two strips of land from one of two heirs at law of source of title, and the strips so conveyed were expressly excepted in a deed made by source of title, sufficiently shows title in plaintiff to such strips to entitle him to a judgment against the defendant for the fractional portion of both strips upon which defendant's dam encroaches.

[Ed. Note.—For other cases, see Entry, Writ of, Cent. Dig. §§ 48-49.]

Report from Supreme Judicial Court, Penobscot County, at Law.

Writ of entry by James H. Stairs against the Bangor Power Company. On report from the Supreme Judicial Court, Penobscot County. Judgment for plaintiff.

Argued before SAVAGE, C. J., and CORNISH, KING, BIRD, HALEY, and PHILBROOK, JJ.

Morse & Cook, of Bangor, for plaintiff. Ryder & Simpson, of Bangor, and Charles J. Dunn, of Orono, for defendant.

BIRD, J. The plaintiff by this writ of entry seeks the recovery of land described as follows: Commencing at the thread of the northerly branch of Pushaw stream, so called, at a point where the thread of said stream intersects the thread of the Stillwater branch of the Penobscot river; thence northwesterly up the thread of said Pushaw stream about 20 rods to a point where the southerly line of land formerly owned by Frank Lancaster intersects the thread of said stream; thence westerly on the southerly line of said Frank Lancaster's land to the Bennoch road, so called; thence southerly along said Bennoch road to Gilman Falls avenue; thence easterly along said Gilman Falls avenue to the thread of the Stillwater branch of the Penobscot river; thence northeasterly along the thread of said Stillwater branch of the Penobscot river to the point of beginning.

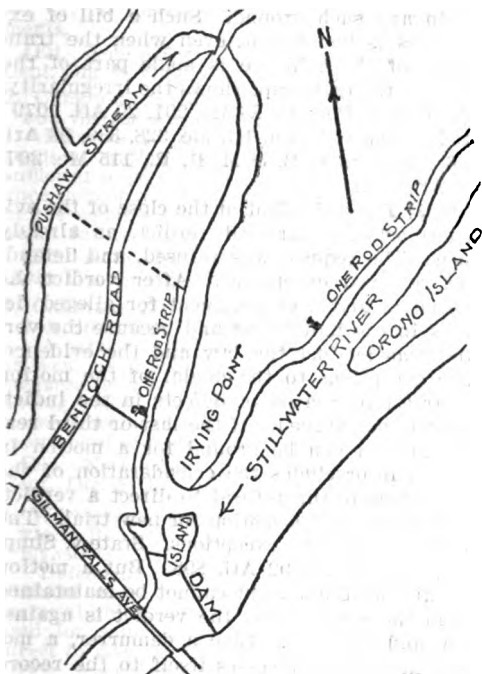
The defendant pleaded the general issue and, by way of brief statement:

"That it claims and was in possession of only a part of the premises described in plaintiff's writ when said action was commenced, viz. a strip of land one rod in width on the west side of Pushaw stream and the Stillwater branch of the Penobscot river extending along the southerly line of land formerly owned by Frank Lancaster as alleged in plaintiff's writ to Gilman Falls avenue, so called. Said defendant further says that it was not on the day of the date of plaintiff's writ and never since has been, and is not now, tenant of the freehold in, or in possession of so much of the premises described in

plaintiff's writ as lies west of a strip of land one rod in width on the west side of Pushaw stream and Stillwater branch of the Penobscot river extending from the southerly line of land formerly owned by Frank Lancaster as alleged in plaintiff's writ to Gilman Falls avenue, so called."

The case is reported to the Law Court upon so much of the evidence as is legally admissible; "that court to determine all the rights of the parties and order final judgment."

The following sketch illustrates the location:



It is admitted:

"That on the 1st day of January, 1845, Daniel White, deceased, was the owner in fee simple of 65 undivided 100ths part of the land described in the plaintiff's writ, and John Bennoch, deceased, was the owner in fee simple of 35 undivided 100ths part of said land. The above admission is not to preclude either party from introducing deeds for the purpose of construction only."

The principles of law involved are, if not elementary, amply established by authority. The questions to be determined are questions of fact. They are stated by defendant to be:

"(1) What is the main branch of Pushaw stream? (2) The plaintiff has shown title to the land described in his declaration in two ways; by title deeds, and again by adverse possession."

To discuss extensively the evidence upon either of these two points would be profitless.

The court concludes, upon the evidence afforded by the plan of 1805, the construction of the deeds offered and admitted and the oral evidence including that of the engineers that the main Pushaw stream extended to the south end of the island, which lies south of Irving Point, and that the mouth of Pushaw river referred to in the deeds is the mouth between the south end of the island and a point on the west bank of the river northeasterly of Pushaw road, or Gilman Falls avenue, as otherwise called, and not the mouth north of the island, as claimed by plaintiff, which the court concludes was artificially formed.

The plaintiff claims title by sundry mesne conveyances from Daniel White and John Bennoch through Alexander Gray and his grantee, Richard Lancaster. We do not find the plaintiff's contention supported by the deeds. He also claims title by adverse possession, but the acts relied upon to show open, notorious, exclusive, and uninterrupted continuous possession for the requisite period are not, in the opinion of the court, sufficient to give title by adverse possession. *Roberts v. Richards*, 84 Me. 1, 24 Atl. 425. Plaintiff shows no title to the island or the strips of land along the Stillwater river or Pushaw stream, either by deeds above considered or by adverse possession. *Derby v. Jones*, 27 Me. 357, 362.

The plaintiff, however, offers the deed of release of William H. White, one of the two heirs at law of Daniel White, deceased, "of a strip of land one rod in width upon Stillwater stream and a strip of land one rod in width on Pushaw stream from the mouth of the same," to a point several rods northerly of the island. The strips so conveyed were expressly excepted in the deed of Daniel White and John Bennoch to Alexander Gray. The plaintiff therefore shows title to $.32\frac{1}{2}$ in common and undivided of the strips, one rod in width, on both Pushaw stream and Stillwater river, but no title to the "Island." The defendant's dam encroaches upon both these strips, and plaintiff is entitled to judgment against it for such fractional proportion of both strips.

Judgment for plaintiff for $.32\frac{1}{2}$ in common and undivided of a strip of land one rod in width upon the westerly side of Pushaw stream from the south line of land of Frank Lancaster to a point on the westerly side of Pushaw stream, southwest of the south point of the "island," and $.32\frac{1}{2}$ in common and undivided of a strip of land one rod in width on the westerly side of Stillwater river from the northerly point of the "Island" to Gilman Falls avenue.

So ordered.

(116 Me. 260)

STATE v. DAVIS.

(Supreme Judicial Court of Maine, June 29, 1917.)

1. CRIMINAL LAW \S 1091(7) — APPEAL — BILL OF EXCEPTIONS—SUFFICIENCY.

Where a bill of exceptions in a criminal appeal was silent as to the allegation that the jury were allowed to separate, such ground of exception will not be considered, although the transcript of the evidence which is made a part of the bill shows the irregularity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2815, 2831.]

2. CRIMINAL LAW \S 901—APPEAL—WAIVER OF EXCEPTION—MOTION FOR NEW TRIAL.

A motion for new trial in a criminal prosecution waives exceptions to refusal to direct a verdict of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124.]

3. CRIMINAL LAW \S 968(8)—MOTION IN ARREST OF JUDGMENT—VERDICT AGAINST LAW AND EVIDENCE.

A motion in arrest of judgment in a criminal prosecution cannot be maintained upon the ground that the verdict is against law and evidence, and, like a demurrer, such motion addresses itself to the record alone, which does not include the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2437.]

4. CRIMINAL LAW \S 753(2)—DIRECTING VERDICT OF NOT GUILTY.

Where the evidence in a criminal prosecution is so defective or weak that a verdict of guilty based upon it cannot be sustained, a verdict of not guilty should be directed, and a refusal to do so constitutes a valid ground of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1729.]

Exceptions from Superior Court, Cumberland County.

W. C. Davis was convicted of crime, and brings exceptions. Exceptions sustained.

Argued before CORNISH, KING, BIRD, HALEY, HANSON, PHILBROOK, and MADIGAN, JJ.

Jacob H. Berman, Co. Atty., of Portland, for the State. Henry C. Sullivan, of Portland, for respondent.

BIRD, J. The indictment in this case charges the defendant with violation of R. S. 1903, c. 119, § 16, punishable by imprisonment for any term of years. At the close of the evidence at the trial a motion was made for the direction of a verdict for defendant, which was refused. After verdict of guilty, the defendant moved in arrest of judgment, because:

(1) "The indictment does not allege or set forth any substantive crime;" (2) "because the indictment does not set forth or allege any facts sufficient to constitute the substantive crime," etc.; (3) "because the verdict is against the law and the evidence."

This motion was also overruled.

The bill of exceptions, upon which alone the case is before this court, sets out the two motions, their refusal and the reserving of exceptions thereto. It concludes:

"The report of the evidence given at said trial, which is filed herewith, is hereby expressly re-

ferred to and made part of this bill of exceptions.

"To all which rulings and instructions and refusals to instruct the said respondent excepts, and prays that his exceptions may be allowed."

[1] The defendant urges that during the trial the jury were allowed to separate (but to this order of the court no objection appears to have been made nor exception noted), and that his exceptions should be allowed upon this ground. This alleged irregularity in the course of the trial, assuming it can be reached by exceptions, cannot be considered. The bill of exceptions is entirely silent as to any such ground. Such a bill of exceptions is insufficient, even when the transcript of the evidence is made part of the bill and the transcript shows the irregularity. *McKown v. Powers*, 86 Me. 201, 29 Atl. 1079; *Richardson v. Wood*, 113 Me. 328, 330, 93 Atl. 836; *Borders v. B. & M. R. R.*, 115 Me. 207, 98 Atl. 662.

[2, 3] The defendant at the close of the evidence asked a directed verdict, as already seen. The request was refused, and defendant reserved exceptions. After verdict, he moved in arrest of judgment for alleged defects in the indictment and because the verdict was against the law and the evidence. The exceptions to the denial of the motion in arrest by reason of defects in the indictment is not argued. If the last or third reason alleged can be ground for a motion in arrest, it precludes the consideration of the exceptions to the refusal to direct a verdict, as it is in effect a motion for new trial. The motion waives the exceptions. *State v. Simpson*, 113 Me. 27, 92 Atl. 898. But a motion for arrest of judgment cannot be maintained upon the ground that the verdict is against law and evidence. Like a demurrer, a motion in arrest addresses itself to the record alone, and evidence is no part of the record. We conclude, therefore, that the motion in arrest in this case is not for these reasons to be treated as a motion for new trial, and thus bring the case within the rule of *State v. Simpson*, supra.

[4] Upon a careful reading of the evidence, the unpleasant details of which it is undesirable and unnecessary to rehearse, it is the opinion of the court that the exceptions to the refusal to order a verdict, as moved by defendant, be sustained. The evidence is not such as warranted a verdict of guilty. When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty. A refusal to so instruct is a valid ground of exception. *State v. Cady*, 82 Me. 426, 428, 19 Atl. 908; *State v. Simpson*, 113 Me. 27, 28, 92 Atl. 898; *Mickle v. United States*, 157 Fed. 229, 84 C. C. A. 672. See, also, *Whar. Cr. Pl. & Pr.* (8th Ed.) § 812.

The exceptions are sustained.

(91 Vt. 521)

DIONNE v. AMERICAN EXPRESS CO.

(Supreme Court of Vermont. Caledonia. July 2, 1917.)

1. CARRIERS ⇐177(3)—LOSS OF GOODS—LIABILITY—INTERSTATE SHIPMENT—RECEIPT OR BILL OF LADING.

A carrier accepting goods for interstate shipment is liable for their loss, though in violation of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584, no receipt or bill of lading was issued, and though Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1916, § 8574), of which the Hepburn Act is amendatory, by section 10, imposes penalty on the carrier for noncompliance with its requirements.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779-789.]

2. CARRIERS ⇐134 — ACCEPTANCE OF GOODS FOR SHIPMENT—QUESTION FOR JURY.

Relative to carrier's liability for loss of goods at station before shipment, evidence held sufficient to go to jury as to delivery and acceptance thereof for shipment as soon as practicable in the usual course of business, rather than to await future orders.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592, 607.]

3. CARRIERS ⇐113 — ACCEPTANCE OF GOODS FOR SHIPMENT—LIABILITY FOR LOSS.

A carrier having accepted goods for shipment as soon as practicable in the usual course of business, and not to await further orders, and having placed them in the station for its own convenience, its liability as carrier for their loss commenced at once.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 101, 608-620.]

4. WITNESSES ⇐287(3)—REDIRECT EXAMINATION—REASON FOR ACT SHOWN ON CROSS-EXAMINATION.

Defendant having on cross-examination of plaintiff shown plaintiff's omission to do an immaterial thing, ask for receipt for goods delivered for shipment, permitting plaintiff on redirect to give the reason therefor was not error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1001.]

5. WITNESSES ⇐372(1) — SHOWING INTEREST AND FEELING—DISCRETION OF COURT.

Permitting plaintiff, for the purpose of showing the interest and feeling of defendant's witness E., to pursue a line of cross-examination of E. tending to show he went to the station to meet the train on which plaintiff's witnesses came, and said to R., one of them, that he thought perhaps he would not know where to go, and that he would come down and tell him, and that he took him to the office of defendant's counsel, and in this connection to show by R. that when E. met him he spoke of wanting to find plaintiff's counsel, and E. took him to the office of defendant's counsel, was within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192, 1197, 1199.]

6. EVIDENCE ⇐111—ACCEPTANCE OF GOODS FOR SHIPMENT—CUSTOM OF AGENT.

On the issue whether or not defendant's agent accepted goods for transportation, though he did not issue a receipt, exclusion of evidence under defendant's offer to show by him that he never accepted matter for transportation without issuing a receipt was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 247-253.]

7. CARRIERS ⇐41 — ACCEPTANCE OF GOODS FOR SHIPMENT—INSTRUCTIONS TO AGENT.

There can be an acceptance by a carrier's agent of goods for shipment binding on it, as regards liability for their loss, though no receipt is issued therefor, notwithstanding book of instructions issued by carrier to employes requiring a receipt to be given for goods when received.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 102-106.]

8. WITNESSES ⇐414(1) — CORROBORATION — RULES OF EMPLOYER.

Book of instructions issued by carrier to employes not only requiring a receipt to be given for goods received for shipment, but forbidding acceptance of goods to be held for further instructions, have no tendency to increase probability of truth of testimony of carrier's agent that goods which were received, and for which no receipt was given, were received to await further instructions, and not for immediate shipment, as claimed by shipper, and so are inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1287.]

9. CARRIERS ⇐137 — LOSS OF GOODS — INSTRUCTIONS.

Instructing in action for loss of goods burned, in which the issue was whether defendant accepted them for immediate shipment or received them to await further orders, and in which there was no evidence or suggestion that the fire was due to defendant's want of care, after stating that its liability as carrier was that of an insurer, that if they were held that something further might be done, defendant's liability would be that of a warehouseman, which is not liable for anything more than the exercise of ordinary care, without stating further that a warehouseman is not liable for loss by a fire occurring without its fault, did not harm defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 594, 595.]

Exceptions from Caledonia County Court; Zed S. Stanton, Judge.

Action on the case by Theresa M. Dionne against the American Express Company, with plea of general issue. Verdict for plaintiff, and defendant brings exceptions. Affirmed.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Porter, Witters & Harvey, of St. Johnsbury, for plaintiff. Simonds, Searles & Graves, of St. Johnsbury, for defendant.

MUNSON, C. J. The plaintiff seeks to recover the value of a box of merchandise which was destroyed by the fire which burned the railroad station at Sheldon Junction in the night of the 7th of September, 1914. The box was left on the station platform in the afternoon of that day, for shipment to Plattsburg, N. Y., shortly before the arrival of the 3:18 train for St. Albans. Another train carrying express left for St. Albans at 8:25 p. m. The evidence was conflicting as to what passed between the plaintiff and defendant's agent regarding the shipment. No receipt or bill of lading or other memorandum of contract was issued by the agent. The defendant moved unsuccessfully for the direc-

tion of a verdict on several grounds, of which the only one argued is the want of a receipt or bill of lading.

[1] The Hepburn Act, so called, enacted June 29, 1906, in amendment of the Interstate Commerce Act of February 4, 1887, provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it. * * *"

Section 10 of the act of 1887 provides for the punishment by fine of any common carrier, and in the case of a corporation, of any officer, agent or person acting for such corporation, who shall willfully do or permit anything in this act prohibited or declared to be unlawful, or "shall willfully omit or fail to do any act, matter, or thing in this act required to be done. * * *". The defendant claims that these provisions require that any acceptance of goods for transportation without the issuance of a receipt or bill of lading be treated as the act of the carrier's servant, and not as the act of the carrier, and cites in support of this view the statement in section 11 of Story on Agency that:

"Although a person may do an unlawful act, it is clear that he cannot delegate authority to another person to do it."

The enactment which includes this provision is a regulation of the interstate business of common carriers, and penalties are imposed on the carrier to secure its compliance with the law. The general purpose of the statute is the protection of the public. No duty is imposed on the shipper in connection with the shipment of his goods. The acceptance of the goods for transportation without issuing a receipt or bill of lading therefor is illegal only as to one of the parties. The transportation of goods upon tendering to the carrier its proper charges is, as regards its own line, a service which the shipper is entitled to as of right, and not a matter depending upon negotiation and agreement. In assuming the extended liability for shipments over connecting lines under the provisions of this statute, the nature of the carrier's relation to the public remains the same. The rules which determine the legality of ordinary contract undertakings are not applicable.

The effect of this statute was considered in *Morrison Grain Co. v. Mo. Pac. R. R. Co.*, 182 Mo. App. 339, 170 S. W. 404, and there it was said:

"If the carrier chose to accept and begin the transportation of goods without issuing a bill of lading, it would be violating the act referred to, but the relation of shipper and carrier would exist none the less."

In *International Watch Co. v. Delaware, etc., R. Co.*, 80 N. J. Law, 553, 78 Atl. 49, it was claimed that this provision did not impose a liability upon the initial carrier unless

such carrier should issue a receipt or bill of lading for the property received, and the court characterized the claim in this language:

"This contention in substance is that, although the defendant upon receipt of these goods for shipment failed in its duty to issue a receipt or bill of lading therefor, it, by reason of such failure, escaped the liability which would have rested upon it had it performed its statutory duty."

We think it cannot be said that there can be no acceptance for shipment by the agent binding upon the company unless a receipt or bill of lading is given. So it will be necessary to examine the evidence bearing upon this point.

A truckman testified that he took a box for the plaintiff from the fair ground to the station, and left it on the station platform. The plaintiff testified that the box containing the goods sued for was about ten feet long and eight feet wide; that she put tags on an end and side containing the direction "Plattsburg, N. Y., sent by American Express"; that the box was on a truck at the station when she got there shortly before 3 o'clock; that the express agent was standing near it, and she spoke to him about it, and he said he would attend to it; that he told her he did not have time to get it off on that train, and she asked him if he would change the address if she should phone him to do it when she got to St. Albans, and he said he would; that she did not so phone; that the agent did not ask her to pay charges, and she did not ask for a receipt. The express agent testified that the plaintiff came to the station that afternoon and told him she would have a shipment going either to Plattsburg or St. Johnsbury, and that she would give him instructions the following day, by telephone or letter, which place she would ship to, and said nothing else; that he told her he could not do anything for her at that time; that he did not see her box, and she did not tell him where it was; that she did not ask whether the box could go on that train; that he did not weigh the box, nor make out a waybill for it, and did not accept any box for shipment; that after the fire you could see from some of the stuff where the box had been; that he and his helpers took into the station the boxes that were burned there.

[2, 3] This evidence tended to show the delivery and acceptance of the plaintiff's goods, to be shipped as soon as practicable in the usual course of business. For anything that appears they might have been shipped by the evening train, instead of being left in the station where they were destroyed. If placed in the station solely for the defendant's convenience, and not to await further orders, as the plaintiff's testimony tended to show, the defendant's liability as a carrier commenced at once, and the loss falls on the defendant.

So there was a case for the jury, and the motion for a verdict was properly overruled.

[4] Defendant's counsel drew from the plaintiff on cross-examination the fact that she did not ask for a receipt. Her counsel was permitted to ask her in redirect examination why she did not, and she said it was because he was busy and she knew that he could not weigh the box and give the receipt. This was not error. Moreover, the answer was harmless; for both the fact and the explanation were immaterial.

[5] During the cross-examination of the express agent, and for the purpose of showing the interest and feeling of the witness, plaintiff's counsel was permitted to pursue a line of inquiry which tended to show that the witness went to the station to meet the train on which the plaintiff's witnesses came in, and said to Rice, the truckman, that he thought perhaps he would not know where to go, and that he would come down and tell him, and thereupon took him to the office of defendant's counsel. In connection with this, plaintiff's counsel was permitted to show by Rice that when the express agent met him witness spoke of wanting to find plaintiff's counsel, and that the agent took him to the office of defendant's counsel. This was a matter entirely within the discretion of the trial court.

[6] The defendant offered to show by the agent "that he never accepted express matter for transportation without issuing a receipt for the same to the shipper or the agent of the shipper," and the evidence was excluded. The judges are agreed in saying that the exclusion was proper on the case presented. It is considered by a majority that this was no more than an offer to show the station agent's custom or business habit, and that under our cases this was inadmissible. *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557; *Alken v. Kennison*, 58 Vt. 665, 5 Atl. 757; *Clark v. Smith*, 72 Vt. 138, 47 Atl. 391; *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323. See, further, *Lucia v. Meech*, 68 Vt. 175, 179, 34 Atl. 695; *Ware v. Childs*, 82 Vt. 359, 73 Atl. 994; *Russ v. Good*, 90 Vt. 236, 97 Atl. 987.

[7, 8] The defendant offered certain instructions contained in a book of rules and instructions issued by the defendant for the guidance and use of its employes only, which instructions forbade the acceptance of any shipment offered for transportation with a request that it be held for further instructions, and required that a receipt be given for every article at the time it was received, whether asked for or not, and required further that a shipment be refused if the shipper refused to accept the receipt, or if, when shipment was called for, there was no one present to accept a receipt. These instructions were offered: First, to show that the agent could not bind the company by accepting the box without giving a receipt; and, second, to corroborate the agent's testimony that he did not accept the plaintiff's box for shipment. The evidence was excluded, and

an exception allowed on each ground. The first point is sufficiently covered by what has already been said. We treat the second of these exceptions as having reference to all the agent's testimony bearing upon the question of acceptance, and not simply to his answer corresponding to the terms of the offer.

When there is a question whether some duty required by a rule or regulation has been done, the rule or regulation is received in evidence as tending to increase the probability that the thing required was done. There is no question here as to what the agent did with the plaintiff's box. He did not send it on the 8:25 train, but put it in the station. So this is not the case of evidence offered in corroboration of a claim that a certain specific act was done. The issue depended upon the quality of the act done, and its quality was not to be determined by the agent's intention or understanding, but from a consideration of the attending statements and circumstances. If the plaintiff's testimony is correct, the box was ready for shipment on the evening train. If the agent's testimony is correct, it was held to await instructions to be sent the following day. So if the rules were admissible here, they were admissible as increasing the probability that the agent's version of what passed between him and the plaintiff was true. But the rule did not have that tendency, as it forbade acceptance for the purpose testified to by the agent.

[9] Early in the introduction of the defense counsel indicated their claim that the defendant could be held liable only as a warehouseman, and one ground of the motion for a verdict was that there was no evidence that the goods were delivered to and accepted by the defendant in any other capacity than as a warehouseman. The defendant requested instructions to the effect that, if the goods were held at the request of the plaintiff in order that something further might be done to prepare them for transportation or to await further orders before shipment, the defendant's liability during the detention was only that of a warehouseman, and that a warehouseman is not liable for a loss by fire which occurs without his fault or neglect. There was no evidence or suggestion during the trial that the fire was due to any want of care on the part of the defendant. The court charged, in substance, that the liability of the defendant as a common carrier was that of an insurer of the safety of the goods, but that, if the goods were held after delivery for the accommodation of the plaintiff, that something further might be done, the liability of the defendant during such detention would be that of a warehouseman only, and that a warehouseman is not liable for anything more than an exercise of ordinary care. The court went no further; and the defendant claims that the failure to instruct the jury that a warehouseman is not liable for loss by a fire which occurs

without his fault was a serious error. The court might well have presented the matter more fully, but we think the defendant has not been harmed by the incompleteness complained of.

Judgment affirmed.

(78 N. H. 439)

GAGNE v. MASSACHUSETTS BONDING & INS. CO.

(Supreme Court of New Hampshire. Coos. June 5, 1917.)

1. INSURANCE \Leftrightarrow 136(5)—ACCEPTANCE OF POLICY—PRESUMPTION.

In the absence of fraud, one who accepts an insurance policy is presumed to know the terms, conditions, and limitations therein contained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 222–224, 229, 230.]

2. INSURANCE \Leftrightarrow 305(2)—SICK BENEFITS—RECOVERY UNDER POLICY.

Under a policy following Laws 1913, c. 226, § 3, subsec. 3, (C) 3, and providing that, "if default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium * * * shall reinstate the policy only to cover, * * * such sickness as may begin more than 10 days after the date of such acceptance," insured could not recover by virtue of a premium payment made October 27th, for an illness beginning October 25th, without showing a new contract creating such liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 933.]

Exceptions from Superior Court, Coos County; Chamberlin, Judge.

Assumpsit on insurance policy by John Gagne against the Massachusetts Bonding & Insurance Company to recover for sick benefits. Upon an agreed statement of facts, the court pro forma found a verdict for the plaintiff, and defendants except. Exceptions sustained, and judgment for defendants.

Ovide J. Coulombe, of Berlin, for plaintiff. Goss & James, of Berlin (W. W. James, of Berlin, orally), for defendant.

PARSONS, C. J. By its terms the policy expired on the 1st day of June, 1915, but was renewable from month to month at the election of the company by the payment of a monthly premium of \$1.65 on or before the 1st day of each month expiring in all cases upon the 1st of the month, if not renewed. The plaintiff paid the premium due September 1st, but did not pay the October premium until October 27th, two days after his illness began, October 25th. He was insured against disability resulting from illness which is contracted and begins during the life of the policy. As the policy was not in force when the illness began for which sick benefits are claimed, unless the payment and acceptance October 27th of the monthly premium for October restored the policy and gave it life from October 1st, the plaintiff cannot recover. The effect of such payment and acceptance depends upon the agreement or understanding of the parties. It is to be given

the effect they agreed it should have. The policy provided that:

"If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium * * * shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

[1, 2] In this provision the policy follows the statute. Laws 1913, c. 226, § 3, subsec. 3, (C) 3. In the absence of fraud, one who accepts a policy of insurance is presumed to have knowledge of the terms, conditions, and limitations therein contained. *Johnson v. Casualty Co.*, 73 N. H. 259, 60 Atl. 1009, 111 Am. St. Rep. 609. In a suit on the contract the plaintiff must recover according to its terms. *Anderson v. Aetna Life Ins. Co.*, 75 N. H. 375, 377, 74 Atl. 1051. Recovery, therefore, cannot be had for an illness beginning October 25th by virtue of a premium payment October 27th by the terms of the written contract. To recover, the plaintiff must show a new contract creating such liability, —one establishing such liability by express terms, or by implication from circumstances, or by estoppel. The only evidence offered is the payment and acceptance of the July premium on July 16th, and of the August premium on August 13th. But there is no evidence that either of these premiums were paid or accepted, except in accordance with the terms of the policy and the statute, or that the plaintiff understood otherwise. The facts stated failing to establish liability, the verdict ordered is set aside.

Exception sustained. Judgment for the defendants. All concurred.

(78 N. H. 433)

THOMPSON & NESMITH v. MANCHESTER TRACTION, LIGHT & POWER CO.

(Supreme Court of New Hampshire. Merrimack. June 5, 1917.)

1. EMINENT DOMAIN \Leftrightarrow 17—CONDEMNATION OF FLOWAGE RIGHTS.

Public Service Commission Act (Laws 1911, c. 164) § 13d, giving railroads and public utilities the right to petition the Public Service Commission to take lands needed for the construction of a line, branch line, extension or pipe line, conduit, line of poles, etc., to meet the reasonable requirements of service to the public, does not give public utilities the power to secure flowage rights by eminent domain, though the words "rights and easements" and "land" in the statute makes it broad enough to include flowage rights.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 6, 90.]

2. EMINENT DOMAIN \Leftrightarrow 13—TAKING OF PROPERTY FOR PRIVATE USES.

Private property cannot be taken by eminent domain for private uses.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51–53.]

3. WATERS AND WATER COURSES ~~163~~ —
FLOWAGE ACT — SUPERSESSION BY PUBLIC
SERVICE COMMISSION ACT.

The Public Service Commission Act, § 13d, giving railroads and public utilities the right to petition the Public Service Commission to take lands needed for the construction of a line, branch line, extension or pipe line, conduit, line of poles, etc., to meet the reasonable requirements of service to the public, not conferring on public utilities the power to acquire flowage rights by eminent domain, does not supersede the Flowage Act (Pub. St. 1901, c. 142).

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 208.]

Transferred from Superior Court, Merrimack County; Sawyer, Judge.

Petition, under Pub. St. 1901, c. 142, by Albert Thompson and Mary E. Nesmith, against the Manchester Traction, Light & Power Company, to assess damages caused by flowing lands. On transfer without ruling. Petition of plaintiffs ordered to stand for trial in accordance with the agreement of transfer, and case discharged.

Petition under chapter 142 of the Public Statutes to assess the damages caused to the plaintiffs by flowing their land by the defendants. The petition coming on for hearing, the defendants represented that they had filed a petition with the Public Service Commission under chapter 164 of the Laws of 1911 and amendments thereto, to acquire as against the plaintiffs certain rights of flowage or easements necessary to the maintenance of certain flashboards to be used on their dam, and for a necessary extension of their plant and works. The defendants filed a plea and motion, claiming that the proceedings before the Public Service Commission, under chapter 164 of the Laws of 1911, and the amendments thereto, supersede the proceedings begun by the plaintiffs under the flowage act, and requested the court so to rule, and to continue the petition under the flowage act until the final determination of the petition of the defendants before the Public Service Commission. The case was transferred without ruling, upon the agreement that, if the provisions of chapter 164 of the Laws of 1911 supersede chapter 142 of the Public Statutes for the determination of the value of the rights and easements referred to under the circumstances in this case, the defendants' motion shall be granted; if not, then this case shall stand for trial in its order.

Robert W. Upton, of Concord, for plaintiffs. Streeter, Demond, Woodworth & Sulloway, of Concord, and Jones, Warren, Wilson & Manning, of Manchester, for defendants.

PLUMMER, J. The defendants contend that they are entitled to acquire flowage rights under section 13d of chapter 164 of the Laws of 1911, and that the Flowage Act (P. S. c. 142) respecting public utilities

is thereby superseded. This section which was not changed by amendments made in 1913, provides that:

"Whenever it is necessary, in order to meet the reasonable requirements of service to the public that any railroad corporation or public utility subject to supervision under this act should construct a line, branch line, extension or a pipe line, conduit, line of poles, towers or wires across the land of any other person or corporation, or should acquire land for necessary extension of any plant or works operated by such railroad corporation or public utility, and such railroad corporation or public utility cannot agree with the owner or owners of such land as to the necessity or the price to be paid therefor, such railroad corporation or public utility may petition the commission for such rights and easements or for permission to take such lands as may be needed for said purposes."

The rights and easements that public utilities are empowered to take by eminent domain under this act are to construct a line, branch line, extension or a pipe line, conduit, line of poles, towers or wires across the land of any other person or corporation. And the land that this law enables them to acquire is land for necessary physical extension of any of their plants or works; that is, the land upon which they desire to construct buildings or other works. The defendants contend that the use of the words "rights and easements" and "land" in the statute makes it broad enough to include flowage rights. Undoubtedly these terms are sufficient to describe such rights. But these words do not refer to flowage rights. They have reference to certain definite purposes enumerated in the statute as above pointed out.

[1] The act does not give public utilities the power to secure flowage rights by eminent domain. Its language does not indicate that such was the intention of the Legislature. The rights that they can obtain by eminent domain are specifically stated, and flowage rights are not included. This statute, which gives to public utilities the special and extraordinary right to condemn private property for their uses, being an exercise of sovereign power, and in derogation of common right, must be strictly construed, and should not be extended beyond its plain and unmistakable provisions. *Claremont Co. v. Putney*, 73 N. H. 431, 62 Atl. 727; *Mitchell v. Electric Co.*, 70 N. H. 569, 49 Atl. 94; *Cooley's Con. Lim.* (7th Ed.) 762; *Harvey v. Aurora & Geneva Ry. Co.*, 174 Ill. 295, 304, 51 N. E. 163; *U. S. v. Raders* (D. C.) 70 Fed. 748; *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340, 351; *Lance's Appeal*, 55 Pa. 16, 26, 93 Am. Dec. 722. "In the construction of powers given to a corporation to take land by eminent domain, every reasonable doubt is to be resolved adversely. The affirmative must be shown and silence is negation." 15 Cyc. 567; *Providence, etc., R. Co., Petitioner*, 17 R. I. 324, 343, 21 Atl. 965. In *Claremont Co. v. Putney*, supra, the plain-

tiffs claimed that they were authorized to take water rights by eminent domain because their charter gave them the power to "lease, purchase, hold, and acquire such real and personal estate as may be necessary or convenient in carrying out the purposes for which said corporation is organized." Laws 1901, c. 276. The court in answer to this claim said:

"The first contention of the plaintiffs is that it is to be implied from the use of the word 'acquire' in their charter that the Legislature intended to confer upon them the power to take by eminent domain such property, real and personal, as might be necessary to the prosecution of their business. But the answer to this is that as the exercise of this power is against common right, and the plaintiffs' charter does not expressly confer the power, or point but the steps to be pursued in its exercise, or make provision for compensation, the presumption is that the Legislature did not intend to confer it. Private property cannot be invaded by this power without statutory authority; and statutes which are claimed to authorize its exercise are to be strictly construed."

The plaintiffs further contended that they were empowered to exercise the rights of eminent domain to obtain water privileges under section 4, chapter 93, of the Laws of 1901. The language of the section upon which they based this claim is:

"Said railway corporations may take and hold * * * such land as may be necessary for the purposes of installing and maintaining power plants."

"But this provision," said the court, "does not authorize street railway corporations to condemn land and water privileges for the purpose of diverting streams and procuring power with which to operate power plants erected or to be erected on their own land. On the contrary, the authority there conferred is limited to taking such land as may be necessary for locating or placing power plants in position for use and maintaining the same." This case, it will be perceived, is very similar in principle to the instant case.

It is argued by the defendants that the flowage act does not meet the needs of public utilities, only in an incidental and inadequate way, and that the act was framed primarily for the benefit of manufacturing enterprises, which are private callings and serve the public only in an indirect or economic sense. The ground upon which the flowage act was upheld as constitutional was that flowage rights taken under it must be employed by those so acquiring them for the public use or benefit.

[2] It is elementary that private property cannot be taken by eminent domain for private uses. *Concord Railroad v. Greely*, 17 N. H. 47; *Ash v. Cummings*, 50 N. H. 591, 612; *Rockingham Light, etc., Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; *McMillan v. Noyes*, 75 N. H. 258, 72 Atl. 759. The act provides that, if in the opinion of the court the erection of a dam is not of public use or benefit, the petition to obtain flowage rights shall be dismissed. P. S. c. 142, § 16. And as to the claim of the defendants that

the flowage act does not meet the needs of public utilities, it was held in *McMillan v. Noyes*, supra, that a hydroelectric company engaged in manufacturing electrical energy, and furnishing it primarily to the public, was entitled to maintain a petition to acquire flowage rights under the flowage act. Consequently this act affords to hydroelectric companies engaged in manufacturing electrical energy as ample and adequate means of obtaining flowage rights as it does to any other manufacturing concern. If it were decided that public utilities could acquire flowage rights under the Laws of 1911, chapter 164, the law of the state respecting such rights would be in this anomalous situation: Public utilities could obtain flowage rights by paying the actual damages caused by the flowage while all other manufacturing companies engaged in enterprises for the public use or benefit could only acquire such rights under the flowage act by paying 50 per cent. more than the actual damage. P. S. c. 142, §§ 16, 17.

Under the flowage act, if the parties could not agree upon the damages caused by the flowage, either party could petition the court for the assessment of damages. P. S. c. 142, § 13. But chapter 164 of the Laws of 1911 does not give to persons whose lands are taken the right to petition to the Public Service Commission to have their damages assessed. Only public utilities and railroads can petition for such assessment of damages. Therefore, if this act supersedes the flowage act, persons whose lands are flowed by public utilities have lost not only the right to recover 50 per cent. more than the actual damage caused by the flowage, but they have also lost the right to bring a petition to have their damages assessed. This is a cogent indication that the Legislature did not intend to confer upon public utilities the power to acquire flowage rights under the public service commission act.

It is true, as the defendants state in their brief, that many companies under special acts of the Legislature have been granted the power to acquire flowage rights by eminent domain without paying 50 per cent. more than the actual damages occasioned by the flowage. These companies, however, have been largely aqueduct companies for the purpose of supplying towns with water, and some of them were municipal water companies, but the rights granted do not imply the use of water for power. Only a very few of these companies chartered previous to the public service commission act were hydroelectric companies similar to the defendants' company. It will be noted that some of the largest companies of this character that have in recent years been granted the right to obtain flowage rights for power by special legislative act have been required to pay 50 per cent. more than the actual flowage damages. Laws 1903, c. 306; Laws 1909, c. 328; Laws 1911, c. 358. Since the passage of the

public service commission act in 1911 several public utility companies have been granted by special acts of the Legislature power to acquire flowage rights by paying only the actual flowage damages. Laws 1913, cc. 353, 368, 394; Laws 1915, cc. 285, 303. If the position of the defendants is correct, there was no occasion for these companies to seek such rights by special acts from the Legislature, and no reason why they should have been granted.

[3] As the public service commission act does not confer upon public utilities the power to acquire flowage rights by eminent domain, it does not supersede the flowage act, and the petition of the plaintiffs is to stand for trial in its order, in accordance with the agreement upon which it was transferred.

Case discharged. All concurred.

(40 R. I. 499)

SPOUTING ROCK BEACH ASS'N v. TAX COM'RS OF RHODE ISLAND.

(No. 4982.)

(Supreme Court of Rhode Island. July 6, 1917.)

1. TAXATION \Leftrightarrow 115—TAXATION OF CORPORATIONS—CORPORATION FOR PROFIT.

In determining whether a corporation is to be assessed as a corporation carrying on a business for profit, the fact that no dividends have been paid is not material, where a surplus is being accumulated which necessarily is for the benefit of the stockholders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 211.]

2. TAXATION \Leftrightarrow 115—TAXATION OF CORPORATIONS—CORPORATION FOR PROFIT.

In determining the nature of a corporation for the purposes of taxation, the amount of business done or the profits made is of no effect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 211.]

3. TAXATION \Leftrightarrow 115—TAXATION OF CORPORATIONS—CORPORATION FOR PROFIT.

Pub. Laws 1912, c. 769, § 9, provides for taxation of corporations carrying on a business for profit. Section 47 provides for exemption of corporations organized for social purposes. A corporation organized by special act was empowered to buy, sell, lease, let, and improve real and personal property, bathing privileges, and other rights, and to undertake such measures as may promote the welfare of the city of Newport as a resort for summer residents and owners of cottages, and for the transaction of any business connected therewith and incidental thereto, with all the powers and privileges, subject to all the duties and liabilities set forth in Gen. Laws 1896, c. 177. The charter provided that no stockholder should transfer his stock without giving the corporation the first opportunity to purchase, and that no assignee of stock should be entitled to privileges of membership or to a voice in the corporation affairs until regularly elected a member. *Held*, that the corporation was not a social corporation, but a corporation carrying on a business for profit, since it had accumulated a large surplus through its real estate holdings and was therefore taxable as a business corporation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 211.]

Vincent and Baker, JJ., dissenting.

Exceptions from Superior Court, Providence & Bristol Counties; Willard B. Tanner, Judge.

Petition by the Spouting Rock Beach Association against the Tax Commissioners for relief from a tax assessment. On petitioner's exceptions to the denial of the petition. Exceptions overruled.

Sheffield & Harvey, of Newport, for petitioner. Herbert A. Rice, Atty. Gen. (James A. Tillinghast, of Providence, of counsel), for respondents.

STEARNS, J. Case on the petitioner's exception to the decision of the superior court confirming a tax assessment made by the respondents, tax commissioners of the state of Rhode Island, against the petitioner, as a corporation carrying on business in this state for profit.

Is the petitioner a corporation carrying on business for profit within this state, within the meaning of section 9, c. 769, Pub. Laws 1912, or is it, as claimed by the petitioner, a corporation organized for social purposes, and consequently exempt from taxation on its intangible property, "called its corporate excess," as provided for by section 47 of said chapter? In considering the nature of this corporation we will examine, first, the powers given to the corporation by its charter, and its organization thereunder, and then the acts of the corporation.

The Bailey Beach Association was incorporated by a special act of the General Assembly on February 5, 1897, and the name was changed to the Spouting Rock Beach Association by amendment May 20, 1897. The charter is as follows:

"Section 1. Robert Goellet, Henry A. O. Taylor, and I. Townsend Burden, and their associates and successors, are hereby created a corporation by the name of the Bailey Beach Association, for the purpose of buying, selling, leasing, holding, and improving real and personal property, bathing privileges, and other rights, and of undertaking such measures as may promote the welfare of the city of Newport as a resort for summer residents and owners of cottages, and for the transaction of any business connected therewith and incidental thereto, with all the powers and privileges, and subject to all the duties and liabilities, set forth in chapter 177 of the General Laws, and of all acts in amendment thereof and in addition thereto.

"Sec. 2. The said corporation shall have power to make and ordain such constitution and by-laws, not repugnant to the Constitution and laws of this state and of the United States, as it may think proper, and the same to modify and repeal at pleasure, to take, hold, and convey real and personal property to an amount not exceeding two hundred thousand dollars, and which real and personal property may be divided into such number of shares and of such amount as may be determined from time to time by said corporation, and which shall be deemed personal property and be transferred as such according to such rules and conditions as the said constitution and by-laws of said corporation may prescribe.

"Sec. 3. No stockholder shall sell or transfer his stock or any portion thereof without first giving said corporation the right to purchase the same at the lowest price for which he is willing to sell such stock, and said corporation may provide by by-laws in what way such right of pre-emption shall be exercised by said corporation.

"Sec. 4. This act shall take effect from and after its passage."

By the constitution of the corporation the amount of the capital stock is fixed at \$200,000, divided into shares of \$500 each, with stock certificates in the usual form, signed by the treasurer and secretary.

Clause 5 is as follows:

"No assignee of stock in the corporation shall be entitled to the privileges of membership, or to a voice in the affairs of the corporation, until he shall have been regularly elected a member, as herein provided."

Without passing on the question of the legality of this particular by-law, it is apparent that the capital stock of this corporation is similar to the capital stock in the ordinary business corporation. It is personal property which can be bought and sold, is transferable and assignable, and on the decease of a stockholder the stock is the property of the estate of such member unless disposed of by will. Ownership of the stock, however, does not carry with it the privilege of membership and the social enjoyment of the use of the property.

In the Constitution are the following provisions:

"Members' shall be all persons who, having been duly elected and being stockholders, are members of the corporation. Every member, except the corporators and original members, shall be elected by the governing committee."

No person shall be elected a member unless he is the owner of at least one share of stock. Every member has one vote for each share of stock held by him, at all meetings of the corporation. The control of the business of the corporation, except the sale or mortgage of its real estate, is vested in a governing committee of nine members, with power to make rules and regulations which have the force of by-laws, and the by-laws of the corporation may be amended or repealed by the governing committee. The by-laws also provide for the use of the property by "subscribers" who upon payment of a subscription and on vote of the executive committee are entitled to the privileges of members for the time subscribed for.

In article 3 of the Constitution is the following provision:

"Each original member (or subscriber) being the owner of four shares of the capital stock, shall have the privilege at any time of having from one to four bathhouses built and conveyed to him (or to such member as he may designate) by payment to the treasurer of one hundred dollars for each house desired.

"Said houses to be built by the association, and to be similar to those previously erected on the beach, and to be conveyed to the member by deed or grant, containing same covenants, etc., as in deeds of bathhouses made by Bailey and Smith, the former owners of said beach."

Coming now to the consideration of the acts of the corporation, the following facts appear from the statement of the corporation for the year 1914, which was filed by the corporation under protest:

Total amount of authorized capital stock	\$200,000 00
1. Amount issued and outstanding.....	107,500 00
Number of shares outstanding.....	215 00
Par value of shares.....	500 00
Average fair cash value.....	250 00
2a. Rate of annual dividends paid.....	none
2b. Rate of annual dividends earned.....	none
3. Amount of bonds, debentures, or outstanding indebtedness	none
4. Gross receipts within and without R. I.	7,220 35
5. Assets.	
Real estate and improvements \$ 93,934 14	
Cash	184 62
Securities ..	11,387 10
Profits and loss	1,994 14
	<hr/>
	\$107,500 00
6. Assessed valuation:	
Real Estate.	Tangible Personal.
Assessed and fair cash value	Assessed and fair cash value
\$41,800 00	\$2,000 60
7. Securities:	
Certificate of deposit, Newport Trust Co.	\$ 3,000 00
Seven bonds. C., B. & Q. R. R.....	7,387 10
One bond. N. J. Zinc Co.....	1,000 00
	<hr/>
	\$11,387 10

The manner of conducting the affairs of the corporation was thus described by Mr. Paine, the assistant treasurer of the corporation (cross-examination):

"Q. 74. And from time to time since the purchase of the land have you given rights to members by giving them also an easement in the real estate? Is that the theory of the association? A. They purchased stock, and that entitled them to bathhouses or more, according to the number of shares taken." "Q. 79. They assign a bathhouse from time to time, either this one or that one, or any other, from year to year, to the different members, and so long as they have a bathhouse it makes no difference? A. No. It is strange I can't remember. We do— Q. 79. Don't you know your method of granting these privileges to members? A. Yes; we do. I was afraid that I might not state it exactly—you see the reason that I hesitate—but we do give a deed to that particular portion of the beach. Q. 80. Occupied by the bathhouse? A. Occupied by the person who purchases it. Q. 81. To the purchaser? A. To the person who— Q. 82. Is the owner of the stock? A. Who owns the stock. The Court: A deed in writing? A. A deed in writing. Q. 83. You give a deed in writing? A. In writing. Q. 84. What does that deed convey? A. That conveys—I am stating now as well as I can recall so I shall not make any mistake, that conveys a bathhouse of such a number—we have them all numbered. It conveys that particular number to the person purchasing. The Court: Then what you give is a deed to a particular bathhouse, and the personal use of the beach; is that put on, too? A. A particular bathhouse on the beach." "Q. 94. They pay \$10 for each house, and the association takes care of all the houses? A. It does. Q. 95. Now, do you charge admission to come onto the beach? A. Nobody can come on the beach unless by the invitation of a member. Q. 96. The member doesn't have to pay to come on the beach? A. The member doesn't have to pay. Q. 97. Suppose they have guests, what system have

you to entertain a guest? A. A member pays 25 cents for each guest that he brings in." "Q. 117. All your revenue comes from the privileges granted at the beach? A. From the dues and privileges. Q. 118. The different privileges at the beach? A. Yes, sir."

The corporation owns ten acres of land on the other side of the street from the bathing beach, also another strip of land on the water side of the street near the beach.

In regard to the finances of the corporation, Mr. Paine testified as follows:

"Q. 126. Now you have accumulated some assets which consist of a certificate of deposit of \$3,000; that is in the bank at Newport; you have that in hand now? A. In the bank at Newport. Q. 127. You also have seven shares of C. B. & Q. property—seven bonds? A. Bonds. Q. 128. Of the C. B. & Q.? A. Yes, sir." "Q. 130. And you have one other bond of \$1,000 face value. Is that all of your assets? A. That is all. Q. 131. That is money assets, besides the property at the beach? A. That is all that I am aware of. Q. 132. What do you do with your income from this property? A. We carry it, what there is. Q. 133. Do you keep it in the bank? A. Keep it in the bank; or, if it amounts to anything worth while, the treasurer buys some stock or something, and deposits it. What we have on hand has been stated, I believe. Q. 134. You try to keep your assets, these assets, the intangible assets, you try to keep them apart as a reserve fund? A. As a reserve fund for any purpose, anything that happens. Q. 135. You attempted to get enough revenue from different privileges at the beach to pay all the expenses at the beach; is that correct? A. Yes, sir. Q. 136. Have you some cash on call besides these items? A. We have not, only what little cash may be in the bank. Q. 137. A running account? A. A running account. Q. 138. Have you ever sold any of the real estate that the association originally bought? A. We have never sold any that I am aware of."

In 1897, when this special charter was granted, corporations formed by general law were incorporated in accordance with the requirements of General Laws of 1896, c. 176, now Gen. Laws of 1909, c. 212. In said chapter 176 it was provided:

"The several classes of corporations shall be formed according to the methods herein prescribed.

"Class I.—Business Corporations.

"Class II.—Insurance and Banking Corporations.

"Class III.—Literary and Scientific Corporations and Miscellaneous Corporations."

The method provided for the creation of a social organization is distinctly set forth in section II:

"All libraries, lyceums, fire-engine companies, and corporations formed for religious, charitable, literary, scientific, artistic, social, musical, agricultural or sporting purposes, not organized for business purposes, and all other corporations of like nature not hereinbefore otherwise provided for, shall be created in the following manner."

Five or more persons may associate by written articles which shall express their agreement to form a corporation, the name by which it shall be known, the purpose for which it is constituted, and the location. This agreement must be filed with the Secretary of State, and upon payment of a fee of five dollars the Secretary of State issues

a certificate, and the incorporators are then authorized to carry out the purpose of their agreement as a corporation.

Class I, business corporations, with certain specified exceptions, such as railway, quasi public corporations, etc., are formed in a similar way, with this difference, that the written articles of the associates must contain a statement of the amount of capital stock and the par value of each share, and the fee for incorporation in this class is \$100.

The apparent purpose of this statute was to provide a simple method of incorporation for Class I and Class III corporations, without imposing upon the incorporators the burden and expense of a special application to the Legislature, and also to provide for the creation of corporations at times when the Legislature was not in session. This corporation at the time of its formation belonged either in "Class I.—Business Corporations," or "Class III.—Literary and Scientific Corporations and Miscellaneous Corporations." If the attempt had been made to incorporate under the general law under Class III, and the proposed articles of agreement had contained the statement of the purpose for which the proposed corporation was constituted, as set forth in section 1 of the charter, and also the provision for capital stock, it is clear that the Secretary of State could not have issued a certificate of incorporation, as for a corporation formed for social purposes not organized for business purposes. The parties would have been required to incorporate under the "Class I.—Business Corporations," and the fact that the corporation was created by special act does not change the nature of the corporation. The language of this charter neither expresses nor implies in any way the formation of a corporation for a social purpose. The instrument is silent on the subject of promoting the social welfare of its members. It states nothing from which it may be inferred that the corporation is constituted for any social object or purpose. The clause, "and of undertaking such measures as may promote the welfare of the city of Newport as a resort for summer residents and owners of cottages," is incidental and subsidiary in this section of the charter, and does not change the general business character of the powers granted. Social clubs are not organized for the purpose of buying and selling and improving real and personal property. By general law, and without special authority of the state (section 13, c. 176, Gen. Laws 1896, now section 13, c. 212, Gen. Laws 1909), a social club is entitled to "take, hold, transmit, and convey real and personal estate to an amount not exceeding in all one hundred thousand dollars." This power is given to such organizations as an incident to the main purpose, which is the social enjoyment of the members, and to enable such social club to provide the place and means for social enjoyment. It is a much more re-

stricted power than the power of buying and selling given by this charter.

The organization of this corporation is different in many respects from that of the ordinary social organization, in which members have equal rights of control. In this corporation the members have a share in the control and a property interest in the corporation proportionate to their stock holdings. By purchase, gift, or inheritance a person may become a stockholder and part owner of the property of the corporation without thereby becoming entitled to any enjoyment of the social privileges of members. Three classes are created by the constitution and by-laws. The stockholders who are the owners of the property, members who are also owners but who must be elected to membership, and pay an initiation fee and dues in order to enjoy the social privileges, and subscribers who are allowed temporarily the social privileges on payment therefor.

There is a distinction drawn between the stockholders, the owners of the property and the persons who may enjoy the social privileges of its use.

[1, 2] The actual conduct of the corporation affairs discloses the existence of a corporation doing business to a limited extent for the benefit of the stockholders, and also engaged in rendering services to a particular class of persons, which latter group constitutes the social organization. The statement supra shows that the corporation has acquired a surplus which it calls a reserve, and with the surplus it has invested in bonds. The policy of the corporation apparently is to accumulate a surplus and not to divide it in the form of dividends. The result of either method is of benefit to the stockholders, and the fact that no dividends have been paid is not material. It is argued that by the use of the words in the tax act, "a corporation carrying on business for profit," it was the intent of the Legislature to impose the tax on a class of corporations different from the class of corporations heretofore referred to as "Class I.—Business Corporations." We are unable to discover any such intention after an examination of the statutes in question, but, even if this contention was sound, in this case the facts show that the corporation has carried on business for profit, and that thus it comes within the letter of the law as well as its spirit. Granting that the amount of business done is less than might have been done, and that the gain is not large, this does not change the character of the corporate activity.

The question in this case is one which involves the interpretation of the laws of this state, and more particularly the provisions of chapter 769, enacted in 1912. No cases have been called to our attention by counsel which have any decisive bearing on the question involved.

[3] In the case of R. I. Hospital Trust Co.

v. Rhodes, 37 R. I. 141, 91 Atl. 50, decided in 1914, this court has defined the meaning of the phrase "carrying on business," and discussed the general meaning of the act in question. The precise issue in this case, however, was not involved in the decision of that case. In consideration of the intent of the original incorporators, as shown by the application for and acceptance of the charter, and the character of the organization effected, and the nature and results of the corporation acts, we are of the opinion that the petitioner is a corporation "carrying on business for profit," and consequently that the tax appealed from was properly assessed.

The petitioner's exception is overruled, and the case is remitted to superior court.

BAKER, J. (dissenting). As I do not agree with the conclusion reached in the opinion of the majority of the court, I hereby state the grounds of my dissent.

The petition was filed in the superior court in accordance with the provisions of section 18 of chapter 769 of the Public Laws, praying for relief from a tax assessed against the petitioner, under section 12 of said act, upon its corporate excess for the years 1912, 1913, and 1914. The petition was denied, the petitioner excepted, and the case is before us on its bill of exceptions.

Chapter 769, in sections 9, 10, and 11, provides for the assessment of a tax of that portion of the intangible property of certain corporations and joint stock companies called their corporate excess. This expression "corporate excess" was a new designation and classification of property. The classification of corporations liable to this tax is effected by the use of the language, "every corporation * * * carrying on business for profit in this state."

Two questions arise: First, What is the proper interpretation of the words "carrying on business for profit"? Second, Was the Spouting Rock Beach Association, a corporation, "carrying on business for profit in this state" in the years 1912, 1913, and 1914?

It is to be noted that the language of section 9 aforesaid creates a new classification of corporations hitherto not known to our statutes. When chapter 769 was passed in 1912, chapter 212 of the General Laws was in force, which classifies corporations into three classes: "I.—Business Corporations. II.—Insurance and Banking Corporations. III.—Literary and Scientific Corporations and Miscellaneous Corporations." If the General Assembly intended by said section 9 to make "Class I.—Business Corporations," as such, subject to the tax for corporate excess, it would have been both easy and natural to adopt the existing and well-known classification, including with them also similar business corporations incorporated under special charters. The natural inference is that the Legislature, in not adopting the ex-

isting classification, intended and did make a new classification of corporations for the purpose of determining their liability to be taxed for corporate excess. This view is supported by the caption preceding section 9, which is "Taxation of Manufacturing, Mercantile, and Miscellaneous Corporations." The petitioner is certainly neither a manufacturing nor a mercantile corporation, and, if taxable under section 9, it must be under the designation "Miscellaneous Corporations." But under chapter 212, "Miscellaneous Corporations" is placed under Class III. Obviously the words in the two chapters are used with different meanings, thus further indicating an intentional departure from the classifications of chapter 212. Moreover, the classification in the two chapters shows another significant and basic difference. The classification under chapter 212 is (speaking in a general way) based upon the character of the dissimilar powers given the different corporations. The class created by section 9 rests upon the actual activities of the corporation, coupled with and modified by the words "for profit," as expressive of the purpose of such activities. The necessary inquiry as to the latter class is, What is the corporation doing for the purpose of gain? and not, Do its corporate powers make it a business corporation?

In *R. I. Hospital Trust Co. v. Rhodes*, 37 R. I. 141, on page 149, 91 Atl. 50, on page 52, this court stated that the words, "every corporation * * * carrying on business for profit in this state," effected a general classification of corporations liable to a tax for corporate excess, and held that, in addition to the corporations specially excepted from such taxation by chapter 769 (that is, business corporations of certain kinds and all corporations in Class III, under chapter 212), "by implication * * * all corporations not 'carrying on business for profit in this state' escape liability for taxation for 'corporate excess.'" In other words, it is held that other business corporations, other than those specified, may be exempt from taxation for corporate excess. It may be readily agreed in the present case that the petitioner, judged by the principles of classification established in chapter 212, is a business corporation. But that would aid little, if at all, in determining the question now raised, which is to be answered by means of the new classification instituted for the purpose of determining liability for taxation for corporate excess. The rule as to the interpretation of statutes is clearly stated as follows in 26 Am. & Eng. Ency. of Law, 598:

"Where Meaning Plain, the Letter Controls—(1) General Statement. In order to ascertain the legislative intention, the primary rule is that a statute is to receive that meaning which the ordinary reading of its language warrants, words not technical being taken in their ordinary, familiar acceptation, with regard to their general and popular use; and the meaning thus arrived at must be adopted when it involves no

absurdity, if from a view of the whole law and other laws in *pari materia* no different legislative intent is apparent.

"(2) Results, Motives, and Policy Not Considered. If the language is clear and admits but one meaning, the Legislature should be intended to mean what it has plainly expressed, and there is no room for construction. The plain and sound principle is to declare *ita lex scripta est*, although so understood the statute leads to absurd and mischievous results, or to consequences not contemplated by the Legislature; for courts are not to inquire as to the motive of the Legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy. A *fortiori* there can be no departure from the terms of the statute where no absurdity or inconvenience will follow from a literal interpretation."

The meaning of the words "carrying on business for profit" is so plain as to leave no room for construction. If we substitute for them the expression "prosecuting or conducting business for the purpose of pecuniary gain" we do not explain the original expression, but simply paraphrase it. In *R. I. Hospital Trust Co. v. Rhodes*, supra, the question considered was whether the United Traction & Electric Company was "carrying on business for profit in this state." Its powers under its charter were numerous, broad, and comprehensive. It clearly was a business corporation. In considering the question of its liability to this peculiar form of taxation, this court took into account only the exercise of its corporate powers actually employed, and held that the exercise of any of its corporate powers in this state constituted the "carrying on of business." It also recognized the fact that the inquiry involved the ascertaining of whether the business was conducted for profit, when it said (37 R. I. on page 147, 91 Atl. on page 51):

"It is certainly idle to suggest that the activities of the company, by whatever name they may be characterized, were not carried on 'for profit.' The stockholders received eight hundred and fifty thousand dollars a year on its invested capital, and the only reasonable inference is that they were maintaining the corporation and carrying on its work for the 'profit' or gain afforded thereby and not for pleasure or charity."

Under the authority of the case quoted, the Spouting Rock Beach Association is certainly carrying on business in this state. The only question, as affecting its liability to be taxed for corporate excess, is as to whether it is carrying on business "for profit." The argument *ab inconvenienti*, as related to the difficulty of the tax commissioners ascertaining whether a business is carried on for profit, should be given little weight in view of the rule of construction already quoted. Moreover, chapter 769 apparently contemplates investigation along this line in fixing the amount of corporate excess, as may be seen by a careful examination of the provisions of sections 9, 10, and 11 of that chapter.

I think the opinion of the majority inaccurately states the questions involved, and

also the claim of the petitioner in saying, "Or is it, as claimed by the petitioner, a corporation organized for social purposes, and consequently exempt from taxation on its intangible property, called its corporate excess, as provided for by section 47 of said chapter." I fail to find any claim of exemption under section 47. On the contrary, the claim is that the petitioning corporation is not in the class created by the words "carrying on business * * * for profit."

For the reasons above stated, I am of the opinion that the words "carrying on business * * * for profit" should receive the meaning which the words have when "taken in their ordinary familiar acceptation, with regard to their general and popular use."

The remaining question is one of fact. As the majority opinion quotes the act of incorporation in full and portions of the constitution and by-laws, states the amount of capital stock authorized, and the par value of the shares of stock, it is not necessary to restate these matters. The statement of the corporation for 1914 filed with the tax commissioners shows its assets and liabilities to be as follows:

Real estate and improvements	\$ 93,934 14
Cash	184 62
Securities	11,387 10
Profits and loss	1,994 14

\$107,500 00

Liabilities.

Capital stock... \$107,500 00

Respecting this statement, Frederick H. Paine, assistant treasurer and assistant secretary, testified in his direct examination:

"Q. 43. That was all you held to represent the \$107,500 worth of capital stock was that real estate and those securities? A. That is all."

And in cross-examination:

"Q. 68. Is the real estate and improvements thereon carried on your books as to that amount, and returned to the tax assessors, \$93,934.14? A. Everything here was taken from the books. Q. 69. It was taken from the books? A. Yes, sir. Q. 70. Then they have actually spent for land and for improvements on the land something over \$93,000. Is that correct? A. That is correct, as far as I can tell." "Q. 136. Have you some cash on call besides these items? A. We have not, only what little cash may be in the bank. Q. 137. A running account? A. A running account."

Just preceding these last two questions, the witness has been interrogated as to the items grouped as "securities" in the statement. The statement in evidence shows that no dividends had been paid and none earned. It is obvious from this that the item, "Profits and loss, \$1,994.14," represents loss, and that the corporation, in the 17 years of its existence, had not been carrying on business at a profit. It is to be reasonably inferred also that the item, "Securities, \$11,387.10," represents capital, probably arising from the sale and issuance of capital stock since the purchase of the land and the making of the improvements.

It may be agreed, however, that the fact

that the business had been conducted at a loss does not in itself establish the further fact that it was not conducted for profit. Mr. Paine testified, in reply to the question, "Is the corporation operated for profit?" "A. It is not." This is, of course, not conclusive, but as the opinion of a well-informed, though presumably an interested witness, it is to be considered. Speaking in general terms, the petitioner exercised its corporate powers by buying, holding, and improving real estate and thereafter leasing bathing privileges. These bathing privileges it has conducted in the form of a club organization, with the customary restrictions as to membership and the use of club privileges. In this respect its activities have the characteristics of those of a social club, peculiar in the respect that they are conducted on a beach and during the three or four months of each year when in this region out-of-door bathing is ordinarily indulged in. This is the only business carried on by the corporation during the three years when the taxes in question were assessed. The only revenue or income of the corporation was the dividends on its securities, the annual dues of \$20 due from each of its 71 members, the annual charge of \$10 on each bathing house belonging to members (a member being entitled to own one bathhouse for each share held by him), the dues receivable from persons temporarily admitted to the club privileges of the corporation, called subscribers, the amount of which is not in evidence, and the sums received from members paying 25 cents for each guest brought in by them. The social character of the petitioner's activities, and their purposes as being similar in kind to those of a purely social club, are clearly evidenced by the constitution and by-laws. The total amount of revenue is not shown. There is an item in the statement for 1914 of total gross receipts of \$7,220.25, but this amount may contain proceeds of the sale of stock during that period. The fact that the largest possible annual revenue from membership dues and the charges on the 215 bathhouses which the members are entitled to have (one for each share) is \$3,570 makes it probable that such receipts contain such proceeds of sale. Inasmuch as the stockholders are shown to have paid \$500 a share for their stock, and to have contributed annually approximately at least the amount of \$3,500 for the upkeep and management of the corporation and its property, and never to have received a dividend on their stock, it is difficult to reasonably conclude that they acquired and have continued to hold the stock of this corporation as an investment, or for any other purpose than the enjoyment of the bathing and other privileges and pleasures afforded them as members. This is plainly apparent from the fact that 37 of the 71 members each hold four shares of stock and upwards, a large and controlling majority of the stock. And

if we consider the purposes of the present activities of the corporation as shown in its constitution and by-laws, and the character of these activities themselves, and the further fact that the corporation, by the continued maintenance of these activities for 17 years, has brought to itself no pecuniary profit, but the contrary, it is equally difficult to infer or believe that the corporation has been "carrying on business for profit." I am of the opinion that, on the contrary, it very clearly appears that the petitioner has not been "carrying on business in this state for profit."

The presiding justice of the superior court in his oral decision at the close of the testimony, after saying that the question was "somewhat close," said:

"I think they are doing business to make money, and if they go on making a profit on the enterprise, * * * if an association of this kind for any reason elected to dissolve, and had a big surplus in its treasury, every stockholder would get the benefit of it, and there would be a profit there."

I think he misinterpreted the item, Securities" as indicating a surplus, and from this that the corporation had made and was making a profit in the conduct of its business, and therefore concluded that the business was conducted to make money. For the same reason, I think that the majority opinion is in error in stating that the petitioner has "acquired a surplus." This impression of the existence of a surplus was perhaps derived from the cross-examination of Mr. Paine (questions 126 to 135, inclusive, quoted in the majority opinion). The inquiry related to the different items of the securities. After naming them, a part of question 130 is:

"Is that all your assets? A. That is all that I am aware of. Q. 132. What do you do with your income from this property? A. We carry it, what there is."

The word "income," from its construction, plainly refers to the income from these securities. Question 135 and its answer clearly show this. His answer to question 134, that these assets are kept "as a reserve fund for any purpose, anything that happens," might aid the impression of a surplus. But as hereinbefore pointed out, the statement filed with the tax commissioners shows beyond question that the corporation has accumulated no surplus in excess of its liabilities.

As has already been stated, my opinion is that the evidence clearly shows that no pecuniary profit has resulted from the business, and that there is no surplus, and therefore that the conclusion that the corporation was "doing business to make money" is without support.

Accordingly, I am of the opinion that the decision of the presiding justice denying the petitioner relief was clearly an error, and that the exception should be sustained, and

the case remitted to the superior court for a new trial.

VINCENT, J., concurs in dissenting opinion of BAKER, J.

KAZARIAN BROS. v. PROVIDENCE-WASHINGTON INS. CO.

(No. 4972.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. PLEADING \S 389 — WITHDRAWAL OF SPECIAL PLEA—DISCRETION OF COURT.

It was within the discretion of a justice of the superior court to permit the withdrawal of defendant's special plea to a count of the declaration in an action on a fire policy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1033-1045.]

2. INSURANCE \S 668(14) — ACTION ON FIRE POLICY—NONSUIT.

In an action on a fire policy, where the plaintiff failed to present evidence establishing the filing of proof of loss in accordance with the requirements of the policy, the court properly granted a nonsuit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1747, 1749, 1750, 1766, 1768.]

3. INSURANCE \S 230—ACTION ON FIRE POLICY—NONSUIT.

In an action to recover unearned premiums paid on a fire policy, where plaintiff failed to present evidence of a return of the policy to the defendant as required by the policy, the court properly granted a nonsuit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-512.]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Kazarian Bros. against the Providence-Washington Insurance Company. On plaintiff's exceptions to the granting of a nonsuit. Exceptions overruled, and case remanded to superior court for entry of judgment upon the nonsuit.

Reargument denied 102 Atl. 88. See, also, 96 Atl. 839.

William J. Brown, of Providence, for plaintiffs. Claude R. Branch and Edwards & Angell, all of Providence, for defendant.

PER CURIAM. This is an action in assumpsit brought upon a fire insurance policy issued by the defendant to the plaintiffs to recover for a loss by fire alleged to have occurred to the property covered by said policy.

The declaration is in two counts. The first count alleges that a large amount of said property was destroyed by fire, and that the plaintiffs filed with the defendant due notice and proof of loss in accordance with the requirements of the policy. The defendant canceled said policy after the fire and loss alleged in the first count; and the second count was for the recovery of a certain sum as unearned premium. The defendant pleaded the general issues to both

counts, and also pleaded specially to the first count. To this special plea the plaintiffs replied by two special replications, to which replications the defendant demurred. Said demurrers were sustained in the superior court. The case was tried before a justice of the superior court sitting without a jury. Before proceeding to trial, the defendant moved that the court permit it to withdraw its special plea to the first count of the declaration. This motion was granted by said justice, to which action of said justice the plaintiffs excepted. At the conclusion of the plaintiffs' evidence, on motion of the defendant, said justice nonsuited the plaintiffs on the first count of their declaration on the ground that the evidence disclosed that the plaintiffs had not filed with the defendant a proof of their loss in accordance with the terms of the policy. Said justice nonsuited the plaintiffs on the second count on the ground that the evidence showed that the plaintiffs had never surrendered said policy to the defendant, upon which surrender alone, under the terms of the policy, their right to recover the unearned premium accrued to them. The plaintiffs also claim other exceptions to certain rulings of said justice made during the trial.

[1] It was within the discretion of said justice to permit the withdrawal of said special plea. We fail to see that the plaintiffs can properly claim they were prejudiced by that action of said justice. The plaintiffs take nothing by this exception.

[2, 3] The nonsuit was properly granted. The plaintiffs clearly failed to present evidence establishing either the filing of proof of their loss with the defendant or the return of said policy to the defendant.

The other exceptions of the plaintiffs are entirely unimportant in view of our opinion upon the question of nonsuit.

All the plaintiffs' exceptions are overruled; the case is remitted to the superior court for the entry of judgment upon the nonsuit.

RICHARDS v. CAVALRY CLUB OF RHODE ISLAND. (No. 382.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. CORPORATIONS ⇨613(1)—PROCEEDING FOR DISSOLUTION—PARTIES.

Proceedings for the dissolution of a corporation because it has ceased to act under its franchise cannot be brought by a private individual but must be brought by the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431-2434.]

2. CORPORATIONS ⇨592—PETITION FOR DISSOLUTION—DISMISSAL.

A petition based on Gen. Laws 1909, c. 213, § 27, as amended by Pub. Laws 1911-12, c. 780, providing for proceedings for the dissolution of corporations, was properly dismissed, where it appeared not only that the active members of the corporation did not wish to have it dissolved, but that the corporation did not have capital

stock, and a majority of the members had not voted to dissolve, and that the petitioner had resigned and ceased to be an officer or member of the defendant corporation, and had lost all interest in its affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2373-2375, 2378, 2379, 2381, 2390, 2401.]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Petition by John J. Richards for appointment of a receiver and for the dissolution of the Cavalry Club of Rhode Island. From a decree dismissing the petition, complainant appeals. Affirmed and cause remanded.

John P. Beagan, of Providence, for appellant. Boss & Barnefield, of Providence, for appellee.

PER CURIAM. This is a petition for the appointment of a receiver and for the dissolution of the defendant corporation. The petitioner claims that he is entitled to relief under the provisions of chapter 213, Gen. Laws 1909. Said petition was heard by a justice of the superior court and a decree was entered dismissing the petition. From said decree the complainant has appealed to this court.

It appears that the defendant corporation was organized and incorporated under the provisions of chapter 212, Gen. Laws 1909, class III, "Literary and Scientific Corporations and Miscellaneous Corporations." The defendant's by-laws provide that the membership shall consist of two classes, active and associate. Sections 2 and 3 of said by-laws are as follows:

"Sec. 2. The active membership shall be made up of officers of the cavalry organizations of the National Guard of Rhode Island.

"Sec. 3. The associate membership shall be made up of those persons holding membership certificates and their membership shall terminate upon surrender of the certificate. An associate member shall not be eligible for election to any office or any permanent committee, and shall have no vote in the management of the organization, but may, however, serve on temporary committees."

At the time of the organization of the defendant corporation the complainant was an officer in one of the cavalry organizations of the National Guard of Rhode Island, and was one of the incorporators of the defendant. It is as an active member that the complainant has brought this petition.

The primary purpose of the corporation was to procure horses for use of the cavalry of the National Guard of Rhode Island at drill. It further appears in the certificate of incorporation that it was formed for "the purposes of advocating and promoting such a confederation of the National Guard Cavalry of the New England states as will increase its general efficiency as an incident of national defense, and especially to develop and assist the cavalry of Rhode Island by

the encouragement and promotion of horsemanship." In carrying out its purposes, after organization the corporation purchased a number of horses, and the cavalry organizations of the National Guard of Rhode Island continued to use said horses until said cavalry organizations were called into national service and ordered to the Mexican border in 1916. Said horses were then sold to the United States government. The petitioner claims that the United States government has now taken over "the matter of furnishing horses to the troops for drill purposes, there is no longer necessity or occasion for the existence of the Cavalry Club, and all the purposes for which it was incorporated have been accomplished." He further alleges that the Cavalry Club has many outstanding unpaid bills; that it has not met regularly in accordance with its by-laws; that the treasurer of the organization has been permitted to exceed his authority. The complainant brought this petition on December 13, 1916. After filing said petition and before the time of trial in the superior court the complainant resigned as an officer of the cavalry organizations of the National Guard of Rhode Island.

We find no merit in the reasons of appeal upon which the case is before us. The findings of fact made by the justice of the superior court that the conduct of the business of the defendant does not warrant a dissolution is justified. The purposes for which the corporation was organized may still be pursued. It appears that the present active members of the association do not wish to have the corporation dissolved.

[1] Proceedings for the dissolution of a corporation because it has ceased to act under its franchise are not properly instituted by a private individual, but must be brought by the state.

[2] The section of the statute which the petitioner invokes as a basis for his petition is section 27, c. 213, Gen. Laws 1909, as amended by chapter 780 of the Public Laws (1911-12). That portion of said section which relates to the matter under consideration is as follows:

"Sec. 27. Whenever any corporation incorporated under the laws of this state, except a bank, savings bank, or trust company incorporated under the laws of this state, is insolvent, or whenever by reason of fraud, negligence, misconduct, or continued absence from the state of the executive officers of any such corporation, or whenever by reason of the neglect, refusal or omission by the stockholders of any such corporation for an unreasonable time to hold meetings or attend to its concerns, the estate and effects of such corporation are being misapplied or are in danger of being wasted or lost, or whenever any such corporation has done or omitted to do any act, which act or omission is ground for the forfeiture of its charter, or whenever a majority in interest of the members of such corporation having a capital stock, or a majority of the members of such corporation having no capital stock, shall have voted to dissolve said corporation and to wind up its affairs,

the superior court may, upon the petition of any stockholder or creditor of such corporation, and upon such reasonable notice as the court may prescribe, decree a dissolution of such corporation and appoint a receiver of its estate and effects, or may decree such dissolution without appointing a receiver, or may appoint such receiver without decreeing a dissolution."

The defendant corporation does not have capital stock, and a majority of the members have not voted to dissolve the defendant and to wind up its affairs. It therefore clearly appears that the petitioner has no standing in court under the provisions of said section. Furthermore, the petitioner, when he resigned and ceased to be an officer in any of the cavalry organizations of the National Guard of Rhode Island, was no longer a member of the defendant corporation, and lost all legal interest in the affairs of the corporation.

The decree of the superior court is affirmed; the cause is remanded to that court for further proceedings.

(40 R. I. 394)

ROWE v. BORDER CITY GARNETTING CO. et al. (No. 275.)

(Supreme Court of Rhode Island. June 27, 1917.)

1. CORPORATIONS \Leftrightarrow 130 — STOCKHOLDER'S RIGHT TO REGISTRATION OF SHARES.

When a bona fide owner of stock presents his certificate to the company and demands a registration of his shares, the corporation is legally bound to recognize his ownership, and to make due transfer of such stock, in his name, on its books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489.]

2. MANDAMUS \Leftrightarrow 126 — REGISTRATION OF STOCK.

In view of financial condition of corporation, mandamus was proper to compel transfer of stock on corporation's books to a bona fide purchaser, since, under the circumstances, petitioner would not otherwise have an adequate remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 261.]

3. MANDAMUS \Leftrightarrow 10 — REGISTRATION OF STOCK—DISPUTED OWNERSHIP.

As to shares of stock regarding which petitioner's title was questionable, mandamus to compel registration was not permissible, and petitioner must resort to some other remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37.]

4. MANDAMUS \Leftrightarrow 3(7) — REGISTRATION OF STOCK.

Where court deems remedy at law adequate, it may, in its discretion, refuse to allow mandamus to compel registration of stock on corporation's books, although petitioner's title is undisputed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 34.]

5. MANDAMUS \Leftrightarrow 2 — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Article XII of Amendments to Constitution, providing that the Supreme Court "shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law," and Gen. Laws 1909, c. 272, § 2, providing that the Supreme

Court "may issue writs of habeas corpus, of error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary prerogative writs and processes necessary for the furtherance of justice and the due administration of the law," were not intended to alter essential character of writs of mandamus and other prerogative writs named therein.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 4.]

6. MANDAMUS ¶3(2)—SCOPE OF REMEDY.

Gen. Laws 1909, c. 272, § 2, authorizes the use of mandamus where circumstances of the case show that petitioner has no other adequate legal remedy, although such use of the writ may be contrary to practice established by common law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 8.]

7. MANDAMUS ¶14(1)—DEMAND—STOCK-HOLDER'S INSPECTION OF BOOKS.

Where demand for inspection of corporation's books by stockholder and refusal are not shown, mandamus will not lie to enforce such right.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 44.]

Petition for mandamus by Leon R. Rowe against the Border City Garnetting Company and others. Petition granted in part and denied in part.

Walling & Walling, of Providence, for petitioner. John R. Higgins, of Woonsocket, for respondents.

BAKER, J. This is a petition for a writ of mandamus against the Border City Garnetting Company, a corporation organized under the laws of this state, and Allan McIntosh, Ulric A. Poulin and Hector L. Poulin, respectively president, treasurer, and secretary of said corporation, ordering it and them to transfer upon the books of said corporation 46 shares of the stock of said corporation now standing in the name of the defendant Allan McIntosh, and represented by three certificates, one for thirty shares and two for 8 shares each, to the name of the petitioner and to issue new certificates therefor to your petitioner. A citation was issued, and duly served on the corporation and the other respondents. There was a general entry of appearance for respondents by an attorney, although it was apparent at the hearing that he did not represent Allan McIntosh, who did not appear, and was, we assume, in fact unrepresented. The counsel for the respondents in open court admitted that the title of the petitioner to the 30 shares represented by the certificate for that amount was a clear one, and that he was entitled to have them transferred upon the books of the corporation and a certificate therefor issued to him, and the evidence offered also shows this to be the fact. But the petitioner's title to the 16 shares represented by the two certificates of 8 shares each was disputed, the two respondents Poulin claiming that the respondent McIntosh had received these two certificates in trust, and had

transferred them in breach of that trust to the petitioner, claiming also that the petitioner at the time of the transfer had knowledge of these alleged facts.

The respondents urge that mandamus is not the proper proceeding to compel a transfer of corporate stock upon the books of a private corporation and the issuance of a new certificate on the ground that the petitioner has an adequate remedy in an action at law for the value of the stocks claimed. The text-book writers and commentators as a rule concede that the weight of authority supports this claim. For example, while Cook on Corporations (1913 Ed.) in section 389, vol. II, says that the remedies of a transferee for refusal of the corporation to allow the registry of a transfer of stock are three, namely, he may apply in a court of law for a mandamus to compel the transfer, or to a court of equity to accomplish the same purpose, or may bring an action at law against the corporation for damages for conversion of his stock, in section 390, in discussing the remedy by mandamus, says:

"The authorities are in irreconcilable conflict on the question whether a mandamus lies to compel a corporation to allow a registry on its books of a transfer of stock. The weight of authority holds very clearly that mandamus will not lie. This rule is based largely on the historical origin of the writ of mandamus, and on the theory that the stock of a private corporation has no peculiar value, and may be readily obtained in open market or fully compensated for in damages. There is a strong line of decisions, however, which holds that a mandamus does lie to compel a corporation to allow a registry of a transfer of stock, particularly where the corporation has no good and sufficient reason for refusing the registry"

—and he cites with great fullness the cases supportive of the two views. See, also, as to weight of authority on this point 26 Cyc. 347; 7 R. O. L. 271; Thompson on Corporations (2d Ed.) vol. IV, § 4439; 19 Am. & Eng. Ency. of Law, 881; Morawetz on Private Corporations, vol. I, § 215; Bailey on Habeas Corpus and Special Remedies (1913) vol. II, § 303. The latter writer says:

"The courts of this country quite generally at an early day, when the remedy by mandamus was much more restricted in its nature and purpose than it is at present, concluded that the writ would not lie to compel the proper officer to transfer stock of a shareholder upon the books of the company. Since that time, relying upon the precedents established, many of them, and others where the question became one of first impression, have adhered to the original holding. The reason upon which their conclusion was based is that the shareholder had an adequate remedy at law against the corporation, for the value of the stock claimed."

After pointing out conditions under which the action at law would not afford an adequate remedy, the author says:

"Courts of respectable authority hold that such transfer may be compelled by mandamus, especially where there is no dispute with respect to the ownership or right of possession of the stock. It would seem that some of the courts do not hold that the writ will not lie in all cases, or that an action for value of the stock is an

adequate remedy. They only so hold when the legal right of the petitioner to the possession of the stock and to the right of transfer is not clear and unquestionable; and such undoubtedly is the better rule and best in accord with the principles which underlie the granting of the writ. If there be doubt as to what his legal right may be, involving the necessity of litigation to determine it, mandamus ought to be withheld, upon the well-settled principle that the relator must show a clear right."

In *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922, there was a petition for mandamus for a transfer of stock and the issuance of a new certificate. On page 482 of 106 Me., on page 925 of 76 Atl., the court says:

"The idea of the cases, denying mandamus on the ground that an action at law is open to the petitioner, is that in such action he could recover as damages the market value of the stock, and would thereby be fully indemnified. But it must be conceded, we think, that in very many cases that idea could not be realized in practice. Business of all classes and kinds is now carried on under corporate organization. The capital stock of some of these corporations has some known market value, but that of the greater number of them, perhaps, has none. Nevertheless, the shares in the latter have a substantial value to the owners thereof. That value may result from business immediately profitable, from special opportunities and circumstances insuring future profits, or from the good will of a well-established business. It does not therefore seem reasonable that the owner of such shares is afforded adequate relief, for a denial of his rights as a stockholder, by an action at law, to be prosecuted at his own expense and trouble, and for the uncertain recovery of some trifling sum as damages in lieu of the rights and benefits he would have enjoyed if the transfer to which he was entitled had been made to him. * * *

"The same reasons and objections, we think, may be urged against the suggestion that the petitioner has an adequate remedy in equity. Before that remedy could be prosecuted to a final decree important opportunities to enhance the value of the business of the corporation may have passed, and maladministration have wasted and dissipated its assets. Such a remedy is not commensurate with the petitioner's rights. * * *

"Notwithstanding the fact that the weight of authority in other jurisdictions appears to be otherwise, we are unable to assent to the doctrine that a bona fide share owner in a private corporation, existing under our statutes, who is wrongfully denied his statutory right to have a certificate of his shares issued to him by the corporation, and a record transfer thereof made on its books, is afforded an adequate remedy, a remedy commensurate with his special and peculiar rights and necessities under all the circumstances, by an action at law against the corporation for the value of his shares, or by equitable proceedings for a specific performance. And we are of opinion that such remedies should not constitute a bar to relief by mandamus to compel such issue and transfer where the petitioner's right is unquestioned, and where neither the corporation nor its officers have, or pretend to have, any reason or excuse for their refusal.

"We readily perceive that great injury would often result to a petitioner from a refusal of mandamus in such case as the one at bar, while, on the other hand, we fail to perceive how injustice could be done to any one from granting it in such case, since no reason is given or suggested why the shares should not be transferred as requested."

See cases there cited and in addition *Shepard v. Rockingham Power Co.*, 150 N. C. 770, 781, 64 S. E. 894.

[1] There was a statutory provision in Maine requiring the issuance of a new certificate. But this does not seem to us to be material, as it is generally recognized that:

"Where there is a valid sale of stock, and where a bona fide owner of stock presents his certificate to the company and demands a registration [of his shares] the corporation is legally bound [to recognize his ownership and] to make due transfer of such stock, in his name, on its books." 7 R. O. L. 262.

[2] From the testimony offered in the case at bar as to the financial condition of the corporation we are of the opinion that an action at law, so far as the certificate representing 30 shares is concerned, does not afford the petitioner an adequate remedy, and that mandamus is a permissible and proper remedy for him in the circumstances of this case. Although not precisely in point, see, also, *Portland Stone Ware Co. v. Taylor*, 17 R. I. 33, 19 Atl. 1086; *Cornell v. Barber*, 31 R. I. 358, 378, 76 Atl. 801, for similar use of the writ; also *Norris v. Irish Land Co.*, 8 E. & B. Reports, 512, opinion of Coleridge on page 527, as to tendency to enlarge the remedy by mandamus.

[3] We think the situation as to the 16 shares represented by the two certificates of 8 shares is a different one. The title of the petitioner to them is questioned. In *Townes v. Nichols*, 73 Me. 515, there was a petition for mandamus for the issuance of a certificate of stock, and the title of the stock was in question. The court said, on page 517:

"All the authorities declare that the remedy by mandamus cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, mandamus must be withheld. Mandamus is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary lawsuits or equitable proceedings. * * * An application of this rule defeats the petitioner's claim under the present proceeding. * * * It should appear to be an unquestionable claim."

See *Bailey on Habeas Corpus*, etc., supra, § 303; *Murray v. Stevens*, 110 Mass. 95.

In our opinion, in the circumstances disclosed in this case, mandamus is not a permissible remedy for the petitioner as to the shares represented by the two certificates of 8 shares each. He must resort to some other proceeding for relief. *Cook on Corporations*, supra, in section 390, suggests that by a bill in equity "not only can a registry be specifically decreed and ordered by the court, but the rights of the corporation and of all the claimants may be fully and finally heard and disposed of."

[4] We do not regard our conclusions in the present case as in conflict with *Wilkinson v. Providence Bank*, 3 R. I. 22. Referring to mandamus, the court said:

"The law * * * wisely restricts its application as a remedy to enforce mere private rights of property to cases where the applicant has no adequate remedy by action in the due course of the common law"

—and after calling attention to the fact that there was a dispute as to the ownership of the stock, said, "the present proceeding is a very imperfect mode of trying these questions," and held that an action at law for damages for the refusal of the bank to transfer shares of its stock was an adequate remedy, and left the petitioner to the common-law remedy by action. We believe the decision was sound; and, although we might now be disposed to place more emphasis on the existence of the dispute as to ownership, we do not now mean to imply that, in the absence of such dispute, the court may not, in its discretion, refer a petitioner to his remedy at law, if it deem such remedy in the circumstances adequate.

[6] It may be noted, also, that *Wilkinson v. Providence Bank*, supra, was decided under the Constitution and statutes in force in 1853 in strict accordance with the rules of the common law. Article XII of Amendments to the Constitution, adopted November, 1903, provides among other things, that the Supreme Court "shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law." Section 2, c. 272, of the General Laws provides that the Supreme Court "may issue writs of habeas corpus, or error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of the law." It is not to be presumed, we think, that this amendment and this statute are intended to alter the essential character of these prerogative writs.

[6] It does not seem, however, too much to claim as to the matter of the proper use of process, say of mandamus, that, if the circumstances of the case show, in the judgment of the court, that a petitioner has no other adequate legal remedy, and that justice can be done only by mandamus, the statute does in such case authorize the use of mandamus, although such use may run counter to its use under the practice established by the common law.

[7] The petitioner also asks for a mandate permitting him to inspect the books of the corporation. There is no evidence of any demand for such inspection and of its refusal, and this request is denied.

The prayer of the petition is granted to the extent that a peremptory writ of mandamus is ordered to issue to the respondent corporation, commanding it by its president and treasurer to transfer on its books the 30 shares of stock, represented by certificate No. 8, now standing in the name of Allan Mc-

Intosh, to the name of the petitioner, and to issue to him a new certificate for said shares, upon the surrender to it for cancellation of the certificate now held by him. In other respects the petition is denied.

(40 R. I. 410)

SLATERSVILLE FINISHING CO. v.

GREENE et al., Assessors of Taxes.

(No. 4995.)

(Supreme Court of Rhode Island. June 27, 1917.)

1. TAXATION \Leftrightarrow 348 — VALUATION — USE OF LAND.

The valuation of land for the purpose of taxation is fixed by the elements of value which lead to the most profitable form of improvement, though the owner may not improve the land at all, or may put it to uses which are less profitable than others for which it is suited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589.]

2. TAXATION \Leftrightarrow 348 — VALUATION OF LAND — WATER POWER.

That the owner of land, formerly assessed at its value as a mill privilege, erected a dam below such land, causing it to be overflowed, thereby destroying elements of value in it, did not require that it be thereafter valued at a less amount, though the water power created by the dam was conducted to mills situated elsewhere and there applied; such circumstance not taking away any elements of value from the land, where the power was created, though it increased the value of the mills receiving the power, and could be considered in the taxation of such mills.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589.]

3. TAXATION \Leftrightarrow 64 — VALUATION — WATER POWER — WATER RIGHTS — "POWER" — "WATER."

Though, for the purpose of taxation, the right to use the water of a stream, and the water power that arises from controlling the flow of its current, must be considered as appurtenant to and an incident of some land, water power and water rights are not independently taxable; power being a force, and water a nontaxable element.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 148, 149.

For other definitions, see Words and Phrases, First and Second Series, Power; Water.]

Case Certified from Superior Court, Providence and Bristol Counties.

A petition by the Slatersville Finishing Company against Albert S. Greene and others, assessors of taxes, was certified from the superior court on agreed statement of facts. Decision for respondents, and case remitted, with directions to enter final judgment.

Barney, Lee & McCanna and Walter H. Barney, all of Providence, for petitioner. Irving Champlin, James Harris, and John J. Lacey, all of Providence, for respondents.

SWEETLAND, J. This is a petition brought under the provisions of section 15, c. 58, Gen. Laws 1909, for relief against a tax assessed against the petitioner's ratable estate in the town of Burrillville. The petition

has been certified to us upon an agreed statement of facts.

By said statement it appears that on August 1, 1910, the petitioner duly brought in before the assessors of said town an account of its ratable estate in said town, including a parcel of land described in said account as follows:

"Slatersville Finishing Company, Slatersville, land lying southerly of the highway leading from Nasonville to Slatersville, bounding westerly by the Douglas pike, and by Inman road, so called, on the east, \$500."

The assessors assessed said parcel as follows:

"Slatersville Finishing Company, Slatersville, land, mill privilege and water rights, formerly the Inman mill privilege, lying southerly of the highway leading from Nasonville to Slatersville, bounding westerly by the Douglas pike, and by Inman road, so called, on the east, \$5,000."

The petitioner paid under protest so much of said tax as was assessed upon the valuation of said parcel in excess of the valuation set out in the petitioner's account. In said agreed statement it appears that said parcel was situated upon a stream of water the name of which is not given in the statement; that on said parcel was formerly located a mill known as the "Inman Scythe Works," the use of which was discontinued, and which fell in ruins many years ago; and that there was a dam, waterfall, and mill privilege connected with said land. The parcel was sold in January, 1860, by Ezekiel Daniels and others to John F. and W. S. Slater, who are the predecessors in title of the petitioner, the Slatersville Finishing Company. Either said Slaters, or the "Slatersville Mills," which succeeded them, erected or raised lower down on said stream at Slatersville, in the town of North Smithfield, a dam, thus creating a mill pond extending back over said stream into the town of Burrillville, and flowing out the Inman mill privilege and water rights, so that there is no fall of water there when the Slatersville dam is full. At and before the time of the raising of said dam and the flowing of said land, said land was assessed for its value as a mill privilege, and it is agreed that such value was not less than \$5,000. If the elements of value attributed to said land by the assessors ought not to have been considered by them in fixing the valuation at the time of said assessment, it is agreed that the value of said land for the purposes of taxation was \$500.

The petitioner contends that in this matter the court should adopt one or the other of two views, and that, in accordance with either, the petitioner should have the relief which it seeks. Its claim is that, by the erection and use of the dam at Slatersville, either said mill privilege and water rights in Burrillville have been destroyed as elements of value to be considered in assessing said land in Burrillville, or said privilege and water rights have become a part of and have increased the value of the water rights appurtenant to the mill at Slatersville, in the

town of North Smithfield, and are only taxable there.

In support of its position that said mill privilege and water rights no longer exist as elements of value in the parcel of land under consideration, the petitioner relies chiefly upon language employed in certain cases dealing with claims for damages made by the owners of lands which have been permanently submerged through the construction of public works. In some of the cases cited there was a mill privilege upon the land flowed; in others, there was not. In no case is the question of taxation involved. In each case the court was considering whether, because of the impairment or destruction of the owner's beneficial use of the land or mill privilege, he should be entitled to compensation under constitutional requirements that just compensation shall be paid to owners of property taken for public use. We will briefly consider the cases cited by the petitioner upon this point.

In *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355, it appeared that, in the course of construction for the improvement of canal and lock navigation, the state of New York had built a dam across the Hudson river at Troy. Thereby a waterfall belonging to the relator, situated on a branch of the Mohawk river, tributary to the Hudson above said dam, had been permanently overflowed. In these circumstances the court held that there had been a "taking" of said waterfall for public use, and the relator should have compensation. In *Velte v. U. S.*, 76 Wis. 278, 45 N. W. 119, and in *Pumpelly v. Green Bay Co.*, 13 Wall. 168, 20 L. Ed. 557, the respective plaintiffs were seeking compensation for the permanent flowing of their lands through the erection of dams as part of public works for the improvement of the Fox and Wisconsin rivers. In each case it was held that the plaintiff's use of his land had been destroyed, and that the flowing constituted a "taking" of the land within the meaning of the Constitution. The petitioner cites *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145. The decision in that case, upon analysis, does not support the view that, when a mill privilege has been flowed out by the raising of a dam below it on the same stream, the mill privilege is destroyed as an element of value in the land to which it was attached. The court held that the owner of a privilege so overflowed was entitled to an action for his damages, and approved an assessment of damages amounting to yearly interest upon the value of the privilege as it was before obstruction. This is by no means an authority for the contention that a privilege when flowed out is destroyed. The case proceeds upon the theory that the owner of the privilege had been deprived of its use, which use, in a sense, had been taken by the owner of the dam lower down, and for such taking he should pay an annual compensation while

the taking continued. It cannot with reason be urged from this that the value of the privilege as an incident of the land had been destroyed and should be disregarded in negotiation for the sale of the land, or that the assessors of Northampton, where the land was situated, could not properly consider this element in placing a valuation upon said land for the purpose of taxation.

For the promotion of manufactures, Legislatures in most of the states have enacted so-called "Mill Acts," giving to a riparian proprietor upon a stream, where water power may be utilized, the right to increase the impelling force of the current at his land by the erection of a dam and the setting back of the water of the stream beyond the limit of his own land and upon that of a proprietor above, with provision for compensation in damages, and with the restriction, generally expressed in the act, that a proprietor cannot flow back and obstruct the operation of a mill privilege above which has already been established by authority of law. This restriction is not expressed in the Rhode Island act. Chapter 148, Gen. Laws 1909, amended by Pub. Laws (1911-12), c. 897. This court, however, has held that our mill act should receive a reasonable construction, and that it does not authorize the owner of an unoccupied privilege to erect thereon a dam and mill, and then to flow out an occupied privilege above. *Mowry v. Sheldon*, 2 R. I. 369.

The constitutionality of these mill acts has frequently been questioned. Their constitutionality has generally been supported, sometimes on the ground that the flowing out of the land above was a taking for public use under a delegation of the state's right of eminent domain. Perhaps the constitutionality of these acts is better supported on the ground that it is within the power of the Legislature to regulate the manner in which the rights of riparian owners may be asserted and enjoyed with due regard to the interests of all and to the public good. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889.

Whether it be regarded as based on the right of eminent domain or as a legislative regulation of the common right of the different riparian proprietors to use the waters of a stream, such act does not work the destruction of the property which may be invaded in accordance with its provisions. The statute contemplates that the property submerged should remain as a valuable possession of the owner, even though he has been deprived of his unobstructed enjoyment. Although the owner may elect to have his damages in gross, the Rhode Island act provides for the appraisalment of the damages that the owner of land overflowed ought yearly to receive and recover from the owner of the dam below, his heirs and assigns, until five years after the dam shall be removed by its owner, his heirs and assigns. Similar provisions are

contained in all the acts of other states which we have examined. The case of *Quinebaug Reservoir Co. v. Union*, 78 Conn. 294, 47 Atl. 328, we shall consider later in its bearings upon the other branch of the petitioner's claim. With reference to the point with which we are now dealing, viz. as to the taxable valuation of lands which have been submerged to increase the water power at a mill site lower down on a stream, the court said that under the system which makes all real estate taxable by the town in which it is situated, the court would expect that either the value of the power created by submerging the land, or so much of it as equals that of the land if left in its natural condition, would be made taxable in the same way in which the land had been before.

[1] Many of the questions which might arise when the land submerged and the land on which the dam is located belong to different owners are not presented in the case at bar, where the petitioner owns both parcels of land. The value of land depends upon its capacity for improvement. The elements of its value may be its fertility, the minerals in its soil, its location, the configuration of its surface, and many other circumstances, one or more of which may be incident to a certain tract of land. In estimating its value for the purpose of sale or of taxation, all these incidents should be considered, and the element or elements of value which lead to the most profitable form of improvement fixes the proper valuation of the land. The owner may not see fit to improve his land at all. He may put it to uses which are much less profitable than others for which it is suited. He cannot thereby lessen its valuation for the purpose of taxation. Generally the chief element of value of a parcel of land on one of the principal streets of the city of Providence is its capacity for profitable use as the location of a building for business purposes. The owner of such parcel may permit it to remain unimproved, he may use it in a manner which produces little return, but the assessors of taxes would be justified in assessing it upon a valuation based upon its favorable location and its desirability for building purposes. The petitioner in the case at bar is the owner of a parcel of land admittedly of the value of \$5,000, in view of its possible use as a mill site. If the petitioner made no use of this parcel, it could not claim that a valuation of \$5,000 was excessive. In the furtherance of its business, it finds it profitable to employ this \$5,000 tract of land as part of its works to increase its water power at Slatersville. It is fair to presume that the added water power at Slatersville which is obtained by this use of the land is of greater value to the petitioner than any return which it would obtain from the use of the land simply as a mill privilege; and the capacity of the land to produce water power in this way to be used at Slatersville is an element of greater value than its capacity

for producing water power to be used on the land itself in Burrillville. In accordance with the suggestion made by the Connecticut court in Quinebaug Reservoir Co. v. Union, *supra*, it might be said that either the full value of the power so obtained at Slatersville through the use of this land, or so much of that value as equals the value of the land if it had been left in its natural condition, should be made taxable in the same way in which the land has been taxed before.

[2] However that may be, and without reference to the value of the added power which the use of this land has enabled the petitioner to obtain at Slatersville, the valuation of the land made by the assessors should not be disturbed on the ground that, because the petitioner has seen fit to employ this land for purposes which are either more or less profitable than that for which it surely is suited, the petitioner has in that way destroyed certain elements of value which formerly pertained to it. It is true that the petitioner has submerged the land and concealed it from view, but in no proper sense can it be said to have destroyed any of its elements of value.

In support of the position that said privilege and water rights in Burrillville might properly be held to have become a part of the water rights appurtenant to the mill at Slatersville, and only taxable there, the petitioner relies mainly upon what it claims is the authority of *Boston Mfg. Co. v. Newton*, 22 Pick. (Mass.) 22, and *Union Water Power Co. v. Auburn*, 90 Me. 60, 37 Atl. 331, 37 L. R. A. 651, 60 Am. St. Rep. 240.

[3] In considering this phase of the case, we may start with the principle, generally conceded, that water power and water rights are not independently taxable. Power is a force and water is an element no more taxable than air. The respondent assessors did not assume to tax the mill privilege and water power independently, but as a part of the land. For the purpose of taxation, the right to use the water of a stream and the water power that arises from controlling the flow of its current must be considered as appurtenant to and an incident of some land. When the power has been applied at some place other than that at which it was produced there has been some slight disagreement in the cases, a disagreement, however, more apparent than real, in regard to the land to which the power shall be considered as appurtenant, whether to the land which from its situation and configuration was able to produce the power or to the land where the power is applied. It should be observed that the case at bar does not present the condition of power produced by a fall at one place and applied at another. However, cases which deal with that condition furnish assistance in the determination of the petitioner's claim that some of the elements of value of the

Burrillville land have been taken from it and annexed to the land at Slatersville.

In *Boston Mfg. Co. v. Newton*, 22 Pick. (Mass.) 22, relied upon by the petitioner, it appears that the plaintiff was the owner of two milldams across the Charles river where it passed between the towns of Waltham and Newton, one half of each dam being in Newton, and the other half in Waltham, and that the water power thereby created was applied exclusively to drive certain mills of the plaintiff in Waltham. The plaintiff was taxed in Newton, upon separate items, for one-half of the value of each dam, for the value of the land in Newton covered by the river, and for one-half of the water power. The action was brought solely for the purpose of trying the right of Newton to tax any portion of the water power, all of which was applied in Waltham. The court held that water power cannot be taxed independently of land, and further stated as their opinion that the water power had been annexed to the mills at Waltham and could only be taxed there. The plaintiff in that case did not question the taxation of the land under the river in Newton, and hence the court was not called to pass upon the elements of value which pertained to that land, or whether its value was increased by its capacity to create water power. The case is of little if any value in determining the matter before us.

In *Water Power Co. v. Auburn*, 90 Me. 60, 37 Atl. 331, 37 L. R. A. 651, 60 Am. St. Rep. 240, it appears that the plaintiff was the owner of dams across the Androscoggin river where it flows between Auburn and Lewiston. None of the power created by these dams was used in Auburn, but was employed by the plaintiff in connection with its mills at Lewiston. The assessors of taxes of Auburn assessed a tax upon the plaintiff's dam and water rights. The action was for an abatement of said tax. The court held that water power, until applied, is potential, and that when applied to mills it becomes a part of the mill property and is a subject of taxation where the mills are located. From this opinion of a majority of the court Mr. Justice Emery dissented, and in an able opinion pointed out that in these circumstances water power as a force was not taxable either in Auburn or Lewiston, but as a waterfall or mill privilege it is a parcel of land over which a stream of water flows and falls, and is to be taxed in the town where it is situated. So far as the land is more valuable by reason of the stream and the falls, so far those facts are to be considered in the valuation of the land. The owner of the land owns not strictly the power but the gateway through which alone the power can be captured and led out. If the right to use the power has been acquired by the owner of a mill situated elsewhere, either personally or as an incident of the ownership of the mill, the value of such

right is to be estimated in assessing the owner or the mill.

"It should not be assumed that taxing in Lewiston the right of the mill to have water power from the dam in Auburn should reduce the tax in Auburn upon the corresponding right of the dam to receive compensation therefor. The water power is not to be taxed in either town. The increased value of the real estate by reason of the incident natural monopoly, or incident acquired rights, is to be taxed in the town in which the real estate is situated."

The principles thus enunciated by Judge Emery have been followed in later Maine cases. They are in accordance with the rule in New Hampshire and in the later Massachusetts cases.

In *Water Power v. Buxton*, 98 Me. 295, 56 Atl. 914, the court said:

"The property assessed here was a 'mill privilege.' It was the land and the dam, but it was the land and the dam situated as they were, with the capacity to hold the water of the stream and create power. By the terms of the assessment, the power was not assessed, and the water was not assessed. The 'privilege' was assessed. Its value might be greatly enhanced by the existence of the water and the means of creating the power."

In *Fibre Co. v. Bradley*, 99 Me. 263, 59 Atl. 83, it appeared that the plaintiff was the owner of the entire dam and mill privilege of the Penobscot river as it flows between Oldtown and Bradley. The principal works of the plaintiff were situated in Oldtown, and nearly all the water power created by the dam was used there. The plaintiff urged that such water power should be regarded as appurtenant to the mills in Oldtown, "and that the additional value which the existence of the water power creates should not be assessed to the company in Bradley." The court said:

"Land upon which a mill privilege exists is taxable, and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it, and water power thereby created. The capability of the land for such use, and the probability or certainty, as the case may be, of its use, certainly affect its value. * * * It is not where is the water power created by the appellant's dam used, but how much is its property in Bradley worth. How much is it worth as it stands—not for farming merely, or for house lots, nor for any other one thing, but for any and all purposes for which it may be used. How much is it worth, taking into account that it is part of a valuable mill privilege."

The question now under discussion has arisen in a number of New Hampshire cases, and the Supreme Court of that state has passed upon it in very carefully considered opinions. Those cases are all opposed to the contention of the petitioner that a part of the value of the mill privilege in Burrillville shall be held to have become appurtenant to the mill at Slatersville, and to be taxable solely in the town of North Smithfield. *Cocheco Co. v. Strafford*, 51 N. H. 455; *Manufacturing Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849; *Amoskeag Co. v. Concord*, 66 N. H. 562, 34 Atl. 241, 32 L. R. A. 621.

In *Pingree v. County Commissioners*, 102 Mass. 76, it appeared that the petitioner was the holder of land and a dam in the town of Winsor, which was used to form a reservoir to hold back water to be used at mills in the towns of Dalton and Pittsfield. The dam, independent of its use for the purpose of a reservoir, was of nominal value, but for that purpose was of great value; the land while covered by water was of only nominal value considered merely as land without regard to reservoir purposes. The assessors of Winsor taxed the dam and land for \$15,000. The plaintiff asked for an abatement of the tax, contending that the said valuation and tax must have been made and assessed upon the water power, none of which was applied in Winsor. The court pointed out that *Boston Mfg. Co. v. Newton*, 22 Pick. (Mass.) 22, apparently relied upon by the plaintiff as it is by the petitioner in the case at bar, while it decided that the water power should be regarded as incident to the mills to which it was applied, did not decide that the land and the structures by which the water power was created were not taxable at their value for such purposes. The court in the *Pingree* Case sustained the valuation and tax; held that the land and the dam are taxable in Winsor, and "that the valuation should be made, not subject to the use to which they are, for the time, appropriated, nor independently of that use, in any sense which excludes it from consideration as a means by which their value is made available."

In *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 82, 85 N. E. 880, 18 L. R. A. (N. S.) 755, it appeared that a Rhode Island corporation erected in Massachusetts a dam across the Blackstone river, and constructed in connection therewith, upon land owned by it, canals, ponds, and trenches in the town of Blackstone, but, without making any application of the water power in Massachusetts, carried the water in a trench with a slight fall into Rhode Island, where it was used in a powerhouse to generate electricity with which to run a mill in that state. The assessors of Blackstone taxed such of the property of the corporation as was in that town, including the dam, the pond, the canals, and the trench, with reference to its value as a means of furnishing power at the corporation's power house in Rhode Island, and the corporation petitioned to have the tax abated. As part of a very fully considered opinion, the court said:

"What is the value of the petitioner's property, having reference to any and all of the uses to which it is adapted? * * * If conditions in Rhode Island were disregarded, the value of the property in Massachusetts, including with the land and water the fall which the land furnishes, and the dam, pond, canals, and other appurtenances, would be estimated in reference to the most profitable uses to which it could be put, and especially its use to furnish power to a mill in Massachusetts, situated near the line of the state of Rhode Island. Inas-

much as it has been joined to the property in Rhode Island, and used with the slight additional fall there to produce a single unit of water power, and inasmuch as it is found that this is the most valuable use to which it can be put, there is no reason why its value should not be considered in reference to the use to which it is adapted, and which is now made of it in connection with the property in the other state."

In the state of Connecticut it is provided by statute that, when water power is used in a different town from that in which it is created, such power shall be listed for taxation only in the town where it is used. In *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294, 47 Atl. 328, it appeared that the plaintiff was the owner of certain water rights in the town of Union, which the court held to be an incorporeal hereditament and real estate. The plaintiff employed these water rights for the purpose of accumulating a water supply for use by mills lower down on the stream in the state of Massachusetts. The court held that the said statute was to be construed as applicable only to towns in Connecticut. As the power was used in Massachusetts the ordinary rule governed, and the water privilege was properly taxed in Union.

"When water is artificially stored upon land so as to create mechanical power by its fall, the necessary result is to bring into existence a new element of value. If the land thus used for storage purposes would be more valuable for other purposes, the value gained is less than the value lost. If, on the other hand, the power created has a value exceeding that of the land occupied, the taxable resources of the state in which that land is situated are increased."

In our opinion, the better reason well supported by the weight of authority is that land should be taxed with all its elements of value in the town where the land is situated. If land upon a stream has such topography, either natural or artificial, as to give to the land the capacity to control the current of the stream, and to pour out the water of the stream from an elevation, thus creating water power, these circumstances enhance the value of that land and furnish a basis for taxation. This is true whether that capacity is employed to create water power to be used on that land or upon other land in another town or another state, and also even in case such capacity of the land is not employed at all. If water power thus created is conducted to mills situated elsewhere, and there applied, that circumstance may reasonably be regarded as increasing the value of the mills receiving such power, and may be considered in the taxation of such mills; but no element of value is thereby taken from the land, where the power is created and transferred and made appurtenant to the mills where the power is used.

In our opinion, the petitioner is not entitled to relief upon either of the grounds that it has urged before us. We give decision in favor of the respondents for their costs.

The papers are ordered to be sent back to

the superior court with this decision certified thereon, and with direction to enter final judgment upon said decision.

(51 Conn. 581)

WHITE v. TAYLOR.

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

1. BROKERS \S 88(8)—ACTION FOR COMMISSION—INSTRUCTION.

In broker's action for loss of profit when defendant saloon owner refused to sell to purchaser obtained by plaintiff, charge *held* to place burden on plaintiff to prove consent of defendant's partner if defendant's offer to sell was on condition that partner's consent be obtained.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 124, 127.]

2. TRIAL \S 267(3) — MODIFICATION OF CHARGE.

Modification of charge *held* a proper application of a legal proposition to the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 668, 672.]

3. TRIAL \S 256(13) — INSTRUCTIONS — REQUESTS.

In an action for commission in negotiating sale of a business, a charge on the question of damages was not erroneous for failing to state that the jury should add interest in case of a verdict for plaintiff, plaintiff not calling to the court's attention that he claimed interest should be added if the jury found for him.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 640.]

4. BROKERS \S 85(3)—ACTIONS FOR COMPENSATION—EVIDENCE—RELEVANCY.

The fact that the prospective purchaser of a saloon, procured by a broker endeavoring to negotiate its sale, had money enough to buy another saloon three months later, was not itself evidence in the broker's suit for commission that he had enough three months previous.

5. PARTNERSHIP \S 49—EVIDENCE OF EXISTENCE—MATERIALITY.

In suit against a member of a firm operating a saloon for commission for negotiating sale of the saloon, defendant contending that his agreement to sell through the broker was conditioned on his partner's consent, the partnership agreement was admissible to prove the existence of the partnership.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. \S 67-74.]

Appeal from District Court of Waterbury; Francis T. Reeves, Judge.

Action by Alexander J. White against Thomas J. Taylor. From a judgment for defendant, plaintiff appeals. No error.

The plaintiff's complaint alleges in substance these facts: In September, 1914, the defendant was the owner of a retail liquor business in the town of Torrington. On the day named the defendant agreed with the plaintiff to sell the business within a reasonable time for \$9,500. The defendant agreed to pay the plaintiff as compensation for his service in obtaining a purchaser any sum realized over \$9,500, and if the plaintiff failed to procure a purchaser the plaintiff would make no charge for his services. In October, 1917, the plaintiff procured a customer for

the business for the price of \$10,000. The defendant refused to sell, and the plaintiff lost the profit of \$500. The defendant's answer was a general denial. The defendant offered evidence tending to prove the following: The plaintiff had been in the real estate and meat business in the city of Waterbury for five years. The plaintiff is a Lithuanian, and speaks that language. At the time of the alleged agreement to sell, the defendant and one Zavakay were partners and joint owners of the liquor license and saloon business in Torrington. Before the agreement was made, the plaintiff and several of his friends, all Lithuanians, visited Torrington for the purpose of buying a saloon, and on or about the 1st day of September, 1914, the plaintiff called upon the defendant and requested him to sell the saloon. At that time the defendant informed the plaintiff that he was willing to sell the saloon, providing his partner would agree to the sale. On or about September 18th the plaintiff again visited the saloon, and the defendant then agreed to sell the saloon to the plaintiff for \$9,500 providing his partner, Zavakay, would agree to the sale. The plaintiff had one or two interviews with Zavakay, and he would not consent or agree to the sale. The defendant understood from the plaintiff that he was the prospective buyer, and he never informed the plaintiff that the price of the business was \$10,000. The plaintiff and one George Miglan came to the saloon later, and led the defendant to believe that Miglan intended to purchase the business, and that the plaintiff was acting as Miglan's agent. The plaintiff never informed Miglan that the defendant's price for the saloon was \$9,500, but did inform him that the price was \$10,000. On October 7, 1914, Miglan offered to buy the business. The defendant never placed the saloon and liquor business in the plaintiff's hands for sale as a broker, and the plaintiff never informed the defendant that he expected compensation in the event of a sale. The plaintiff offered evidence tending to prove the allegations of the complaint. The cause was tried to the jury, and verdict was rendered for the defendant. From a judgment for the defendant the plaintiff appeals, assigning as error that the court erred in the charge to the jury, and his refusal to charge as requested by the plaintiff, and assigning as erroneous rulings on evidence.

Clayton L. Klein, of Waterbury, for appellant. Edward B. Relley, Jr., of Waterbury, for appellee.

SHUMWAY, J. (after stating the facts as above). The material and controlling fact in the plaintiff's case was the agreement set out in the complaint, and as the parties were directly at issue on this allegation, a verdict for the defendant necessarily implies a finding of this issue for the defendant, and the

judgment must stand, unless there is some material error in the charge to the jury.

[1] The plaintiff complains of this paragraph taken from the charge:

"If you believe that the defendant told White that before the sale of the business could be consummated the consent of the defendant's partner must be obtained, then before the plaintiff could recover from the defendant it would have to appear, by a fair preponderance of the evidence, that the partner's consent had in fact been obtained. Such consent would be a part of the terms of the sale. Otherwise the consent must have been obtained before the terms of the sale were made."

The last sentence may not be entirely clear, but its meaning in connection with the context is apparent. The jury must have understood that there was no contract binding on the defendant without the partner's consent to the sale in case the jury found the defendant's offer to sell was upon condition that first the consent of the partner must be obtained, then the burden was upon the plaintiff to prove such consent.

[2] The plaintiff further complains that the court refused to charge as follows:

"An agent who obtains a purchaser who is ready, able and willing to buy the property upon the terms and conditions prescribed by its owner is entitled to his commission though the sale finally falls through, because the owner subsequently refuses to sell on such terms and seeks to impose additional conditions."

An inspection of the charge shows that the court used that exact language, but added these words:

"It is for you to say whether Miglan was a person ready, willing, and able to buy the retail liquor business in question at the terms prescribed by the defendant, if you further believe from the evidence that the plaintiff was authorized by the defendant to sell the premises or the business."

There was no error in this. It was a proper application of a legal proposition to the evidence in the case, and the court left it to the jury to determine what in fact the contract was between the parties.

[3] The plaintiff took an exception to the charge upon the question of damages, in that the court did not say to the jury that they should add interest in case of a verdict for the plaintiff. As the jury rendered a verdict for the defendant, they were not required to consider the question of damages. The plaintiff did not call to the attention of the court that he claimed interest should be added in case the jury rendered a verdict in his favor for \$500, and it does not follow as a matter of law that in all cases such as this interest should be allowed.

[4] The plaintiff excepted to the ruling of the court in excluding a question to the witness Miglan. There was a question raised as to Miglan's having enough money to purchase the saloon, and it appeared he had, two or three months later, purchased a saloon in another place, and he was asked how much he paid for the latter saloon. This question was excluded. The fact that Miglan had money enough to buy the saloon in December

was not in itself evidence that he had enough in the October previous, but the case did not turn upon that fact, though it appeared in evidence that Miglan had only \$5,000 in October, 1914.

[5] The court admitted in evidence, over the objection of the plaintiff, the partnership agreement between Taylor and Zavakay. This agreement was admissible to prove the existence of the partnership, and it did not appear that it was used for any other purpose.

There is no error. The other Judges concurred.

(91 Conn. 712)

DE WOLF v. BONEE.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. MECHANICS' LIENS \S 281(4)—EVIDENCE—GOOD FAITH.

In a suit to foreclose a mechanic's lien, evidence held to sustain a finding that defendant had paid the entire contract price to the contractor in good faith.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. \S 571.]

2. MECHANICS' LIENS \S 149(4)—CLAIM—CER-TAINTY.

A suit for a lien cannot be maintained where the lien claim does not disclose how much material had been furnished for the building against which the lien was claimed; another building having been erected at the same time on an adjacent lot by the same contractor, and the claimant having furnished material for both.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. \S 259.]

3. MECHANICS' LIENS \S 136(2)—STATEMENT—DESCRIPTION.

A statement for a mechanic's lien is fatally defective, where it alleges that plaintiff has furnished materials and rendered services for the construction of a certain building owned by a named person and located upon a described lot, where it appears that the material was in fact furnished for two separate buildings owned by different parties located on separate tracts of land.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. \S 214.]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Asahel R. De Wolf against Joseph Bonee. Judgment for defendant and plaintiff appeals. No error.

The action is to foreclose a mechanic's lien and for damages. On May 4, 1914, Alexander Hepburn, a carpenter and builder, submitted the following proposal to the defendant:

"Hartford, Conn., May 4, 1914.

"Mr. Bonee: I agree to furnish all material and labor required to erect and complete the carpenter and mason work on your cottage at Sound View, Conn., for the sum of \$1600.00.

"Alex Hepburn.

"This estimate includes painting two coats outside and inside for the first and second story.

"Alex Hepburn."

Upon the same day the defendant accepted Hepburn's written proposal. This acceptance

and proposal constituted the entire agreement as between the parties. No time was fixed upon for the payment of the contract price by the parties. When this agreement between Hepburn and the defendant was made, James D'Atro, a relative of the defendant, owned a lot of land adjoining the defendant's lot at Sound View. Shortly thereafter, D'Atro requested Hepburn to build a cottage on his lot similar in all respects to that which Hepburn had agreed to build for the defendant. During the construction of the D'Atro cottage, the plans were changed so that his contract price was \$1,800. These contracts entered into by the defendant and D'Atro were entirely independent of and had no connection with each other. After making this contract, Hepburn contracted with the plaintiff for certain building materials which were to be delivered by the plaintiff at Sound View, and which were used in the construction of the cottages for the defendant and D'Atro. Between May 11, 1914, and the 22d day of June, 1914, the plaintiff furnished and delivered to Hepburn, on the premises of the defendant and D'Atro at Sound View, building materials for which Hepburn agreed to pay the plaintiff \$1,928.44. No payment on this sum was made by Hepburn until July 17, 1914. Hepburn completed the defendant's cottage on July 6, 1914. Prior to this time, the defendant had paid to Hepburn on account of his contract \$1,300, \$800 of which was paid on June 20, 1914, and \$500 of which was paid on some date subsequent to June 20, 1914. Both of these payments were made before the defendant's cottage was completed. The balance of \$300 due on the defendant's contract was paid by him to Hepburn on July 17, 1914. The defendant had no knowledge or information that the plaintiff was furnishing materials for the construction of his cottage until the 6th day of August, 1914, and all the payments described in the foregoing paragraph were made by the defendant without notice of any kind to the plaintiff. Prior to the 6th day of August, 1914, the defendant paid Hepburn in good faith the sum of \$1,600, the full contract price for the defendant's cottage. On July 17, 1914, Hepburn paid to the plaintiff the sum of \$1,000, for which amount credit was given by the plaintiff to Hepburn on his account for materials furnished which were used by Hepburn in the construction of the defendant's cottage and the cottage of James D'Atro, and there then remained due on account thereof to the plaintiff the sum of \$880. On the 22d day of August, 1914, the plaintiff gave the defendant written notice of his intention to claim a lien for the sum of \$880. This sum represented the total balance due from Hepburn to the plaintiff for materials and services furnished for the construction of the cottage of the defendant and for the cottage of D'Atro. On August 22, 1914, at the time

the plaintiff gave the defendant written notice of his intention to claim a lien, there was nothing due from the defendant to Hepburn. The certificate of lien filed by the plaintiff against the premises of the defendant states that the value of the materials and services furnished for the construction of the defendant's cottage amounts to the sum of \$880. It did not appear in evidence as to just what materials were used in the construction of the defendant's cottage, other than that the plaintiff furnished materials to the value of \$1,938.44, used in the construction of both the defendant's and D'Atro's cottages, and that materials were furnished to the value at least of \$880, which were used in the construction of the defendant's cottage.

C. Hadlai Hull, of New London, for appellant. Edward W. Broder and John L. Bonee, both of Hartford, for appellee.

RORABACK, J. (after stating the facts as above). [1] There are numerous exceptions to the finding and to the refusal of the trial court to find certain matters which the appellant claims were established by the evidence; but one of these merits consideration. This exception relates to the foundation of the plaintiff's cause of action. In this connection, it appears that the plaintiff contends that the court below erred in holding, from the evidence, that the defendant in good faith paid the full contract price for the materials used in the construction of his cottage before he had any knowledge or information that the plaintiff was furnishing materials for his building. The plaintiff insists that this conclusion is not justified by the evidence which is before us, and we are asked to correct the finding so that it will express an opposite conclusion. An examination of the record discloses that the evidence upon this branch of the case was conflicting, and that the weight of it tended to sustain the defendant's contention that the payments made to Hepburn, the contractor, were made in good faith. The proof relied upon by the plaintiff to show that the payments made by the defendant to Hepburn were not made in good faith was that the defendant had a general knowledge that some one besides Hepburn was furnishing materials for the construction of his building. This was not enough.

"Everybody who contracts for a building must know in a general way that the contractor is not doing the work with his own hands, nor, as a rule, with his own stock of materials. The statute, however, contemplates a degree of knowledge sufficient to give written notice to each person who has furnished materials or rendered services, and that must involve a knowledge of the names of such persons and of their relation to the work. The plain implication of the statute is that only persons so known are entitled to notice. *Hubbell, Hall & Randall Co. v. Pentecost*, 80 Conn. 268 [93 Atl. 672]."

The record discloses that there was evidence from which the court could have reasonably reached a conclusion favorable to the defendant's contention upon the question of good faith. Therefore the motion to correct is denied.

[2] There is another serious objection to the validity of the plaintiff's claim against the defendant. A careful examination of the record discloses that the amount of his claim cannot be ascertained. It appears that the plaintiff did not take the necessary steps for laying the foundation of a claim for a lien against the defendant's property, as he kept no separate account of the materials furnished by him which were used in the construction of the Bonee cottage. The record discloses that the materials for both cottages were sold to Hepburn for a round sum and under one contract. These materials were delivered to Hepburn and used by him in the construction of both cottages. There is nothing to indicate how much was used in the construction of either cottage. There is nothing to show that the amount now claimed to have been delivered for the Bonee cottage was in fact used for any such purpose. The plaintiff's claim does not meet the requirements of our statute, in that it does not appear how much was in fact used in the construction of the defendant's building.

In the case of *Larkins v. Blakeman*, 42 Conn. 293, this court stated:

"The materials were not charged in a separate account, but in a general account, including charges for materials furnished for other buildings. In respect to that, however, perhaps the finding shows with reasonable certainty that the amount claimed was actually expended in the two houses. The value of the materials furnished for each house does not appear. The aggregate value of the materials for the two houses is stated, a single lien is claimed covering both houses and the lots on which they stand, and one certificate only is filed. The record therefore does not show, and it is impossible now to ascertain, the amount furnished for each house. This is a fatal objection."

The *Larkins* Case was one in which materials were furnished, under separate contracts, for two houses that were being constructed by the same builder upon adjoining lots; one being commenced about six weeks before the other. No separate account was kept of the materials furnished to either house, and it could not be ascertained how much had gone into either.

[3] The plaintiff in his certificate of lien states that he has "furnished materials and rendered services in the construction of a certain building owned by said Joseph Bonee and situated in the town of Old Lyme, on a lot of land belonging to said Joseph Bonee," and then he claims a lien "on said building and land on which it stands." It now appears that the certain "building and land on which it stands" were two separate buildings owned by different parties and located upon separate tracts of land. It is plain that

such a lien does not meet with the requirements of our statute.

There is no error. The other Judges concurred.

(91 Conn. 620)

STAMFORD TRUST CO. v. MACK et al.

(Supreme Court of Errors of Connecticut.
June 1, 1917.)

1. TRUSTS § 226—TRUSTEE—LIABILITY FOR TAXES—DUTY TO PAY.

Those to whom a testamentary trustee is required by the will to accord the right of occupancy of a building, even though such right is conditioned on their defraying the expenses of carrying the property, are under no legal obligation to pay taxes on the building levied against, the trustee having the legal title and right of possession; it being the trustee's duty to cause such taxes to be paid if the means to accomplish that end are at its command.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 323.]

2. TRUSTS § 184—TRUSTEE'S DUTY TO INSURE, etc.

It was the duty of a testamentary trustee, holding legal title to a building, to make necessary repairs and maintain reasonable insurance thereon; the will having made an express bequest to the trustee to pay taxes, defray the cost of insurance and necessary repairs, and to keep the property free from incumbrances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 238.]

3. WILLS § 684(5) — TRUST — PAYMENT OF TAXES—USE OF FUNDS.

Where testator's will provided for the accumulation of a \$14,000 fund, and devoted it to the production of income to be paid over to surviving nephews and nieces, it being his evident intent that the fund, when accumulated to the specified amount, should be kept intact, and its income enjoyed by the nephews and nieces, the trustee could not appropriate any of the income of such fund, or any of its principal, to the payment of taxes or the cost of insurance or repairs on a building which the nephews and nieces were given the right to occupy so long as they remained unmarried.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1621.]

4. TRUSTS § 191(1)—TRUSTEE'S POWER TO SELL REALTY—PAYMENT OF TAXES.

Where testator's will gave a building for the occupancy of his nephews and nieces so long as they should remain unmarried, etc., and provided that on the death of all the beneficiaries the executors and trustees should transfer all the estate to a Lutheran seminary, to apply a portion not exceeding \$14,000 to the erection of a brick or a stone church on the realty on which the building stood, and the trustee for the nephews and nieces was expressly authorized to sell and convey by proper deed any and all portions of testator's estate, the trustee had power to sell and convey the northerly half of the realty on which the building stood to procure money to pay accrued taxes on the property, to make repairs, and to secure insurance, if the course was necessary to carry testator's purpose into effect to the fullest practicable extent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243.]

Case Reserved from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Suit by the Stamford Trust Company, ex-

ecutor and trustee, against Dorothea W. Mack and others. Reserved by the superior court on an agreed statement of facts for the advice of the Supreme Court of Errors. Superior court advised.

Charles F. A. Mack died in Stamford in 1892, leaving personal estate and a single piece of real estate located on Franklin street in that city. By provisions of his will preceding the seventeenth paragraph he made dispositions of personal estate. The seventeenth, nineteenth, twentieth, twenty-first, and the first portion of the twenty-second paragraphs are as follows:

"Seventeenth. I give and devise to my executors and to their successors, my real estate, including the buildings thereon, situated on Franklin street in said Stamford, in trust, nevertheless to hold the same as a place of habitation free of charge, for my said nephew and nieces jointly during the term of their natural lives, or so long as they and each of them shall be and remain single and unmarried, and it is my will that if at any time hereafter my said nephew or any of my said nieces shall marry, such use shall thereupon cease so far as such one or ones as shall be married are concerned, but the same shall be enjoyed jointly by such of them as shall remain single and unmarried, and it is my further will and desire that should the wife or husband of such of my said nephew or nieces as shall marry, die leaving them surviving such nephew or nieces shall thereupon be entitled to the use of said premises jointly with the others, in the same manner as if they had never married, and further in case none of my said nieces or my said nephew shall have remained single and unmarried, or neither of them shall have become widows before the last of my said nieces and my said nephew shall have married, then it is my will, and I hereby give my said executors and their successors the power, in their discretion to continue said use for the benefit of my niece last married or any or all of my said nieces, for the purpose of preventing at all times the invalidation of any policy or policies of insurance now covering or to hereafter cover the buildings upon said real estate, giving to my said executors and to their successors the right to extend and continue such use during the life time of such of my nieces as they (my said executors) may see fit, but upon the death of any of them, said use shall thereupon at once and forever cease, so far as her or their respective husband or husbands are concerned, and in case my said nephew or either or any of my said nieces or all of them, shall take any steps towards the invalidating of this my last will and testament, or shall appeal from or in any way oppose any of the acts of my said executors or their successors in the administration of my estate as herein provided, then I hereby give to my said executors and their successors the power to discontinue such use of my said real estate as is herein given so far as such one or ones as shall in any way oppose or appeal from the administration of my estate, are concerned, and my said executors and their successors shall also have the power, at any time thereafter in their discretion, to renew such use in the same manner as if such use had never been discontinued. * * *

"Nineteenth. In case any apartment in my said dwelling or the whole premises including the barn shall not be needed or occupied by my said nephew or any of my said nieces as hereinbefore provided, then I hereby request and empower my executors and their successors to rent the same temporarily from time to time until

my said nephew and all of my said nieces shall have deceased and to invest the income derived therefrom in the manner provided herein for the residue of my estate.

"Twentieth. All the rest, residue and remainder of my estate of whatever kind and wheresoever situated I hereby give to my said executors and their successors, so as to vest in them the legal estate, but to hold the same in trust, nevertheless, for the following purposes and uses, to wit: to invest the sum of fifteen hundred (\$1,500) dollars in such manner and upon such security as they may deem best, and to apply the income derived therefrom, or so much thereof as may be necessary, and if necessary, at their discretion any or all of the principal sum, towards the payment of all legal taxes levied on my said real estate on Franklin street aforesaid, and for the continuing of any fire insurance on said buildings, and for such repairs to said buildings, as may from time to time be necessary, and also to keep the entire legal estate from encumbrances or record during the natural life of my said nephew or any of my said nieces, and upon the death of my said nephew and all of my said nieces, it shall be the duty of my said executors or their successors, to transfer said sum or so much thereof as shall then remain, to the Evangelical Lutheran Seminary of Gettysburg, Pa., for the uses and purposes hereinafter directed. To invest the balance of said rest, residue and remainder of my estate in such manner as in the opinion of my said executors shall seem best, until the same with the accumulation of interest shall amount to fourteen thousand (\$14,000) dollars, and thereafter to apply the income thereof, one half annually in equal shares to the use of my said nephew Charles F. Mack and my said nieces Christine C. Schaalmann, Catherine A. Mack and Emilie C. Schmidt, or such of them as shall then be living, during their natural life, and one half annually in equal shares to the use of my said nieces Dorothea W. Mack, Anna B. Mack and Effie J. Mack or such of them as shall then be living, and in the event of the marriage of my said nephew or either of my said nieces his or her share of said income shall be paid to him or her, for his or her sole and separate use, and in the event of the death of my said nephew or any of my said nieces, the share of such deceased shall be divided among the survivors in equal shares per capita.

"Twenty-first. Upon the death of my said nephew and all of my said nieces, I direct my said executors or their successors to transfer all my estate, both real and personal and wheresoever situated, to the Evangelical Lutheran Seminary of Gettysburg, Penn., and to its successors forever, in trust, to apply a portion thereof, not exceeding the sum of fourteen thousand (\$14,000) dollars, towards the erection and completion of a church of brick or stone upon my said real estate on Franklin street in said Stamford, for the use of the Evangelical Lutheran Church and to apply the income of the remainder thereof towards the support of a pastor therefor, and the maintenance of said church, paying over said income in such manner as said Evangelical Lutheran Seminary of Gettysburg, Pa., may deem expedient for such purposes and I make this bequest and devise upon the express condition that religious services held in said church in said Stamford shall be mainly conducted in the German language, and also upon the condition that there shall be placed over the main entrance to said church a marble slab or tablet, on which shall be conspicuously inscribed, in memory of my mother, the following words: 'In memoriam Lucie Christine Elizabeth Mack.'

"Twenty-second. I hereby give to my said executors or to such of them as may accept said trust and to the majority of them and to their successors in like manner, the power to sell, invest, reinvest and take charge of my entire estate and to give proper deeds of conveyance

therefor and to execute any and all instruments which may be necessary in the premises. * * *

By the eighteenth the testator authorized the executors to sell and convey a cemetery lot. The last portion of the twenty-second paragraph, with which the will is concluded, deals with the appointment of executors and the choice and authority of their successors. The plaintiff is the successor of the three persons named by the testator as executors and trustees, and by the terms of the will it has all the powers given therein to them.

The Evangelical Lutheran Seminary declined to accept the trust created in the twenty-first paragraph, and the defendant Berges was appointed trustee in its stead. No assets of the estate have ever come into his hands. The \$1,500 fund created pursuant to the twentieth paragraph has been exhausted in meeting the demands upon it as provided in that paragraph.

A large sum of money is due for unpaid taxes laid upon the Franklin street real estate, and the buildings thereon are in great need of repair. The balance of the rest, residue and remainder of the estate referred to in the last portion of paragraph 20 has been invested, and after accumulation to the amount of \$14,000 the income thereof has been paid over from time to time to the nephews and nieces entitled to receive it. The plaintiff now has that fund in its hands. That, and the Franklin street real estate, comprise the only property of the estate held by it. Six of the nephews and nieces are living, four of them are unmarried. The husband of the fifth has been absent and his whereabouts unknown for more than seven years.

The Franklin street lot has a frontage of 120 feet. The house is located upon its southerly portion. The northerly portion contains no buildings and is unproductive. The lot is susceptible of division as proposed by the plaintiff. It represents that it would be for the best interests of the estate and best to promote the interests of the beneficiaries under the trust that the northerly half of the lot, 60 feet in front, be sold and the proceeds used as far as necessary in the payment of taxes, and the balance disposed of as the court may direct.

Warren F. Cressy, of Stamford, for plaintiff. H. Stanley Finch, of Stamford, for defendant Wm. J. Berges, trustee. Hugh J. Lavery and Lawrence S. Finkelstone, both of Bridgeport, for defendant Christine Schaalmann.

PRENTICE, C. J. (after stating the facts as above). The plaintiff has in its hands as trustee, under the provisions of a will, a tract of land in Stamford having 120 feet frontage and a dwelling house thereon and a fund of \$14,000. The trust is not fully executed, and it holds no other property of the estate. A fund of \$1,500 left by the testator

for the special purpose of paying the taxes which might be levied upon this real estate and thereby keeping it free from incumbrance during the continuance of the trust and of defraying the expense of insurance and necessary repairs during such period has been exhausted. Already unpaid taxes covering a period as far back as 1911 have accumulated, and the dwelling is sadly in need of repair. The trustee has no means at his command to use either in paying the taxes or in making repairs without a resort to either the principal or income of the \$14,000 fund or a sale of the portion of the real estate. In this situation it seeks the advice of the superior court as to the true construction of pertinent portions of the will and its duty and powers in the premises under that construction.

As far as the real estate is concerned, it is apparent that the best interests of all parties concerned demand that all accrued and accruing taxes be paid, and the property thus be kept free from lien and saved from danger of sequestration. In that way only can the manifest intent of the testator be effectuated, and his purpose saved from defeat.

[1] Those to whom the plaintiff is required by the terms of the will to accord the right of occupancy, even though that right were conditioned upon their defraying the expense of carrying the property, would be under no legal obligation to pay the taxes levied, as they presumably and properly were, against the trustee having the legal title and right of possession, and could not be made to do so. It is clear, therefore, that it is the plaintiff's duty as trustee to cause these taxes to be paid, if the means of accomplishing that end are at its command.

[2] The situation, in so far as the insurance and necessary repairs are concerned, is somewhat different. The interest of the defendant Berges as trustee for the Evangelical Lutheran Church and of that church as cestui que trust in having the house insured and preserved in habitable condition is not, in view of the provisions of the will, so clearly apparent. The nephews and nieces, however, have such interest. Not only that, but under the peculiar terms and provisions of the will they are in a position to successfully claim that it was the testator's expressed purpose that they should have the use of the building as one fit for habitation without charge or expense to them, and that whatever charge or expense might be involved in so maintaining it should be borne by his estate, in so far at least as the means to do so were available. The manner of his gift in their favor through the intervention of a trustee, the language used in making it, and the bequest to the trustee for the purpose of paying taxes, defraying the cost of insurance and necessary repairs, and keeping the property free from incumbrance, when read together indicate this. Thus the plaintiff trustee's duty to make necessary repairs and

maintain reasonable insurance is established, assuming, of course, that the means wherewith to perform it are within its reach.

The plaintiff's duty being established, the problem which the trustee has next to face concerns the ways and means. The nephews and nieces, as we have seen, are under no legal obligation to provide them. The same line of reasoning which establishes their right to the use and occupancy of the property in habitable condition without charge for the cost of necessary repairs also establishes their freedom from moral obligation to do so. Mr. Berges, the trustee who is to receive property of the estate on behalf of the Evangelical Lutheran Church, is likewise free from that obligation. The plaintiff is thus compelled to look to the property of the estate in its hands, which is confined to the real estate and the \$14,000 fund.

[3] The latter fund is unmistakably devoted by the testator to the production of income to be paid over to surviving nephews and nieces. It was his evident intent that the fund, when accumulated to the amount specified, should be kept intact and its income enjoyed by them. They were made its beneficiaries, and any appropriation of its income or of its principal (thereby reducing the income) for the payment of taxes or cost of insurance or repairs would be a withholding from them of what was their just due, and, as far as the taxes were concerned, a clear diversion from them for the benefit of those who are entitled to enjoy the property after they are gone.

Turning to the real estate itself, we find that the trustee is by the twenty-second paragraph of the will expressly authorized to sell, and by proper deed of conveyance to convey, any and all portions of the testator's estate. This power to sell and convey is not one whose exercise is restricted to any emergency. It is unlimited. That it comprehends the real estate and was intended so to do is made evident by the testator's language giving authority not merely to sell, but to sell and convey by "proper deeds of conveyance." As the real estate in question was all that the testator owned, this language must have been used with reference to it, and with the purpose of empowering its alienation by the trustees. Authority so given implies authority to alienate at discretion. *Bristol v. Austin*, 40 Conn. 438, 439. Evidently, therefore, the testator's purpose indicated in an earlier paragraph of preserving it for the erection of a church thereon was not the foremost one in his mind, nor his direction in that regard absolute and unyielding.

The power of sale is coupled with one to invest, reinvest, and care for the proceeds. Quite likely the testator did not anticipate a contingency in which funds in excess of those specifically provided for the purpose would be needed to meet expenditures required to be made in furtherance of the best interests of his trust estate, and thought only

of investment and reinvestment. But the power of sale as authorized having been exercised, and a portion of the property having been sold, the proceeds would form a part of the trust estate not devoted by the testator to a specific purpose, and available for use in the preservation of the trust property and the conduct of the trust in such a way as to effectuate the testator's intent to the fullest practicable extent.

[4] Our conclusions render it unnecessary to consider the appeal which is made to section 1035 of the General Statutes in support of the authority of the superior court to order a sale. We are of the opinion, therefore, and the superior court is advised:

(1) That the plaintiff has ample power under the provisions of the will to sell and convey the northerly half of said premises as proposed, if in its judgment such course is, under existing circumstances, necessary or prudent in order that the testator's purpose, as expressed in his will, may be carried into effect to the fullest practicable extent, and the best interests of the trust and of the beneficiaries thereunder be subserved.

(2) That it may use so much of the proceeds of such sale as may be required to pay the taxes already laid or which may hereafter be laid upon said real estate in its hands, and also so much thereof as may reasonably be necessary in order that the dwelling house thereon may be kept reasonably insured and in a reasonably habitable condition.

(3) That any unexpended balance of such proceeds should be held by it under the terms of the trust in lieu of property sold.

The superior court is further advised that it is the plaintiff's duty to continue to pay over the income of the \$14,000 fund to the surviving nephews and nieces in the manner and the proportion stated in the twentieth paragraph of the testator's will.

No costs in this court will be taxed in favor of any of the parties. The other Judges concurred.

(6 Boyce, 562)

MILFORD CO. v. SHORT. (No. 77.)
(Superior Court of Delaware. New Castle.
June 7, 1917.)

1. NOVATION §5—CONTRACT OF SALE.

Where a contract for the sale and delivery of lumber for a building was assigned by the buyer for valuable consideration, the seller having notice of the assignment, in the absence of the seller's agreement thereto, some new promise on his part to the assignee based on consideration or extinguishment of the seller's liability to the buyer, there was no novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5.]

2. CONTRACTS §346(4)—ACTION FOR BREACH—VARIANCE.

Proof of any contract other than that declared on in an action for breach constitutes a fatal variance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1720, 1722-1725.]

3. ASSIGNMENTS §121—CHOSE IN ACTION—SUIT.

A chose in action, such as a contract to sell and deliver lumber for a building, was not assignable so as to entitle the assignee to maintain an action in its own name for breach; it should have sued in the name of the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205.]

Action brought by the Milford Company, a corporation of the State of Delaware, against Isaac D. Short. On motion at close of plaintiff's testimony for nonsuit. Granted.

The action was for an alleged breach of contract, entered into between Emil P. Gebhart and the defendant for furnishing lumber by the latter to the former, for the erection of a certain building in the town of Milford, Sussex County.

After some deliveries of the lumber had been made to Gebhart, he assigned the contract to the plaintiff, giving Short notice of the assignment. Short made subsequent deliveries; but failing, it being claimed, to comply with his contract by delivering the lumber as required in the construction of the building, the Milford Company rescinded the contract and bought lumber in the open market to complete the building. The Milford Company, in its own name, sued Short for damages and declared on the assigned contract. At the close of plaintiff's testimony, counsel for defendant moved for nonsuit on the ground that an action at law could not be brought for the alleged breach of the contract in the name of the assignee, but must be maintained in the name of the assignor as the holder of the legal right or title.

It was contended for the plaintiff that the evidence showed a novation of the contract between all the parties, or a new contract between Short and the plaintiff such as to entitle the latter to sue in its own name.

Argued before BOYCE and HEISEL, JJ.

Andrew C. Gray and E. E. Berl, both of Wilmington, for plaintiff. Robert H. Richards and James I. Boyce, both of Wilmington, for defendant.

BOYCE, J. (delivering the opinion of the court). [1, 2] Both on the pleadings and from the evidence, this is an action for the breach of a contract for the purchase of lumber on the part of Emil P. Gebhart and the sale and delivery thereof to Gebhart, on the part of Isaac D. Short, the defendant, for the erection of a certain building. The contract was subsequently assigned by Gebhart to the Milford Company, the plaintiff, with notice to Short. There is no proper suggestion in the declaration of a novation of the contract. The averment in the declaration is:

" * * * On the eighteenth day of July, A. D. 1912, the said Emil P. Gebhart by certain writing signed by him, bearing date the day, month and year last aforesaid, for valuable consideration, assigned, transferred, bargained and

sold to the plaintiff all his right, title and interest under the said contract, whereof the said defendant on the same day, month and year aforesaid had notice."

It is not shown that the defendant agreed to the assignment, or that there was any new promise on his part to the plaintiff based on any consideration therefor from the plaintiff to the defendant, or that the liability of the latter to Gebhart was extinguished. *McKinney v. Alvis*, 14 Ill. 33; *Cole v. Bodfish*, 17 Me. 310. It is scarcely necessary to say that proof of any other contract than that declared on constitutes a fatal variance.

[3] The contract sued on being a chose in action, was not assignable so as to entitle the plaintiff, the assignee, to maintain an action thereon in its own name for a breach thereof; for in such a case the assignee must sue in the name of the assignor. 1 Saund. Pl. & Ev. 144; *Dacey on Parties to Actions*, rules 6, 15, pages 80, 136; 1 Chitty, Pl. 15; *Elliott on Contr.* § 1431; 5 C. J. 986; *Kinniken v. Dulaney*, Assignee, 5 Har. 384; 1 Woolley, Del. Prac. §§ 145-147.

For the reasons stated, we are constrained to grant the nonsuit.

Mr. Gray: We decline to take a nonsuit.

BOYCE, J. (charging the jury). The court instruct you, gentlemen of the jury, to return a verdict for the defendant.

Verdict for defendant.

(6 Boyce, 564)

STATE v. KANE.

(Supreme Court of Delaware. June 12, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS §107—LICENSE—VALIDITY.

James Kane was indicted for selling intoxicating liquor on April 27, 1917, in less quantity than one quart to be drunk off the premises, under a special license, issued to him on the fourteenth day of March, 1917, authorizing such a sale. One May ninth, 1917, plea of not guilty was entered. The act under which the special license had been issued was repealed, April fourth, 1917. The question before the court was as to the effect of the repeal on the license, in the absence of any saving from the operation of the repeal. *Held* that the license is good and valid for a period of one year from the date of the issuance thereof.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 114.]

James Kane was indicted for selling intoxicating liquor, etc. Case heard in the court in banc in accordance with the determination of the Court of General Sessions directing that the case be so heard. Opinion certified to Court of General Sessions, wherein nolle prosequi was entered.

Argued before PENNEWILL, C. J., and BOYCE, CONRAD, RICE, and HEISEL, JJ.

David J. Reinhardt, Atty. Gen., for the State. Philip L. Garrett, of Wilmington, for accused.

It was considered by the Court of General Sessions that the question of law arising in the case ought to be heard by the court in banc, and, on the joint application of the parties with an agreed statement of facts appended, the court directed that the same shall be so heard.

The agreed statement of facts shows the indictment, which charges as is admitted, that James Kane, late of, etc., on the twenty-seventh day of April, in the year of our Lord, one thousand nine hundred and seventeen, with force and arms at, etc., in a certain house there situate, to wit, the house known as the Hotel Wilmington located at 819 Market street in the Fifth ward of the city of Wilmington and in which said house the business of selling intoxicating liquors was then and there carried on, he the said James Kane then and there being the tenant and occupant of said house, he, the said James Kane then and there having a proper license to sell intoxicating liquor according to law only in quantities less than one quart to be drunk on said premises did then and there unlawfully sell intoxicating liquor to wit, whiskey, to one Lucius C. Jones in a quantity less than one quart to be drunk off said premises, against, etc.

That said defendant did on the fourteenth day of March, A. D. 1917, receive from this honorable court a proper license authorizing him to sell at said Hotel Wilmington intoxicating liquors in quantities less than one quart to be drunk on the premises.

That having obtained such last mentioned license, said defendant did on the fourteenth day of March, A. D. 1917, make application to the clerk of the peace of New Castle county and from him did receive a further or special license for one year to sell intoxicating liquors in quantities less than one quart to be drunk off the premises.

That on the — day of —, A. D. 1917, the General Assembly did pass a certain law, viz.:

" * * * Section 1. That chapter 6 of the Revised Statutes of the state of Delaware be and the same is hereby amended by striking out paragraph number 6 of section 124 of said chapter, Code section 161." Approved April 4th, 1917.

It was agreed that if the court in banc should be of the opinion that the said special license issued to the said James Kane by the clerk of the peace of New Castle county on the fourteenth day of March, A. D. 1917, authorizing him to sell intoxicating liquors in less quantities than one quart to be drunk off the premises, is good and valid for a period of one year from the date of the issuance thereof, then judgment in the above stated cause shall be entered accordingly upon a verdict of not guilty, but if the court shall be of the opinion that said special license so issued by the clerk of the peace as aforesaid to said defendant was revoked or rendered null, void and invalid by the above

recited act of the General Assembly approved April fourth, 1917, then judgment shall be entered against the said defendant upon a verdict of guilty to be rendered by a jury, charged accordingly by the court upon the said admitted facts.

The repealed paragraph, numbered 6, § 124, c. 6 (Code 1915, § 161), reads:

"Any person or persons having obtained a license under the provisions of this section may, if he so desires, on application to the clerk of the peace of the county in which such license has been obtained, be entitled to receive a further or special license for one year to sell intoxicating liquors in quantities less than one quart, to be drunk off the premises, and for such special license shall pay to said clerk of the peace the sum of twenty-five dollars in addition to the license fees now provided by law."

The Attorney General contended, that the amending act took effect and became operative upon the date of its approval by the Governor; that it expressly repealed the provision for the granting of special licenses authorized by paragraph numbered 6 of section 124 of chapter 6 (Rev. Code 1915, § 161); that there is in the act no provision for saving from its operation special licenses such as that granted to the defendant; that a license to sell intoxicating liquor is not a contract, or a property or vested right but is only a permit or privilege which may be withdrawn at any time; and that a license to sell intoxicating liquor is revoked or annulled by the repeal of the law authorizing the grant of such license. *Joyce on Intox. Liq.* 368; 1 *Woollen & Thornton*, §§ 331, 428; *Black on Intox. Liq.* §§ 90, 127, 190; 15 *R. C. L.* 311; *Brown v. State*, 82 *Ga.* 224, 7 *S. E.* 915; *Arie v. State*, 23 *Okl.* 166, 100 *Pac.* 23; *Pleuler v. State*, 11 *Neb.* 547, 10 *N. W.* 481-490; *Robertson v. State*, 12 *Tex. App.* 541; *Ex parte Lynn*, 19 *Tex. App.* 293; *Ex parte Vaccarezze*, 52 *Tex. Cr. R.* 105, 105 *S. W.* 1119; *State v. Cooke*, 24 *Minn.* 247, 31 *Am. Rep.* 344; *Com. v. Jones*, 10 *Pa. Co. Ct.* 611; *Com. v. Sellers*, 130 *Pa.* 32, 18 *Atl.* 541, 542; *Viefhaus v. State*, 71 *Ark.* 419, 75 *S. W.* 585; *Bordwell v. State*, 77 *Ark.* 161, 91 *S. W.* 555; *Calder v. Kurby*, 5 *Gray (Mass.)* 597; *Fell v. State*, 42 *Md.* 71, 20 *Am. Rep.* 83; *Columbus v. Outcomp*, 61 *Iowa*, 672, 17 *N. W.* 47; *State v. Mullenhoff*, 74 *Iowa*, 271, 37 *N. W.* 329; *State v. Isabel*, 40 *La. Ann.* 340, 4 *South.* 1; *Reitmilller v. Peoples*, 44 *Mich.* 280, 6 *N. W.* 667; *State v. Holmes*, 38 *N. H.* 225, *Metropolitan Board of Excise v. Barrie*, 34 *N. Y.* 659; *Prohibitory Amendment Cases*, 24 *Kan.* 700; *Brown v. State*, 82 *Ga.* 224, 7 *S. E.* 915.

Counsel for the defendant replied that the repealing act affects nothing but the power to issue special licenses after the act took effect; that it repealed the authority to grant any more such licenses but nothing more; that there is nothing in the act indicating an intention of the Legislature to revoke or annul the unexpired licenses granted before the repeal. *Hirn v. State*, 1 *Ohio St.* 15; *Adams v. Hackett*, 27 *N. H.* 289, 59 *Am. Dec.* 876;

State v. Andrews, 26 *Mo.* 171; *State v. Andrews*, 28 *Mo.* 14; *May v. Commonwealth*, 160 *Ky.* 785, 170 *S. W.* 493; *Foster v. Dow*, 29 *Me.* 442; *Watts v. Commonwealth*, 78 *Ky.* 329; *Bush v. D. C.*, 1 *App. D. C.* 1.

It was also urged that it is a sound rule of construction that a statute shall have a prospective operation only, unless its terms show clearly a legislative intention that it shall operate retrospectively. *Cooley's Const. Lim.* 370; *Railroad Co. v. Judge, etc.*, 10 *Bush (Ky.)* 574.

PENNEWILL, C. J. (delivering the opinion of the court). The question to be determined in this case is not whether a law making it unlawful to sell intoxicating liquor would revoke a license for such sale issued before the enactment of the law.

In such case it is clearly the intention of the Legislature that liquor shall not be sold at all. Therefore, all the cases cited by the state, in which the sale was made unlawful, are not applicable to the present case where the statute which authorized the issuance of the license was merely repealed. In all the state's cases, except the Pennsylvania County Court case, the sale was expressly made unlawful, and in the excepted case there was this unusual feature, viz.: The license of the defendant only authorized him to sell in accordance with the law of the state "as it may exist at the time of the sale."

Some of the language quoted by the state from certain text-writers is very general, and if intended to apply to such a case as the present one, does not appear to be supported by the authorities cited.

The text must be based upon statutes or constitutional provisions which expressly made the sale unlawful; and this is evident from more particular statements made by the writers referred to.

In 1 *Woollen & Thornton*, § 531, it is said:

"The passage and adoption of a constitutional or statutory provision by which the sale of intoxicating liquors is prohibited, will have the effect of repealing by implication all laws authorizing the issuance of licenses and of annulling those which may have been issued previously," etc.

Black employs similar language, but both writers also make general statements respecting the effect of a repeal of a statute which apparently supports the contention of the state.

It is not questioned that the Legislature may revoke a license previously given for the sale of intoxicating liquor, because such license is only a privilege; but in order that a statute shall have that effect it must be clear that such was the legislative intent. When the later statute makes it unlawful to sell intoxicating liquor at all, or unless the licensee procures a further license or complies with some additional requirement, there can be no question about the intent, but when the statute merely repeals the law which authorized the issuance of a license

for the sale of liquor in a particular way, as in the present case, the legal effect is only to prevent the issuance of any other licenses of the same kind.

The defendant had a license to sell intoxicating liquor to be drunk on the premises, and the general law which authorized the issuance of such license was not repealed. Because he had that license he was entitled to receive from the clerk of the peace an additional license to sell liquor to be drunk off the premises.

The act in question did not, therefore, take away the defendant's right to sell intoxicating liquor, but merely repealed the section of the liquor law that authorized the issuance of the additional license. There is nothing in the repealing act to show that it was intended to have any other effect than to prevent the clerk of the peace from issuing any other licenses under the act repealed.

While the act in question is not retroactive in terms, it would unquestionably have that effect if given the construction contended for by the state; and the law is well settled that an act of the Legislature will not be held to operate retrospectively unless the legislative intention that it shall have such operation be clearly shown. *Cooley's Con. Lim.* 370.

The court are of the opinion that the special license issued to the defendant by the clerk of the peace of New Castle county, on the fourteenth day of March, 1917, authorizing him to sell intoxicating liquors in less quantities than one quart to be drunk off the premises, is good and valid for a period of one year from the date of the issuance thereof.

The opinion was certified to the Court of General Sessions, whereupon the Attorney General entered a nolle prosequi.

(87 N. J. Eq. 607)

In re WHITE'S ESTATE. (No. 88.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(*Syllabus by the Court.*)

DESCENT AND DISTRIBUTION ~~§ 84~~—SURVIVING BROTHERS—CONSTRUCTION OF STATUTE.

Under the amendment of the Orphans' Court Act (Statute of Distributions) by Act March 20, 1914 (P. L. p. 69), surviving brothers and sisters take to the exclusion of children and grandchildren of deceased brothers and sisters.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97-101.]

Kalisch, Black, White, and Williams, JJ., dissenting.

Appeal from Prerogative Court.

In the matter of an order for distribution in the estate of Henry R. White. From a decree of the Prerogative Court (99 Atl. 606), reversing a decree of the Passaic County Orphans' Court, the decedent's brothers appeal. Decree reversed, and record remitted

in order that decree may be entered dividing the estate equally between two surviving brothers.

Arthur B. Seymour, of Orange, for appellant. Clifford L. Newman, of Paterson, for appellee.

SWAYZE, J. Henry R. White died intestate December 29, 1914. There survived him two brothers (the present appellants); children of a deceased sister; children of a deceased brother; a grandchild of a deceased brother. The Prerogative Court directed that the estate be distributed, one-fifth to each of the brothers, one-fifth to the children of the deceased sister, one-fifth to the children of the deceased brother, and one-fifth to the grandchild of the other deceased brother. The brothers appealed.

The result turns on the construction of the amendment of 1914 (P. L. 69) to sections 168 and 169 of the Orphans' Court Act, paragraph 3 of which reads as follows:

"If there be no husband or widow, as the case may be, then all of the said estate to be distributed equally to and among the children; and in case there be no child, nor any legal representative of any child, then equally among the parents and brothers and sisters, except where the intestate is a minor, in which case all of the said estate shall be allotted to the parents, if living, but if not, then to the brothers and sisters equally."

It is necessarily conceded that if the words of paragraph 3 of section 169, as amended, govern the case, the brothers are entitled to the whole estate. The effort of the respondent is to vary the plain meaning of the words of that paragraph by "reading into it" as the learned vice ordinary said, a provision that the children of a deceased brother or sister take by representation the parents' share. He found a warrant for this interpolation in the provision of section 168 that the distribution should be just and equal, and to the next of kindred to the intestate in equal degrees, or legally representing their stocks. It is always dangerous to read words into a statute that are not there, as we said in *Blanz v. Erie Railroad Company*, 84 N. J. Law, 35, 85 Atl. 1030. It can rarely, almost never, be done and only when it plainly effectuates the legislative intent and is, as in that case, within a possible construction of words actually used. It can never be done when the language of the act shows that the Legislature has considered the subject and omitted the words sought to be interpolated. That is the present case. Paragraph 3 in the act of 1914 answers to paragraphs 3 and 4 of the old act (C. S. 3875), but there is a most significant change of language. The old act provided for distribution under paragraph 3 to the next of kindred in equal degree "and their legal representatives as aforesaid." The words "as aforesaid" refer to the language of section 168 "legally representing their stocks." Paragraph 4 of the old act

provided for a distribution "to brothers and sisters and the representatives of them." With these words in both paragraphs of the old act before them, the Legislature, in 1914, carefully, almost ostentatiously, omitted them in the new act. They not only dropped them out, but dropped them out after using substantially the same words in the very next preceding line of paragraph 3, which provided for the representative of a child. That this omission was no mere oversight appears more clearly when we consider the object of paragraph 3. The old act in paragraph 4 gave brothers and sisters and the representatives of them an equal share with the mother. The new act, paragraph 3, gives the brothers and sisters an equal share with the parents, except where the intestate is a minor. If the Legislature had added the words which the vice ordinary has read into the act it would have provided for a distribution equally among the parents and brothers and sisters and the representatives of them. It could hardly be meant to allow representatives of parents to share since the brothers and sisters and representatives of brothers and sisters would necessarily be the representatives of parents also; yet the Legislature by coupling parents with brothers and sisters has shown that they were to be treated alike; they are to share equally. For this there is reason in the fact that parents and brothers and sisters form a family group. But it could hardly have been meant to compel a father who, before this legislation took the whole estate, to share, not merely with his wife, his children, and in case of divorce and remarriage, with his wife's children, but with his children's children to the remotest degree. This result was avoided by the Legislature when it abandoned the idea of representation. No argument can be drawn from the provision of section 168 that the distribution shall be just and equal, for as we said in *Smith v. McDonald*, 71 N. J. Eq. 261, 65 Atl. 840, any distribution authorized by the statute would be just; changes in old established rights of inheritance are becoming frequent, and no one would be so bold as to suggest that the rule of the Legislature can be challenged as unjust because novel. Is it unjust to deprive the father of his former right to take the whole of the child's personal property; and shall we therefore say that the word "parents" in the new act does not mean parents? We must read the law as the Legislature makes it, even if it conflicts with ideas of justice that have prevailed for centuries. Our whole scheme of inheritance taxes rests on the theory that the right to inherit is the gift of the Legislature, not a natural right. The words which it is proposed to interpolate mean representation to the remotest descendant of a brother and sister, and would not be limited in the same way that the right of representation had been limited by the wisdom and sense of

justice of the Roman jurisprudence as well as of our own until 1899, as we pointed out in *Smith v. McDonald*. Justice, the old idea of justice, at least, excluded representation beyond brothers' and sisters' children. The construction of the Prerogative Court opens the door to a contest of a testator's will by descendants of nephews or nieces who have nothing to lose and in whom the testator could have little interest at best. Nor do we derive any help from the use of the word "equal," since a distribution per stirpes, i. e., by representation, is distinguished from a distribution per capita by the very fact of inequality between individuals. Nor do the words "representing their stocks" help us, since in the case of nephews and nieces and other next of kin there had been no representation among collaterals beyond brothers' and sisters' children for centuries prior to 1899. The words of section 168 as to representation of stocks had never been applicable except in that limited way to the next of kin before the omission of the proviso in that year. *Smith v. McDonald*, 71 N. J. Eq. 261, 262, 65 Atl. 840. All that the Legislature did in 1914 was to take away representation of brothers and sisters, perhaps because the amendment of 1899 threatened the dissipation of estates in small fragments among persons not the next of kin of the decedent and in most cases unknown to him by allowing them to share with parents; perhaps because it was realized that nephews and nieces were a degree more remote than brothers and sisters, and still more remote than parents; while grandnephews and grandnieces were still further removed. It would be a step backward for us to read into the statute words that the Legislature has taken pains to omit. The legislation of 1899 is a precedent to the contrary. The Legislature in that year omitted from paragraph 2 as it then stood the proviso "that no representation shall be admitted among collaterals after brothers' and sisters' children." The omission caused serious difficulty in *Smith v. McDonald*, but no one was hardy enough to suggest that we should interpolate words the Legislature had omitted in order to make the act correspond with our ideas of justice and equality. Whatever argument in favor of the justice of a method of distribution can be drawn from its antiquity and continuous and unbroken existence had to give way then as now to the will of the Legislature. The decree must be reversed and the record remitted in order that a decree may be entered dividing the estate equally between the two surviving brothers. Costs will properly be paid out of the estate.

The CHIEF JUSTICE and GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, HEPPELMEIER, TAYLOR, and GARDNER, JJ., concur. KALISCH, BLACK, WHITE, and WILLIAMS, JJ., dissent.

(90 N. J. Law, 490)

GAFFNEY v. ILLINGSWORTH. (No. 66.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)*(Syllabus by the Court.)*1. NEW TRIAL \S 75(1), 161(1)—GROUNDS —
INADEQUATE DAMAGES—TERMS.

Under the practice act of 1912 (P. L. p. 377, \S 32) and rules 72 and 73 annexed, and Supreme Court Rules 1913, Nos. 131, 132, and 219, a judge of the circuit court has power to grant a new trial because of inadequate damages awarded by the verdict of a jury, and, under rule No. 122, to impose terms that, if the defeated party pays a certain sum within a specified time, the rule to show cause why a new trial should not be granted shall be discharged, otherwise made absolute. Semble, that the trial court could impose such terms without the aid of statute or rule of court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 151, 321.]

2. APPEAL AND ERROR \S 70(9)—NEW TRIAL
 \S 6—ORDERS APPEALABLE — GRANTING OF
NEW TRIAL.

The granting of a new trial rests in the sound discretion of the trial court, and, as it does not settle definitively the rights of the parties, it is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 378; New Trial, Cent. Dig. \S 9, 10.]

Appeal from Circuit Court, Essex County.

Action by John Gaffney against William H. Illingsworth. Judgment for plaintiff, and defendant appeals. Affirmed.

M. Casewell Heine, of Newark, for appellant. Grosken & Moriarty, of Newark, for appellee.

WALKER, Chancellor. This action was brought in the Essex county circuit court for damages for personal injury suffered by the alleged negligence of defendant. It was tried before Judge Dungan, and resulted in a verdict for the plaintiff in the sum of \$190.25, and costs. Rules to show cause were taken by plaintiff and defendant, respectively, and, upon argument, the court discharged defendant's rule and made an order granting to plaintiff a new trial as to damages only, provided that, if the defendant paid \$480.50 within ten days, the plaintiff's rule should be discharged. The defendant did not make the payment, and the plaintiff's rule became absolute. The propriety of the circuit court judge's action in this regard is drawn in question by the appeal.

[1] The defendant argues that upon common-law principles a trial court has no power to set aside a verdict as inadequate and to grant a new trial as to damages only. Without pausing to consider the force of these particular objections, a perfect answer is found in the practice act of 1912 (P. L. p. 377), which provides, in section 32, that the Supreme Court shall prescribe rules for that court and for the circuit and common pleas courts, and that such rules shall supersede (so far as they conflict with) statute and

common-law regulations theretofore existing, and that until such rules be made the rules thereto annexed shall be deemed the rules of the court. Rules 72 and 73, at page 397, are as follows:

"72. In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

"73. When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects."

The Supreme Court in 1913 made rules to take effect December 1, 1913, and, among them, adopted rules 72 and 73 annexed to the practice act of 1912, making them rules 131 and 132 of those then promulgated, and provided in rule 219 that the rules of the Supreme Court should, so far as appropriate, be applicable to the practice of the several circuit courts. The appropriateness and applicability of these rules cannot be doubted. Therefore the trial judge had the right to grant a new trial on the sole question of the inadequacy of the damages by virtue of the statute and rules mentioned, the question of damages being clearly separable from that of liability, and the only question remaining is: Had he the power to couple the rule for a new trial with terms, namely, that if the defendant paid a certain sum within a specified time, the rule should be discharged?

Counsel for appellant contends that the imposition of the terms mentioned upon the defendant was unwarranted. He cites no authority to sustain this proposition.

Quite aside from any question of the Court's inherent power to impose terms, the appellant is here again met with a positive rule of the Supreme Court which provides that the judge to whom an application for a rule to show cause whether a new trial should be granted shall exercise the same discretion in granting such rule as was then exercised by the court, and shall prescribe the terms, that is, the terms upon which the rule may be granted. Supreme Court Rules 1913, No. 122.

The power of the court in granting a new trial upon the ground that the damages are excessive, upon terms that a new trial shall be had unless the plaintiff will accept a certain sum named, less than that awarded by a verdict, is too well established to be questioned. It would seem to follow, by parity of reasoning, that when a new trial is granted because the damages are inadequate, the court may impose like terms, that is, terms to the effect that, if the defeated party will pay a certain sum greater than that awarded by the verdict, the rule will be discharged, subject, doubtless, to the power of an appellate court to vacate any such terms when they appear to be an abuse of discretion. No such showing is made on the record before us; and this makes it inappropriate for us to give consideration to the appellant's other

contention, namely, that the verdict, as it stands, is adequate and proper and evinces no prejudice or partiality on the part of the jury. As to whether or not the verdict is adequate and proper is, on application for a new trial, a matter of sound discretion in the trial court, and, in the absence of an abuse of discretion, the appellate court cannot review the trial court's action. And with the question of damages, apart from such discretion, we have nothing to do.

[2] These views lead to an affirmance. But affirmance also is to be rested upon another ground, namely, that the order under review is not appealable.

An appeal which was substituted by the practice act of 1912 for a writ of error lies only when the decision sought to be reviewed has not proceeded from a matter resting in discretion, but has settled definitively in the suit or proceeding the rights of the parties. *Eames v. Stiles*, 31 N. J. Law, 490, 494; *Defiance Fruit Co. v. Fox*, 76 N. J. Law, 486, 70 Atl. 460; *Knight v. Cape May Sand Co.*, 83 N. J. Law, 597, 83 Atl. 964; *Hanford v. Duchastel*, 87 N. J. Law, 205, 93 Atl. 586. The proceedings of the circuit court in a common-law action are reviewable only after final judgment. *Taylor Provision Co. v. Adams Exp. Co.*, 72 N. J. Law, 220, 65 Atl. 508.

It is obvious that the decision in question does not definitively settle the rights of the parties in the cause. A finality would eventuate from a judgment resulting from a new trial granted. Besides, as stated, the question of granting a new trial is a matter of sound discretion. 3 Bl. Com. 392. That the granting of a new trial rests in the discretion of the court is fully established by all authorities. *Hilliard on New Trials*, § 6, citing *Gray v. Bridge*, 11 Pick. (Mass.) 189, wherein, at page 191, it is held that the decision of that question is not appealable. And our Supreme Court, in *Mitchell v. Erie R. R. Co.*, 70 N. J. Law, 181, at page 183, 56 Atl. 236, held that in the circuit courts the matter of granting a new trial is discretionary and not reviewable upon error.

The judgment under review will be affirmed, with costs.

(90 N. J. Law, 208)

JEROLAMON v. TOWN OF BELLEVILLE.
(No. 159.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §54(1)—DIVERSION OF SURFACE WATER—LIABILITY.

A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains, it would not go.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1785.]

2. TRIAL §54(1)—RECEPTION OF EVIDENCE—GOOD IN PART.

Evidence legal for some purpose cannot be excluded because a jury may erroneously use it for another purpose. The opposite party's protection against this is to ask for cautionary instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 126.]

Appeal from Circuit Court, Essex County.

Action by Theodore Jerolamon against the Town of Belleville. Judgment for plaintiff, and defendant appeals. Affirmed.

Harold A. Miller, of Newark, for appellant.
Pitney, Hardin & Skinner, of Newark, for appellee.

PARKER, J. The suit was for overflowing plaintiff's lands by water, and the complaint, in two counts, alleged two different dates when such overflow occurred. The jury found for plaintiff in the sums of \$179.18 on the first count, and \$2,935.66 on the second count.

Plaintiff was the owner and occupier of a coal and lumber yard on the northwest corner of Cortlandt and Jerolaman streets in Belleville. Jerolaman street runs substantially east and west. One block west of Cortlandt street, and running parallel with it, is the Paterson & Newark branch of the Erie Railroad. A block further west, up a sharp grade, is Washington avenue, an important highway between Newark and Paterson. Next west of Washington avenue, and still further up the hill, is Linden avenue. North of Jerolaman street, and east of Linden avenue was a spring, whose overflow ran generally slightly south of east, always to the north of Jerolaman street, passing under Washington avenue down the hill, under the railroad through a culvert, and across plaintiff's lands to the corner of Jerolaman and Cortlandt streets and so to the Passaic river. Previous to the occurrences giving rise to the suit, the town had adopted a general plan of regrading, which involved, among other things, the elimination of a "hump" in Jerolaman street above Washington avenue, which had retarded the flow of water down the hill; and these changes, as claimed by plaintiff, led to the flooding of Jerolaman street in heavy rains, which resulted in cutting gullies and carrying away of soil, so that the town undertook to prevent this by banking the east side of Washington avenue, which prevented the water from running down Jerolaman street and, as plaintiff claimed, turned it in large measure into the natural water course already described.

The case presented under the first count was that in the storm conditions of November 11, 1911, this artificial diversion caused an overflow of plaintiff's land, whereby he was damaged. The second count, as amended, rested on the same acts of defendant in

diverting the water, and in addition charged that early in 1912 the town connected the natural water course with a covered drain just east of plaintiff's premises, and put catch-bars across the opening, so that in March, 1912, during storm conditions, the excessive volume of diverted water flooded plaintiff's premises as before, and in addition the opening of the covered drain became blocked by debris caught by the bars, and the water backed up on plaintiff's premises.

[1] 1. There was a motion to nonsuit on each count, and it is now urged that there should at least have been a nonsuit as to the first count. For this the case of *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61, affirmed in this court in 48 N. J. Eq. 645, 25 Atl. 20, is relied on as the leading authority. The argument proceeds on the assumption that plaintiff's evidence showed nothing more than a regrading of streets and diversion of water consequent thereon. If this were true, defendant's point would be well taken under the first branch of the *Miller Case*; but the evidence tends to show in addition, and the jury evidently found, that water flowing down Jerolaman street had been intentionally diverted therefrom by special provision for that purpose and thrown on plaintiff's land. This was a very different thing from mere regrading, and brought the case under the second branch of the *Miller Case*, where it was held that such conduct is an actionable injury. The law was stated by the court in the precise language of the syllabus to the case cited, on both branches, and the jury was justified in finding that the conditions of the second proposition were met. The same rule was laid down by this court in the later case of *Kehoe v. Rutherford*, 74 N. J. Law, 659, 65 Atl. 1046, 122 Am. St. Rep. 411, where the conditions closely approximated those in the case at bar. If the plaintiff's evidence were believed, the defendant for its own convenience diverted the water naturally flowing down Jerolaman street and turned it over the plaintiff's land. This it had no right to do without making proper compensation.

2. The same considerations dispose of the point that there should have been a direction of verdict for the defendant. There was a fair conflict of evidence, and a direction would have been improper.

[2] 3. Error is further charged, in that the court permitted evidence of changes made by defendant in the drainage system after the injuries complained of. Ordinarily it may be conceded such evidence is irrelevant and injurious, in tending to operate as an admission of guilt. In the present case, however, it came in on the cross-examination of defendant's engineer, who had denied in his testimony that the flood water had run down the

street in any such quantity as to do material damage on the roadway and lead defendant to provide for it in other ways. This was a material point in plaintiff's case, and to meet it he was entitled to bring out that defendant had taken care of this storm water by a special sewer; the inference of course being that unless there were a material amount of storm water, the culvert would not have been built, and its building was evidential of the incorrectness of the witness' statement. In this aspect it was competent; its incidental harmfulness, as tending to show an admission of liability, could and should have been met by a proper request to limit its application in the charge. *Trenton Pass. Railway Co. v. Cooper*, 60 N. J. Law, 219, 223, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Perry v. Levy*, 87 N. J. Law, 670, 94 Atl. 569.

4. Finally, it is claimed that the court erred in charging the jury as follows in response to plaintiff's request:

"If the jury find that, at the time complained of, water which, in its natural course, according to the grade of streets and levels of adjacent property, would not have reached plaintiff's land, was artificially collected and diverted by the town to the plaintiff's land, to his damage, it will not excuse the town that the water years before, by another route, had reached the water course that ran through plaintiff's land. In other words, if on the 11th of November, 1911, and the 12th and 13th of March, 1912, water which would not have come to the plaintiff's land in any way was thrown upon it, the fact that at some prior time it had come upon the plaintiff's land by some other course is past history, which does not concern the court and jury."

The objection to this instruction, stated in the language of appellant's brief, is this:

That the jury were told "that they were not concerned with the question whether the same volume of water, from the same sources, prior to the acts of defendant, would or would not have reached plaintiff's land by the natural water courses of the surrounding country."

If by "acts of defendant" counsel means the general system of regrading, rather than the particular act of diversion at the crossing of Washington avenue, the charge was correct. If, as was held in *Miller v. Morristown*, the town might lawfully adopt a new set of grades causing incidental changes in drainage, it is that system, and not the natural drainage of an uninhabited country to which owners are to conform and which they are entitled to assume will be maintained. If by "acts of defendant" the particular diversion is meant, we answer that a reading of the instruction will demonstrate that no such interpretation as that indicated by appellant can reasonably be placed upon it; for the comparison is between the "natural course according to the grade of streets and levels of adjacent property" and the "artificial collection and diversion to plaintiff's land."

The judgment will be affirmed.

(87 N. J. Eq. 624)

TAUB v. TAUB. (No. 118.)(Court of Errors and Appeals of New Jersey.
June 18, 1917.)*(Syllabus by the Court.)***MARRIAGE §58(1) — REPEAL OF STATUTE —
ANNULMENT.**

Paragraph 6 of section 1 of the Divorce Act of 1907 (Act May 17, 1907 [P. L. p. 474]; Comp. St. 1910, p. 2022) was not repealed or abrogated by the Marriage Act of 1912 (Act March 27, 1912 [P. L. p. 306]), and that paragraph of the Divorce Act authorizes the annulment of a marriage at the suit of the husband when he was under the age of 18 at the time of the marriage, and when the marriage had not been confirmed by him after arriving at such age, even though his parents consented to the marriage in the form prescribed by the Marriage Act, and even though it is inferred from the evidence that at the time of the marriage he intended to disaffirm it upon reaching the age of 18.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 115, 118.]

Appeal from Court of Chancery.

Petition by Stanley J. Taub against Margaret Pangburn Taub for the annulment of a marriage. From a decree of the Court of Chancery dismissing the petition, petitioner appeals. Reversed, and record remitted to Court of Chancery for the entry of a decree annulling the marriage.

Michael T. & Hugh C. Barrett and Roy F. Anthony, all of Newark, for appellant. Condict, Condict & Boardman, of Jersey City, for respondent.

TRENCHARD, J. This is the husband's appeal from a decree dismissing his petition for the annulment of his marriage.

The appellant and respondent were married in this state on April 22, 1915, by a minister of the gospel. At the time of the marriage the appellant was under the age of 18 years. He reached that age June 22, 1915. The respondent was 20 years of age. The parties did not reside together after the marriage. The marriage was in no way confirmed after the appellant reached the age of 18. On July 10, 1915, he filed his petition praying for the annulment of the marriage on the ground of his nonage at the time of the ceremony. The learned advisory master advised a decree dismissing the petition on the ground that the provisions of the Divorce Act authorizing annulments of marriage because of nonage of the parties did not apply where the parents of the minor had consented to the marriage. It is from that decree dismissing the petition that this appeal is taken. We are constrained to think that the decree was wrong.

The proceeding was pursuant to paragraph 6 of section 1 of the Divorce Act (P. L. 1907, p. 474; C. S. p. 2022), which provides:

"Decrees of nullity of marriage may be rendered in all cases * * * 6. At the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such mar-

riage be confirmed by him after arriving at such age."

It is argued that this provision of the Divorce Act has been repealed. We think not. It is not contended that it has been expressly repealed. But it is argued that it has been repealed because inconsistent with the provision in section 8 of the Marriage Act (P. L. 1912, p. 310), which reads as follows:

"If any such male applicant for a license to marry shall be a minor under the age of twenty-one years, or any such female applicant under the age of eighteen years, such license shall not be issued unless the parents or guardian of the said minor, if there be any, shall first certify under their hands and seals in the presence of two reputable witnesses, their consent thereto; which consent shall be delivered to the assessor, registrar or clerk issuing the license. If the parents, or either of them, or guardian of any such minor shall be of unsound mind, then the consent of such parent or guardian to the proposed marriage shall not be required," etc.

Since in the present case the parents of the appellant consented to the marriage in the form prescribed by the above section, it becomes necessary to determine whether or not paragraph 6 of section 1 of the Divorce Act is by implication repealed pro tanto, to the extent of the alleged repugnancy, by the above-recited provision of the Marriage Act. We think it was not.

At the outset it is to be remarked that a marriage license is not requisite to make a valid marriage. A marriage performed without a license for that purpose is as valid as one performed after securing the proper license. The provisions of the Marriage Act with regard to licenses both for minors and for others are penal in their nature, section 10 providing that, if any person having authority to solemnize marriages shall perform any marriage ceremony without the presentation of a license therefor, obtained in accordance with the provisions of the act, he shall be deemed guilty of a misdemeanor. P. L. 1912, p. 311. The burden is thus placed on the officer performing the marriage ceremony to see that the proper legal forms have been observed but if such officer, through design or oversight, fails to require the production of marriage license, the marriage nevertheless is a binding one. The license therefore appears to be merely an additional safeguard against hasty and ill-considered marriages and affects in no way the validity of the marriage.

Next it is to be observed that the provisions of the Marriage Act of 1912 requiring the consent of the parents of a minor before the issuing of a license were not new legislation, but merely re-enactment of provisions already in the statutes. Legislation on this subject is first found in section 5 of "An act concerning marriages," passed March 4, 1795 (Paterson's Laws p. 150), and the subsequent legislation, including that of 1912, is, in effect a mere re-enactment of the Pater-

son Act. It is also found in P. L. 1866, p. 960, section 1 of which provides that no person having authority to join persons together in the holy bonds of matrimony shall marry any male under the age of 21 years or female under the age of 18 years unless the parents or guardian shall be present and give their consent thereto, or until the minor applying to be married shall have produced a certificate in writing under the hand of the parents or guardian. And section 2 provides that, if any such officer shall marry any minor without the consent of the parents or guardian, such officer shall, for every such offense, forfeit \$300. These provisions were incorporated in the revision of the Marriage Act of 1874 (Rev. St. 1874, p. 459), found with various slight amendments in General Statutes, p. 2003, §§ 3, 4, and 5.

In 1902 the Marriage Act was again revised (P. L. 1902, p. 490), and the same provisions were incorporated, forming sections 3, 4, and 5. Up to the time of this latter act there was no requirement of a marriage license. In this revision, however, for the first time appeared provisions requiring the obtaining of a marriage license. Section 6, etc. The license was required only from nonresidents. If such nonresident was a male under 21 years or a female under 18, the license could not be issued except upon the consent of the parents or guardian. Section 13.

Thus the law stood until the act was revised in 1910 (P. L. 1910, p. 477; C. S. p. 3217). In this revision it was made mandatory that a license be secured by residents as well as nonresidents. Section 7 covered the marriage of minors and contained the same provisions with regard to the consent of the parents before the issuing of a license as is found in section 13 of the act of 1902.

So we find that the present Marriage Act of 1912 (P. L. 1912, p. 306), although passed subsequent to the Divorce Act of 1907, is merely a revision of substantially similar provisions in force long before the passage of that act. It was not a new expression of legislative intent inconsistent with the earlier divorce act, and under well-settled rules of statutory construction cannot be held to have worked an implied pro tanto repealer of that act.

The advisory master held that it was not the legislative intention to authorize the annulment of the marriage of a minor where the parents had given their consent in the statutory form. But clearly this is not so. It passed the Divorce Act of 1907 with the provisions of the Marriage Act before it relative to the consent of the parents to the marriage of minors. There is nothing in the Divorce Act itself to indicate a legislative intent to distinguish between marriages of minors where consent was given and those where no such consent was obtained. After providing for the annulment of marriages at the suit of the wife when under 18 at the

time of the marriage, when not confirmed, paragraph 6 of section 1 of the act says that marriages may be annulled "at the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such marriage be confirmed by him after arriving at such age." The suit is to be brought at the option of the husband, and his right to an annulment is to be barred if he has confirmed the marriage after reaching the age of 18. Speaking now without regard to the rights of the wife to an annulment in a proper case, the act places the responsibility on the husband; he alone can confirm the marriage after he becomes 18, and he alone can disaffirm it and begin the annulment suit. His parents cannot confirm or disaffirm, nor can they apply for the annulment. With these facts in mind, it is clear that no act of the parents prior to the marriage can make it binding against the will of the husband. They cannot deprive him of the right given him by statute by signifying their consent to the marriage.

It seems plain, therefore, that when the Legislature said that "decrees of nullity of marriage may be rendered at the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such marriage be confirmed by him after arriving at such age," it meant precisely what it said, and did not intend to limit decrees to marriages without the consent of the parents. Such evidently was the view of Vice Chancellor Stevens. In *Williams v. Brokaw*, 74 N. J. Eq. 561, 70 Atl. 665, speaking with reference to the Divorce Act of 1907, he said:

"If hereafter any person shall be so ill-advised as to enter into a marriage with an infant under the prescribed age, he or she will do it with the knowledge that the relationship can be terminated at the mere will of the infant."

Such also seems to have been the opinion of Vice Chancellor Stevenson. In *Titworth v. Titworth*, 78 N. J. Eq. 47, 78 Atl. 687, he thus speaks of the act of 1907:

"Under our statute, if there be issue, the same will be legitimate, and I think the view is a correct one, that in a case like this a decree of nullity operates practically to render void at the time of its rendition what up to that time was a valid, but voidable, marriage, and thus amounts to a decree of divorce a vinculo. Young men under 18 years of age are thus permitted to contract a 'trial marriage,' and if the wife be above 16 years of age, it will be optional with the husband alone to affirm or disaffirm the marriage when he shall reach the age of 18 years. * * * But while I concur in the views of this sort of legislation indicated by Mr. Bishop (1 Bish. Mar. & D. §§ 564, 566), even when innocent children may not be bastardized, the duty of the court, of course, is perfectly plain, viz, to enforce this statute in every case fairly brought within it without venturing to 'impugn the wisdom or the policy of the law.'"

It is argued that the appellant intended, at the time of the marriage, to disaffirm it upon reaching the age of 18, and it is contended that to permit him to do so would work a fraud both upon the wife and the state. But it is enough to say in disposing of this con-

tention that the wife is presumed to have known the law, and the state by the statute has declared in effect that it does not care to enforce any public policy keeping marriages indissoluble contracted under the circumstances of the present case.

The decree below will be reversed, with costs, and the record remitted to the Court of Chancery for the entry of a decree of annulment of the marriage.

(90 N. J. Law, 707)

MAXWELL et al. v. EDWARDS, State Comptroller, et al. (No. 108-51A.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

Appeal from Supreme Court.

Certiorari by Lawrence Maxwell and others against Edward I. Edwards, Comptroller of the Treasury of the State of New Jersey, and others, to review an assessment of a transfer tax. From a judgment by the Supreme Court (99 Atl. 138), affirming the tax, prosecutor appeals. Affirmed.

Coult & Smith, of Newark, and Edward De Witt, of New York City, for appellants. John W. Wescott, Atty. Gen., and John R. Hardin, of Newark, for appellees.

PER CURIAM. The constitutionality of the act of April 9, 1914 (P. L. 1914, p. 267), amending the inheritance tax law of April 20, 1909 (P. L. 1909, p. 325), has been sustained by the Supreme Court in an opinion by Mr. Justice Minturn. Maxwell v. Edwards, 89 N. J. Law, 446, 99 Atl. 138. Nothing need be added thereto on the constitutionality of the act, but it is important that the facts illustrating the method by which the transfer inheritance tax was levied in this case may be amplified somewhat; thus, the return to the writ of certiorari shows the appraised value of the entire estate, wherever situate, was ascertained and fixed at \$3,969,333.25. From this amount was deducted \$328,914.04, being the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, leaving \$3,640,419.21, from which figure was deducted \$270,813.17, being the amount allowed for debts, administration expenses, etc., leaving a net estate of \$3,369,606.04; from this net estate was deducted legacies bequeathed under the will, together with legacies to beneficiaries in the 5 per cent. class and the interest of the widow in the estate, other than New Jersey stocks specifically bequeathed, amounting to \$651,474.25, leaving a residuary estate of \$2,718,131.79.

The appraised value of the New Jersey stocks specifically bequeathed to the widow was ascertained to be \$246,685.53, and the rate of taxation assessed thereon is 1 per cent., 1½ per cent., and 2 per cent., making the tax due this state on this specific bequest to the widow \$3,933.71. The appraised value of the New Jersey stock specifically bequeathed to the stranger was ascertained at \$82,228.51, and the rate of taxation on the value of this bequest is 5 per cent., making the amount of tax due \$4,111.42. The appraised value of the New Jersey stocks owned by the decedent at the time of death was \$1,114,965; from this appraised value was deducted the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, amounting to \$328,914.04, leaving the net appraised value of the New Jersey property, which formed a portion of the general assets of the estate, at \$786,050.96. The method employed in ascertaining the tax due this state,

on the transfer of the shares of stock of the New Jersey corporations not specifically bequeathed, is as follows: The amount of legacies, etc., passing to beneficiaries taxed at the rate of 5 per cent. was determined at \$356,761.26, making the tax due thereon at the rate of 5 per cent. \$17,838.06. The interest of the widow in the estate, other than shares of New Jersey stocks specifically bequeathed, was determined to be \$294,712.99, and the statutory exemption of \$5,000 was deducted and the tax at the rate of 2 per cent. and 3 per cent. was \$8,658.24. The residuary estate was taxed, as passing to the son and two grandchildren and determined to be \$2,718,131.79, and the statutory exemption of \$5,000 to each, totaling \$15,000, was deducted, and the balance taxed at the rate of 1 per cent., 1½ per cent., 2 per cent., and 3 per cent., making the tax on the residuary estate \$70,893.96.

The total amount of tax on the interest of the collateral heirs and the amount passing to the widow, together with the residuary estate passing to the son and grandchildren, as set forth above, total \$97,390.25. The percentage or proportion of the New Jersey stocks (not specifically bequeathed), which total \$786,050.96, bears to the entire estate (less specific bequests of New Jersey stocks), which totals \$3,640,419.21, was determined to be .2159 thus:

\$3,640,419.21) \$786,050.96 (.2159.

This percentage or proportion of \$97,390.25, which is the tax that would have been due if the decedent had died a resident of this state and all his property had been located here equals \$21,026.55. The total amount of tax, as set forth above, which included the tax on the New Jersey stocks specifically bequeathed to the widow and stranger and the New Jersey stock which forms a portion of the general assets of the estate, totals \$29,071.63, the amount of the tax.

The judgment of the Supreme Court is affirmed, with costs.

(90 N. J. Law, 630)

TITLE GUARANTY & SURETY CO. v. FUSCO CONST. CO. et al.

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY \S 190(9) — SURETY BOND—ACTION FOR PREMIUMS.

The plaintiff in consideration of the execution of an agreement of indemnity to it by defendants executed a surety bond to the town of Harrison, N. Y., for the due performance of the contracts of the defendant company with the town.

The indemnity agreement provided for the payment of annual premiums during the continuance of the work, and the payment of incidental expenses in case of suit.

The only affirmative defense pleaded was that the contracts were completed before the maturing of the annual premium sued for. The proof showed otherwise, and no contradiction of the substantial allegations of the plaintiff's loss being apparent, the trial court directed a verdict for the plaintiff. Held, upon review of the testimony, that the action of the trial court was not erroneous.

Appeal from Supreme Court.

Action by the Title Guaranty & Surety Company against the Fusco Construction Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles M. Mason, of Newark, for appellants. Cohn & Cohn, of Paterson, for appellee.

MINTURN, J. The plaintiff, a foreign corporation, brought suit against defendants, the defendant company being a corporation of this state, to recover premiums due on three bonds given by the plaintiff, as surety for the Fusco Construction Company, to the town of Harrison, in the state of New York, to ensure the completion of certain contracts entered into by the construction company with the town, for the construction of a sanitary sewer system therein.

The allegation of the complaint is that in consideration of the plaintiff's suretyship, the defendants agreed in writing with the plaintiff to pay in cash the annual premium upon each of said bonds, and to continue the payment of the same until the plaintiff should be discharged, according to law, from all liability upon the obligations. The agreement also contained a provision of indemnity, in virtue of which the plaintiff was to be saved harmless from any loss or liability by reason of its execution of the obligations, including disbursements and costs and counsel fees incurred in collecting the premiums due upon the bonds. The breach alleged was that the premiums remained unpaid for the years 1914 and 1915, maturing respectively on the 6th of December in each year. The answer of both defendants contained a general denial of the allegations of the complaint, and an averment that the contract in question was completed by the company prior to December 6, 1913.

The trial at the circuit resulted in a direction of a verdict for the plaintiff, and the appeal lies from that determination. The due execution of the bonds was not denied in the proof. It is contended that there was a variance between the allegation and the proof, in that two of the bonds were dated December 6th, and since the indemnity agreement was dated December 19th, the inference to be drawn was that the latter could not have been executed as *quid pro quo* for the former. No proof was tendered to support the contention, while the proof was ample and uncontradicted that the agreement of indemnity presented the moving motive for the execution of the bonds. It is also to be observed that the test is not fixed by the date of the bond, but by the date of delivery thereof.

The argument that the agreement was without consideration is based upon the same misconception and falls with it; and it is to be noted that no averment of the kind is made in the answers, and that the agreement itself refers to the execution of the bonds as *quid pro quo* for the execution of the agreement. The third bond was in fact dated December 28th, and the premiums for the first year were paid, and it was proved and stands apparently without dispute in the record that the performance of the contract consumed more than a year, so that the premiums again matured on December 6, 1914, and the liability

of the defendants for their payment consequently is manifest.

Certain ledger cards, containing statements of payment of premiums by defendants, were admitted in evidence over the defendants' objection, that they were not original entries, and were not properly proved. If this contention be conceded, their admission was in no wise injurious to the defendants, since without their presence in the case the proof was ample from other sources, upon which to base defendants' liability. The substantial allegations of the complaint remained challenged and uncontradicted in the proof; and we think the right, if not the duty of the court, under the circumstances, manifestly was to adopt the course it pursued, and to direct the judgment appealed from, which will be affirmed.

(87 N. J. Eq. 601)

GOLDSTEIN v. GOLDSTEIN et al. (No. 42.)
(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. HUSBAND AND WIFE §31(8) — JEWISH MARRIAGE ARTICLES—CONSTRUCTION.

A Jewish betrothal agreement and marriage certificate, whereby the prospective husband obligates himself to care for the property brought in by the wife and pledges his own property as security for doing so, constitute marriage articles which give rise to an executory trust wherein the creator of the trust denotes his ultimate object, imposing on the trustee or the court the duty of effectuating it in the most convenient way.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 187, 883.]

2. HUSBAND AND WIFE §31(13) — JEWISH MARRIAGE ARTICLES—CONSTRUCTION.

The nature of an executory trust created by Jewish betrothal agreement and marriage certificate indicates that the settlement will provide not only for husband and wife, but for children, and it is for the court to work out the details of the scheme according to the circumstances of each case so as to do justice and effectuate the intention of the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 193, 883.]

Appeal from Court of Chancery.

Bill in equity by Eva Goldstein against Hyman I. Goldstein and others. Decree (98 Atl. 835) for defendants, and complainant appeals. Reversed.

Henry S. Alvord, of Vineland, for appellant. Albert S. Woodruff, of Camden, for appellees.

SWAYZE, J. The bill is filed to establish a trust in the sum of \$5,000, to charge it on lands of the defendants, and to secure the return of wearing apparel, jewelry, and wedding presents brought by the complainant on her marriage to the defendant, Hyman I. Goldstein. The important question is as to the title to the \$5,000. The facts are as follows: Eva Lipitz, then under 16 years of age, the complainant, entered into a written betrothal agreement with the defendant, Hy-

man I. Goldstein, on June 10, 1914. The agreement was signed by both. It provided for a marriage with ceremony of canopy and sanctification according to the rite of Moses and Israel; that they should share in their possession, just portion and portion as is the universal custom. The bridegroom bound himself to give presents to the bride according to the custom. The bride obligated herself to bring in as dowry \$5,000 and clothing, beddings, and trousseau, according to the manner of the prosperous. At the time of the betrothal the father of the complainant deposited \$5,000 in bank and received therefor a certificate payable to Eva Lipitz and Dr. Hyman Goldstein ten days after legal marriage notice. This certificate was then delivered to Dr. Goldstein, who satisfied himself by inquiry that it was good for the money. Subsequently, in September, the marriage took place with ceremony of canopy and sanctification. We are furnished with a translation of a Hebrew marriage certificate, translated from the original Aramaic, which sets forth the obligations of the parties. This is only a blank form. Mrs. Goldstein testifies that her husband took the original certificate from her. He testifies that he understood it was a certificate certifying to the fact that they were man and wife and that he was to feed and support her. He does not deny that he took the certificate from her. It is not questioned that this form is followed in a case of ceremony under the canopy and with sanctification and is included as a part of the ceremony. Dr. Goldstein's father testifies that they positively do it in every Jewish marriage. The certificate states that the bride consented to become the bridegroom's wife and brought unto him the dowry given her by her family, consisting of gold and of silver, of ornaments and of garments, of furniture and of bedding, which the bridegroom accepted and agreed to add thereto and give her an equal sum, declaring:

"I accept the responsibility to the integrity of this dowry and of my addition thereto, for myself and my heirs that will follow me, to compensate with the most valuable of my estate and possessions, which I do possess anywhere beneath the sky, that which I have bought already and that which I may buy hereafter whether of land or of goods and chattels, all of which I hereby pledge as security and hold them subject to the collection of the sum set forth in this certificate, to wit, the amount of this dowry and my addition thereto even pledge the very cloak I wear on my shoulders in payment during my lifetime and after my lifetime from this day forever."

The certificate of marriage goes on to state that the bridegroom took upon himself in accordance with the certificate the responsibility for the dowry and the addition thereto. The certificate is declared to be subject to strict enforcement as all certificates of dowry customary among the daughters of Israel. It closes with the declaration that:

"We have purchased the right of this man, namely, the bridegroom, and have vested it in this worthy woman aforementioned * * *

to all that is written and set forth in the foregoing by means of an article with which the right and title may be properly purchased."

Dr. Goldstein obtained his wife's indorsement of the certificate of deposit and drew the money, most of which, \$4,000 or more, he has invested in a house in Camden in his own name. Some of it seems to have been used to buy presents for the complainant, and some invested in a house, the title to which is in the doctor's mother.

[1,2] The rights of the parties obviously depend on the betrothal agreement, the certificate of deposit, and the marriage certificate. Dr. Goldstein's testimony as to the conversations with his prospective father-in-law are unimportant, since the negotiations, to call them by their proper name, finally took form in written documents. We think it clear that there was no gift of the money to the defendant. The fact that the certificate of deposit was in the joint names of the prospective spouses is conclusive on that point. The betrothal agreement contemplated a subsequent marriage according to commonly used Hebrew rites which involve obligations on the part of the prospective husband to care for the property brought him by the wife, and to add thereto. The pledge by the marriage ceremony of his own property as security indicated that he was to have either complete or partial control of the property, and that the wife was to have some beneficial interest therein secured by his pledge. If we lay aside the terms, unusual to our ears, in which the documents are couched, we have what is familiar to English law under the name of marriage articles, and we have a case of the legal situation, which so often arises out of marriage articles, of an executory trust, where, to use the language of a classic text-book:

"The creator of the trust has merely denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way." Adams on Equity, star page 40, a statement commended by Pomeroy as "very accurate." Pomeroy's Equity Jurisprudence, § 1001.

"In the case of executory marriage articles," continues the author, "there is an indication furnished by the nature of the instrument, independently of an expressed intention leading to this construction of the trust; for it is assumed, in accordance with ordinary practice, and in the absence of reason to conclude the contrary, that the settlement contemplated by such articles is one which will not only provide for the husband and wife, but will also secure a provision for the children of the marriage. If therefore the articles, strictly interpreted, would have a different result, they will be molded in conformity with the presumed object."

Pomeroy says (section 1001) that, where marriage articles or agreements to settle are general in their terms, a court of equity presumes that it was the intention of the parties to provide for the issue of the marriage, and will therefore direct a settlement to be made which does provide for the children. The subject is discussed in Lord Glenorchy v. Bosville, 1 Leading Cases in

Equity, 1, and the notes thereto, but we need go no further than the opinion of Justice Depue, speaking for this court, in *Oushing v. Blake*, 30 N. J. Eq. 689, at page 701, followed by us in *Pillot v. Landon*, 46 N. J. Eq. 310, 19 Atl. 25. In those cases, indeed, the trusts were definitely and perfectly expressed in the declaration; here they are left indefinite and uncertain. Indefinite and uncertain as the terms are, the intent is clear. It is to create a trust fund in consideration of the marriage and for the purposes thereof. It is for the court to work out the scheme of the marriage settlement. The fact that cases of this kind are uncommon and unfamiliar to our courts arises out of our different social customs and usages, which are apt to treat gifts of this kind as made to the bride and take little thought in the case of small fortunes of the objects of the marriage and the possible claims of future children. Uncommon and unfamiliar as such marriage articles are, there is no reason why they should not be enforced and carried out as marriage articles, and executory trusts are enforced and carried out by the English law. Since we think the case is one of an executory trust, it is not important to determine the effect of the complainant's indorsement of the certificate of deposit. Her husband was also a trustee, and the fund in his hands alone would be charged with the same trust as in their joint hands. It may be well to add that, even if the complainant had a title free from the trust to any part of the fund, it would be presumed to remain her property. *Black v. Black*, 30 N. J. Eq. 215. The reversal of that decree (31 N. J. Eq. 798), although without opinion, can only be interpreted under the facts of the case as emphasizing the principle, which has since been followed in this court. *Cole v. Lee*, 45 N. J. Eq. 779, at 785, 18 Atl. 854.

If a proper settlement had been drawn to effectuate the intent of the marriage articles, it would have provided that the trustees should hold the estate during the continuance of the marriage. Such a clause was approved in *Harvard College v. Head*, 111 Mass. 209, and may prevent the injustice of allowing the spouse who is guilty of misconduct to profit by the settlement as the law in England permitted prior to legislation. *Evans v. Carrington*, 2 De. F. & J. 481; *Fitzgerald v. Chapman*, L. R. 1 Ch. D. 563, 45 L. J. Ch. 23; *Chase v. Phillips*, 153 Mass. 17, 26 N. E. 136. The case is like *N. J. Title Guarantee & Trust Co. v. Parker*, 85 N. J. Eq. 557, 96 Atl. 574.

In case the marriage shall be dissolved, as seems not improbable in view of what has happened, the scheme of the settlement should provide for that contingency. Where husband and wife had separated, *Lord Romilly*, M. R., in *Munt v. Glynes*, 41 L. J. Ch.

689, directed that the legacy be paid to the wife. Each case depends on its own circumstances, but there would be all the greater reason for this direction where the fund came from the wife or on her behalf, and a trust would result upon failure of the purpose of the marriage articles. Speaking generally, the Court of Chancery will now be in a position to work out a scheme in the light of what has happened, which shall be calculated to do justice and effectuate the intention of the parties. Illustrations of the length to which the court may go in settling the scheme to effectuate the intention may be found in the cases cited in the notes to *Lord Glenorchy v. Bosville* in the *Leading Cases in Equity* and in *Taggart v. Taggart*, 1 Sch. & Lef. 84; *Young v. McIntosh*, 13 Sim. 445; *Cogen v. Duffield*, 2 Ch. Div. 1044, 45 L. J. Ch. 307. The report in 13 Sim. gives a form of decree.

Other precedents may be found in *Seton on Decrees*, 1235ff. The opinion of the Vice Chancellor was adverse to the complainant and the scheme of the settlement was a matter which, under his view, it was unnecessary to consider.

The claim of the complainant to personal chattels was only touched upon in the court below, and not discussed in this court. The evidence is not detailed enough to enable us to express any opinion that would be helpful. If important, it can be dealt with by the Court of Chancery upon more complete evidence.

The complainant is entitled to a decree charging upon the land owned by Dr. Goldstein the amount which he invested therein out of the \$5,000, appointing a trustee, and settling the terms of the trust or the destination of the fund if the trust must be considered at an end. As to the amount invested in property owned by defendant's mother, we find nothing in the testimony to charge her with notice of the trust. As to that and any other sum that he may have spent out of the trust fund, the decree can only be a personal decree against him. The existing decree must be reversed, and the record remitted to the Court of Chancery for further proceedings in accordance with our opinion. The complainant is entitled to costs in both courts.

(87 N. J. Eq. 611)

SHANNON et al. v. WATT. (No. 45.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

CURTSEY §2—DEVISE FREE FROM CURTSEY—STATUTE.

The amendment of 1876 to the Married Women's Property Act (3 Comp. St. 1910, p. 3230, pl. 8a) supersedes the proviso in section 9 of the act of 1874 (3 Comp. St. 1910, p. 3235, pl. 9), as well as the provisions of section 14

(3 Comp. St. 1910, p. 3237), in the cases to which it is applicable; in such cases, a married woman may devise lands free of any curtesy of her husband.

[Ed. Note.—For other cases, see *Curtesy*, Cent. Dig. §§ 3, 4.]

Appeal from Court of Chancery.

Bill by John F. Shannon and another against Daniel C. Watt to enjoin actions of ejectment. From a decree of the court of chancery (99 Atl. 114) dismissing the bill for want of equity, complainants appeal. Affirmed.

The bill seeks to enjoin actions of ejectment. Mary J. Watt, wife of the defendant, died seised. She and the defendant were married in 1889, and had a child. In 1908, on the wife's complaint, she obtained a judgment in the Supreme Court of New York, whose jurisdiction is not questioned, separating her from the bed and board of the defendant forever. Thereafter, and until her death, she and her husband lived in a state of separation under that judgment. Mrs. Watt, by a will made October 30, 1914, devised the real estate in question to the appellants. Probate of the will was resisted, although apparently not by the husband; the will was sustained both in the orphans' court and the prerogative court; there is nothing to show that there was an appeal to this court. The husband brought the ejectment suits, relying on an alleged estate by the curtesy. The appellants answered, setting up that the devise to them was free of the curtesy by virtue of the amendment of 1876 to the Married Women's Property Act (P. L. 1876, p. 18; Revision of 1877, p. 639, pl. 18; C. S. p. 3230, pl. 8a). It is not claimed that the property in suit came to Mrs. Watt by gift through or from her husband. While the actions at law were pending, the defendants therein, now the appellants, apparently thinking that, even if their view of the statute was upheld, it would be open to the plaintiff in the ejectment suit to question whether the will was valid or not, filed this bill. The equity on which they rely is an oral promise made in open court in the New York action, recited in the findings of fact and made part of the judgment, by which the defendant agreed to release his interest as tenant by the curtesy in all his wife's real property, as well that she then had as that she might subsequently acquire, and to execute all instruments and conveyances necessary to carry into effect such releases whenever he might be requested by his wife so to do.

Substantially the bill is a bill for specific performance of the contract and for the enforcement of the judgment. Upon motion the chancellor dismissed the bill for want of equity. The appeal is from this decree.

Marshall Van Winkle, of Jersey City, for appellants. Walter L. McDermott and Runyon & Autenrieth, all of Jersey City, for appellee.

SWAYZE, J. (after stating the facts as above). The first question to be decided is what is the effect of the devise in Mary F. Watt's will. This depends on the effect of the act of 1876, now printed in the *Compiled Statutes*, p. 3230, pl. 8a. The case is clearly within the language of the act. Mrs. Watt was a married woman, living in a state of separation from her husband, under and by virtue of the judgment of the Supreme Court of New York founded upon her application for the separation. The devise of the lands to the appellants was made during the continuance of the separation, and the lands did not come to her by gift through or from her husband. In such a state of facts, the statute says, in so many words, that she may devise "in the same manner and with the like effect as if she were sole and unmarried." Obviously, if this statute is effective, the devise must be free of any curtesy of the husband; otherwise it would not have the like effect as if the testatrix were sole and unmarried. The husband's contention, however, is that section 9 of the Married Women's Property Act, as revised in 1874 (Revision of 1877, p. 638), enacts that "nothing herein contained shall be so construed as to authorize any married woman to dispose, by will or testament, of any interest or estate in real property to which her husband would be, at her death, entitled by law; but such interest or estate shall remain and vest in the husband in the same manner as if such will had not been made." This statute was approved March 27, 1874. By section 6 it authorizes a married woman living in a state of separation from her husband, under or by virtue of the final judgment or decree of a court, during the continuance of the separation to sell, release, transfer, and convey any interest, estate, or right in real property in the same manner and with the like effect as if she were sole and unmarried, but expressly provides that such sale, conveyance, or release shall not affect any estate or right her husband might then have in such property. There was no inconsistency between section 6 and section 9 of the act of 1874. The proviso of section 9 was applicable only in case of a devise by a married woman, and no devise was authorized by section 6, which, moreover, was as carefully drawn as section 9 to save the rights of the husband.

In 1875 the Legislature saw fit to introduce a change (P. L. 1875, p. 52). The act is in two sections, the first authorizing a married woman, under the specified circumstances, to convey, mortgage, lease, or devise as if sole and unmarried; the second authorizing a married man, under the same circumstances, to convey, mortgage, lease, or devise. There was a clerical error in the first section caused by the omission of the word "except." This error was corrected by the act of 1876, above recited. The im-

portant change was the insertion of the word "devise." This word can only have effect if the act of 1876 supersedes the proviso in section 9 of the act of 1874 in the cases to which it is applicable. The proviso still is law as to all other cases and constituted the usual rule. It is not, since 1876, applicable to the cases, fortunately few in number, which fulfill the special conditions of that act. The same reason makes section 14 of the act of 1874 inapplicable to cases arising under the act of 1876. This case, as we have said, is within the special conditions of the act of 1876, and Mrs. Watt might therefore devise with the like effect as if she were sole and unmarried, i. e., free of any curtesy of her husband.

It follows from this that the defendants in ejectment, now appellants, have a complete defense at law if Mrs. Watt's will is valid, as it has been held to be by the orphans' court and the prerogative court. If that will should be questioned in the ejectment suits, and the jury should find adversely to its validity, a different question would be presented. But Mr. Watt's counsel in their brief in this court state their contention as being that the will was not inconsistent with his right of curtesy; that they rely on the proviso in section 9, and that the actions of ejectment depend for determination upon the construction of the statute. If they adhere to this position, the defense at law will be adequate. But if they had taken a different position, the present bill would be without equity. It avers that the will is valid and sustained by the decrees of both courts. If that is so, it is idle to enforce a contract for the release of curtesy, since there is no curtesy to release. The bill in that view is prematurely filed. It would be well for the chancellor to modify the decree below so as to leave no doubt that the complainant's rights may be presented by a new bill if and when the proper time comes. We express no opinion as to the points dealt with by the vice chancellor. In the view we take, no harm can be done the complainants by affirming the present decree. The defendant is entitled to costs in both courts, as he has been brought in the present proceeding unnecessarily.

(90 N. J. Law, 698)

KOETTEGEN v. MAYOR AND ALDERMEN
OF CITY OF PATERSON et al.
(No. 149.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. MUNICIPAL CORPORATIONS §121 — ORDINANCE—DETERMINATION OF VALIDITY.

An ordinance could not be set aside as a whole in a proceeding in which no conviction had been had, though the authority conferred on the board of aldermen by the city charter to pass

the ordinance had been curtailed or superseded by a statute in one or more respects.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 257.]

2. LICENSES §7(9)—REGULATION—REVIEW.

Where the license fee fixed by an ordinance was not excessive or unreasonable in view of the incidental expenses connected with the enforcement of the ordinance, including cost of inspection, the fee was an incident to regulation and not for revenue.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 1519.]

3. MUNICIPAL CORPORATIONS §121 — ORDINANCES—VALIDITY—RIGHT TO ATTACK.

The prosecutor in certiorari proceedings could not complain that the penalty imposed for violation of an ordinance was not authorized by the city charter, where she had not been convicted and no penalty had been imposed upon her.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 257.]

4. MUNICIPAL CORPORATIONS §111(4) — ORDINANCES—PARTIAL INVALIDITY.

The whole of a city ordinance will not be set aside because part of it is invalid, where the valid and invalid provisions are separable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 248-251.]

5. MUNICIPAL CORPORATIONS §591 — ORDINANCES—DELEGATION OF CHARTER POWERS.

Where a city charter merely authorized the board of aldermen to pass ordinances regulating places of amusement, and did not require them to license such places, an ordinance, authorizing issuance of licenses by the mayor, was not an illegal delegation of the charter powers to the mayor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1310.]

6. LICENSES §7(1)—ORDINANCES—VALIDITY—CONFISCATION.

That an ordinance imposing licenses on places of amusement may incidentally decrease the profits from the sale of liquors and the receipts of rent for a dance hall does not make the ordinance confiscatory.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7, 19.]

Appeal from Supreme Court.

Proceeding by Wilhelmina Koettegen against the Mayor and Aldermen of the City of Paterson and others. From judgment for defendants, prosecutor appeals. Affirmed.

The following is the opinion of the court below:

"This writ brings up for review an ordinance passed by the Paterson board of aldermen to license and regulate the public dance halls of that city.

"Our examination leads to the following conclusions:

[1] "1. The authority to pass the ordinance in question is conferred upon the board of aldermen by the provisions of the city charter. If the authority thus conferred is in one or more respects curtailed or superseded by the act of 1913, still the ordinance as a whole cannot be set aside in this proceeding in which no conviction has been had.

[2] "2. The fee fixed by the ordinance is not excessive or unreasonable in view of the incidental expenses connected with its enforcement, including cost of constant inspection. The fee

thus fixed is therefore incident to regulation, and not for revenue.

[3, 4] "3. The penalty imposed by the ordinance is authorized by the charter; in the absence of a conviction and the imposition of any penalty it is not perceived that the prosecutor is in a position to quarrel with a provision which, if her contention be correct, would not be enforceable in case she violated the ordinance. If separable, the whole ordinance will not be set aside. *Shill Rolling Chair Co. v. Atlantic City*, 87 N. J. Law, page 399, 94 Atl. 314.

[5] "4. The ordinance is not an illegal delegation of the charter powers to the mayor. The charter does not require the board of aldermen to license places of amusement; it authorizes them to pass ordinances regulating such places. That they have done, and a part of the regulation thus ordained is a license to be obtained in the manner prescribed by the ordinance. The board has not delegated its authority; it has exercised it. The prosecutor has not been refused a license or been convicted for not having one; hence she has not shown that any injury has come to her from this incident of regulation.

[6] "5. The ordinance is not unreasonable because of its incidental effect upon the business in which the prosecutor is lawfully engaged; hence the fact that the sale of liquors and the receipts of rent for the dance hall fell off after the ordinance went into effect does not render it confiscatory in any legal sense.

"The defendant in certiorari contends in limine that, inasmuch as there has been no conviction, the ordinance cannot be set aside in toto if any of its provisions are at once lawful and separable from those that are challenged, citing *Rosenkrans v. Eatontown*, 80 N. J. Law, 227, 77 Atl. 88; *Neumann v. Hoboken*, 82 N. J. Law, 275, 82 Atl. 511; *Siciliano v. Neptune Township*, 83 N. J. Law, 158, 83 Atl. 865.

"There are in the ordinance such provisions, e. g., the sale of intoxicating liquors, the inspection of dance halls, and the revocation of licenses.

"Our conclusion, therefore, is that in the respects in which it is challenged, the ordinance is valid, and that if it were otherwise, it would not be set aside in toto in this proceeding.

"This applies also to the cases in which the prosecutors are Duffy, the Charles Kruchen Company, and the Riverside Turn Verein Harmonie.

"The writs are dismissed, with costs."

Ward & McGinnis, of Paterson, for appellant. Edward F. Merrey, of Paterson, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(90 N. J. Law, 717)

RIVERSIDE TURN VEREIN HARMONIE
v. MAYOR AND ALDERMEN OF CITY
OF PATERSON et al. (No. 148.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

Appeal from Supreme Court.

Proceedings by the Riverside Turn Verein Harmonie, a corporation, against the Mayor and Aldermen of the City of Paterson and others. From judgment for defendants, prosecutor appeals. Affirmed.

Ward & McGinnis, of Paterson, for appellant. Edward F. Merrey, of Paterson, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per

curiam in *Wilhelmina Koettegen v. Mayor and Aldermen of the City of Paterson et al.*, No. 149, 101 Atl. 253, of the present term of this court.

(90 N. J. Law, 700)

CHARLES KRUCHEN CO. v. MAYOR AND
ALDERMEN OF CITY OF PATERSON
et al. (No. 150.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

Appeal from Supreme Court.

Proceedings by the Charles Kruchen Company, a corporation, against the Mayor and Aldermen of the City of Paterson and others. From judgment for defendants, prosecutor appeals. Affirmed.

Ward & McGinnis, of Paterson, for appellant. Edward F. Merrey, of Paterson, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per curiam in *Wilhelmina Koettegen v. Mayor and Aldermen of the City of Paterson et al.*, No. 149, 101 Atl. 253, of the present term of this court.

(90 N. J. Law, 282)

SMITH v. SMITH. (No. 143.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. COVENANTS \S 122—BREACH OF COVENANT AGAINST INCUMBRANCES—EVIDENCE — FOREIGN DECREE.

A judgment or decree being entered in the courts of the state of Iowa, under proceedings to foreclose a mortgage and for the redemption of the land, by paying the amount due on a judgment, such decree and proceedings are prima facie evidence of the validity of the mortgage, of the amount due thereon, of the lands upon which the same were a lien, of the extent of the lien, and of the right of redemption. This is so when such judgment or decree is put in evidence, in a suit brought in the New Jersey courts, to recover damages for a breach of the covenants against incumbrances, contained in deeds conveying the lands covered by the mortgage foreclosed.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 224.]

2. ACTION \S 17—COVENANT AGAINST INCUMBRANCES—REMEDIES—LEX FORI.

Remedies are to be regulated and pursued according to the lex fori, the law of the place where the action is instituted.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 94.]

3. COVENANTS \S 110 — LIMITATION OF ACTIONS—COVENANT AGAINST INCUMBRANCES.

There is no statute of limitations in New Jersey, in an action for breach of a covenant against incumbrances.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 177, 178.]

4. COVENANTS \S 102(1)—COVENANT AGAINST INCUMBRANCES—ACTION FOR BREACH—EVICTION.

Actual eviction is not necessary, before an action will lie for the breach of a covenant against incumbrances. It is sufficient that eviction may take place.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 157-159.]

Gummere, C. J., and Swayze, Bergen, Williams, Taylor, and Gardner, JJ., dissenting.

Appeal from Circuit Court, Warren County.

Action by Walter H. Smith against Clarence C. Smith, executor of James Prall, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

William H. Morrow, of Belvidere, for appellant. L. De Witt Taylor, of Belvidere, and Osiris D. McConnel, of Phillipsburg, for appellee.

BLACK, J. The respondent sued the appellant's testator, in the Warren circuit court, for a breach of the covenants against incumbrances, contained in two deeds, made by James Prall, the appellant's testator, bearing date March 8, 1891. The land conveyed by the deeds is situate in Harrison county, state of Iowa. The case coming on for trial, the record shows, the respective counsel having agreed upon the facts, the court took the case from the jury and directed a verdict for the respondent, for \$2,091.08. An exception was then noted to the direction of the verdict. The appellant brings the appeal, and alleges 13 grounds and reasons for a reversal of the judgment, all of which, in different forms, challenge the right of the respondent to maintain the action. Thus the first four and the eleventh allege error in the trial court in directing a verdict, in favor of the respondent. The fifth, sixth, and seventh allege the only action that could be maintained is an equitable proceeding; eighth, certain releases given by the respondent operated as an equitable estoppel, against the respondent maintaining the suit; ninth, there was no eviction; tenth, the broken covenants did not run with the land, so that an action could be maintained on such broken covenants; twelfth, the respondent and those claiming under him have been in open and exclusive possession of the premises since the 30th day of October, 1890, upwards of 20 years next before the commencing of this suit; that such possession is a bar to the right of action asserted by the respondent; thirteenth, the decree or judgment entered in the district court of Harrison county, Iowa, so far as the same is claimed to be the basis of this action, is of no force or effect, against the appellant, as executor of James Prall, deceased. These points are argued by the appellant's counsel at length in an elaborate brief, which fails to convince us that the trial court was in error, or that the respondent had no right to maintain his action.

The correctness of the computation of the amount of the judgment, as directed by the trial judge, is not challenged by any ground of appeal; nor is it argued by the appellant in his brief. We have not therefore considered that question, nor is it necessary to follow in detail the argument of the appellant.

[1, 2] A short summary, however, of the essential facts is necessary to a clear understanding of the case. The language of the covenants in each deed is:

"That the above-described premises are free from any incumbrances other than roads and highways."

At the time of the delivery of the deeds, one Alonzo P. Tukey held a mortgage upon the lands described in the deeds, for the sum of \$500 and interest. This mortgage was made to Tukey by one John W. Foster, owner of the lands. The mortgage was dated January 25, 1888. James Prall, the appellant's testator, received his title to the land by virtue of a sheriff's deed under a decree, entered in the district court of Harrison county, Iowa, on September 6, 1889. This decree was made in a suit brought by James Prall to foreclose a first mortgage upon the same lands, for \$1,600 and interest, made by the same John W. Foster to D. C. Richman & Son, and by them assigned to James Prall. This mortgage was dated December 16, 1887. In this foreclosure suit by James Prall, Tukey was made a defendant, by reason of his holding the above mortgage, being a second mortgage upon the lands; no process was served upon him, he did not appear in the action, and the suit was by order of the court continued as to him. In fact he had no knowledge of the Prall foreclosure suit until a long time after the sheriff's sale, 1897 or 1898. On March 11, 1908, Tukey brought suit in the district court of Harrison county, for the foreclosure of his mortgage, for the redemption of the land, by paying the amount due on the judgment, in the Prall foreclosure suit. The respondent, in this case, was made a defendant, as were also Peter Reinholdt and Alfred Peterson, who were, at that time, the owners of the equity in the lands, having derived their title from James Prall and the respondent, through intermediate grantees. Peterson filed a cross-petition against the respondent, the plaintiff in this suit, to compel him to pay Peterson such sum of money as might be found necessary, to redeem the land from the Tukey mortgage, and to make Peterson whole in the premises. On June 18, 1909, a final decree was entered in the Tukey Case, wherein it was adjudged that the Tukey mortgage be established, as a lien upon the lands in the amount of \$1,355.88, with interest from June 18, 1909. The court directed a special execution to issue for the sale of the lands to satisfy the Tukey lien. The purchaser should pay off the senior lien, by paying \$3,000, with the accumulated interest thereon, to the clerk of the court, for the benefit of the owners of the land sold. On the cross-petition, the court ordered that Peterson was entitled to recover from the respondent, the plaintiff in this suit, such sum as should be necessary, under the decree, to redeem the lands from the Tukey mortgage, or to satisfy that mortgage.

An appeal was taken by the respondent, the plaintiff in this suit, from this decree, to the Supreme Court of Iowa, and that court affirmed the decree. A procedendo was is-

sued by that court on April 29, 1913. After this affirmance by the Iowa Supreme Court, in order to extinguish the Tukey decree or judgment, as it is called, and free the lands from the lien thereon, the respondent paid Tukey's attorney, on May 23, 1913, \$1,906.76, being the amount of the judgment, with interest and costs. He then took an assignment of the judgment. Respondent then released all of the lands from the lien of the judgment, and thereupon brought the present suit, October 10, 1913, against the appellant's testator, to recover the amount which he paid to extinguish the incumbrance of Tukey, with the result that the trial court directed a verdict in his favor.

The question, as we see it, arising out of this state of facts and involved in the decision of this case, is whether the respondent, the plaintiff in this suit, had a right to maintain his action in the common-law courts of New Jersey, to recover damages for the breach of the covenants against incumbrances, and, if so, what law is to be applied to the solution of this problem. The answer to this question depends upon the application of the following accepted principles of law: The proceedings and decree in the Tukey Case are *prima facie* evidence in this case of the validity of the Tukey mortgage, of the amount due thereon, of the lands upon which the same were a lien, of the extent of the lien and of the right of redemption. 11 Cyc. 1156, 1157. The law of Iowa governs as to the lien on the lands situate in that state. *Griffin v. Griffin*, 18 N. J. Eq. 104, 107. It is the law of the state in which the mortgaged property lies which governs. *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, 635, 24 L. Ed. 858; 5 R. C. L. p. 926, § 21. The Iowa Supreme Court passed upon the Tukey mortgage in an opinion in which the facts, as disclosed by this record, are quite fully set out. *Tukey v. Reinholdt*, 130 N. W. 727. See *Same v. Foster*, 158 Iowa, 312, 138 N. W. 862. From these propositions it would seem to follow that Prall's liability, the appellant's testator, is to be determined from the judgment or decree entered in the Iowa courts, except, in so far as that liability may be affected by matters relating to the remedy, i. e., the *lex fori*. Thus, the statute of limitations of New Jersey, if any, would be applied, the period of limitation prescribed by the law of the forum controls. *Jaqui v. Benjamin*, 80 N. J. Law, 10, 77 Atl. 468. A foreign judgment is subject to the statute of limitations of the *lex fori*. *Summerside Bank v. Ramsey*, 55 N. J. Law, 383, 26 Atl. 837. Remedies are to be regulated and pursued according to the *lex fori*, the law of the place where the action is instituted. *Gulick v. Loder*, 13 N. J. Law, 68, 23 Am. Dec. 711; 5 R. C. L. p. 917, § 11, p. 941, § 28.

[3, 4] In cases from our courts, in actions for a breach of covenant against incumbrances, it is said the general rule is the right

of action on the covenant against incumbrances arises upon the existence of the incumbrance, irrespective of any knowledge upon the part of the grantee or of any eviction of him or of any actual injury it has occasioned him, so that, if he has paid off or bought in the incumbrance, he is entitled, at least, to nominal damages. *Demars v. Koehler*, 62 N. J. Law, 203, 208, 41 Atl. 720, 72 Am. St. Rep. 642; 7 R. C. L. p. 1163, §§ 78, 79. He may recover the amount fairly and justly paid by him for the removal of the incumbrance, not exceeding the value of the estate (*Hartshorn v. Cleveland*, 52 N. J. Law, 473, 482, 19 Atl. 974, affirmed 54 N. J. Law, 391, 25 Atl. 963; 7 R. C. L. p. 1181, § 104), although, he may not yet have paid the same (*Sparkman v. Gove*, 44 N. J. Law, 252; *Fagan v. Cadmus*, 46 N. J. Law, 441, affirmed 47 N. J. Law, 549, 4 Atl. 323). An actual eviction or disturbance of possession, unlike a suit for a breach of a covenant of warranty, is not necessary, as a condition precedent, to maintaining an action for the breach of a covenant against incumbrances. *Carter v. Executors of Denman*, 23 N. J. Law, 260, 270; *Smith v. Wahl*, 88 N. J. Law, 623, 97 Atl. 261. It is sufficient that eviction may take place. *Share v. Anderson*, 7 Serg. & R. (Pa.) 43, 61, 10 Am. Dec. 421.

There is no statute of limitations in New Jersey, in an action for breach of a covenant against incumbrances, barring such an action, if not brought within 20 years after breach of the covenant. *Hasselbusch v. Mohmking*, 76 N. J. Law, 691, 73 Atl. 961. See *Parisen v. New York, etc., R. R. Co.*, 65 N. J. Law, 413, 47 Atl. 477. The counsel for the appellant concedes this, but argues, in the answer to the complaint, he set up accord and satisfaction as a bar to this action, thereby invoking an analogy to the statute of limitations, citing *Gulick v. Loder*, 13 N. J. Law, 68, 23 Am. Dec. 711, *Parisen v. New York, etc., R. R. Co.*, 65 N. J. Law, 413, 47 Atl. 477, and *Blue v. Everett*, 55 N. J. Eq. 339, 36 Atl. 960, as illustrative cases on which to rest the defense of presumptive satisfaction, received for a breach of the covenant. The obvious answer to this is, of course, those cases, and the principle therein illustrated have no application to the facts of this case, as disclosed by the record. At best, that is a rebuttable presumption of satisfaction. The proceedings in the Tukey Case show satisfactorily the reasons for the delay. No evidence was offered or produced in denial of the facts shown by that record; the facts not being controverted. It is hardly necessary to pursue this discussion further in detail. The record consists entirely of exhibits and documents, over which there is no dispute. No evidence was produced to controvert the findings of the decree in the Iowa courts in the Tukey Case.

Upon the undisputed facts and the law applicable thereto we are satisfied that the respondent was entitled to maintain his com-

mon-law action in the courts of New Jersey. In our view, this determines the case. As stated above, the amount of damages as calculated by the trial court is not challenged or argued, so we express no opinion upon that point.

Finding no error in the record, the judgment of the Warren circuit court is affirmed.

GUMMERE, C. J., and SWAYZE, BERGEN, WILLIAMS, TAYLOR, and GARDNER, JJ., dissenting.

(90 N. J. Law, 632)

BETTS v. MASSACHUSETTS BONDING & INS. CO. (No. 142.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

1. INSURANCE — 146(2) — CONSTRUCTION OF POLICY—INDEMNITY CONTRACT.

Policy insuring against loss from liability by law for damages on account of bodily injuries or death suffered in consequence of error, mistake, or malpractice in assured's profession of dentistry, or by any assistant of the insured while acting under his instructions, is neither technical nor ambiguous, and its language must be given the legal, natural, and ordinary meaning.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 294.]

2. INSURANCE — 152(3) — INDEMNITY INSURANCE—POLICY—CONSTRUCTION.

Persons entering into dentist's indemnity insurance policy will be presumed to have contracted with full knowledge of the legal effect of their acts under the laws relating to the practice of dentistry.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 312.]

3. INSURANCE — 435—INDEMNITY INSURANCE—POLICY—CONSTRUCTION.

An insurer, issuing an indemnity policy to a dentist to protect him in actions for his alleged malpractice, may rely on the full performance of the dentist's duties under the law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144.]

4. INSURANCE — 437—INDEMNITIES—LIABILITY.

Under policy indemnifying dentist from liability for alleged malpractice of himself or assistant while acting under his instructions, the insurer is not liable for a judgment obtained by a patient who was operated on and injured by an unregistered and unlicensed assistant acting in violation of the dentist's instructions, in view of 2 Comp. St. 1910, pp. 1811, 1913, 1915, §§ 1, 8, and 12, stating the requisites of practicing dentistry.

5. INSURANCE — 437—INDEMNITY POLICY—DENTIST—UNLICENSED ASSISTANT.

That such assistant was duly qualified in another state does not make his act in practicing in New Jersey without a license and without registration any the less a violation of law, so as to affect the case.

6. INSURANCE — 437—INDEMNITIES—LIABILITY.

Dentist's indemnity policy, avoiding liability for any claim against the assured or his assistant arising from violation of any law or ordinance on the part of the assured, creates no liability for a claim arising from injuries to a patient from an unlicensed and unregistered as-

sistant, regardless of whether the violation of law was the permanent cause of the injury.

7. INSURANCE — 437—INDEMNITIES—LIABILITY.

A dentist cannot recover on an indemnity policy for a claim arising from malpractice of his assistant, who was unlicensed when in the application he held his assistant out as a licensed dentist.

Swayze, Parker, Black, White, Heppenheimer, and Williams, JJ., dissenting.

Appeal from Supreme Court.

Action by Edwin Betts against the Massachusetts Bonding & Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Kallsch & Kallsch, of Newark (Isidor Kallsch, of Newark, on the brief), for appellant. Joseph Steiner, of Newark, for appellee.

KALISCH, J. This case is a sequel to Klitch v. Betts, decided by us at the June term, 1916, and reported in 98 Atl. 427. There it appears that the respondent, herein, a licensed dentist, was sued for malpractice by one Klitch, for injuries inflicted upon his jaw by one Snively, an assistant to the respondent, while in the performance of a dental operation. It further appears that Dr. Betts, the defendant in that case and the respondent herein, endeavored to defend upon the ground that his assistant, Snively, had done an unauthorized and illegal act in operating on Klitch's jaw in the absence of and not under the supervision of the respondent; Snively not being licensed to practice dentistry in this state. We held that Dr. Betts had so arranged the conduct of his business office as to hold out Snively as his lawful assistant, and therefore was answerable for the assistant's negligence to Klitch, and upon that ground we sustained the judgment obtained against Betts. Dr. Betts, having paid the judgment, brought an action against the appellant insurance company to recover the amount so paid, basing his action on a policy of insurance issued to him by the appellant company, whereby the company had agreed to protect him, as a licensed dentist practicing in this state, against loss from liability to any person or persons, upon certain terms and conditions, to be later herein set forth and considered. The case was tried at the Essex circuit, and by stipulation the record and testimony in the case of Klitch v. Betts, supra, together with the record of this court in that case, were put in evidence, with some slight additional testimony. Upon these records and testimony Betts recovered a judgment against the insurance company, from which it has appealed.

The argument advanced to us, by counsel for appellant, for a reversal of the judgment, is that the respondent was not entitled to recover a judgment against the appellant, because, by the uncontroverted testimony in the case, it appears that the negligent act of

Snively, for which the respondent was held answerable in damages, was not covered by the contract of indemnity, in that Snively was not a licensed and registered dentist, and therefore, under the law of this state, was not only not authorized to perform a dental operation, but was expressly forbidden to do so, the statute making it a misdemeanor, and that by the terms of the policy it was expressly agreed that the company should not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured or any assistant; that the malpractice or error in the dental operation performed by Snively was not done while acting under the assured's instruction, which is one of the requirements of the policy as a basis of the right of the assured to indemnity; that the respondent knew that Snively was not licensed and registered to practice dentistry in this state, and nevertheless was employed and held out by respondent as his assistant in performing dental operations, which was in express violation of the dentistry act, which statute makes such conduct a misdemeanor, and therefore the respondent does not come into court with clean hands, and should not be permitted to make his unlawful act the basis of a right to recover; that in the application for the policy of insurance the respondent stated that he employed no physician, surgeon, or dentist regularly on a salary or commission except Dr. Charles L. Snively, and thereby he falsely represented that Snively was a licensed and registered dentist of this state, and that, being so, he subjected the insurer to a risk which was not contemplated by it, and which was concealed from the insurer, and therefore the contract of insurance became void; and, lastly, that no notice was given by respondent to the company of any claim made by Klitch upon him within the time required by the terms of the policy.

Turning to the policy of insurance, we find that by its terms the insurance company agreed to protect the respondent:

(1) "Against loss from the liability by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error, or mistake or malpractice occurring in the practice of the assured's profession as described in the application for this policy"; (2) "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error or mistake or malpractice, by any assistant of the assured while acting under the assured's instructions."

This undertaking of the insurer is made by the policy subject to certain conditions contained therein, but for the purpose of this case it will suffice to set forth conditions B and C. Condition B provides that the company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or

ordinance on the part of the assured. Condition C provides that the assured shall give immediate written notice of any charge of error or mistake or malpractice, and of any claim for damages covered by this policy to the home office of the company or its authorized agent.

[1] The respective rights of the litigants in this controversy must be determined by the contract of insurance. The language of the contract is neither technical nor ambiguous, and therefore no difficulty can interpose itself to prevent applying the well-recognized canon of construction by giving the language employed its legal, natural, and ordinary meaning. This court in *Bennett v. Van Ripper*, 47 N. J. Eq. on page 566, 22 Atl. 1056, 14 L. R. A. 342, 24 Am. St. Rep. 416, speaking through Scudder, J., said:

"Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then 'the best construction,' says Chief Justice Gibson, 'is that which is made by viewing the subject-matter of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention.'"

Therefore upon the threshold of the present inquiry into what the legal obligations and rights, flowing from the agreement between insurer and insured, were and are, we must first pay due regard to the fact that state legislation, for the protection of the public against charlatanism and imposition, has put the practice of dentistry under statutory control. Section 1 of the act relating to dentistry (2 O. S. p. 1911) provides that only persons who are now duly licensed and registered pursuant to law, and those who may hereafter be duly licensed and registered as dentists pursuant to the provisions of this act, shall be deemed licensed to practice dentistry in this state.

The eighth section of the act provides, *inter alia*, that the act shall not be construed to prohibit an unlicensed person from performing mechanical work upon inert matter in a dental office or laboratory, or to prohibit a registered student of a licensed dentist from assisting his preceptor in dental operations while in his presence and under his direct and immediate personal supervision. This section further provides that a person shall be regarded as practicing dentistry within the meaning of the act who shall use the words "doctor of dental surgery," "doctor of dental medicine," or the letters, "D. D. S.," or "D. M. D.," in connection with his name, or any other title intended to imply or designate him, etc., as a practitioner in all its branches.

Section 12 of the act provides that any person, company, or association, practicing or holding himself or itself out to the public as practicing dentistry, not being at the time of said practice or holding out legally licens-

ed to practice such in this state, shall be guilty of a misdemeanor.

[2] This being the established law regarding the practice of dentistry in this state at the time the parties to the contract entered into it, they will be held to have done so with full knowledge of the legal effect of their contractual act.

[3] The appellant was entitled to rely on the safeguards which the law erected against improper and illegal practice of dentistry which tends to lead to error, mistake, or malpractice.

[4] The record in *Klitch v. Betts*, supra, establishes the uncontroverted fact that Snively, both unlicensed and unregistered to practice dentistry, did, as an assistant to Dr. Betts, a licensed dentist, in the dental office, and in the absence of Dr. Betts, perform several dental operations upon Klitch and treated the latter's injured jaw resulting from such operations. These acts were clearly in express violation of the statute which forbids dental operations by an unlicensed person. The record also clearly shows that Betts employed and permitted Snively to perform dental operations while he was an unlicensed person, which was a clear violation of the policy.

Snively's acts, being both unlawful and unauthorized and not having occurred while acting under the assured's instruction, by force of the provision of the insurance contract which limits the liability of the insurance company to injuries or death in consequence of any alleged error or mistake or malpractice by an assistant of the assured while acting under the assured's instruction, cannot therefore operate to create any liability on part of the insurance company to indemnify the respondent.

Besides this conclusive bar to the respondent's right to a recovery, condition B of the policy of insurance expressly provides that the insurance company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on part of the assured. The insurer is entitled to the protection which this clause affords it. It is of the very essence of the contract. It is difficult to perceive in what reasonable way the insurance company could have protected itself against claims arising out of illegal acts or acts by unauthorized persons than the one agreed upon between the parties to the contract, by limiting the liability of the company to claims arising out of mistakes, error, or malpractice, against a dentist or his assistant in the lawful practice of dentistry.

[5] The fact that the assistant was a dentist of another state does not make it the less a substantial violation of the law of this state and his act an unauthorized one. In the legal aspect his act stands upon the same level as if it had been performed by a butcher

or a blacksmith, or any other unqualified person.

[6] It is suggested that condition B has only reference to where the violation of the law is the proximate cause of the injury. We must bear in mind that we are dealing with liability arising out of contractual relations and not with liability arising out of a tort.

There is no legal obstacle in the way to parties agreeing, as in this case, what shall or shall not be the basis of liability. If they fix remote causes as a basis, it is not for us to say that they intended to fix proximate. In the present case, however, it might be properly said that the violation of law, in that the unauthorized act of an unlicensed dentist in this state caused the malpractice, was in a certain sense the proximate cause.

The record in *Klitch v. Betts*, supra, establishes that injuries from which Klitch suffered were inflicted upon him by Snively, the respondent's assistant, in a dental operation. Before a person can lawfully practice dentistry in this state he must submit himself to both a written and oral examination by the state board of registration and examination in dentistry, and if the board finds the applicant qualified to practice dentistry and of good moral character, he will be entitled to a license and be registered. Snively had never submitted himself to any such a test as to his qualifications in order to obtain a license, and therefore, in the eye of the law, his status was that of a person not qualified to practice dentistry. It was the direct result of Snively's unlawful act, coupled with his want of ordinary skill, that caused the injury. It would not be reasonable to hold the insurer liable for the malpractice of an assistant whose act was, to the knowledge of Betts, contrary to law.

[7] We think also that the respondent is debarred from recovering on the policy because it appears that the basis of his claim of recovery is the unlawful act of Snively, in which the respondent participated by holding Snively out as a licensed dentist to the public and to the appellant. It is to be observed that in the contract of insurance the respondent makes and warrants the truth of the statements made by him in applying for the insurance. He made this statement:

"I employ no physician, surgeon, or dentist regularly or on a salary or commission except as follows: Dr. Charles L. Snively."

It has already been pointed out that a person shall be regarded as practicing dentistry within the meaning of the dentistry act who shall use a title, etc. Therefore, when the respondent made the statement and gave the title "Dr." to Snively, knowing that Snively was not entitled thereto under the law of this state, he made an untruthful statement. It is manifest that the truthfulness of this statement was highly important to the insurer. For it determined one of the

risks that the insurer was to insure against. It was one of the risks to be covered by the policy of insurance, and therefore, it was essential that the statement in relation thereto should be true.

We need not spend time to demonstrate that the risk of mistake, error, etc., is greater in the case of one who is not legally qualified to practice dentistry than in the case of one who is.

The Legislature has declared what the qualification to practice dentistry shall be, and in the absence of a license to practice dentistry, there will be an absence of presumption of qualification. It is therefore apparent that the object of requiring a statement as to the status of the person or persons is to apprise the insurance company of the risk which it was insuring against.

Upon the question whether the insured will be permitted to recover on his contract where he has sustained a loss, which loss arose through the act of an assistant in violating the law related to the subject-matter of the contract, the lawful practice of dentistry, and in which violation the insured either actively or passively participated, we are unable to distinguish, on grounds of public policy, the present case from the case of *Hetzel v. Wasson Piston Ring Co.*, recently decided by this court, and reported in 98 Atl. 308.

In that case it was held that the father disintitiled himself of his right of action to recover for loss of the services of his son, who was injured while in the employ of the company, because it appeared that the son was under 14 years of age, and hence was employed in violation of a statute which imposed a penalty of \$50 on any corporation, firm, individual, parent, or custodian who permitted such employment. *Gummere, C. J.*, speaking for this court, on page 308 of 98 Atl., says:

"The injury to the plaintiff's son is the direct result of the joint violation of the act of 1904 by the defendant and the plaintiff, and the stripping of the child of that protection which the Legislature by that statute declared he should have. The plaintiff can take nothing by way of compensation for a loss which has come to him as the direct result of his own violation of law."

In the present case the insurance company is a wholly innocent party, which was not the fact as to the company in the case just referred to, and therefore there is a stronger reason for denying the respondent's right to a recovery.

Furthermore it is to be observed that the statement made by the respondent in his application for insurance that Dr. Snively was his assistant was a material statement, since it related to the risk which the company was taking, and, besides, the respondent warranted the statement to be true when he knew that Snively was not authorized to practice dentistry in this state. This of itself is suf-

ficient to avoid the appellant's liability on the policy.

Having reached the result that the trial judge erred in not directing a verdict for the appellant, we find it unnecessary to consider the other matters assigned, as grounds of appeal.

The judgment will be reversed.

SWAYZE, PARKER, BLACK, WHITE, HEPPEHEIMER, and WILLIAMS, JJ., dissent.

(87 N. J. Eq. 462)

COX v. BROWN et al. (No. 42/383.)

(Court of Chancery of New Jersey. June 16, 1917.)

1. SPECIFIC PERFORMANCE §105(3)—DELAY IN BRINGING SUIT—EFFECT—LIMITATIONS.

In administering the remedy of specific performance and cancellation of instruments, the period of delay which will be fatal to the relief sought does not depend upon the statute of limitations, but depends mainly upon the circumstances and effect of the delay in the particular case, and the suit may be dismissed for delay less than the period fixed by the statute limiting the pursuit of legal remedies.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327-341.]

2. TRUSTS §365(2)—ENFORCEMENT—EFFECT OF DELAY.

The rule that the enforcement of an express or subsisting trust by a cestui que trust is not barred by lapse of time or the statute of limitations is subject to exceptions arising from the conduct of the parties in relation to the trust property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571.]

3. TRUSTS §365(4) — ESTABLISHMENT AND ENFORCEMENT—LIMITATION OF ACTIONS.

The statute of limitations may afford a bar to relief in a suit to establish and enforce a resulting trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 570, 572.]

4. LIMITATION OF ACTIONS §182(2)—PLEADING OF STATUTE—NECESSITY.

It is essential in order that the statute of limitations may bar an action that the statute be pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676, 678.]

5. TRUSTS §371(5)—ENFORCEMENT—LACHES—PLEADING.

Relief may be denied in a suit in equity to enforce a resulting trust where the claim asserted is a stale claim, though that defense is not pleaded.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 595.]

6. PARTNERSHIP §258(5) — PARTNERSHIP PROPERTY—ESTABLISHMENT OF INTEREST—LACHES.

Where, in a partition suit by a surviving partner seeking to establish his partnership interest in property the legal title to which had stood for more than 40 years in the name of the deceased partner, it appeared that during the entire time the partnership, and the most intimate and confidential social and business relations had existed between the two partners, who were brothers, and that the property had been treated by both as partnership property, and that failure to have the legal title trans-

ferred to the partnership was merely a matter of neglect arising from the mutual confidence of the partners and from engrossment in their business, and that no rights of creditors were involved, the complainant was not precluded by the delay in asserting his claim from obtaining the relief sought.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 568, 593.]

Partition by Bowman S. Cox against Albert Brown and others. Decree advised for complainant.

A. H. Swackhamer, of Woodbury, for complainant. D. O. Watkins, of Woodbury, for defendants Anna R. Cox and others.

LEAMING, V. C. The only controversy in this suit is whether a certain tract of land which is described in the bill as tract No. 1 is the property of the heirs at law of Isaac G. Cox, deceased, or is the property of a certain copartnership which was composed of the said Isaac G. Cox and his brother, Bowman S. Cox, at the date of the decease of Isaac.

The record title to the property stands in the name of Isaac G. Cox, but the proofs in the case have established with a certainty amounting practically to a complete demonstration that the property was purchased at the instance of the two partners for the partnership with assets of the partnership, and that for convenience the title was taken in the name of Isaac for the benefit of the partnership, and that since the purchase until the death of Isaac the property has at all times been treated by the two partners as partnership property. The evidence so clearly establishes these facts that any discussion of the details of the evidence seems unnecessary.

The only hesitancy in advising a decree to the effect above stated arises from a claim upon the part of defendants that complainant, the surviving partner, has allowed the legal title to stand in the name of his brother for so long a time that a court of equity should not, as against the heirs of Isaac, at this late date decree that the property is a partnership asset.

An examination of the authorities will disclose that the effect of delay in the assertion of rights in a court of equity is not only peculiarly interwoven with and dependent upon the special circumstances surrounding the individual case, but is also measurably dependent upon the nature of the primary right asserted, and also upon the nature of the relief sought.

[1] In administering the remedy of specific performance and cancellation of instruments the period of delay which will be fatal to the relief sought does not depend upon the statute of limitations, but will be considered and determined with reference mainly to the circumstances and effect of the delay in the particular case, and the suit may be dismissed for delay less than the period fixed by the statute limiting the pursuit of legal

remedies. *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625, was a suit of the latter nature, and the rule there defined recognizes that a period of delay less than the statutory period may be fatal when it is operative to render the court unable to feel confident of its ability to ascertain the truth as well as it could have done when the subject for investigation was recent, and before the memories of those who had knowledge of the material facts had become faded and weakened by time.

[2] On the other hand, where the substantive right asserted is the enforcement by a cestui que trust of an express and subsisting trust, neither lapse of time nor the statute of limitations will ordinarily be allowed to defeat the relief sought. *Stimis v. Stimis*, 54 N. J. Eq. 17, 83 Atl. 468. But even that rule is subject to exceptions arising from conduct of the parties in relation to the trust property. See *Starkey v. Fox*, 52 N. J. Eq. 758, at page 768, 29 Atl. 211.

[3, 4] Again, where the suit is to establish and enforce a resulting trust, the statute of limitations may afford a bar to relief. *McClane's Adm'r v. Sheperd's Ex'r*, 21 N. J. Eq. 76, at page 79. The present suit is of that nature; for the equitable title of the partnership to the property in question results from the purchase of the property by a partner with partnership assets. But in this suit the statute of limitations has not been pleaded, and to render that statute available as a bar it should be pleaded. 3 *Daniel's Ch. Pl. & Pr.* § 2116, note; 1 *Daniel's Ch. Pl. & Pr.* 781.

[5] But relief may be denied in equity in all cases of the nature above referred to when the claim asserted is a stale claim, and that defense need not be pleaded. In *Sullivan v. Portland & Kennebec R. R. Co.*, 94 U. S. 806, 24 L. Ed. 324, the rule touching the enforcement of stale claims in a court of equity is stated as follows:

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will upon that ground be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

The most recent general statement of the rule touching laches is to be found in *Soper v. Cisco*, 85 N. J. Eq. 165, 174, 95 Atl. 1016, 1020, as follows:

"The general rule is well settled that he who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief. *McCar-*

tin v. Traphagen, 43 N. J. Eq. 324 [11 Atl. 156], affirmed 45 N. J. Eq. 265 [17 Atl. 809]."

The authorities above cited sufficiently disclose the great extent to which the circumstances surrounding the individual case necessarily enter into and control the force of the defense of laches in a court of equity.

In the present case the partnership was formed by the two brothers when complainant, the younger brother, was yet a minor; the legal title to the property in question was obviously taken in the name of the older brother for that reason. The legal title was allowed to so remain for over 40 years, when the older brother died. But during all that time the partnership and the most intimate and confidential social and business relations of the two brothers continued unchanged. The residence on the property in question was occupied by the older brother, but the remainder of the property, including the foundry where the firm business was conducted, was occupied by the firm. Another residence property, admittedly belonging to the partnership, was occupied by the younger brother, and no rent was paid by either brother for the dwellings occupied by them, and no rent was taken into account for the occupancy of the foundry, and the evidence clearly discloses that at all times during the life of the partnership the entire property now in question was treated by both partners as firm property. While much of this evidence relates to a period of such an early date as to invite the most careful scrutiny as to its accuracy, most of it is of a nature to practically demonstrate its truth. At the conclusion of the testimony no substantial doubt could be said to exist that the property was originally purchased for the partnership with partnership funds and had always been regarded by both partners as partnership property. The failure to have the legal title transferred to the partnership was obviously merely a matter of neglect arising primarily from the mutual confidence of the partners and their absorbing engrossment in their life work of making money in their joint enterprise.

No rights of creditors are involved; the single question is whether the property belonged to the elder brother at the time of his death or to the firm. There has been no unreasonable delay on the part of complainant since the death of his brother in asserting the title of the firm. It will be thus observed that the title now asserted by complainant is not a title in himself in his own right; but a title in behalf of the partnership. That circumstance is not without force in considering the effect to be given to the claim of laches; for, if the property was firm property, it was at all times during the life of the partnership equally the duty of both partners to have the legal title transferred to the partnership. A similar duty of a trustee may

be said to exist in all cases of resulting trusts; but where a partnership is the equitable owner, rights of creditors are involved, and both partners owe to firm creditors the duty to manifest the legal title in the partnership. The laches which is now urged against the surviving partner is accordingly laches of the partnership in which both partners have been equally negligent. In that view I think the consequences of neglect in the performance of that duty cannot be equitably visited upon complainant to the same extent as might be done for the failure to seasonably assert an equitable title in himself.

[6] As the evidence is convincing that the property was originally purchased with the firm money, and the legal title taken in the name of the older brother for the firm, and that there has at no time been any claim upon the part of the older brother to the contrary or any adverse holding on his part, and that both brothers have at all times during the life of the partnership treated the property as firm property, I am convinced that a decree to that effect cannot be properly denied by reason of the long period of time during which the legal title has been allowed to stand in the name of the older brother. I will accordingly advise a decree to the effect stated.

(37 N. J. Eq. 364)

BENSEL v. ANDERSON et al. (No. 122.)

(Court of Errors and Appeals of New Jersey.
March 5, 1917.)

CONTRACTS \Leftrightarrow 265—RESCISSION—RESTORATION OF STATUS.

One who repudiates an agreement ought not to profit thereby, and equity requires that the situation existing when the agreement was made should, as far as possible, be restored.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187.]

Appeal from Court of Chancery.

Suit by William Bensel against William O. Anderson and others. Decree for plaintiff (85 N. J. Eq. 391, 96 Atl. 910), and defendants appeal. Remanded, with directions.

Frank S. Katzenbach, Jr., and Frederic R. Brace, both of Trenton, for appellants. Aaron V. Dawes, of Hightstown, and James J. McGoogan, of Trenton, for appellee.

PER CURIAM. We agree with the reasoning of the learned vice chancellor and in the main with his result. The decree relieves Bensel of his liability on the note of \$4,650 which existed prior to the arrangement now declared void. He ought not to profit by an agreement he repudiates, and equity requires that the situation existing when that agreement was made should, as far as possible, be restored. This can be done by so modifying the decree that the bank may proceed on its judgment for \$5,443.79 primarily against Bensel to the extent of

\$4,650, with interest from the date from which interest was calculated in entering the judgment, and the costs of suit and requiring it to proceed primarily against Anderson for the balance, and by requiring Anderson to satisfy that balance and cancel the judgment upon the payment by Bensel, or out of his property of the \$4,650, interest thereon and costs included in the bank's judgment.

Let the record be remitted to the Court of Chancery, in order that the decree may be thus modified.

(90 N. J. Law, 644)

GROMER v. GEORGE et al. (No. 96.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. APPEAL AND ERROR ⇨1052(6)—HARMLESS ERROR—EVIDENCE.

In an action to recover damages for negligently causing the death of plaintiff's intestate, against the father as the owner and the son as the driver of the automobile which ran into him while the son was on his father's business, where the jury found the son not guilty of negligence, error in the admission of evidence as to the ownership of the automobile in the son was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4176.]

2. APPEAL AND ERROR ⇨1068(1)—HARMLESS ERROR—INSTRUCTIONS.

In an action to recover damages for negligently causing the death of plaintiff's intestate, against the father as the owner and the son as the driver of the automobile which negligently ran into him while the son was on his father's business, where the jury found the son not guilty of negligence, error in the instructions as to what must be proved to make father answerable for negligence of son is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225.]

Appeal from Supreme Court.

Action by Julius Gromer, administrator, against Joseph George and Antonio George. Judgment for defendants, and plaintiff appeals. Affirmed.

William Greenfield, of Newark, for appellant. John A. Matthews and William J. Dowd, both of Newark, for appellees.

KALISCH, J. The appellant, who was the plaintiff below, appeals from a judgment entered on a verdict rendered by a jury in favor of the respondents, defendants below.

The appellant brought his action, as administrator of the estate of his son, a lad 14 years of age, in the court below, against the respondents, father and son, to recover damages for negligently causing the death of appellant's son. The complaint charged the respondents with being "the owners, proprietors, or lessees of a certain automobile," etc., and that on the 30th day of May, the respondents, their agents, servants, etc., did operate and run the automobile along the public highway, at a high rate of speed and

in a careless, reckless, and negligent manner, run into and against the appellant's decedent, who was then and there lawfully on the public highway, etc.

It is to be observed that the gravamen of the charge is negligence. This charge was negatived by the jury finding a verdict in favor of both respondents. On the trial the appellant sought a recovery against both respondents upon the theory that the father was the owner of the automobile and that the son while on the business of his father negligently operated the car, with the result as above stated.

[1] The principal ground relied on by the appellant for a reversal of the judgment is that the trial judge illegally admitted hearsay testimony concerning the ownership of the automobile, in Antonio George, the son.

Even upon the assumption that such testimony was improperly admitted, it is obvious from the verdict of the jury, finding the son not guilty of negligence, that the admission of such testimony was harmless. For it is plain that if the father was the owner of the car and the son was on his father's business, as his agent or servant, at the time of the infliction of the injury upon appellant's decedent, the father would not have incurred any legal liability therefor, unless it also appeared that the injury to the appellant's decedent was due to the son's negligence and to which the decedent did not in any wise proximately contribute.

[2] The remaining exceptions discussed in the brief of counsel for appellant relate to what the trial judge said in his charge to the jury was necessary to be established by the evidence in order to make the father answerable in law for the negligent acts of his son in operating the machine. But, in view of the fact that the jury, by their verdict, exonerated the son from the charge of negligence, and without which negligence no legal liability could have been incurred by the father, it is manifest that, if any error in stating the legal rule governing the father's liability was committed, it was harmless.

The judgment will be affirmed.

(90 N. J. Law, 600)

LIMPert BROS., Inc., v. R. M. FRENCH & SON et al. (No. 84.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE ⇨86(8)—RIGHT OF ATTACHING CREDITOR—MOTION TO QUASH.

The respondents caused an attachment to be issued out of a court for the trial of small causes, and under it the debtor's goods were seized, subsequently but before judgment in the proceedings, the prosecutors, as they claim, issued an attachment out of the circuit court against the same debtor and under it the same goods were seized. Held that, if it appeared that prosecutor had in fact issued the attachment and seized the goods, it had the same right that the debtor

would have to move the justice court to quash the writ issued by that court, and to rescue the goods on which it had a lien from the prior seizure.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 290.]

2. JUSTICES OF THE PEACE ¶86(8)—MOTION TO QUASH—AFFIDAVITS.

In support of such motion *ex parte* affidavits are not sufficient; the material facts must be proved before the justice by the production of competent proof.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 290.]

3. JUSTICES OF THE PEACE ¶184(6)—REVIEW—RECORD—STIPULATIONS.

A stipulation of facts not submitted to the justice of the peace cannot be used on review by an appellate court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 633-636.]

Appeal from Supreme Court.

Certiorari by *Limpert Bros., Incorporated*, to review an order of the court for the trial of small causes refusing to quash a writ of attachment issued in favor of *R. M. French & Son* and others. Writ dismissed, and prosecutor appeals. Affirmed.

James O. Clark, of Westfield, for appellant.
Augustus O. Nash, of Westfield, and W. S. Angelman, of Plainfield, for appellees.

BERGEN, J. *R. M. French & Son* procured a writ of attachment to be issued out of a court for a trial of small causes, and the officer seized the property of *Clay & Tokis*, trading as "*Diana*," the defendants in that proceeding. Subsequently, and before judgment therein, it is claimed by the present prosecutor that it caused to issue a writ of attachment out of the Union county circuit court, under which the same property was attached by the sheriff. Thereafter the prosecutor filed an affidavit with the justice of the peace and moved to quash the writ issued by him because the Christian names of the defendants are not set forth in the affidavit or the attachment.

The affidavit and the writ described the defendants as "*Clay & Tokis*, partners trading and doing business as *Diana*," and the motion to quash was made in pursuance of a stipulation that it should be made in one case; there being other attachments of like nature "For the purpose of establishing the validity of said attachment." The court, after argument, refused to quash the attachment and proceeded to hear the merits, rendering judgment for *R. M. French & Son*. The prosecutor then obtained a writ of *certiorari* to review the order of the court for the trial of small causes in refusing to quash, and the Supreme Court dismissed the writ upon the ground that the statute does not authorize a stranger to the record in that court to intervene by filing an affidavit of interest in the subject-matter of the litigation, and therefore the prosecutor had no legal status in the proceeding.

[1] Assuming that it was properly proven before the justice that a writ of attachment had been issued out of the circuit court and the same goods seized under it, we are of the opinion that the conclusion of the Supreme Court was not sound in law, for it was held in *National Papeterie Co. v. Kinsey*, 54 N. J. Law, 29, 23 Atl. 275, where a subsequent judgment creditor moved to quash a prior attachment, that:

"The judgment creditors acquired the right of the judgment debtor in the property levied on, and had a right to rescue it for the satisfaction of their claims from any one who could not assert a superior title in the law to it. It is not perceived how the efficacy of the proceedings under the judgments can be impaired, or how validity can be imparted to attachment proceedings unauthorized by law, by the mere volition of the debtor as against the judgment creditors. The debtor may waive his own rights, but he cannot surrender the rights of his judgment creditor."

We are of opinion that an attachment vests in the attaching creditor the same right of rescue as if he were a judgment creditor, and that if the debtor has a right to move to quash an attachment in any court, his attaching creditor has the same right. He has a lien upon the property and stands in the place of the debtor, and if the debtor is entitled to have the writ quashed he cannot defeat the rights of his other creditors having a lien by consenting to the execution of a void attachment.

[2] The prosecutor's difficulty in this case arises over the method which it adopted in proceeding to quash the attachment, for while, as was said in *McLaughlin v. Cross*, 68 N. J. Law, 599, 53 Atl. 703, "The practice is quite general to afford relief against void judgments to any person interested," the method of relief in a case of this character seems to be prescribed by statute. Section 43 of the Attachment Act (1 Comp. St. 1910, p. 150) provides that in all cases of an attachment issued by a justice of the peace, when an affidavit shall be filed by or on behalf of the defendant setting forth facts which would render said attachment illegal or void, it shall be the duty of the justice upon a motion to quash to try the facts. In this case the prosecutor produced no witnesses, but seems to have relied on the affidavit filed by him, and also the affidavit upon which the justice issued the writ, but it was held in *Morris v. Quick*, 45 N. J. Law, 308, that the *ex parte* affidavits of the moving party cannot be used on the motion, but that he must sustain the burden, by legal evidence, that the writ was illegally issued.

The original affidavit described the debtor as "*Clay & Tokis*, partners trading and doing business as *Diana*," and section 3 of the Attachment Act provides that the writ may issue against the separate and joint estate of joint debtors "either by their names or the names of the partnership or by whatsoever name they may be generally distinguished."

In the original affidavit the defendant is described as doing business under the name of Diana, and the prosecutor offered no proof that this was not correct.

Nor did the prosecutor make any legal proof before the justice of the peace that any attachment had been issued out of the circuit court and the debtor's goods attached under it.

[3] Without this there was nothing before the justice to show that the prosecutor had any interest in the goods to be rescued for its benefit. The stipulation between the parties, from which an inference, it is claimed, may be drawn that there was such a writ of attachment was not submitted to the justice and his record as returned, to correct which no attempt has been made, certifies that:

"This court has no knowledge except the statements of the attorney that a writ of attachment has been issued out of the Union county circuit court. If a writ affecting these proceedings has been issued, superseding or affecting this jurisdiction, this court has not been officially so informed."

Under the facts before the justice he correctly disposed of the motion.

For the reasons given, the judgment will be affirmed, with costs.

(90 N. J. Law, 584)

STUART v. BURLINGTON COUNTY FARMERS' EXCHANGE. (No. 125.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

EVIDENCE \S 158(28), 243(2)—SALES \S 441(2)—IMPLIED WARRANTY—EXPENSES OF GROWING CROP—DECLARATIONS OF AGENT.

Plaintiff, relying on representations of defendant's agent that its product, called "crude fish," was a good fertilizer for his intended crops of sweet corn, gave an order for "crude fish," and used what he received in response to such order in the belief that it was "crude fish." The crop failed, and he sued for damages. *Held:* (a) That there was evidence of implied warranty that the fertilizer supplied was "crude fish"; (b) that on this point evidence of the statements to plaintiff by the general manager of defendant was competent; (c) that plaintiff's oral testimony as to the receipts and expenses of growing, reaping, and marketing his crop was competent, whether or not he kept books of account, and without their production on his own case. See 89 N. J. Law, 12, 97 Atl. 775.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 523-525, 910; Sales, Cent. Dig. \S 1278.]

Black and Heppenheimer, JJ., dissenting.

Appeal from Circuit Court, Burlington County.

Action by John C. Stuart against the Burlington County Farmers' Exchange. From a judgment of the Supreme Court (89 N. J. Law, 12, 97 Atl. 775) reversing a judgment for plaintiff, defendant appeals. Affirmed.

Gaskill & Gaskill, of Camden, and George M. Hillman, of Mt. Holly, for appellant. John G. Horner, of Camden, for appellee.

PARKER, J. Plaintiff, a farmer, contracted to purchase a fertilizer called "crude fish" from defendant, upon the representation of defendant's sales agent that it was a specially good fertilizer for raising sweet corn. He received and used the contents of a number of bags shipped by defendant and labeled "crude fish," but his crop failed, and he then discovered, as claimed, that the contents of the bags were not "crude fish," but something else. He brought suit for damages on the theory of Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438, for the loss of the crops which he claimed would have resulted, had the fertilizer been as represented, and at the trial had a verdict of \$1,000.

The representations regarding the fertilizer were made by one Page, a sales agent of defendant; and the first point made on this appeal is that it was error to admit testimony of oral statements by Page at the time when the purchase was agreed on, because the contract of sale was in writing. An examination of the paper referred to, however, shows that plaintiff was not a party to it, but that it was a mere order for shipment to plaintiff's address, sent by the salesman to the factory or office of his principal, signed by the salesman, but not by the plaintiff.

This also disposes for the most part of the fourth point relating to the same conversation on the redirect examination of the plaintiff. It is also objected that he had already been fully examined on this head; but a repetition of his testimony was within the judicial discretion.

Under the second, third, and sixth points the argument is made that it was error to permit plaintiff to testify to a conversation, after his crop failed, with Mr. Embree, admitted by defendant to be the manager of the defendant, wherein plaintiff complained that the fertilizer was not as represented, and perhaps he should have tried it out in a small way first, and Embree said, "We stand behind what we sell," etc. There is no doubt of the competency of statements by Embree as manager that were relevant to the issue. *Agri-cultural Ins. Co. v. Potts*, 55 N. J. Law, 158, 26 Atl. 27, 537, 39 Am. St. Rep. 637; *Smith v. Telephone Co.*, 64 N. J. Eq. 770, 53 Atl. 818; *Carey v. Wolff*, 72 N. J. Law, 510, 63 Atl. 270; *Bridgeton v. Fidelity Co.*, 88 N. J. Law, 645, 96 Atl. 918. If the defendant had been an individual, his statement that he held himself responsible for the quality and fitness of what he sold through his agent would be clearly relevant as an admission that he was liable for defects therein; and the fact that this statement is made by a general agent of a corporation does not deprive it of relevancy.

The seventh point alleges error in the

court's refusal to strike out the testimony of plaintiff respecting the amount of his sales and losses on the crop. This was asked on the ground that plaintiff admitted he kept books showing the amount of his sales and expenses, etc., and had not produced them. We think there is no merit in this point. The books, if they existed, and if they were legal evidence at all for plaintiff, against the defendant, were not the best evidence so as to exclude his parol proof. The whole line of "shop book" cases in this state bears, not upon the exclusiveness, but upon the admissibility, of such books, as unsworn day-to-day records of the business of the party producing them, to show facts in his own favor. Defendant could have obtained these books under subpoena, but was not entitled to shut out plaintiff's testimony as to the receipts from his business because of their nonproduction. The case of *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201, 38 Atl. 631, is in no wise to the contrary; nor is that of *Bartow v. Erie Railroad Co.*, 73 N. J. Law, 12, 62 Atl. 489, where the absence of plaintiff's books was commented on in connection with the total absence of evidence of the cost of conducting his business. In *Standard Amusement Co. v. Champion*, 76 N. J. Law, 771, 774, 72 Atl. 92, the books were held admissible because as between the parties they partook of the nature of partnership accounts. In the very recent case of *Rabinowitz v. Hawthorne*, 89 N. J. Law, 308, 98 Atl. 315, the discussion was not as to the exclusiveness or admissibility of the books, for there were none, but as to the general competency of evidence to show the average profits of plaintiff in his business. We may add that plaintiff was again put on the stand and then testified that the "books" were only the collected sales slips that had been sent him from time to time by the commission merchants, and that these were the only record he had.

Lastly, it is urged that the court should have granted the motion to nonsuit, on the double ground (a) that plaintiff had failed to show any warranty or (b) any breach thereof. There was evidence of a sale by description, which raised an implied warranty that the goods were "crude fish" (G. S. 4650, § 15), and evidence that in fact they were not. The nonsuit was properly denied. If it be conceded that the evidence for plaintiff failed to indicate that what he received was not in fact "crude fish," this was supplied by the testimony offered for defendant, and the error, if any, cured. *Bostwick v. Willett*, 72 N. J. Law, 21, 60 Atl. 398; *Van Ness v. North Jersey Street Railway Co.*, 77 N. J. Law, 551, 73 Atl. 509; *Dennery v. Great Atlantic & Pacific Tea Co.*, 82 N. J. Law, 517, 81 Atl. 861, 30 L. R. A. (N. S.) 574.

The judgment will be affirmed.

BLACK and HEPPELHEIMER, JJ., dissent.

(90 N. J. Law, 649)

MAYOR AND ALDERMEN OF JERSEY CITY v. HUDSON & M. R. CO.
(No. 128.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. RAILROADS ⇐75(6)—USE OF STREET—COMPENSATION—ORDINANCE—"EACH."

The word "each" in an ordinance of Jersey City providing for compensation to be paid the city for the use of land privileges by a railroad company, in connection with its three routes, depending upon the amount of fare for each single passenger service, means any route, and not all three routes.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 188.]

For other definitions, see *Words and Phrases*, First and Second Series, Each.]

2. RAILROADS ⇐75(6)—LAND PRIVILEGES—USE—PAYMENT.

Where an ordinance by its terms does not constitute a contract with a railroad company for the use of land privileges, but does provide an option, the railroad company cannot retain the use of the privileges and refuse to pay the stipulated compensation.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 188.]

3. RAILROADS ⇐75(6)—PRIVILEGES UNDER MUNICIPAL ORDINANCE—ELECTION TO PAY COMPENSATION.

A continued exercise of the privileges by a railroad company, under an ordinance accepted by it evinces an election to pay the stipulated compensation, and thereby creates a legal obligation to pay. The language of the ordinance construed will be found in the opinion.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 188.]

Appeal from Circuit Court, Hudson County.

Suit by the Mayor and Aldermen of Jersey City against the Hudson & Manhattan Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. James J. Murphy and John Bentley, both of Jersey City, for appellee.

BLACK, J. The suit in this case was brought by the mayor and aldermen of Jersey City against the Hudson & Manhattan Railroad Company to recover compensation for the conditional rights or occupancy by the defendant company of certain land and privileges in the public street, at Henderson and Grove streets, Jersey City, used by the defendant company for station purposes. The case was tried under a stipulated state of facts, on the second count of the complaint only, before Judge Speer at the Hudson circuit, without a jury, resulting in a judgment in favor of the plaintiff for the sum of \$6,525.

The suit grows out of the construction of sections 3, 4, and 6 of an ordinance of Jersey City which was accepted by the defendant company on September 29, 1910. Those sections read thus:

"Sec. 3. Said railroad company, its successors or assigns, shall pay to the city, annually, except in the contingency hereinafter noted in section 4 hereof, for the right to use and occupy said tract of land aforescribed in section 1 hereof, and so long as it shall so use and occupy the same, in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority, the sum of one hundred (\$100) dollars for the first year of occupancy dating from the acceptance of this ordinance and thereafter like payments for the entire period of the life of this ordinance. The permission to use and occupy said tract of land aforescribed to continue and remain in force so long as the rate of fare charged by said Hudson & Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson street stations and Thirty-Third street and Broadway, New York, and intermediate stations, and between the said Grove and Henderson street stations and the Hudson terminal in New York and intermediate stations, and between said Henderson and Grove street stations and Hoboken, New Jersey, and intermediate stations, shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents.

"Sec. 4. If at any time after the passage and acceptance of this ordinance the said Hudson & Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted, or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforescribed, shall in lieu of the amount of annual payment indicated in section 3 of this ordinance and in substitution therefor be five thousand (\$5,000) dollars, to be computed from the date of exaction by said company of such excess fare—such payment of five thousand (\$5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder. If by reason of the enforcement of the provisions of this section there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said company on the first payment day thereafter ensuing and as hereinafter provided."

"Sec. 6. Proper proportions of the payments of the city herein provided for shall be made in advance to the city comptroller at his office in the city hall, on the first days of October and April next succeeding the acceptance of this ordinance, failing which payment for thirty days or a failure by said company to comply with all or any of the terms, requirements or obligations of this ordinance as heretofore expressed shall constitute an annulment of any and all permission herein or hereby accorded, and the city may thereupon remove any and all obstructions herein authorized and restore any affected street or portion thereof at the entire cost and expense of said company without prior notice and without recourse to it."

Some of the additional facts pertinent to this discussion are: The defendant railroad company from the time it began operations charged only five cents for each passenger service from the Grove and Henderson street station eastward thereof, on any of its lines,

until December 24, 1911, when it raised its rate of fare to seven cents, between the Grove and Henderson street station and the stations in New York City on the Thirty-Third Street line. It did not increase the rate to the Erie station, to Hoboken, to Exchange Place in Jersey City, or to the Hudson Terminal in New York, the rate to those stations from Grove and Henderson street station and from Summit avenue station, remaining five cents, that is, passengers who go to New York from the Grove and Henderson street station by way of the uptown line are charged two cents extra fare to New York stations and to those only.

There are five grounds of appeal: First, no breach of the alleged contract; second, no election under the fourth section of the ordinance; third, acceptance of \$100 per year by Jersey City after the increase of fare was a construction by the parties to the contract that it had not been broken by such increase. The other two grounds of appeal, the fourth and fifth, are purely formal.

[1] The argument is the use of the conjunction "and" in section 3 of the ordinance, where reference is made to the three lines of the railroad and intermediate stations, in connection with section 4, makes section 3 mean that the permission stands until the rate of fare is increased above five cents on all three lines, and that for each single passenger service one way or in either direction means for all the lines, but we think the natural and intended meaning of the word "each" in this connection means "any," i. e., any one of the three lines.

[2] It is next argued the ordinance does not constitute a contract to pay; at best, it provides merely for an annulment. It may be conceded that section 4, in itself, does not constitute a contract to pay, but it gives the railroad company the option either to surrender its privileges to the city, or to pay the \$5,000. When the railroad company continues exercising the privileges, it evinces an election to pay the increased amount, and it thereby becomes in law liable to pay. Section 6 does not militate against this conclusion. That section provides simply that the failure to make the payment of \$5,000 shall constitute an annulment of the permission granted. The city may thereupon enter and remove obstructions.

[3] This is nothing more than the ordinary clause of forfeiture in a lease. It hardly seems reasonable, and it cannot be reasonable, that one can have the option to make a contract valid or invalid, as he chooses; that he can retain the privileges and get rid of the obligation by refusing or failing to perform his part, by paying the stipulated amount for the privileges so retained.

The other points need no discussion; they are without legal merit.

The judgment of the circuit court is therefore affirmed, with costs.

(87 N. J. Eq. 620)

SANDS v. RUDDICK et al. (No. 58.)(Court of Errors and Appeals of New Jersey.
June 18, 1917.)*(Syllabus by the Court.)***1. INSANE PERSONS ~~§~~66—CONVEYANCE—ACTION TO SET ASIDE.**

Where it appears that the mind of the owner of real estate was so impaired as to make her incapable of understanding the nature and effect of her acts or the affairs in which she was participating, the purchaser of her real estate at a sheriff's sale (made while she was trying and substantially ready to pay the execution), who knew of her mental condition, and who purchased at a price so inadequate as to shock the conscience, will be directed, on payment to him of the money expended for the property with lawful interest, to reconvey the real estate.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 100-102, 104, 105.]

2. INSANE PERSONS ~~§~~66—CONVEYANCE—ACTION TO SET ASIDE—COSTS.

Where the guardian of a lunatic, before filing her bill, tenders to the purchaser of the lunatic's real estate, bought at a sheriff's sale, the amount of his purchase money and interest, which tender was declined, it is allowable for the Court of Chancery to require the purchaser to pay the complainant's costs in that court, upon the court's finding that equity requires a decree that the purchaser shall reconvey the property to the complainant upon payment of the purchase price and lawful interest.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 100-102, 104, 105.]

3. JUDGMENT ~~§~~464 — EQUITABLE RELIEF — DECREE.

The Court of Chancery has no power in a strict sense of the term to set aside a judgment at law. In granting relief it does not interfere with the records of the law court or strike therefrom the judgment. It treats the proceedings at law as valid and grants relief against the consequences thereof because the rights acquired thereunder cannot be retained in good conscience by reason of some new matter on which the court of law did not or could not pronounce a judgment or which for some just cause the party could not bring to the consideration of the court of law. The suit in equity to obtain relief is strictly a proceeding in personam, and the decree adjudges the rights of the parties inter sese in relation to the judgment, and the relief is limited to enjoining parties from proceeding to enforce the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 898, 901.]

Appeal from Court of Chancery.

Bill in equity by Clara L. Sands, a lunatic, by Elizabeth R. Sands, guardian, against Frank Ruddick and others, to compel a reconveyance of real estate. From a decree of the Court of Chancery (99 Atl. 101) ordered for complainant, defendants appeal. Reversed, and record remitted for the entry of a decree.

William J. Morrison, Jr., of Ridgefield Park, for appellants. Hunziker & Randall, of Paterson, for appellee.

TRENCHARD, J. The primary object of the complainant's bill was to compel a reconveyance of real estate. The facts were these: One Phillips recovered a judgment for

\$428 and costs against Clara L. Sands in the Bergen county common pleas court. Mrs. Sands owed the money, and the judgment was properly recovered. Execution was issued thereon and her real estate was sold to the defendant below Frank Ruddick for \$500 apparently because on the day of sale she reached the sheriff's office with the money to satisfy the execution a few minutes too late. The real estate thus sold was worth \$10,000, and was subject to a mortgage of \$5,500. Mrs. Sands then instituted proceedings in the Bergen pleas and in the Supreme Court to obtain relief from such sale. Of course, in these proceedings no question was raised as to her sanity, and she was denied relief. The purchaser, Ruddick, then brought an ejectment suit against Mrs. Sands, took judgment by default, and a writ of possession issued. Shortly thereafter, on the petition of her daughter, proceedings were taken in the Court of Chancery to inquire into the lunacy of Mrs. Sands. The result of such inquisition was an adjudication that she was then, and for 11 years then last past had been, a lunatic, without lucid intervals, and not capable of the government of herself and her estate. The daughter was then appointed her guardian. She first tendered to Ruddick a sum sufficient to reimburse him for his outlay of purchase money and expenses, and requested a reconveyance of the real estate. Such request being refused, she filed this bill to compel a reconveyance of the property.

At the hearing the foregoing facts appeared. Apart from the presumptive effect of the inquisition finding of lunacy overreaching the judgment and sale, it otherwise appeared to the satisfaction of the Vice Chancellor, and to our satisfaction, that at the time of the judgment and sale, Mrs. Sands' mind was so impaired as to make her incapable of understanding the nature and effect of her acts or the affairs in which she was participating. It also appeared that Ruddick, who was her next-door neighbor, knew of her mental condition.

The court below decreed that the Phillips judgment, the execution issued thereon, the deed from the sheriff to Ruddick, and Ruddick's judgment in ejectment and writ of possession were null and void, and that Ruddick should reconvey the lands to Mrs. Sands upon payment to him of the purchase price with interest, and also decreed that he should pay to the complainant her costs in the Court of Chancery. We are of the opinion that in the main the Vice Chancellor was right.

[1] On familiar principles, where, as here, it appears that the mind of the owner of real estate was so impaired as to make her incapable of understanding the nature and effect of her acts or the affairs in which she was participating, the purchaser of her real estate at a sheriff's sale (made while she was trying and substantially ready to pay

the execution), who knew of her mental condition, and who purchased at a price so inadequate as to shock the conscience, will be directed, on payment to him of the money expended for the property with lawful interest, to reconvey the land. We therefore conclude that the decree is quite right in so far as it declares the deed null and void, and directs, upon terms, a reconveyance to the complainant.

[2] We also think the decree right as to costs. Where, as here, the guardian of a lunatic, before filing her bill, tenders to the purchaser of the lunatic's real estate, bought at a sheriff's sale, the amount of his purchase money and interest, which tender was declined, it is allowable for the Court of Chancery to require the purchaser to pay the complainant's costs in that court, upon the court's finding that equity requires a decree that the purchaser shall reconvey the property to the complainant upon payment of the purchase price and lawful interest.

[3] But we think the decree below went too far in adjudging the Phillips judgment and execution and the Ruddick judgment in ejectment and writ of possession to be null and void. The Court of Chancery has no power in the strict sense of the term to set aside a judgment at law. In granting relief it does not interfere with the records of the law court or strike therefrom the judgment. It treats the proceedings at law as valid and grants relief against the consequences thereof because the rights acquired thereunder cannot be retained in good conscience by reason of some new matter on which the court of law did not or could not pronounce a judgment or which for some just cause the party could not bring to the consideration of the court of law. The suit in equity to obtain relief is strictly a proceeding in personam, and the decree adjudges the rights of the parties inter sese in relation to the judgment, and the relief is limited to enjoining parties from proceeding to enforce the judgment. *Clark v. Board of Education of Bayonne*, 76 N. J. Eq. 326, 74 Atl. 319, 25 L. R. A. (N. S.) 827, 139 Am. St. Rep. 763.

The application of these principles to the case at bar necessitates the elimination from the decree of such parts thereof as adjudged null and void the Phillips judgment and execution and the Ruddick judgment in ejectment and writ of possession. The decree should, however, enjoin the defendant Ruddick from proceeding to enforce his judgment in ejectment and writ of possession.

With respect to the Phillips judgment and execution it is sufficient to say that it appears that Phillips has properly received the moneys due thereon, and, if such judgment is not already satisfied of record, it may be canceled upon proper proceedings for that purpose. There is therefore no reason for enjoining further proceedings thereon.

The decree will be reversed to the extent

indicated, and the record remitted to the Court of Chancery for the entry of a decree in accordance with this opinion.

No costs will be allowed in this court.

(90 N. J. Law, 545)

ECKERT v. TOWN OF WEST ORANGE.
(No. 123.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. TOWNS — § 36, 38 — DISPOSITION OF GARBAGE — AUTHORITY — ORDINANCE.

A town has the authority to provide for the collection and disposal of ashes and garbage in either of two ways, but not otherwise: First, it may provide for the doing of the work by the town itself. If it adopts this course, it must do so by ordinance, with all of the formalities necessary to enact a valid ordinance. Second, it may make a contract with some one to do the work. But where more than \$500 is to be expended, it has no authority to make a valid contract until it has first publicly advertised for bids, and the contract can then be awarded only to the lowest responsible bidder.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 69, 72.]

2. TOWNS — § 39(1) — REMOVAL OF GARBAGE — ULTRA VIRES CONTRACT — RECOVERY ON QUANTUM MERUIT.

Where a town has contracted for the removal of ashes and garbage, involving an expenditure of more than \$500, without complying with the provisions of chapter 342 of Laws 1912 (P. L. p. 593), requiring advertisement for bids and award to the lowest responsible bidder, there can be no recovery on a quantum meruit for services rendered under such ultra vires contract after the service upon the contractor of the writ of certiorari sued out to review the validity of the contract.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 73.]

3. TOWNS — § 39(1) — ULTRA VIRES CONTRACT — RECOVERY ON QUANTUM MERUIT.

The law will not permit a recovery on a quantum meruit in a suit against a municipality where an express contract would be ultra vires because in violation of chapter 342 of Laws 1912 (P. L. p. 593).

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 73.]

Appeal from Circuit Court, Essex County.

Action by Frank G. Eckert against the Town of West Orange. From a judgment of the Essex circuit court in favor of the defendant, the plaintiff appeals. Affirmed.

Arthur B. Seymour, of Orange, for appellant. Borden D. Whiting and Ira C. Moore, Jr., both of Newark, for appellee.

TRENCHARD, J. This is an appeal from a judgment of the Essex county circuit court in favor of the defendant in an action brought to recover compensation for collecting and disposing of ashes and garbage in the town of West Orange. The material facts are as follows:

The town council of the town of West Orange passed an ordinance purporting to create the office of town scavenger. This

ordinance provided that this so-called officer should collect all ashes and garbage and dispose of the same at a place to be provided by himself. His salary, by an amendment passed May 5, 1914, was fixed at the rate of \$469.50 a month. This was intended not only to compensate him for his services in supervising the work, but also to reimburse him for his necessary expenses, such as hiring men and providing wagons. Eckert, the plaintiff, was appointed town scavenger under this ordinance.

On July 20, 1914, a writ of certiorari was allowed attacking the ordinance and the appointment of Eckert thereunder, and the writ was served upon Eckert July 23, 1914. One of the grounds of attack was that it violated chapter 342 of the Laws of 1912 (P. L. p. 593), which requires that, where an expenditure of more than \$500 is to be incurred for labor, materials, etc., the town council must first publicly advertise for bids and award the contract to the lowest responsible bidder. On August 14, 1914, the Supreme Court rendered judgment setting aside the ordinance and appointment and all proceedings thereunder. Briefly the basis of the decision was that the person appointed under an ordinance of this character was not an officer of the town, and the services were such as should be regulated by contract.

The plaintiff continued to act as scavenger until September 15, 1914, thereby serving after service of the writ of certiorari upon him, and even after entry of the judgment setting aside the ordinance and his appointment. He was paid in full up to July 31, 1914, which was one week after the writ of certiorari was served upon him. He has not been paid for the work done from August 1, 1914, to September 15, 1914. It is to recover compensation for work performed by him during this period that this suit was brought. We are of the opinion that the judgment for the defendant was right.

The contention that, even though the contract was set aside as illegal, the plaintiff is nevertheless entitled to recover on a quantum meruit, is not well founded in law. A municipality is under no legal obligation to take charge of the rubbish or garbage which accumulates upon the properties of the inhabitants thereof. It has authority to do so, however, by virtue of the following acts of the Legislature:

A supplement to the Town Act of 1895 (4 C. S. 5533, par. 378), provides that:

"The council shall have power by ordinance to provide for the collection, removal, treatment and disposal of ashes and garbage, and to appropriate and provide for raising money by taxation for the said purposes, or any or either of them."

The Town Act of 1895 (P. L. 1895, p. 358), as amended by P. L. 1906, p. 324, provides:

"No ordinance or by-law shall be passed by the town council, unless the same shall have been introduced at a previous stated meeting, and shall be agreed to by a majority of the members of the council; and no ordinance shall

take effect until five days after it shall have been published in the official newspapers of the town, and if there be none, in at least one newspaper published in the county and circulating in the town. * * *

Chapter 56 of the Laws of 1914 (P. L. p. 91) provides as follows:

"It shall be lawful for the governing body of any incorporated town of this state to enter into and make a contract or contracts, not exceeding the term of five years at a time, with any corporation or individual for the collection and removal of ashes and rubbish, and for the collection, removal and disposal of garbage."

Chapter 342 of the Laws of 1912 (P. L. p. 593) provides as follows:

"Where and whenever hereafter it shall be lawful and desirable for a public body in any county, city, town, township, borough or village to let contracts or agreements for the doing of any work or for the furnishing of any materials or labor, where the sum to be expended exceeds the sum of five hundred dollars, the action of any such public body entering into such agreement or contract, or giving any order for the doing of any work or for furnishing of any materials or labor, or for any such expenditures, shall be invalid unless such public body shall first publicly advertise for bids therefor, and shall award said contract for the doing of said work or the furnishing of such materials or labor to the lowest responsible bidder: Provided, however, that said public body may, nevertheless, reject any and all bids."

[1] It thus appears that the town council has authority to provide for the collection and disposal of rubbish and garbage in either of two ways, but not otherwise: First, it may provide for the doing of the work by the town itself. If it adopts this course, it must do so by ordinance, with all of the formalities necessary to enact a valid ordinance. Second, it may make a contract with some one to do the work. But, where more than \$500 is to be expended, it has no authority to make a valid contract until it has first publicly advertised for bids, and the contract can then be awarded only to the lowest responsible bidder.

The sections of the Town Act and the acts of 1914 and 1912 above quoted should be read together in the same manner as this court in *Townsend v. Atlantic City*, 72 N. J. Law, 474, 65 Atl. 509, decided that the act under which Atlantic City was organized (P. L. 1902, p. 284) and the Garbage Act (P. L. 1902, p. 200) should be read together. The town therefore had no power to make the contract in question with the plaintiff without complying substantially with the provisions of the act of 1912, and that admittedly it did not do.

[2, 3] Where, as in this case, a town has contracted for the removal of ashes and garbage involving an expenditure of more than \$500, without complying with the provisions of chapter 342 of the Laws of 1912 (P. L. p. 593), requiring advertisement for bids and award to the lowest responsible bidder, there can be no recovery on a quantum meruit for services rendered under such ultra vires contract after the service upon

the contractor of the writ of certiorari to review the validity of the contract.

This case is different from a suit against a private corporation on a claim arising out of an ultra vires contract. The defendant in this case is a municipal corporation. The contract out of which the plaintiff's claim arises is ultra vires, not because of the provisions of some private charter, but because it violates the public policy of the state.

The Legislature by the act of 1912 provided that all public contracts involving the expenditure of more than \$500 must be publicly advertised and awarded to the lowest bidder. The purpose and importance of this act is too obvious to require comment. The plaintiff is now asking that a contract be implied which this law expressly declares shall be invalid. His claim is for more than \$500. It is for services performed after the granting and service of a writ of certiorari to review his express contract with the town, and in large part performed after the Supreme Court had set aside his express contract as illegal. If he can recover on a quantum meruit for these services, it would seem that there would be nothing to prevent a town council so disposed from permitting him to continue indefinitely to act as town scavenger without any express contract, and thus evade the provisions of the act of 1912 entirely.

Moreover, the law will not permit recovery on a quantum meruit in a suit against a municipality where an express contract would be ultra vires. Recovery has frequently been allowed on a quantum meruit where there has been some unimportant irregularity in the proceedings, or an innocent mistake as to some matter of fact. But the law will not raise an implied promise which would, as in this case, be in direct defiance of an act of the Legislature. If the plaintiff's contention were correct, this law (P. L. 1912, p. 593), which applies to all municipalities alike, and represents a definite public policy, could be nullified by proof of the fact that the man had done the work, and therefore was entitled to what such work was reasonably worth.

In *Swackhamer v. Hackettstown*, 37 N. J. Law, 191, it was held that a note given for an unauthorized loan could not be enforced even though the money borrowed had been expended for municipal purposes. Chief Justice Beasley, in delivering the opinion of the Supreme Court, said (at page 196):

"Nor do I think that it adds anything to the right to enforce the note in this case that the money which it represents, and which was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its repayment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. * * * It is to be noted that it is altogether a fallacy to

argue that the law will raise an implied promise to repay the money after it has been used. The impediment to such a theory is that the corporation has not the competency to make the promise thus sought to be implied. An express promise, to the effect contended for, would be illegal, and therefore clearly the law will not create one by implication. * * * No one can justly reproach the law for not providing him a remedy for his own folly or indiscretion. Such folly or indiscretion may have enabled the city officials to create a burden, or may have stimulated them to acts of extravagance which would not have been otherwise created or done. It is but just that the individual who has occasioned the evil should bear the loss."

In *Hill Dredging Co. v. Ventnor City*, 77 N. J. Eq. 467, 78 Atl. 677, it was held that a municipal corporation cannot be bound by an engagement which it had no power to make; and the corporate powers of such a corporation cannot be extended by the doctrine of estoppel.

In *Dallas v. Sea Isle City*, 84 N. J. Law, 679, 87 Atl. 467, this court said:

"Courts are instituted to carry into effect the laws. They cannot become auxiliary to the consummation of violations of law. And so it has been held with practical unanimity in such circumstances, since an express promise to pay is ultra vires and unlawful, the law will not raise an implied promise."

See, also, *Bourgeois v. Freeholders of Atlantic*, 82 N. J. Law, 82, 81 Atl. 358, and cases there collected.

The cases cited by the plaintiff in his brief furnish no support for a recovery in this case. For example, in the *Bourgeois Case*, supra, the lumber was ordered by an unauthorized agent, but the board of freeholders had authority to buy the lumber and by its acts ratified the purchase.

In *N. Y., S. & W. R. R. Co. v. Paterson*, 86 N. J. Law, 101, 91 Atl. 324, the city had the power to make the contract, although it was not regularly executed.

In *Wentink v. Freeholders*, 66 N. J. Law, 65, 48 Atl. 609, there was no lack of power to make the contract. There was an innocent mistake for which the plaintiff was not responsible, and as to a matter about which he was not bound to inquire.

In *Klemm v. Newark*, 61 N. J. Law, 112, 38 Atl. 692, the city was held to have the power to make the contract; as the making of it acted as a suspension of the ordinance which forbade it. See *MacLear v. Newark*, 77 N. J. Law, 712, 714, 73 Atl. 503.

In *Tappan v. Long Branch Commission*, 59 N. J. Law, 371, 35 Atl. 1070, the proceedings were regular on their face, and the city was acting within the scope of its chartered power.

The case of *Bigelow v. Perth Amboy*, 25 N. J. Law, 297, does not appear to be applicable, but in that case the city had the power to purchase the material.

It is true that the work performed by the plaintiff in the case at bar was of a character which the defendant was authorized by law to have done; and it is true that the plaintiff performed the work for the defend-

ant at its request. The plaintiff's difficulty is that the request was ultra vires and invalid. While the defendant was authorized to make a contract for this work, its authority was conditional upon its awarding the contract in accordance with the provisions of the statute of 1912. It had not the power either to make or to ratify an express contract in any other manner; and the law will not imply a contract which the parties had not power to make. The plaintiff in this case was a party to a scheme to evade and nullify a well-defined public policy of this state, and his present predicament is a direct result of that scheme. What his motive may have been is immaterial. Under such circumstances the courts will not aid him by implying a contract which the law expressly forbids, but will leave him where it finds him.

The judgment below will be affirmed, with costs.

(90 N. J. Law, 512)

DALY v. GARVEN. (No. 133.)

Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. STATUTES \S 64(2)—PREFERENTIAL VOTING ACT—PARTIAL UNCONSTITUTIONALITY—EFFECT—TITLE TO OFFICE.

The provisions of the act of April 7, 1914, commonly known as the Preferential Voting Act (Pamphlet Laws 1914, p. 170), that "all ballots shall be void which do not contain first choice votes for as many candidates as there are offices to be filled," is not separable from the other provisions of the statute, so that it may be rejected and the residue of the statute be permitted to stand; hence, if such provision be unconstitutional the act as a whole fails, and an election held under its terms is incapable of conferring a de jure title to a private relator under section 4 of the Quo Warranto Act (3 Comp. St. 1910, p. 4212).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 59, 195.]

2. CONSTITUTIONAL LAW \S 46(3)—VALIDITY OF STATUTE—NECESSITY OF DETERMINATION.

In quo warranto, when a defeated candidate for an elective office, in order to obtain a judicial determination that he received a plurality of the ballots cast at such election, seeks a decision as to the unconstitutionality of the statute under which the election was held, which is fatal to his de jure title to the office, the court, in view of the futility of deciding the question, will decline to pass upon it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 45.]

Appeal from Supreme Court.

Information in the nature of quo warranto by Bert Daly against Pierre P. Garven. From the judgment of the Supreme Court in favor of defendant, entered upon a postea certifying the result of the trial before the circuit court of Hudson county, plaintiff appeals. Affirmed.

Elmer W. Demarest, of Jersey City, for appellant. Gilbert Collins, of Jersey City, for appellee.

GARRISON, J. This appeal brings up for review a judgment of the Supreme Court in favor of the defendant in quo warranto entered upon a postea certifying the result of a trial before the circuit court of Hudson county. The parties were candidates for the office of commissioner of the city of Bayonne under the act of 1911, commonly known as the Walsh Act (Pamphlet Laws 1911, p. 462). Five commissioners were to be elected. The election was held under the supplement of 1914, commonly known as the Preferential Voting Act (P. L. 1914, p. 170), the pertinent provision of which is that "all ballots shall be void which do not contain first choice votes for as many candidates as there are offices to be filled," which was brought to the attention of the voters by a direction on the ballot, viz., "If more than one office is to be filled, vote as many first choices as there are offices to be elected or the ballot will be void."

More than 9,000 ballots were cast in compliance with this statutory provision, and counted for the respective candidates. The canvass of the votes so counted showed the election of Garven, the defendant, over Daly, the relator, by less than a score of votes. In making this canvass 192 ballots were rejected, for the reason that they did not contain first choice votes for five candidates for the office of commissioner. If these ballots had been counted, they would change the result by giving the relator a plurality over the defendant. The relator, deeming the provision of the statute which required the rejection of these 192 ballots to be unconstitutional, and believing that he was lawfully entitled to the office in question, filed his information in the nature of a quo warranto under the fourth section of the Quo Warranto Act, in which he set forth the foregoing facts in detail, concluding with the charge that the said relator by virtue of said election was lawfully elected one of the commissioners of the said city of Bayonne, and is entitled to said office, "which the said Pierre P. Garven hath usurped to the exclusion of said Bert Daly." Issue was joined, and upon the trial at nisi prius, Judge Speer, sitting by consent without a jury, held that the act of 1914 was not unconstitutional, which decision justified the rejection of the 192 ballots on which the relator's claim to the office rested, and this is the trial error that is laid as the ground for the reversal of the judgment of the court below.

[1] It is the contention of the appellant that the act of 1914 is unconstitutional, for the reason that it places a compulsion upon all electors to vote a first choice for as many candidates for commissioner as there were offices to be filled. His argument is that this provision may operate to shut off voters from the ballot box and hence must fall before the constitutional guaranty of the right to vote,

citing *Ransom v. Black*, 54 N. J. Law, 451, 24 Atl. 489, 1021, 16 L. R. A. 769. The following quotation from the brief of counsel for the appellant illustrates his argument:

"It might very well happen in a given case that there were only five candidates for five offices. Two of them, perhaps, might be totally unfitted to fill the office. Yet, in order to cast a vote for the fit persons, the voter is compelled to vote for persons who should not be trusted with the administration of public offices."

A still stronger argument is that, by being compelled to vote for other candidates in addition to voting for those who are his real choice, the elector may actually bring about the defeat of the candidates whose election he desires.

The constitutionality of an election law having these possibilities is evidently a debatable question of great interest and importance.

A subsidiary question of vital importance to the appellant's contention is whether this provision, if found to be unconstitutional, may be excised from the statute, leaving its remaining provisions to stand.

We are clearly of opinion that this cannot be done. The occasion for the exercise of this delicate judicial function is carefully stated by Mr. Justice Depue in *Johnson v. State*, 59 N. J. Law, 535, 539, 37 Atl. 949, 950, 39 Atl. 646, 38 L. R. A. 373, in these words:

"The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail."

Stated more tersely, the same doctrine is laid down by Mr. Justice Dixon in *Albright v. Sussex County Lake Commission*, 71 N. J. Law, 309, 59 Atl. 146, 69 L. R. A. 768, as follows:

"The general rule with regard to the validity of a statutory scheme, some feature of which proves to be unconstitutional, is that, if the objectionable feature be not so important to the legislative design as to warrant the opinion that the scheme would not have been authorized without it, then the residue of the scheme will be upheld; otherwise, the entire scheme will fail."

Tested by either of these criteria, the provision in question is on the one hand not wholly independent of the other provisions of the act, but on the contrary is intimately connected with them and with the scheme as a whole, while as to its importance, it was evidently inserted under the belief that without it a complete board of commissioners might not be elected, and so the entire scheme of the statute be defeated.

The entire scheme of the statute relates to the holding of an election in which the provision in question is the most striking feature; to eliminate such a feature from a complete

legislative program requires an act of legislation. Such a provision may be dropped by a subsequent Legislature as the result of experience or because it differs in opinion from its predecessor. *P. L. 1916*, p. 216. That, however, is a totally different thing from a judicial determination that the provision was deemed of little or no importance by the Legislature that enacted it.

The provision that is attacked by the appellant is, therefore, not separable from the residue of the statute; hence, if such provision be unconstitutional the statute is invalid and the election held under it is incapable of affording a de jure title to any of the candidates thereat, including the appellant.

True it is that the respondent and the other de facto commissioners might not be directly affected by such a judicial opinion. The appellant, however, has no such de facto status, he is a private citizen claiming a de jure title to an office by force of an election which, if his argument be sound, can confer a de jure title upon no one. For it must be remembered that the title of the relator as well as that of the respondent is at issue. *Lane v. Otis*, 68 N. J. Law, 856, 54 Atl. 442.

In the proceeding which the appellant has instituted in his own right against the respondent, the very rights of both parties are drawn into question. *Manahan v. Watts*, 64 N. J. Law, 465, 45 Atl. 813.

This being so, to what end should a court consider and decide a constitutional question, which, if decided as the appellant argues it should be, would be of no avail to him as a suitor? The charge of the information is that the de facto tenure of the respondent excludes the appellant from an office to which he has the de jure title. If we cannot adjudge the latter, an adjudication of the former would be of no avail to this private relator. If the 192 ballots on which the title of the appellant rests were improperly rejected, because of the compulsory provision of the statute as to first choice under which the election was held, and if such compulsion renders the statute unconstitutional, then the remaining 4,293 votes on which the appellant bases his title were cast under a like compulsion, and were for a like reason incapable of affording valid evidence of a de jure title.

In fine, if the statute be invalid because of the compulsory feature it brought to bear upon all the electors, it is equally invalid as to those who yielded to such compulsion as it is to those who stood out against it. So that, adopting the appellant's illustration, every one of such 4,293 ballots cast for him may have been so cast because of such compulsion. If this be too extreme, still it is at least true that we have no way of knowing how many ballots were cast for the relator because of the invalid provision of the statute.

To take another illustration from the appellant's brief:

"In the Bayonne election there were but 13 candidates. Who can say whether or not voters were not disfranchised by being compelled to vote for at least 5 or not at all."

Look at it as we may, an invalid election cannot invest the appellant with a *de jure* title.

[2] To sum the matter up in a single sentence: In quo warranto, when a defeated candidate for an elective office, in order to obtain a judicial determination that he received a plurality of the ballots cast at an election, seeks a decision as to the unconstitutionality of the statute under which the election was held, which is fatal to his *de jure* title to the office, the court, in view of the futility of deciding the question, will decline to pass upon it.

The redress sought by the appellant as a private relator has two aspects which are interrelated, viz., that the respondent should be ousted from his office in order that the appellant be installed therein, which would not be effected by a decision that the act of 1914 was unconstitutional.

A decision that cannot affect the litigants before the court ought not to be made, and if it ought not to be made, it need not be considered especially in view of what was said by this court in *Devlin v. Wilson*, 88 N. J. Law, 180, 96 Atl. 42.

Having thus reached the conclusion that, upon no ground that is available to the appellant, is any legal error shown in the action of the court below, the judgment of the Supreme Court is affirmed.

(87 N. J. Eq. 630)

BRINK v. FLANNAGAN. (No. 136.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

JUDGMENT \Rightarrow 779(2)—LIEN—STATUTE.

A judgment in attachment under the act of 1901 (1 Comp. St. 1910, p. 132), is ineffective as a lien against land conveyed by bona fide unrecorded deed made and delivered prior to the issue of the writ of attachment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1342.]

Appeal from Court of Chancery.

In the matter of condemnation of lands for school purposes in the Township of Hillside; Leander Brink and Dallas Flannagan, claimants of proceeds. From a decree of the Court of Chancery for Flannagan, Brink appeals. Reversed, with instructions.

William R. Wilson, of Elizabeth, for appellant. Vall & McLean, of Elizabeth, for appellee.

PARKER, J. The controversy is over the proceeds of lands taken in condemnation proceedings, which proceeds were paid into the Court of Chancery pursuant to the statute. Flannagan claims them under a judgment in

an attachment suit against one McKoon, a former owner; Brink claims as holder of the title under McKoon by mesne conveyances.

The attachment was never executed against the lands in question. It was sued out of the Supreme Court in 1903, and writ issued to other counties, but not to Union county, where these lands are situate. Some two years before, in 1901, McKoon had conveyed the lands to one Decker, under whom Brink claims. The deed to Decker was not recorded until 1910. Meanwhile Flannagan went on with his attachment suit and entered judgment therein on November 23, 1904. He does not seem to have discovered the Union county lands until about 1914, when he applied to the Supreme Court to amend the return by including them in the attachment; but this application was denied, on the ground that after judgment it came too late. The court intimated that the judgment itself was a lien on these lands, and this no doubt was the basis of the decision in the Court of Chancery that Flannagan, the attaching creditor, was entitled to the money.

We think that this ruling disregarded the language of the statute, which says (section 8, C. S. p. 138) that "the judgment is a lien on the defendant's lands acquired either before or after the entry thereof." To the inquiry whether these lands were "defendant's lands" at any time during the progress of the attachment suit we answer that the case plainly shows that they were not, for they were conveyed away two years before it was begun, and there is no intimation that the conveyance was not a bona fide one. The master, in his report to the Chancellor, puts the alleged lien of the judgment upon the ground that the deed had not been recorded. This would be correct in the case of a general judgment in a suit begun by personal process, but in attachment the language of the act is different, as we have seen.

In *Garwood v. Garwood*, 9 N. J. Law, 193, the question was whether a writ of attachment bound land that had been conveyed by unrecorded deed, under a statute that provided it should bind the property and estate of the defendant from the time of executing the same. It was held that it did not. A similar question arose in the Court of Chancery touching the priority of the writ as to a mortgage. *Campion v. Kille*, 14 N. J. Eq. 229, affirmed in this court 15 N. J. Eq. 476. The statutes are in *pari materia*, and we see no reason to depart from decisions which have stood so long unquestioned. It is true that there is in both cases cited an intimation of a different result if a judgment were in question; but these intimations were obiter, and predicated on the language of the conveyance act, which, if inconsistent with the attachment act of 1901, must be deemed superseded thereby.

Our conclusion is that a judgment in at-

tachment under the act of 1901 is ineffective as a lien against land conveyed by bona fide unrecorded deed made and delivered prior to the issue of the writ of attachment. The decree of the Court of Chancery will be reversed, with instruction to award the fund in question to the holder of the title conveyed by McKoon to Decker.

(90 N. J. Law, 617)

DARVILLE v. BOARD OF CHOSEN FREEHOLDERS OF ESSEX COUNTY.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

BRIDGES ~~C-46~~(8)—DEFECTIVE BRIDGE—LIABILITY—QUESTION FOR JURY.

The plaintiff having fallen from a county bridge, by reason of the giving way of an iron rail, and there being testimony from which the jury might infer negligence of the defendant, in the performance of its statutory duty of maintenance and repair, as well as the question of the defendant's ownership of the rail, and of the locus in quo, and also testimony from which an inference might reasonably be drawn, that the defendant assumed responsibility and exercised control over the rail in question, *held*, that a motion to nonsuit as well as a motion to direct a verdict were properly refused.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 120.]

Appeal from Circuit Court, Essex County.

Action by James Darville against the Board of Chosen Freeholders of the County of Essex. From the denial of its motions to nonsuit and to direct a verdict, defendant appeals. Affirmed.

Harold A. Miller, of Newark, for appellant.
Hugh B. Reed, of Newark, for appellee.

MINTURN, J. The plaintiff was injured by falling from the entrance to a public bridge, crossing Third river at Nutley, in the county of Essex. The cause of his fall he attributes to the negligence of the defendant in failing to use reasonable care to keep the rail or guard of the approach to the bridge in a reasonably safe condition. The plaintiff fell while attempting to lean upon an iron guard rail which ran from the bridge at right angles, to an adjacent blacksmith shop, out of which the plaintiff came and proceeded to cross the bridge. While he was stopping to answer the salutation of a friend, he placed his hand and weight upon the rail, when it gave way and precipitated him ten feet to the bed of the stream, producing the injuries which present the basis of this suit.

The defendant denies responsibility, insisting that the rail in question was not placed there by the county, and that at the time of the injury the plaintiff was not upon the public thoroughfare, but was upon private property adjoining the bridge, upon which was the rail, and that therefore the county was under no legal liability to maintain or repair it. The alleged contributory negli-

gence of the plaintiff, under the circumstances, presented the final ground of defense. These issues the trial court treated as jury questions, and refused a motion to nonsuit, and to direct a verdict based thereon.

There was testimony sufficient in the case from which a jury might infer that the county at the time the bridge was erected constructed the rail in question. There was testimony also from which a jury might conclude that the county, recognizing its responsibility for the maintenance of the rail, had at least six months prior to the accident caused the rail, with the rest of the structure, to be painted, and that after the accident the county engineer ordered the rail repaired. The latter fact, while not directly evidential of liability, might be accepted as a recognition or admission by the defendant of the extent of the defendant's ownership or control of the rail. These facts were met by counter evidence from which the jury might infer the absence of either ownership or maintenance upon the part of the defendant, and some testimony from which it was argued that the locus in quo, upon which the plaintiff stood at the time of his fall, was private property, over which the defendant could not legally exercise any act of control or ownership.

These questions manifestly presented a jury question, involving as they did inquiries as to questions of fact, and not of law, and in leaving them to the jury the rule is commonplace that the trial court committed no legal error. The production by the defendant of the plans for the construction of the bridge might have thrown light upon the question of the original construction, and have shown the presence or absence of the rail in question, but the failure to produce it left the question open, assuming the locus in quo to be private property, whether during an interim of years since the original construction, the defendant may not have assumed the added responsibility, and imposed the corresponding liability upon itself by accepting permission, tantamount to a license from the adjoining landowner, to keep and maintain the rail as part of the structure, a legal status which the jury might reasonably infer in fact existed in view of the acts of supervision and maintenance, which the proof showed the defendant exercised over the entire structure.

The liability of defendant being entirely statutory (P. L. 1860, p. 285; C. S. p. 304, § 9; *Maguth v. Freeholders of Passaic*, 72 N. J. Law, 226, 62 Atl. 679; *Freeholders of Sussex v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530), the trial court properly left these questions to the jury, premising its comments upon the situation, with the fundamental considerations that the defendant's liability was conditioned upon their answer to the inquiries whether the rail in question was part of the

bridge, and whether the plaintiff at the time of the accident was upon defendant's property or upon private property, over which the defendant assumed no responsibility and exercised no control.

The charge of the trial court, and its rulings upon testimony, were in consonance with these principles of liability, and the judgment will therefore be affirmed.

(87 N. J. Eq. 596)

FIRST NAT. BANK OF HOUTZDALE, PA.,
v. PARKER et al. (No. 25.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

EQUITY §43 — JURISDICTION — REMEDY AT LAW.

A court of equity, when its remedial jurisdiction is invoked in aid of or in lieu of an action at law, will examine, not only the transaction in question, but the relations of the parties, and all of the surrounding circumstances, to the end that, if there is a well-grounded suspicion of fraud or deception, it may withhold its aid and leave the complainant to his legal remedy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166.]

Swayze, J., dissenting.

Appeal from Court of Chancery.

Bill of complaint by the First National Bank of Houtzdale, Pa., against Thomas B. Parker and others. From a decree of the Court of Chancery, complainant appeals. Affirmed.

John D. McMullin, of Moorestown, for appellant. George J. Bergen, of Camden, for appellees.

GARRISON, J. The bill of complaint is exhibited to collect a judgment at law out of a fund placed in trust for his own use by the judgment debtor. Such a bill will lie to prevent a fraud upon bona fide creditors. Statute of Frauds, § 11 (Comp. St. 1910, p. 2617); Chancery Act (Act April 3, 1902 [P. L. p. 534]) § 70.

Upon three previous occasions similar bills were filed by the same complainant, who in each case obtained the relief prayed for. Upon the filing of this fourth bill the Vice Chancellor, who heard the cause and who had made the previous decrees, became convinced that the statutes of this state were being used, not to protect a bona fide creditor of the settlor of the trust, but to enable such settlor to do what he could not lawfully do, viz., to regain the corpus of the trust fund. Some of the reasons that led the Vice Chancellor to this conclusion were stated by him to counsel upon the argument as follows:

"When on three successive occasions, namely, in 1910, 1912, and 1914, Mr. Parker has borrowed on the dates named, respectively, \$10,000, \$12,000, and \$13,000 in the same manner, and on each occasion the bank has been obliged

to resort for the collection of the loans to the same method now pursued, namely, a judgment in New Jersey, personal service upon Mr. Parker out of his own state, in the New Jersey lawsuit, service which it is reasonably apparent is made possible by Mr. Parker for the convenience of the bank, then a bill in equity in New Jersey identical with the present bill, with personal service on Mr. Parker procured in the same way, is not the bank chargeable with knowledge of circumstances that make it impossible to escape the conclusion that when they make the fourth loan in the same manner they are simply making themselves the instrument for Mr. Parker to accomplish indirectly what he cannot accomplish directly?"

The fact that these remarks were made to counsel while the trial was still in progress has a marked significance upon the bona fides of the complainant. Such a statement by the court while the case was still open afforded an opportunity, if it did not amount to an invitation, to the complainant to offer proof of any facts that would tend to rebut the impression the Vice Chancellor had formed as to the collusive character of the suit. That no such proof was offered is practically tantamount to an admission that no such facts existed.

The Vice Chancellor had, moreover, the advantages of the familiarity with the case gathered in previous litigations, and of the presence before him of the witnesses. Without these advantages, we are in danger of dealing with the case upon mere legal abstractions; whereas he dealt with it as the practical application of an equitable remedy to the given case.

In his final conclusions the Vice Chancellor, referring to the previous litigation, said:

"In that litigation complainant became fully apprised of the fact that the trust was void only as to bona fide creditors of Parker, and that Parker could not in his own behalf recover from the trust company the principal of the trust funds. The three subsequent loans made by complainant to Parker, and the proceedings taken in each instance by complainant for recovery from the trust company of the money so loaned, render it impossible to escape the conclusion that in making the loan here in question complainant deliberately and knowingly constituted itself an agency to enable Parker to regain control of his property. The circumstance that complainant actually advanced money and sought to make a profit for itself is immaterial. The practical status which complainant has deliberately assumed is that of a permanent conduit between Parker and the trust company from which Parker may draw funds at pleasure. Complainant has constituted itself a creditor for the sole and definite purpose of appropriating to itself the superior benefits of that status. Creditors' rights which appeal to equitable protection are of an inherently different quality. * * * I am fully convinced that this court cannot be properly made the involuntary machinery for carrying out an arrangement of that nature for the ultimate benefit of Parker."

We fully concur in the conclusions thus reached by the learned Vice Chancellor, and in the consequent dismissal of the complainants' bill which may well be rested upon a well-grounded suspicion that a collusive deception

was being systematically practiced upon the court of equity in order to obtain for one purpose the extraordinary aid it accords only for a totally different purpose.

A positive demonstration of actual fraud is not necessary. In the well-considered opinion in the case of *Worth v. Watts*, 78 N. J. Eq. 299, 74 Atl. 434, Mr. Justice Parker points out that, when parties having a right of action at law seek the aid of a court of equity, such court will examine not only the transaction in question, but the relations of the parties and all of the surrounding circumstances, to the end that, if "an atmosphere of suspicion surrounds and permeates the whole case," a court of equity will refuse its extraordinary relief and leave the complainant to his legal remedy. That is this case.

The circumstance that in the case just cited the same Vice Chancellor sat below gives concrete emphasis to the fact that "stare decisis" is only a more technical term for judicial consistency.

The decree of the Court of Chancery is affirmed.

SWAYZE, J. (dissenting). The trust in this case was created by Parker himself. As soon as he attained his majority he assigned securities amounting to more than \$150,000 to his mother, and she immediately assigned them to the Camden Safe Deposit & Trust Company. The declaration of trust provides that the income shall be paid to Parker during his life for his sole and separate use, so that the same shall not be liable to or for his debts and contracts, or for debts or contracts or under the control of any other person. Immediately after his death the property is to be assigned to such person and for such uses as he shall by will appoint; in default of a will, to his mother, if living, freed and discharged of the trust, but if she die before Parker, then to such person as she may by will appoint, and in default thereof to such persons as would be entitled under the laws of Pennsylvania to the estate of Parker. A right is reserved to Parker, with the consent of his mother, if living, to revoke the trust, and to Parker alone to revoke it after his mother's death. She died in 1901. The trust was made irrevocable just before her death by consent of her and Parker. The deed of trust is clearly void as to creditors under section 11 of the statute of frauds (C. S. 2617), because made in trust for the use of the person making the same, and also because on its face it shows an intent to defraud future creditors. The case comes also within section 70 of the Chancery Act, subjecting to the rights of creditors moneys held in trust where the trust has been created by the judgment debtor himself. It does not come within the rule of *Ruckman v. Conover*, 37 N. J. Eq. 583, and *Winans v. Graves*, 43 N. J. Eq. 263, 11 Atl. 25, to which the Vice Chancellor appeals.

In those cases the rights of third parties were involved. So much the court now concedes. No one is interested in the fund except Parker himself. No one opposes the complainant's recovery of its money, except the trust company, which has no beneficial interest in the fund, except possibly commissions to be earned. Parker has apparently done all he could to secure the complainant its money, except to make a binding agreement to execute his power of appointment in favor of his creditor, which he can do, if it be necessary. The question, therefore, resolves itself into whether he is to be prevented, in spite of himself, from securing payment of his debts by a judgment, execution, and proceedings in chancery supplementary thereto. The case goes further than to protect the corpus of the fund. The bill is dismissed, and the complainant is thereby deprived of its remedy, even against the income of the fund which is clearly Parker's absolute property, and is probably in excess of the \$4,000, mentioned in the statute. C. S. 2254, 30A; P. L. 1880, p. 274.

We have not heretofore adopted in this state the doctrine of "spendthrift trusts," and our Legislature has evinced hostility to them by subjecting income in excess of \$4,000 to supplementary proceedings at law, even where the trust is created by another. We are now by this decision going far beyond any doctrine of spendthrift trusts that has ever come under my notice. And we are doing it without any evidence that Mr. Parker needs the protection of the court as he certainly does not ask for it. We do it because, without proof, we guess that a man who borrows about \$10,000 a year and chooses to pay it out of a fund of which the equitable and beneficial right is wholly his own, by means of judgment and execution, must be doing wrong, and without evidence we attribute moral delinquency to a creditor who loans him the money at the legal rate and in the ordinary course of business. There is no evidence as to Parker's other means or his fortune aside from the trust fund; there is no evidence as to his need of the money, or the use he made of it. It may have been used for a highly profitable investment; it may have been used to discharge debts incurred by him of the highest moral obligation. In effect we say the bank was right in loaning him \$35,000 in four years; the Court of Chancery enforced its right to recover out of this fund three different times. We now say that for it to loan him \$13,000 in the fifth year, and to attempt to recover it by the thrice approved method, shows that it is guilty of some moral delinquency; that its hands are unclean, because it is assisting him to get control of his own property, in which no one else has any beneficial interest, and to discharge that property of a trust created by himself and pronounced void by statute. If

the court is correct, tradesmen who supply him with the means of living must be likewise guilty of moral delinquency if they supply him for a fifth year, after having enforced their claim for four years out of this fund. This must be so, since, as far as the case shows, the money loaned by the bank may have been loaned for the express purpose of meeting Parker's legitimate living expenses, which may not have been extravagant for one of his means. I cannot understand on what legal principle the bank can have imposed upon it the duty to explain what becomes of the money it loans. The Legislature has recently shown a desire to go to great lengths to assist creditors in recovering their debts. A workingman's wages "due and owing . . . or . . . thereafter become due and owing" may be sequestered. P. L. 1915, pp. 182, 470. We are protecting an income on a trust fund in excess of \$100,000, created by the debtor himself and expressly declared by him alone not to be "liable to or for his debts and contracts." The way is made easy for a man of fortune to escape the ordinary obligation to pay his debts, in spite of legislation to compel him to pay. I confess I cannot follow the court's reasoning. I pass over the question that might well be raised as to the estate in the trust fund of a life tenant with an absolute power of disposition by will.

(90 N. J. Law, 261)

STATE v. HART. (No. 75.)

(Court of Errors and Appeals of New Jersey.)

June 18, 1917.)

1. CRIMINAL LAW §1090(1) — BILL OF EXCEPTIONS—RIGHT TO.

Under Cr. Prac. Act (Revision 1877, p. 284) § 91, bills of exceptions are allowable to the defendant for trial errors on the trial of any indictment in any court for any crime or misdemeanor.

2. CRIMINAL LAW §1024(5)—RIGHT OF REVIEW—ACQUITTAL.

Under Const. 1844, art. 1, par. 10, providing that no person shall, after an acquittal, be tried for the same offense, no writ of error will lie in a criminal case in favor of the state to review a judgment of acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2804-2806.]

3. CRIMINAL LAW §186—FORMER JEOPARDY.

Under Const. 1844, art. 1, par. 10, a person cannot be tried a second time for the same offense after he has been acquitted in a court having jurisdiction of the person and the crime, even though acquittal was the product of trial errors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312, 320, 345-361.]

Error to Supreme Court.

Frederick Hart was indicted for seduction. The trial court directed the jury to acquit him, and the State sued out a writ of error in the Supreme Court (88 N. J. Law, 48, 95 Atl. 756), which was dismissed. The State brings the record up for review on writ of error to the Supreme Court. Affirmed.

Martin P. Devlin, of Trenton, for the State.
William J. Crossley, of Trenton, for defendant in error.

KALISCH, J. The defendant in error was indicted for seduction. On his trial in the quarter sessions court of Mercer county the trial judge directed the jury to acquit him. The state sued out a writ of error in the Supreme Court to the court of quarter sessions, which writ was dismissed by the Supreme Court upon the ground that in order for the state to secure a review of a trial error, it must be able to have a bill of exceptions and a writ of error based thereon to remove the case to that court, and since the statute makes no such provision, and there being no such practice at common law as a writ of error in favor of the crown after an acquittal on the merits, the writ was improperly sued out. The state now brings the record up for review before us on a writ of error sued out of this court to the Supreme Court. At common law a bill of exceptions was not allowable in a criminal case. Error was assignable only upon the record. The bill of exceptions had its origin in the Statute Westm. II, 13 Edw. I, c. 31.

Tidd, in volume 2 on Practice, p. 911, in commenting on this statute, says:

"This statute extends to inferior courts, and to trials at bar, as well as those at nisi prius; but it has been doubted whether the statute extends to criminal cases."

In *King v. Archbishop of York*, Willes' Rep. 533, Lord Chief Justice Willes, in discussing the scope of chapter 31, on page 535 says:

"My brother Abney cited 2 Inst. 424, and Saville, 2, where it was holden that the Statute of Westm. II, c. 30, concerning nisi prius, does not extend to the King, and that although the act is general, yet a nisi prius cannot be granted where the King is a party, or where the matter toucheth the right of the King, without a special warrant from the King or the consent of the Attorney General. He said likewise that chapter 31 of the same act, concerning bills of exceptions, was never thought to extend to the crown. And he mentioned some cases where such pleas had been denied, and said that he thought that the Stat. 9 Anne, c. 20, extending this statute to writs of mandamus, etc., rather strengthened the objection."

In 2 Inst. 427, Lord Coke says:

"This act doth extend as well to the demandant or plaintiff as to the tenant or defendant in all actions real, personal or mixed."

And in *King v. The Inhabitants of Preston*, Rep. temp. Hardw. 249, Lord Hardwicke on page 251, on an information in the Court of Exchequer, said that when he was Attorney General he had known a bill of exceptions allowed, "but then," said his lordship, "they are properly civil suits for the King's debt, etc. But a bill of exceptions cannot be allowed by the justices of peace at the quarter sessions on the hearing of an appeal against an order of removal."

In the case of *Sir Henry Vane*, 1 Lev. 68, Kel. 15, Sid. 85, who was tried for high trea-

son, the court refused to seal a bill of exceptions, because, they said, criminal cases were not within the statute, but only actions between party and party. This matter is fully discussed in a learned and exhaustive note by Mr. Evans in volume 3 of Evans' Statutes, p. 341 et seq., Ed. of 1829. On page 342 the learned commentator says:

"From the language of the statute itself, I certainly should not infer its application to criminal cases. * * * The general feeling of the profession upon the subject is most strongly evinced by the fact of no such bill of exceptions having been tendered for a very long period of time, although many important questions of criminal law have been discussed with great warmth, and with strong feelings of opposition to the opinions of the court of which the much agitated question of the functions of the jury in cases of libel previous to the Statute of George III is perhaps the most prominent instance."

Chitty, in volume 1 of his excellent treatise on Criminal Law, on page 508, says:

"When an exception is made by any party to a witness which is overruled by the court, the opposite side have, at least in civil proceedings, the power of appealing from his decision by tendering a bill of exceptions. This document the judge must in civil cases seal by virtue of 13 Edw. I. c. 31, and it will operate like a writ of error. But it seems to be the better opinion that this provision does not extend to any criminal case, and is certainly inadmissible on indictments for treason and felony. It has indeed been allowed on an indictment for a misdemeanor, but the propriety of this allowance has been disputed."

In *Alleyn's Case*, Dearsley, Cr. Cases Reserved, 1852-1856, Lord Campbell, C. J., on page 509, says:

"A bill of exceptions could not lie for the Statute of Westminster II is confined to civil cases."

Under the ancient English practice trial errors in criminal cases were reviewable by the taking of a special verdict or by a case reserved which is illustrated by the following instances:

In *King v. Hodgson et al.*, 1 Leach's Cr. Cases, p. 6, a case decided in 1730, there was a special verdict upon an indictment against several defendants jointly indicted, tried, and convicted. The question was whether under the evidence they were all equally guilty. The report of the case states:

"In order to avoid the expense which attends the drawing and arguing a special verdict, the counsel agreed to submit the point to the consideration of the judges in the shape of a reserved case."

In *Reg. v. Bernard*, 1 F. & F. Cr. Cases, p. 252, the defendant's attorney submitted seven legal questions to the trial court to be reserved, the seventh of which was concerning a certain letter which was claimed to have been improperly received in evidence, upon which Lord Campbell, C. J., sitting with Pollock, C. B., Erle, J., and Crowder, J., and a jury, remarked:

"There appears to be no objection of reserving any of these points except the seventh: but that point, as you must be aware, was argued before us, and we were unanimously of the opinion that the letter was admissible. All other points

which you have raised are very fit indeed for the consideration of the 15 judges."

And so it was held by the courts of the state of New York prior to the passage of a statute providing for bills of exceptions in criminal cases that no bill of exceptions could be taken in a criminal case. *People v. Holbrook*, 13 Johns. (N. Y.) 90; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *Ex parte Barker*, 7 Cow. (N. Y.) 143.

A consideration of the history of the origin and development of bills of exceptions in this state is highly important as bearing upon the question as to what the common law was on the subject prior to the Constitution of 1776.

The first act relating to bills of exceptions was passed in 1797, and is to be found in Patterson's Laws, p. 245, entitled "An act directing bills of exceptions to be sealed." This act, though somewhat narrower in its terms than the English parent act of Westminster II, in that the New Jersey statute confines its operation to causes where a writ of error lies to a higher court, whereas the English statute is general in that regard. In all other respects, however, the act of 1797 is, in substance, a copy of the earlier English statute.

An examination of the early reports of criminal cases in this state shows an absence of bills of exceptions in such cases until 1849, when in *West v. State*, 22 N. J. Law, 212, for the first time, manifestly, in a criminal case under review, with a return of the record came a bill of exceptions, which the reporter says was signed by virtue of the act of 1848.

Looking into the practice which prevailed in criminal cases in this state prior to the passage of the act of 1848, we find that it was analogous to the practice which prevailed in England before the Revolution of 1776, so far as it was consonant with our changed form of government. The practice was for the trial judge or court to take a special verdict, reserving the questions of law for the opinion of the judges, or to certify a stated case asking for an advisory opinion. See *State v. Guild*, 10 N. J. Law, 175, 18 Am. Dec. 404.

That the consensus of opinion of both bench and bar of this state was that the act of 1797 did not provide for bills of exceptions in criminal cases is not only confirmed by the practice above alluded to, but also by the statute of 1848 (P. L. 1848, p. 226), entitled "An act directing bills of exceptions to be sealed in certain criminal cases."

Section 1 of this act declares:

"That the act entitled 'An act directing bills of exceptions to be sealed' passed March 7th, 1797, and each and every of the provisions thereof, shall be taken, deemed, and adjudged to extend to trials of indictments for crimes and misdemeanors which by law are punishable by imprisonment at hard labor."

Section 2 of the act provides for the taking of an exception on the trial of an indictment for any crime or misdemeanor included with-

in the provisions of the first section of the act, and for the return of the bills of exceptions, with a writ of error.

In 1855 the Legislature by an act entitled "A supplement to an act, approved April the sixteenth, 1846, and entitled 'An act regulating proceedings and trials in criminal cases,'" declared that the act passed in 1797 shall be taken, deemed, and adjudged to extend to trials of indictment for treason, murder, or other crimes punishable with death, imprisonment of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury, and subornation of perjury, and in express terms repealed the act of 1848. P. L. 1855, p. 648.

It is obvious that the effect of this declaration of the Legislature and the repeal of the act of 1848 precluded the taking of bills of exceptions in cases of misdemeanor, and not mentioned in the above category of crimes.

In 1863 the Legislature, after declaring that the act of 1797 shall apply to criminal cases, extended the right to a bill of exceptions on the trial of any indictment for any crime or misdemeanor. P. L. 1863, p. 311; Nixon's Dig. p. 228, pars. 40, 50.

[1] By section 90 of the Criminal Practice Act of the Revision of 1877, p. 284, it is provided that sections 242, 243, 244, 245, and 246 of the act entitled "An act to regulate the practice of courts of law" shall be deemed taken and adjudged to extend to trials of indictment for crimes and misdemeanors which by law are punishable by imprisonment at hard labor. This obviously left all cases of misdemeanor punishable by fine only or by imprisonment only, or by fine and imprisonment, without the benefit of bills of exceptions. But by a later statute found in the Revision of 1877, p. 1298, section 90 of the Criminal Practice Act was repealed, and section 91 of the same act was amended, with the result that bills of exceptions for trial errors are allowable "on the trial of any indictment * * * in any court of this state, for any crime or misdemeanor." It is to be noted that the right of review for trial errors on bills of exceptions in criminal cases is given by the statute of this state solely to the defendant.

These statutes were enacted after the adoption of the Constitution of 1844. They essentially broadened the operation of a writ of error in favor of a person convicted of crime.

In view of the constitutional provision (article 1, par. 10) that no person shall, after an acquittal, be tried for the same offense, it is clear that it is not within the constitutional power of legislative authority to confer by statute any such right on the state.

It is no answer to the prosecutor's claim to the right to review a trial error to say that, because the crown at common law was not entitled to a bill of exceptions in a criminal case, therefore no writ of error would lie in its behalf. For it has already been suffi-

ciently pointed out that bills of exceptions in criminal cases were unknown to the common law, and to the criminal procedure of this state until the statute of 1848. But as to the right of the crown to a writ of error at common law for a trial error in a criminal case there seems to be some diversity of opinion. It is the consensus of judicial opinion that the sole function of a writ of error at common law was to bring up for review errors appearing on the face of the record. In *Rex v. Wilkes*, 4 Burr. 2550, Lord Mansfield, *inter alia*, said:

"Till the third of Queen Anne, a writ of error in any criminal case was held to be merely *ex gratia*. * * * But in the third of Queen Anne ton judges were of the opinion that in all cases under treason and felony, a writ of error was not merely of grace, but ought to be granted."

"It cannot issue now without a fiat from the Attorney General, who always examines whether it be sought merely for delay or upon a probable error. * * * In a misdemeanor, if there be a probable cause, it ought not to be denied; this court would order the Attorney General to grant his fiat. But, be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive."

The headnote to the case *Re Pigott*, decided in 1868, 11 Cox, Cr. Cas. p. 311, reads:

"The granting of a writ of error is part of the prerogative of the crown. If, therefore, the Attorney General of England or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision."

Bishop, in the second edition of his valuable treatise on Criminal Procedure (volume 1, § 1191), in commenting on the English practice relating to the writ of error, says:

"It never was granted except when the King, from justice when there really was error, or from favor where there was no error, was willing the judgment should be reversed. After writ of error granted, the Attorney General never made any opposition because either he had certified there was error and then he could not argue against his own certificate, or the crown meant to show favor, and then he had orders not to oppose. The King, who alone was concerned as prosecutor, and who had the absolute power of pardon, having thus expressed his willingness that the judgment should be reversed, the Court of King's Bench reversed it upon very slight and trivial objections, which could not have prevailed if any opposition had been made, or if the precedent had been of any consequence."

But enough has been said to demonstrate that a writ of error even in a case of misdemeanor did not, under the English practice, issue, as a matter of course, upon the application of a convicted defendant, and that the writ was resorted to by the crown to show favor to the convicted person and to bring about a reversal of the judgment against him. Singularly enough it does not appear that the writ was ever used by the Attorney General to reverse a judgment of acquittal until the cases of *Regina v. Mills*, 10 Cl. & F. 534, decided in 1843, *Regina v. Chadwick*, 11 Q. B. 205, decided in 1846, and *Regina v. Houston*, 2 Craw. & Dix, 191, the latter case being a judgment on demurrer in favor of the defend-

ant. In none of these cases was the question raised as to the right of the Attorney General to take the writ. And because of this situation counsel for the state argues that it must be accepted as a fact that the right of the crown to take the writ in case of an acquittal is indisputable.

To a similar contention of counsel made in *People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364, dealing with the precise question under discussion, the Court of Appeals, through Bronson, J. (2 N. Y. on page 17, 49 Am. Dec. 364), said:

"The weight of authority seems to be against the right of the government to bring error in a criminal case. The absence of any precedent for it, either here or in England, until within a very recent period, fully counterbalances, if it does not outweigh, the fact that the right has lately been exercised in a few instances without objection. And in three of the four states where the question has been made the courts have decided that the right does not exist."

But even if it assumed that it was the practice in England for the Attorney General to take a writ of error in a criminal case, where the defendant was acquitted, we must not overlook the fact that this power so exercised sprung from a governmental policy to carry out the royal prerogative of the King and was used either to favor or oppress a subject. Such a policy could not, consistently with our free form of government have become imbedded in the administration of law in this state. And while we recognize in full measure the functions of a writ of error as they existed at common law up to the time of the adoption of the Constitution of 1776, the procedure relating thereto is of statutory regulation.

[2] Whatever doubt may exist whether the King under the common law could have a writ of error in a criminal case after judgment of acquittal of the defendant, it has been, as declared in the opinion of the Supreme Court, the unquestioned practice in this state recognized, and acquiesced in by bench and bar, that no such writ would lie in favor of the state to review a judgment of acquittal. Since the Constitution declares that no person shall, after an acquittal, be tried for the same offense, no legislation can be constitutionally enacted giving the right of review in cases where there has been an acquittal.

[3] Counsel for the state argues that the word "acquittal" in the Constitution signifies legal acquittal, and that, where it appears that a trial error has occurred which led to an acquittal, it cannot be properly said that there was an acquittal within the meaning of the constitutional sense of the word. To adopt this view would lead to a nullification of the benefit of the constitutional provision. The obvious design of the framers of the Constitution was to prevent oppression. Where an acquittal is had in a court of com-

petent jurisdiction having jurisdiction of the person and the crime with which he is charged, it is an acquittal within the meaning of the constitutional provision, even though such acquittal was the product of trial errors.

In the case of *State v. Meyer*, 65 N. J. Law, 233, 47 Atl. 485, 52 L. R. A. 346, the defendant was convicted in the court of quarter sessions, and took a writ of error to the Supreme Court, where the judgment of the quarter sessions was reversed. Thereupon the prosecutor of the pleas sued out a writ of error from this court to reverse the judgment of the Supreme Court, and the defendant moved to dismiss the writ on the ground that the state was not entitled to a writ of error in a criminal case. This court justified the propriety of the taking of the writ by the state by virtue of an act of 1799 (Pat. L. 345):

"That errors happening in the Supreme Court of this state shall be heard, rectified and determined by the Court of Appeals in the last resort in all cases of law."

It is to be observed that the defendant in that case was convicted in the court of first instance, and that it was an intermediate court, whose action was subject to review by this court, which reversed the judgment. This case is therefore no authority for the proposition advanced by counsel for the state that a writ of error may be prosecuted by the state where an acquittal is the result of misdirection by the court.

For the reasons given, the judgment of the Supreme Court dismissing the writ of error is affirmed.

(90 N. J. Law, 570)

STANDARD GAS POWER CORP. v. NEW ENGLAND CASUALTY CO. (No. 8.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY — §59 — SURETY BOND—CONSTRUCTION.

Where a bond refers to another contract and is conditioned for the performance of the specific agreements set forth therein, such contract, with all its stipulations, limitations, or restrictions, becomes a part of the bond, and the two should be read together and construed as a whole.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½.]

2. PRINCIPAL AND SURETY — §81 — SURETY BOND—CONSTRUCTION—LIABILITY.

A bond given by a contractor and his surety to the Passaic Valley Sewerage Commissioners, conditioned that it shall be void if the contractor shall pay for all labor and materials furnished, and shall perform all the obligations of his contract for building a sewer (by which contract he agreed to save harmless the commissioners from claims for labor and materials), is limited to an indemnity of the obligee, and is not made for the benefit of persons who furnish materials to the contractor, even though the contract further provided that the commissioners might pay claims for labor and materials used in the work

and call upon the contractor to repay the same, or might retain funds in their hands, due or to become due to the contractor, for that purpose.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 126.]

3. CONTRACTS —187(1)—CONTRACTOR'S BOND —LIABILITY—STATUTE.

The statute (Comp. St. 1910, p. 4059, § 28), permitting a third party not privy to a contract and who has given no consideration to sue thereon, is limited to those for whose benefit the contract is made, and does not extend to third parties who indirectly and incidentally would be advantaged by its performance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 798.]

Appeal from Supreme Court.

Action by the Standard Gas Power Corporation against the New England Casualty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

McDermott & Enright, of Jersey City, for appellant. Robert Strange, of South Orange (Stuart McNamara, of New York City, on the brief), for appellee.

TRENCHARD, J. This is an appeal from a judgment for the defendant rendered by the trial judge, sitting without a jury, at the Hudson circuit. We are of the opinion that the judgment must be affirmed.

The pertinent facts are these:

The Passaic Valley Sewerage Commissioners (a public corporation of the state of New Jersey) advertised for bids for the building of a section of the Passaic Valley sewer, with notice that the successful bidder would be required to execute a contract and bond with satisfactory surety in a certain form prescribed. The Healey Contracting Company, a corporation of New Jersey, pursuant to such call, bid in writing for such work upon the form prescribed by the commissioners. Such bid was accepted by the commissioners, and the Healey Contracting Company entered into a contract with the commissioners for the execution of such work, delivering to the commissioners concurrently therewith its bond in the sum of \$20,000, executed by it as principal and by the New England Casualty Company as surety, both contract and bond being in the form prescribed. The bond provides that the principal and surety are "held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of \$20,000." The bond further provides that such sum is "to be paid to the Passaic Valley Sewerage Commissioners, for which payment, well and truly to be made, they bind themselves," etc. The condition of the bond is as follows:

"Now the condition of this obligation is such, that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then this obligation shall be void;

otherwise it shall remain in full force and virtue."

Article 13 of the contract provides that:

"The contractor shall take all responsibility of the work, and take all precautions for preventing injuries to persons and property in or about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what was estimated or expected, or on account of the weather, elements or other cause; and he shall assume the defense of, and indemnify and save harmless, the commissioners and their officers and agents, from all claims relating to labor and materials furnished for the work," etc.

Article 17 provides in effect that the commissioners might pay claims for labor and materials used in the work and call upon the contractor to repay the same, or the commissioners might retain funds in their hands due or to become due to the contractor for that purpose. The Healey Contracting Company entered into the performance of the contract, and it, and its receiver, after it had been decreed to be insolvent, purchased, partly from the plaintiff and partly from the plaintiff's assignor, certain of the materials used in the construction of the sewer called for by the contract. These claims for materials purchased from the plaintiff and the plaintiff's assignor, and used in the performance of the work, remaining unpaid, the plaintiff requested the commissioners to enforce the bond for the benefit of the plaintiff. This the commissioners did not do, and subsequently the plaintiff brought this suit against the New England Casualty Company, the surety, upon the theory that the action is maintainable by the plaintiff as one for whose benefit the bond was given. We are of the opinion that the trial judge rightly held that the bond in question was limited to an indemnity of the obligee, and was not made for the benefit of persons who furnished materials.

The plaintiff bases its contention that the action is maintainable by it as one for whose benefit the bond was given upon the statute which reads as follows:

"Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any court and may use the same as matter of defense in any action brought against him notwithstanding the consideration of such contract did not move from him." C. S. p. 4059, § 28.

But that contention is untenable. No doubt where, as here, a bond refers to another contract and is conditioned for the performance of the specific agreements set forth therein, such contract, with all its stipulations, limitations, or restrictions, becomes a part of the bond and the two should be read together and construed as a whole.

But so construed, it is clear that the bond is a contract of indemnity for the benefit of the Passaic Valley Sewerage Commissioners, and not for the benefit of those furnish-

ing materials. The intent and purpose which the commissioners had in requiring it were twofold: The protection of the public interest in the proper performance of the work, and the protection of the commissioners from liability for claims on account of the work. The language of the bond, apart from the condition therein, clearly indicates that the bond is solely for the benefit of the obligee, and the condition of the bond is a mere limitation and restriction upon the language found in the obligation thereof to the effect that the principal and surety "are held and firmly bound unto the Passaic Valley Sewerage Commissioners in the sum of \$20,000," and the person to whom the obligation is to be discharged is manifested by the further provision of the bond to the effect that such sum is "to be paid to the Passaic Valley Sewerage Commissioners." Reading the bond in connection with the provisions of the contract it appears that the commissioners are given two means of protecting themselves from loss resulting from unpaid claims for labor and materials, first, by paying the claims themselves and calling upon the contractor to repay them, and if the contractor fails to make such repayment, to rely upon the bond furnished by the contractor, or, secondly, to retain any moneys due or to become due for the payment of such claims. But it does not appear that the bond was made or intended to be made for the protection of persons furnishing materials to the contractor who at most were merely indirectly and incidentally advantaged thereby.

Now the statute upon which plaintiff relies (C. S. p. 4059, § 28), permitting a third party not privy to a contract and who has given no consideration to sue thereon, is limited to those for whose benefit the contract is made and does not extend to third parties who indirectly and incidentally would be advantaged by its performance. *Styles v. Long*, 67 N. J. Law, 413, 418, 51 Atl. 710; *Styles v. Long*, 70 N. J. Law, 301, 305, 57 Atl. 448; *Lawrence v. Union Insurance Co.*, 80 N. J. Law, 133, 136, 76 Atl. 1053; *American Malleables Co. v. Bloomfield*, 83 N. J. Law, 728, 736, 85 Atl. 167.

The judgment below will be affirmed, with costs.

(90 N. J. Law, 608)

MICHAEL v. MINCHIN.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

WILLS §545(4), 855 — CONSTRUCTION — EXECUTORY DEVISE — FEE.

The testator devised to his wife for life his real estate, and after her death to his three children, each a distinct parcel specifically described, subject, among others, to this proviso, "In Case my Son Harry W. Minchin Should depart this life without Issue His Share will go to my Dauter Emma Jane Minchin." Harry

survived the life tenant and Emma died during the life tenancy, leaving a child. The life tenant conveyed to Harry all her interest in the lands devised to him. *Held*, that Harry having survived the life tenant and the executory devisee, Emma, his estate in the land devised to him became absolute for two reasons: (a) Because the words "depart this life without issue" were properly referable to the death of the life tenant and not to the devisee, applying *Patterson v. Madden*, 54 N. J. Eq. 714, 38 Atl. 273; (b) that by the death of the executory devisee, Emma, in the lifetime of Harry, the gift over became impossible of performance, and that the estate of Harry, the first taker, became absolute, applying *Den v. Schenck*, 8 N. J. Law, 29, and *Drummond's Executor v. Drummond*, 26 N. J. Eq. 234.

[Ed. Note—For other cases, see *Wills*, Cent. Dig. §§ 1174, 2171.]

Appeal from Circuit Court, Essex County.

Action by Mary F. K. Michael against Harry W. Minchin. Judgment for plaintiff, and defendant appeals. Reversed, and venire de novo awarded.

George Minchin died leaving a last will and testament in which, by the first paragraph, he devised to his wife for life his real estate, and at her death to his three children, Harry, Emma, and Adaline, each a distinct parcel specifically described, and to his son Abraham \$3,000, subject to the following conditions:

"Should death take my Dauter Addeline or She do not have anny Issue Children living at her death her Part will be divided between my son Harry W. Minchin and my dauter Emma Jane Minchin in Case my Son Harry W. Minchin Should depart this life without Issue His Share will go to my Dauter Emma Jane Minchin if Emma Should depart this life without (Issue Children) her Share Should go to my Son Harry W. Minchin in Case of my (three 3) last mentioned children depart this life without Issue then the whole Shall go to my Son Abraham C. Minchin.

"Second—I leave to my wife Mary Jane my life Insurance Policies and when Paid She Should Pay my Son Abraham C. Minchin his Share \$3000.00/100 out of it besides in Say Sixty days after or as can be done I leave my Wife Mary Jane all My Personal Property for her lifetime and at her death it Shall go to my Son Harry W. Minchin if alive and if not alive to my Dauter Emma Jane and is not alive to my Dauter Addie L. La Bough and if She is dead to my Son Abraham C. Minchin but at anny time during my wife life if She Wish she can give to my son Harry or my Dauter Emma anny or all Parts of what was left to them besides She is to Seport them untill the are of age in as good a way as it will Alow I diret my Exections to Pay all my lawful deaths."

The testator left him surviving his widow and the four children mentioned in the will, which was probated August 8, 1892. The widow is dead, and of her children three died in her lifetime, Abraham without issue, and Adaline and Emma leaving issue. Harry is still alive, and has two children living.

The widow conveyed her life estate in the land devised to Harry, to him, and he and his wife conveyed the land, the subject of this suit, to the plaintiff by a deed containing

a special covenant of seisin in fee simple, and the plaintiff brought this action to recover damages for an alleged breach of that covenant because, as she claims, Harry has not an indefeasible estate, but one that is subject to the gift over to Emma if he should die at any time without leaving issue.

Arthur H. Mitchell, of Newark, for appellant. Lum, Tamblin & Colyer, of Newark, for respondent.

BERGEN, J. (after stating the facts as above). Upon the foregoing facts the trial court held, a jury being waived, that the estate of Harry was a fee simple subject to a defeat upon his death at any time without issue, in which event the executory devise over to his sister Emma J. Minchin, who died in his lifetime, vested in her heirs or devisees, and that Harry's estate remained defeasible until after his death leaving issue, and ordered judgment entered for the plaintiff, from which the defendant has appealed.

The result reached by the court below is erroneous for reasons to be stated. The trial court disposed of the case without at all considering the effect of the intervention of the life estate of the widow, and the postponement of the right of possession of Harry until after the death of the life tenant.

Passing for the present the consideration of the question concerning the character of the estate which Emma took under this will if she died before Harry, to be hereinafter dealt with, and assuming that there are two gifts after the life estate, one to Harry, defeasible upon his death at any time without issue, and another, the remainder, to his sister Emma in that event, the limitation over, in such case, will be referred either to the death of the first devisee, or of the life tenant, as the court may determine from all the provisions of the will, because it should be so construed as to give effect to the intent of the testator ascertainable from his will. In the present case the will should be so construed as to refer the death of Harry without issue to death in the lifetime of the life tenant. "Where the two concurrent or alternative gifts are preceded by a life, or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, that of applying the words in question (depart this life without issue) to the event of death occurring before the period of possession or distribution." *Jarman on Wills*, vol. 3, 648. In *Patterson v. Madden*, 54 N. J. Eq. 714, 723, 36 Atl. 273, 275, Justice Gummere, in a well-considered opinion read for this court, declared that two rules are established in this state, in the construction of wills containing a limitation over by way of an executory devise after the death of the original devisee without issue, and they are stated by him as follows:

"First. If land be devised to A. in fee and a subsequent clause in the will limits such land

over to designated persons in case A. dies without issue, and A. so dies, and the substituted devisees are in esse at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A. takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.

"Second. Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance, the distribution of the testator's estate or the postponement of the enjoyment of the property devised until the devisee reaches the age of 21 or until the exhaustion of a prior life estate), such limitation over will be construed to refer to the happening of such event or to the death of the devisee, according as the court may determine from the context of the will and the other provisions thereof, that the limitation clause is set in opposition to the event specified or is connected with the devise itself."

It will be observed that under the first rule the substituted devisees must be in esse at the death of the first taker which is not the condition in the case under consideration, for here the executory devisee died in the lifetime of the first taker, and during the existence of the life estate. In the *Patterson Case* the will gave certain farms to his four sons upon condition that neither of the farms should be sold by his sons during the lifetime of his wife, with the proviso that, if either should die without lawful issue, the widow of the one dying should have the use of the farm given to the son so long as she remained unmarried, and on her marriage or decease, over to his lawful heirs, and it was there held that the limitation over stood not in opposition to the devise, but to the event of the devisees coming into possession, and that the limitation over became operative only in case the prior devisee died without issue before the death of his mother, and the case of *Williamson v. Chamberlain*, 10 N. J. Eq. 373, was cited as an example of the application of the second rule. In that case there was a gift of a life estate to a wife in real and personal property with remainder to his children, upon condition that if any of his children should die without lawful issue his or her share should be divided between the survivors, and it was held that the limitation over stood, not in opposition to the devise, but to the distribution to the children after the death of the wife, and that the limitation over was defeated by the death of the mother during the lifetime of the children. Under the cases referred to, supported by numerous citations not necessary to be here repeated, the present will should be construed to mean that testator intended if Harry survived his mother his estate should become absolute, for the words "should depart this life without issue" are properly referable to death without issue during the life tenancy. This interpretation of the intent of the testator is aided by the second paragraph of the will where the personal estate is given to the widow for life and at her death to Harry if alive, and if

not alive to Emma, "but at anny time during my wife life if She wish She can give to my Son Harry or my Dauter Emma anny or all Parts of what was left to them." This will was evidently drawn by an illiterate person, and is crudely expressed, but it is reasonably subject to interpretation that the wife was authorized to turn over to Harry any part of what was left him by the will when he came of age, for until that period the wife was required to support him in "as good a way" as his share would allow.

That the power of appointment given to the wife, to be exercised at any time she might wish, was not intended to be limited to the personal estate, may be inferred from the fact that Emma is given no part of the personal estate unless she was alive at her brother's death, and therefore the gift to Emma of all part of what was left her, if the life tenant so wished, would be without meaning unless it referred to something that had been left to, and which could be advanced to her, and so when the wife exercised her power of appointment by conveying to Harry the land that was left to him, she accelerated, as she had a right to do, the period of distribution as to Harry, but whether this be so or not we have no doubt that the testator intended Harry to have his share, if he survived his mother, and that the executory devise to Emma was dependent upon his death without issue in the lifetime of his mother, and as he survived her his estate became absolute.

The trial court was also in error in holding that notwithstanding the death of Emma, the executory devisee, in the lifetime of her brother Harry, she had an estate which passed to her child, and that the child will take the land by inheritance from her mother if Harry should at any time die without issue. The gift to Emma was a personal one, there being no gift over in case of her death. Under the common law she would have taken a life estate, but by virtue of our statute concerning wills (section 36, C. S. p. 5873), her estate becomes absolute if the prior estate falls by death of Harry without issue, if she be in esse, and the situation is the same as if the devise over to her was absolute, so her children can only take by inheritance from her and not by purchase under the will, for there is no gift to her children or legal representatives. By the death of Emma before the gift over to her took effect, the object of such gift was not in existence, and therefore it became impossible of performance. In such case the prior estate becomes absolute in the first devisee. In *Den v. Schenck*, 8 N. J. Law, 29, the testator gave to his son Guysbert and his two daughters each a parcel of land, with the proviso:

"That if any of my children should happen to die without any issue alive, that such share or dividend shall be divided by the survivors of them."

Of the daughters, one died without issue, and another, Hannah, died during the lifetime of Guysbert who subsequently died without issue. Hannah left children, and after the death of Guysbert, who had conveyed to the defendant Schenck, Hannah's children brought an ejectment suit based upon the claim that their mother had an inheritable estate which passed to her heirs at the death of Guysbert without issue. The court held that Guysbert took an estate in fee, subject to defeasance upon the happening of two events, death without issue, and the survival of the sisters, and said:

"When his two sisters died it became impossible that the estate should be defeated by going over to survivors when there were none; from that time it became an absolute fee simple in Gilbert."

In that case it will be observed there were children of Hannah claiming by inheritance from her, property she would have taken if she had survived Guysbert, he dying without issue.

The rule laid down in that case is that where there is a gift over and it becomes impossible of performance through the death of its object, nothing more being present, the estate of the first taker becomes absolute. The statute making an estate absolute where the words "heirs and assigns" are omitted, and where there is no expression in the will whereby it shall appear that it was intended to convey only a life estate, as it now appears in our statute relating to wills (section 36), was then in force, it having been passed August 26, 1784, and was not in *Den v. Schenck*, supra, considered as vesting an inheritable estate in executory devisees if they did not survive the first taker. That case was decided in 1824, and has been uniformly recognized by our courts as established in this state the legal rule that where there is a gift to one, and then over to another if the first taker dies without issue, the executory devisee must be alive to take at the termination of the prior estate, and in default of the existence of the object of the gift over, the prior estate becomes absolute. *Groves v. Cox*, 40 N. J. Law, 40, 45. This rule was adopted and applied by Chancellor Runyon in *Drummond's Executor v. Drummond*, 26 N. J. Eq. 234, where the gift was to testator's adopted daughter "when she arrives at full age," and if she should die without leaving lawful issue, then to his nephew. The daughter lived to come of age, and the nephew predeceased the testator. The children of the nephew claimed that the daughter only took an estate defeasible in the event of her death without issue at any time, and if that happened they would be entitled as next of kin of their deceased father, but the chancellor held that by the death of the nephew the estate of the daughter became absolute, saying:

"The provision made in the contingency of her dying without leaving lawful issue was made expressly for another object of his bounty

whom he desired and intended to benefit in that event. That object had ceased to exist, and the provision, therefore, was at an end, and the primary gift was left wholly unaffected by it. The testator did not provide that Jane should have a life estate merely, and that, after her death the property should go to her children, if she should leave any, but he gives the property to her without qualification in the gift. The principle of the rule that, where there is an estate in fee liable to be defeated on a condition subsequent, and that condition originally was, or by matters subsequent has become, impossible to be performed, the defeasible estate is made absolute (Co. Litt. 206a), applies to this case, for the estate was made liable to be defeated by a gift over, which could never, by possibility, take effect, and the primary gift, therefore, is the same as if there were no provision for its defeasance."

The trial court refused to apply this case because the nephew died in the lifetime of the testator, apparently overlooking the declaration of the chancellor that the rule applied when the condition "originally was, or by matters subsequent," became impossible of performance. The court below also refused to apply *Den v. Schenck*, supra, upon the ground that the gift over was to survivors of testator's children, and that in the will now under consideration there is nothing to indicate an intention that the share of his son Harry should go to his sister Emma only in the event that she should survive him, but this begs the question for it assumes that under a proper construction of this will, Emma took an indefeasible estate after the death at any time of Harry even if she did not survive him, which is the very matter in dispute. Nor is there any force in the notion expressed by the trial court that there is a distinction between an executory bequest to the survivors of a class of devisees, and one to a single devisee, because the word "survivors" when so used merely describes the object or objects who are to take the gift over because in existence when the prior devise fails, which may be one or more persons. As the court below relies to some extent upon the case of *Seddel v. Wills*, 20 N. J. Law, 223, and quotes at some length from it to sustain its conclusion that although Emma died before her brother Harry the estate given her vested in her heirs or devisees, if Harry thereafter died without leaving issue, a short analysis of that case seems to be required.

The facts in that case, pertinent to the present occasion, are these: The testator had three sons and six daughters and one grandchild, and devised to each of his sons and daughters a specific tract of land, and to his granddaughter a money legacy. He then provided that if either of his children should die without lawful issue, the land devised to them should be equally divided between his surviving children. Two of the daughters died without leaving issue, the three sons died leaving issue, two of them before both of their sisters and the other after the death of one, and before the death of the other sister, another daughter died after her two

sisters, leaving issue, and the three other daughters and the granddaughter named in the will were still alive.

Chief Justice Hornblower, in determining the respective interests of the granddaughter named in the will and of testator's other grandchildren, the issue of his three sons, states two possible constructions of the will depending upon whether the devise over was to all his other children or only to such of them as should actually survive the one dying without issue, and then said:

"Upon the supposition that the devise over was to all his other children then, immediately upon testator's death, they each become seized of or entitled to an executory devise in fee in each other's lands subject to be defeated upon the others leaving issue at the time of their death; and consequently if one died leaving issue after the testator, but before the death of a brother or sister without issue, the issue of the one so first dying would take a share of the land of the one dying without issue; not as devisees of the testator, nor yet as heirs of the one dying without issue, but as heirs at law of his or her deceased father or mother, although such deceased father or mother did not die seized of the land in possession, but seized only of the executory interest or estate."

It is upon this citation that the trial court rested its decision, but Chief Justice Hornblower did not construe "My surviving sons and daughters" to mean all his other children, for following the statement above quoted which applied to "the supposition that the devise over was to all his other children" he said:

"I was at first inclined to adopt this view of the case; but upon further reflection, and upon looking at the whole scope and tenor of this will I think it is not necessary to depart from the plain common sense and grammatical meaning of the language of the testator. There is nothing in the will to indicate any intention in the testator that the children of a deceased child, whether dying before or after him, should stand in loco parentis; nor any necessity to adopt such a construction for the purpose of effectuating any manifest intention of the testator, or satisfying the rules of the law. On the contrary, the peculiarity of the devise to the three sons, and the limitation over only of what he devised to Samuel and Thomas, and the substitution of a mere legacy to his granddaughter Rebecca, in the place of the real estate which the testator originally intended to give to her mother, show that the grandchildren were not viewed, or thought of by him as immediate objects of his bounty in respect of his real estate."

And he determined that upon the death of the two daughters without issue, the land devised to them belonged by force of the will "to the brothers and sisters then actually living, to the exclusion of the children of the deceased brothers and sisters, and of the testator's granddaughter Rebecca," and that the surviving brothers and sisters took their respective shares in fee simple and not contingent upon any future event. As one of the daughters survived her sister who died without issue, it was held that she, surviving her sister, became entitled to her share of the deceased sister's land in fee simple. It thus appears that the construction relied upon by the trial court was not adopted by the Chief

Justice in dealing with a condition similar to the one in this case, and the result which he reached affirmed the principle laid down by the court in *Den v. Schenck*, supra.

The result of the views above expressed is that the defendant's death without issue is referable to his death in the lifetime of the life tenant, and if he survived her his title became absolute, and also that the gift over failed by the death of Emma, in the lifetime of her brother Harry, because the object of the gift over, being removed, the executory devise became impossible of performance, and the prior state became absolute, and in either event the defendant became seized of an indefeasible estate, and therefore there was no breach of the covenant, contained in his deed to the plaintiff, that he was seized of a fee-simple estate.

This requires a reversal of the judgment under review and the awarding of a venire de novo, and it is so ordered.

(90 N. J. Law, 593)

COLLINS v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(*Syllabus by the Court.*)

1. RAILROADS §282(13) — STATIONS — INVITEES — ACTIONS — INSTRUCTIONS.

In a case where the defendant was charged with negligence because of defective premises, an instruction to a jury "that, if the defendant company had at any time before the accident either knowledge or notice of a dangerous condition of its premises, it would have been negligence on the part of the company not to have remedied this condition," is erroneous, because the defendant is entitled to a reasonable time to inspect, discover, and repair such defect. "At any time before the accident" includes immediately prior.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921.]

2. TRIAL §296(13) — INSTRUCTIONS — ERRONEOUS INSTRUCTIONS.

An erroneous instruction is not cured by a subsequent correct one, unless the illegal one is withdrawn.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 718.]

Appeal from Supreme Court.

Action by Andrew J. Collins against the Central Railroad Company of New Jersey. From a judgment for plaintiff, defendant appeals. Reversed.

Charles E. Miller, of Jersey City, for appellant. C. Herbert Walker, of Newark, for appellee.

BERGEN, J. [1] The plaintiff was lawfully in the freight station of defendant at Newark, N. J., for the purpose of moving some bags of manure. After he had taken one and was returning for another, an iron radiator fell on him and inflicted injuries for which he brings this action.

It is not necessary to determine whether any negligence of defendant was shown, because this judgment must be reversed for error in the charge of the court which was as follows:

"If the defendant company had at any time before the accident either knowledge or notice of a dangerous condition of its premises, it would have been negligence on the part of the company not to have remedied this condition."

"At any time before the accident" includes immediately before, and under our cases defendant was entitled to a reasonable time within which to inspect, discover, and repair the defective condition if it existed. *Schnatterer v. Bamberger & Co.*, 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139. All that is required is reasonable care and ordinary prudence. *Ruane v. Erie Railroad Co.*, 83 N. J. Law, 423, 85 Atl. 178.

[2] The fact that the court subsequently charged the correct rule, if he did as is claimed, does not cure the trouble, for, as Mr. Justice Parker said in *State v. Tapack*, 78 N. J. Law, 208, 72 Atl. 962:

"The rule is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter unless it is also expressly withdrawn, as the jury is left at liberty to adopt either."

The judgment is reversed.

(90 N. J. Law, 614)

PARKVIEW BUILDING & LOAN ASS'N OF CITY OF NEWARK v. ROSE.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(*Syllabus by the Court.*)

1. BUILDING AND LOAN ASSOCIATIONS §23(5) — OFFICERS — WRONGFUL ACTS — LOSS AS BETWEEN TWO INNOCENT PARTIES — NEGLIGENCE.

Where a building and loan association draws a check to pay matured shares on account of which a loan has been made and a note taken, expecting the shareholder to pay the note at the time of delivery of the check for the shares, and both note and check are placed in a safe to which the secretary of the association has lawful access, he being the principal officer transacting the financial business between the association and its shareholders, and authorized to receive all moneys paid to the association, and he, without express authority, takes the note and check from the safe, delivers the check to the shareholder, collects the money due on the note, surrenders it, and embezzles the money, the loss must, as between two innocent parties, fall on the one whose negligence made the fraud possible.

2. BUILDING AND LOAN ASSOCIATIONS §41(8) — LOSS AS BETWEEN TWO INNOCENT PARTIES — NEGLIGENCE.

Whether the circumstances in such a case amount to negligence is a jury question, and a directed verdict is error.

The Chancellor and Black, Williams, Taylor, and Gardner, JJ., dissenting.

Appeal from Circuit Court, Essex County.

Action by the Parkview Building & Loan Association of the City of Newark against

Edwin E. Rose. Judgment for plaintiff on a directed verdict, and defendant appeals. Reversed, and new trial awarded.

Phillip J. Schotland, of Newark, for appellant. Riker & Riker, of Newark, for appellee.

BERGEN, J. This is an appeal from a judgment entered upon a verdict directed for the plaintiff, and the question to be decided is: Was such a direction warranted?

The facts are not in serious dispute. The plaintiff was an incorporated building and loan association of which defendant was a shareholder and from which he borrowed \$1,800 and gave his promissory note. When his shares matured they were worth \$2,000, and George Brown, Jr., plaintiff's secretary, notified defendant that the plaintiff would pay him the \$2,000, and that he should draw a check to Brown's order for the amount due on the note. This defendant did, and the note and certificate of shares was delivered to the defendant. Brown cashed the check and embezzled the money, and plaintiff brought this suit to recover the sum due on the note, in which action the court directed a verdict for the plaintiff. The constitution of the plaintiff association provides that the secretary "shall receive all moneys paid to the association and pay the same to the treasurer," and the evidence shows that the secretary did receive nearly, if not all, the moneys paid to the association for it. There was also testimony from which it may be inferred that Brown, as secretary, was intrusted with most of the financial transactions between the association and its members, the duties of the treasurer being confined to the receipt of moneys from the secretary and their disbursement; that in the present case, when on two occasions defendant borrowed money and gave his notes, the delivery of the checks and taking of the notes was done by Brown with the treasurer's knowledge and consent; and that in fact all of defendant's transactions with the association were had with Brown.

[1] But the plaintiff claims that Brown had no authority to deliver the note and accept the moneys due thereon; that, although the uniform course of business of the plaintiff was to pay in full matured shares, and to be paid in full by a borrower the debt due, when shares were pledged for a loan, the secretary had no power to make settlements of this kind, as that was always done by the treasurer, and in accordance with that practice the check in this case was drawn for \$2,000, and placed in the safe of the plaintiff with defendant's note to be delivered when defendant notified the treasurer of his desire to settle, when the latter would attend at his office for that purpose, but there is no proof that defendant had knowledge of this. It is admitted that Brown had lawful access to the safe, in common with the other

officers, and there is proof that he was thus afforded an opportunity to do just what he did, take the note, deliver it to defendant, and collect the amount due. That he accepted a check instead of cash is of no consequence; for he could as readily embezzle the proceeds of the check as the cash.

We are of opinion that it was a jury question whether the plaintiff was not negligent in putting the check and note within the reach of Brown, the one officer with whom most, if not all, the financial transactions between the plaintiff and this defendant were carried on, and also whether the course of conduct pursued or acquiesced in by the plaintiff in permitting Brown to so act was not a holding out of him as the financial agent of plaintiff with whom the defendant might safely deal. Brown collected all dues; he negotiated the loans with the defendant, first one for \$600, and delivered the check and took the note, and when the second loan was made increasing the total to \$1,800, he delivered the check and took the note for \$1,800. From the evidence a jury might infer that when the note for \$1,800 was delivered to Brown to be given to the association it was received by him as agent of the plaintiff; that Brown, through the negligence of the plaintiff, came into possession of the check and note; that he had always collected the interest on the loan and acted as the agent of the plaintiff in its ordinary financial dealings with shareholders; that he came to defendant with the check, note, and shares in his possession, apparently authorized to make the settlement, and delivered them, collecting the amount due on the note; and that the possession by Brown of the necessary papers and the former course of the association in permitting Brown to make the loans misled the defendant into paying his note to him.

In this case one of two innocent parties must suffer, and if the jury should find from the above facts that one was negligent, the loss must be sustained by the one whose conduct has made the fraud possible. *Lawson v. Carson*, 50 N. J. Eq. 370, 25 Atl. 191.

[2] Where one through negligence gives another power to practice a fraud upon innocent parties, the court will not interfere in his protection at the expense of the one who has been deceived.

"What circumstances shall be" deemed to be "sufficient to establish negligence" must be determined as a question of fact." *Heyder v. Excelsior B. & L. Ass'n*, 42 N. J. Eq. 408, 8 Atl. 310, 59 Am. Rep. 49.

A jury might also find that by its course in conducting its business the association had impliedly authorized Brown, as its secretary, by whom all moneys paid to the association must be received according to the terms of its constitution, to surrender the note and collect the amount due.

Questions for a jury to determine being present, the direction for plaintiff was error.

The judgment under review will be reversed, and a new trial awarded.

THE CHANCELLOR, and BLACK, WIL-
LIAMS, TAYLOR, and GARDNER, JJ., dis-
sent.

(90 N. J. Law, 285)

CARSON v. SCULLY et al.
(Middlesex County Recount Case.)

(Court of Errors and Appeals of New Jersey.)

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the court impossible.

On Appeal from the Supreme Court, whose opinion is reported at 99 Atl. 190.

(Filed July 3, 1917.)

WALKER, Ch. My vote to reverse the judgment of the Supreme Court in this case is based solely upon the view that the Legislature has not provided any machinery for carrying on a recount of votes cast for candidates for Congress, although I find in the statute a declaration of intention that recounts shall extend to congressional elections. The learned justice who wrote the opinion in the court below states the case when he says:

"The insistence of counsel for the prosecutor is that the legislative intent was to confine the provisions of this section [159 of the act concerning elections] to candidates for election, such as state senators, members of assembly, surrogates, and other county and municipal officers, who, if elected, are, under the statute, entitled to receive their certificates of election from the county board of canvassers. And in furtherance of this view it is strenuously argued that the clear legislative design to exclude candidates at an election for Governor, United States Senator, members of Congress, and presidential electors, whose election under the statute is to be determined by the state board of canvassers, is made manifest by the provisions of sections 160 and 161 relative to the recount of votes, and section 164 relative to contested elections for county offices," etc.

I agree with the view held by the learned justice that the statute (P. L. 1898, p. 237, § 159; Comp. Stat. p. 2073; P. L. 1909, p. 41) evinces an intent to give to any candidate at any election, who shall have reason to believe that an error has been made in counting or declaring the vote of such election, whereby the result has been changed, the right to a recount, and to this extent, disagree with the contention of counsel that the section evinces a legislative intent to confine the provisions to candidates for the offices named; but, as I find in the act no machinery provided for carrying on, ascertaining, or certifying the result of a recount of votes cast in congressional elections, I am constrained to the view that no such recount can be had, not that it was not the intention of the Legislature to give it.

There was a time in the history of our

state when no recount of votes cast at any election could be had (except as an incident to proceedings in a contested election before a body authorized to inquire into and decide such a question, as the House of Representatives, which is the sole judge of the election and qualification of its members, and the Supreme Court on quo warranto, where the right to office was being inquired into). In fact, we had no statute authorizing a recount of votes until as late as 1880. See the supplement to "An act to regulate elections." P. L. 1880, p. 229; Rev. Supp. p. 277; Gen. Stat. p. 1327, § 195. And this extended only to candidates for member of the state senate or assembly.

By a supplement to the elections act (P. L. 1895, p. 659, § 13; Gen. Stat. p. 1367, § 369) it was provided that if any candidate for any office shall pray a recount of the whole or any part of the vote, by petition to one of the justices of the Supreme Court, and shall deposit such sum as the justice shall order as security for the payment of expenses, it shall be the duty of the justice to order such recount by the county board of elections under such supervision as he may order, etc., and on the conclusion thereof shall certify the result, which certificate shall take the place of that originally issued by the canvassing board. The present statute with reference to recount of votes is to be found in "An act regulating elections" (Revision of 1898; Comp. Stat. 2073, § 159; P. L. 1909, p. 41 et seq.), and provides that whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting or declaring the vote of such election, whereby the result has been changed, such candidate may apply to any justice of the Supreme Court, who shall be authorized to cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine to be publicly made under his direction by the county board of elections, and if it shall appear, upon such recount, that an error has been made sufficient to change the result of such election, then such justice, in case of candidates, shall revoke the certificate of election issued to any person, and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such election (section 159); that whenever any such certificate shall be issued by such justice, the same shall be filed with the clerk of the county or municipality in and for which such election was held, and the clerk shall make and certify a copy thereof and deliver it to the person who shall be so declared elected, and in case of an election for senator, assemblyman, or any county officer, shall transmit to the secretary of state another copy of such certificate (section 160); that any applicant for such recount shall deposit with the county

clerk such sum as the justice shall order as security for the payment of the expenses of the recount, or, if such justice shall order, shall file with the county clerk a bond to the incumbent, to be approved by the justice, in such sum as he may require, conditioned to pay all costs and expenses in case the original count be confirmed or the result of such recount is not sufficient to change the result, and if an error sufficient to change the result has been made, the expenses shall be paid by the county or municipality in and for which such election was held (section 161).

It will be observed that section 13 of the act of 1895 and section 159 of the act of 1898, as amended by P. L. 1909, p. 41, omit mention of the offices, candidates for which may apply for a recount, while the act of 1880 expressly confined recounts to elections for state senators and assemblymen. Assuming that the recount provisions of the act of 1895 are as broad as those of the acts of 1898 and 1909, it would be quite useless to analyze them, as it is the latest statute with which we have to deal in the case at bar. That statute (P. L. 1909, p. 41), which is a supplement to the election act (Revision of 1898), purports to amend section 159 of the act of 1898 "to read as follows," and then goes on to reenact section 159 verbatim et literatim, and adds another section (section 2), which enacts that the provisions in section 159 relating to recount of votes upon any *referendum* or *question* submitted to the electors shall apply to those submitted at the last general election (1908), if applied for within 30 days after the passage of that act (1909), the time of application for which, under the provision of section 159, had expired. Therefore the statute stands just the same, with reference to the recount of votes cast for *candidates* at elections, as though the amendment of 1909 had not been passed.

The provision in section 159 that, "if it shall appear upon such recount that an error has been made sufficient to change the result of such election," the justice shall revoke the certificates of election already issued, etc., does not come in aid of the contention of the appellant to the slightest extent, because the word "certificates" has reference to the word "candidates"; the whole clause reading:

"And, if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice in case of *candidates* shall revoke the *certificates* of election * * * issued to *any person*, and shall issue in *its* place another *certificate* in favor of the *party* who shall be found to have received the majority of the votes cast at such election."

The provision that in the case of *candidates* the *certificates* shall be revoked clearly comprehends the case of recounts for more than one candidate at the same time, as, for instance, a recount before a county board of canvassers of the votes cast at an election for surrogate of the county, and of mayor—or,

say, alderman—of a city within the county, and yet the act goes on and provides that, after the *certificates* shall be revoked, the justice shall issue in *its* place another *certificate* in favor of the *party* who shall be found to have received the majority of the votes cast at the election, although *certificates* may have to be issued to *persons*, as suggested. This alternate use of nouns in the singular and plural numbers, when either one or the other only should be employed, while ungrammatical, does not in any wise vitiate the section; but, on the contrary, because the plural noun is thus employed, it cannot be laid hold of as an argument for the contention that the votes of three counties, comprising a Congress district, may be ordered recounted, because a justice of the Supreme Court may make superseding *certificates* as well as *certificate*, because, as stated, the noun "*certificates*" is used only in reference to *candidates*, comprehending, plainly, one *certificate* for each *candidate* obtaining a majority on a recount; and this, quite aside from the fact that congressmen get no *certificates* from county boards, but only one *certificate* from the state board of canvassers.

The popular and generally accepted meaning of language is to be applied to the construction of a statute, in the absence of a legislative intent to the contrary. *Conover v. Pub. Serv. Ry. Co.*, 80 N. J. Law, 681, 78 Atl. 187. The word "any" means "one out of many * * * and is given the full force of 'every' or 'all.'" *Bouv. Law Dic.* (Rawle's Rev.). In *Purdy v. People* (N. Y. Court of Errors) 4 Hill, 384, Scott, Senator, in his opinion, at page 413, observes:

"Johnson says the word 'every' means each one of all, and gives this example: 'All the congregation are holy, every one of them. Numbers.' The same lexicographer defines 'any' to mean every, and says: 'It is, in all its senses, applied indifferently to persons or things.'"

Now, it must be perfectly obvious that when the Legislature, in section 159 of the present act concerning elections, said that any candidate for any office might have a recount, etc., it meant what it said. The words define themselves, and there is no room for construing them contrary to their plain and ordinary meaning. I start, therefore, with the proposition that the Legislature meant to give a recount to a candidate in a congressional election. But it must be equally obvious that a recount cannot be carried on without machinery provided for that purpose. And the act of 1898, as we have seen, provides that machinery, but restricts its operation to a recount for *county or municipal offices*, for the recount is to be had *by the county board of canvassers* and the certificate of the result is to be filed with *the clerk of the county or municipality in and for which the election was held*, and the expenses, if an error be made sufficient to change the result, are to be paid by *the county or municipality in and for which the election was held*.

Now, an election for congressman is not held in and for a county or municipality, but in and for a "district" created by the Legislature, and these districts have no clerks, and no certificates of election are given congressmen-elect by any officers of their respective congressional districts; in fact, there are no such district officers.

The present act (P. L. 1912, p. 912) divides the state into 12 Congress districts, the one in question being composed of the counties of Middlesex, Monmouth, and Ocean, called in the act the "Third district." Admittedly, a single county could be constituted a district, but none is in the act mentioned, and, what is more to the purpose, several counties are subdivided in creating districts, notably the Sixth, which is composed of the counties of Bergen, Sussex, and Warren and the townships of Pompton and West Milford in the county of Passaic.

If the decision of the court below is right, then a recount of votes cast in a gubernatorial election can be had on the application of an unsuccessful candidate. This recount would have to be made upon an order of a justice of the Supreme Court, under his direction, "by the county board of elections," after due notice, etc. If made, the "county board" would have to swell into 21 different county boards of election, and "the clerk of the county or municipality in and for which such election was held" would have to be multiplied by the total number of county clerks in the state, and all this without any legislative provision made therefor. The analogy in the case of votes cast in a Congress district is entirely apposite to that of an election for Governor. Furthermore, if the result were changed, how would the expenses be paid? That act (section 161) provides, as already noticed, that the applicant for a recount—

"shall deposit with the county clerk such sum as such justice shall order as security for the payment * * * of such recount, or if such justice shall so order, shall file with the county clerk a bond to the incumbent * * * and if it shall appear that an error sufficient to change the result has been made, then the expenses of such recount shall be paid by the county or municipality in and for which such election was held."

As an election for Governor is not held in and for a county or municipality, but for the whole state, it would be entirely impracticable to order the expenses paid in a gubernatorial contest, where the result had been changed by a recount, under the provisions for payment found in the statute, namely, *by the county or municipality in and for which the election was held*, because an election for Governor is held neither for a county nor municipality, but *in every voting precinct* in the state, and, it may be said, *for the whole state*, but *not* for any county or municipality of the state. Payment of the expenses of a congressional recount by the political subdivisions comprising the district—counties and municipalities, as the

case might be—where the result had been changed, in my judgment, could only be made by court action transcending construction, and amounting to judicial legislation, a thing forbidden. Whether, in case the result should not be changed, the money deposited could be laid hold of for payment, or the bond enforced for that purpose, as a voluntary obligation (see *Emanuel v. McNeill*, 87 N. J. Law, 499, 94 Atl. 616), need not be considered.

The scheme of a Congress district recount is not workable under the provisions of the act. I do not say that such a scheme could not be made workable by legislation. On the contrary, it is plain that it could. Ample provisions are made in the act concerning elections for contests for Governor and for members of the Legislature and Congress. The Ninth Congress district is composed of the cities of East Orange and Orange, and certain wards of the city of Newark, all in the county of Essex. If an election recount were held in this district, the certificate of the justice of the Supreme Court might physically be filed with the city clerks of the Oranges, but could not be filed with the clerks of the several wards of Newark, as there are no ward clerks.

The modus operandi of canvassing the votes cast at elections is shortly as follows: The county board of elections in each county is constituted the board of county canvassers. Section 102. The members of the county board proceed to examine the statements and copies of statements of elections which shall be produced before them, and canvass and determine the votes cast at the election, and make two statements of the result containing the number of votes given in each election district for any office to be filled. Section 108. Such boards deliver one of the statements, in case of an election held for members of the House of Representatives, or for electors of President and Vice President, or for Governor or Senator, members of assembly or any county officers, to the secretary of state. Section 110. In case of an election for one or more members of the House of Representatives, or electors of President or Vice President, or for Governor, the secretary of state lays before the board of state canvassers two such statements. Section 118. The Governor and four or more of the members of the senate attend at Trenton, on a certain date, for the purpose of canvassing and estimating the votes cast for each person for whom votes have been given for members of the House of Representatives, or electors of President or Vice President, or Governor, and determine and declare the person or persons who shall, by the greatest number of votes, have been duly elected to such office or offices. Section 119. The board proceeds to make a statement of the result of such election, which is delivered to the secretary of state and filed by him. Section 123. And the secretary of

state makes as many copies of the statement of the determination of such board as there are persons thereby declared to be elected and delivers one of the same to each person who shall be so elected. Section 127.

By this summary of the election machinery, it will be seen that no certificates of election issue to congressmen-elect by county boards of canvassers, who merely make a certificate of the result of election for congressmen as it appears returned in the several election districts, and send that certificate to the secretary of state, who lays it before the state board of canvassers, who make a determination as to who is elected to Congress in any given district. There is no provision in the statute for any revocation by a justice of the Supreme Court of any certificate made by the state board of canvassers. As the certificates of election of congressmen emanate, not from county boards of canvassers, but from the state board, how can interference with the work of a county board affect the holder of a certificate from the state board?

Because there is no practical method of recounting the vote in a Congress district, an apparently unsuccessful candidate is not thereby deprived of the right to show that he, and not his rival, as certified, was elected; for, as already remarked, the House of Representatives is the judge of the election of its members, and our statute provides an ample method of contesting the election of members of Congress. Section 153 et seq. My view is that, while the Legislature in the revision of the election law of 1898 intended to provide for a recount to any unsuccessful candidate for any office at any election, upon proper showing made, which would include Congress districts, it failed to provide the method whereby lawfully, step by step, the proceeding could be effectively carried on and a definite result obtained and certified.

Sir William Blackstone, treating of the constructions of statutes, says:

"Acts of Parliament that are impossible to be performed are of no validity." 1 Bl. Com. p. 91.

The doctrine thus expounded by the learned commentator is, by parity of reasoning, equally applicable to a part of an act which it impossible of performance, as well as to an entire act that cannot be put into operation. It has been held in this state that parts of acts which are unconstitutional are to be excised to the extent to which they are invalid and the rest of the act upheld, if the parts are wholly independent of each other. *State v. Davis*, 72 N. J. Law, 345, 61 Atl. 2, and cases cited, affirmed 73 N. J. Law, 680, 64 Atl. 1134. See, also, *Meehan v. Excise Com'rs*, 73 N. J. Law, 382, 388, 64 Atl. 689. It must be perfectly obvious that a provision in a statute for a recount of votes cast for a state senator is entirely independent of one for a recount in a congressional

election, and that, if the latter be invalid or unenforceable, the former shall, nevertheless, stand. In *Commonwealth v. Gouger*, 21 Pa. Super. Ct. 217, it was held, at page 229:

"In the construction of statutes it may sometimes become necessary to transpose words, or even to supply or strike out a word which the context shows was omitted or inserted by mistake. Instances are not lacking in the Reports where this has been done in order to effectuate the intention of the Legislature. But where an enactment is plain and sensible, and, according to any meaning, broad or narrow, * * * does not apply to the case in hand, it is not permissible for the courts to add or omit words, in order to make it so apply, even though it may be clear to them that the case is as fully within the mischief to be remedied as the cases provided for. This would be, not to construe, but to amend, the law, which is within the exclusive province of the Legislature. * * * When a court has gone to the verge of its powers of construction, there will sometimes remain what is termed a *casus omissus*—a case within the mischief to be remedied, and possibly within the general intent of the Legislature as disclosed by the act, and yet not provided for therein. In such case the Legislature alone can cure the defect."

The doctrine laid down in *Commonwealth v. Gouger* is entirely apposite. I think it clear, as I have said, that the recount provision of the election law is intended to apply to the case of a congressional election. A miscount in an election for congressmen is fully as mischievous and equally entitled to be remedied as a miscount in the case of county or municipal officers; but the enactment is so plain in providing *the method* for recounting votes cast for county and municipal candidates, and ascertaining and certifying the result, and so plainly fails to provide any such machinery in the case of candidates for Congress, that it is not permissible for the courts to add or omit words in order to made the act apply to the class of candidates excluded. And, by the way, how do candidates for county and municipal offices derive their right to a recount? It is not because they are named in section 159. Yet nobody will deny that they have the right. It is derived from the language "any candidate at any election." If this language applies to the case of a surrogate of a county and to the mayor of a city, and certainly it does, it equally applies to a congressman. Therefore, I repeat again, that the office of congressman is within the purview of section 159, which clearly intends to give a candidate for Congress, in given circumstances, a recount; but, the act failing to provide a method for carrying on a recount and certifying to its result in the case of a congressional election, it is, to that extent, impossible of being performed.

The *casus omissus* in the statute under consideration is the lack of provision of machinery for carrying on a recount in the case of a contested election in a Congress district, notwithstanding the act evinces a clear intention to give a recount in such case as well as in all others. The omission was doubtless inadvertently made, and probably came about

in this way: The act of 1880, which gave a recount only to candidates for the state senate or assembly, provided for the recount being made in the particular county, with the superseding certificate, if one were issued, to be certified by the county clerk and delivered to the person found to be elected; while in the supplement of 1895 and the revision of 1898 the language granting recounts and restricting them to candidates for the senate and assembly, found in the act of 1880, was enlarged so as to apply to candidates for any and all offices, but the machinery for recounts, certification of the result, etc., was allowed practically to remain the same, and was not correspondingly enlarged so as to apply to congressional elections, which, of necessity, require other provisions for enabling a recount to be carried on, as an election for congressman is not held in and for a county or municipality, and his certificate emanates, not from a county board of canvassers, but from the state board of canvassers, for the superseding of whose certificate of election by a justice of the Supreme Court no provision is made in the statute.

It is not an answer to say that one of the justices of the Supreme Court, upon petitions preferred for that purpose, made three several orders for a recount of the votes cast at the last general election in the counties of Middlesex, Monmouth, and Ocean respectively, for member of the House of Representatives of the United States, under his direction, by the county boards of election in those counties respectively. Those orders were, in my judgment, unauthorized by the statute, and should be held to be null and void.

The CHIEF JUSTICE, Justices SWAYZE, TRENCHARD, and MINTURN, and Judge WILLIAMS have authorized me to say that they concur in the views expressed in this opinion.

(Filed March 5, 1917.)

WHITE, J. The question is: Do the recount provisions of the act concerning elections (2 Comp. Stat. p. 2125) apply to an election of a congressman for the Third congressional district, comprising the three counties of Middlesex, Monmouth, and Ocean. The language of the act provides for a recount—*"whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting the vote or declaring the vote of such election,"* etc.

It is urged that the court should modify this language of the Legislature by, in effect, reading into it, after the word "candidate," the words "for state senator, member of assembly, or county or municipal officer." It is said this should be done because subsequent provisions of the act provide for the issuing of a certificate by the Supreme Court justice holding the recount in place of the certificates issued by the boards of canvassers, and as there is no certificate of election from the county boards of canvassers in elections for

United States Senator, member of Congress, presidential electors, or Governor of the state, the act, it is urged, must be held not to apply to these officers. A further argument to the same effect is said to arise from the fact that a subsequent section of the act provides, with reference to the expense of such recounts, that in case a recount shall result in favor of the applicant the expense shall be borne by the county or municipality "in and for which such election was held," and that as elections for the officers above mentioned are state-wide, or at least congressional district-wide, this provision for the county or municipality bearing the expense is inappropriate, and therefore indicates that the act does not apply to those elections.

These reasons, it may be remarked incidentally, apply with equal force to the election, say, of an alderman from a single ward of the city of Newark or of a ward councilman of any other municipality having ward representation in its governmental body. No certificate is issued to such alderman or councilman by any board of canvassers, and the election is not municipality-wide, nor is the expense, in case of a successful recount, confined to the ward where the election and recount took place, but must be borne by the municipality at large. No one, however, suggests that the recount provisions are not applicable to an election of such an alderman or councilman. On the contrary, it is here conceded and urged that they are so applicable.

I take it that these certificate and expense provisions are not inconsistent with the wide scope given the act by its express language, "any candidate at any election," but that, on the contrary, they simply provide the machinery to carry out that broad scope in conformity with the political scheme adopted by the state for holding elections. That scheme, as I understand it, is that for the purpose of holding elections there are two divisions of the state, namely, municipal and county. For all municipal officers the municipality is the political unit which holds the elections. For all other elections in the state the county is the political unit which holds such elections. In the municipality, if the election is for mayor, or in commission-governed cities for commissioners, the election is municipality-wide, and if the election is for an alderman or a councilman from a particular ward or subdivision the election is not municipality-wide; but in either case the election is "held in and for the municipality" *and is at the municipality's expense*, although in one case it is municipality-wide and in the other it is not. The municipality is the political unit in the electoral scheme of the state for holding this class of elections. In all other elections the county is the political unit to hold the elections. Where a Governor is to be elected, although his office is state-wide and the election is by the voters of the

entire state, the political units that hold the necessary elections are the counties, and *each county bears the expense of its own election.* The election held in each county for the office of Governor of the state is in effect an election "in and for that particular county," although the office is state-wide and the result in the particular county does not in itself decide who is elected to the state-wide office. So with reference to a United States Senator and presidential electors, and, substituting the congressional district for the state, with reference to a congressman.

This view (which, like all others herein expressed, is only advanced as that of an individual member of the court, and not as that of the court itself, which court, of course, in a case, as here, of a tie vote, does not decide or express any view) supplies in my judgment a consistent working basis for all of the provisions of the recount election law. It removes the alleged inconsistency of each county bearing its own successful recount expense, although more than one county is involved, and a liberal construction of the certificate provisions (and all election laws should be liberally construed in the spirit of their enactment) would make the Supreme Court justice's certificate a substitute for the declarations of results by, or certificates of, election boards, as the case might be, so as to make a reality of the express provision of the act that the Supreme Court justice's certificate "should supersede all others and entitle the holder thereof to the same rights and privileges as if such certificates had been originally issued by the canvassing board." The change from the word "certificate" to its plural "certificates," also made by the amending act of 1909 (the present recount act) authorizing the Supreme Court justice holding a recount to revoke the "*certificates*" of election already issued to any person, instead of to revoke the "*certificate*" of election already issued to any person, as the law theretofore read, would seem to accord with this view, and to contemplate a revoking of all records of the result of the election of whatsoever description, including all certifications thereof, and the substituting therefor of the Supreme Court justice's certificate, the same to have the effect indicated by the above-quoted language.

I think, therefore, that there is no substantial reason for, in effect, reading into the act the words first above indicated, thereby changing the broad language "any candidate at any election" into "any candidate for state senator, member of assembly, or county or municipal office." I think such a judicial reading into the statute of these words would be particularly unjustifiable, in view of the fact that the recount provision of our election law as it was first enacted in 1880 did contain a similar limitation in the words "wherever any candidate at any election in this state for member of the senate or of the assembly," etc., and that subsequently

that limitation was omitted in the present act and the language was made to read: "*Whenever any candidate at any election, etc.* Surely the Legislature in changing the law with reference to recounts from one applying only to "a candidate for state senator or member of the assembly" to "any candidate at any election," did something which has a very significant bearing on what it is now suggested this court ought to read into the act.

Another indication of the wide change contemplated by the act of 1909 is found in the new provision in that act with reference to a recount in referendums, in the following language:

"Whenever *any* citizen shall have reason to believe that an error has been made by *any* board of canvassers in counting the vote or declaring the result of *any* election upon *any* referendum submitted to the electors," etc.

But, even in the absence of such an historical indication of the legislative intent, the language of the present act is in my judgment plain and certain, and therefore is not properly subject to judicial construction into anything other than what it says. As above stated, I find no real conflicting provisions in the act; but, if I did, I should still think this language, "any candidate at any election," too plain for constructive modification. "Where the purpose of the law-makers is expressed in language so plain as to make it unmistakable, it must be enforced by the courts as it is written without regard to its wisdom, or its apparently unwise limitations." This is the language of this court in *Island Heights & Seaside Park Bridge Co. v. Brooks & Brooks*, 88 N. J. Law, 613, 97 Atl. 267, citing *Douglass v. Freeholders of Essex*, 38 N. J. Law, 214. In the case of *Bullock v. Biggs*, 78 N. J. Law, 63, 73 Atl. 69, this court notes with approval the exact words of Chief Justice Beasley in *Douglass v. Freeholders of Essex*, namely:

"Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result is out of place."

It is for the reasons above expressed that I have recorded my vote for affirmance of the decision of the Supreme Court upholding the applicability of the recount provisions of the election law to the congressional election here involved.

I am requested by Justices GARRISON and BLACK and Judges HEPPENHEIMER and GARDNER to say that they unite in the views herein expressed.

Theodore Strong and Alan H. Strong, both of New Brunswick, for appellant. Thomas P. Fay, of Long Branch, and Lindley M. Garrison, of Jersey City, for respondents.

PER CURIAM. The judgment under review herein is affirmed by an equally divided court.

For affirmance—GARRISON, BERGEN, BLACK, WHITE, HEPPENHEIMER, TAYLOR, and GARDNER, JJ.—7.

For reversal—The CHANCELLOR, the CHIEF JUSTICE, and SWAYZE, TRENCHARD, PARKER, MINTURN, and WILIAMS, JJ.—7.

CARSON v. SOULLY et al.

(Monmouth County Recount Case.)

(Court of Errors and Appeals of New Jersey.)

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the court impossible.

On Appeal from the Supreme Court, whose opinion is reported at 99 Atl. 199.

Theodore Strong and Alan H. Strong, both of New Brunswick, for appellant. Thomas P. Fay, of Long Branch, and Lindley M. Garrison, of Jersey City, for respondents.

PER CURIAM. The judgment under review herein is affirmed by an equally divided court.

For affirmance—GARRISON, BERGEN, BLACK, WHITE, HEPPENHEIMER, TAYLOR, and GARDNER, JJ.—7.

For reversal—The CHANCELLOR, the CHIEF JUSTICE, and SWAYZE, TRENCHARD, PARKER, MINTURN, and WILIAMS, JJ.—7.

CARSON v. SOULLY et al.

(Ocean County Recount Case.)

(Court of Errors and Appeals of New Jersey.)

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the court impossible.

On Appeal from the Supreme Court, whose opinion is reported at 99 Atl. 199.

Theodore Strong and Alan H. Strong, both of New Brunswick, for appellant. Thomas P. Fay, of Long Branch, and Lindley M. Garrison, of Jersey City, for respondents.

PER CURIAM. The judgment under review herein is affirmed by an equally divided court.

For affirmance—GARRISON, BERGEN, BLACK, WHITE, HEPPENHEIMER, TAYLOR, and GARDNER, JJ.—7.

For reversal—The CHANCELLOR, the CHIEF JUSTICE, and SWAYZE, TRENCHARD, PARKER, MINTURN, and WILIAMS, JJ.—7.

(87 N. J. Eq. 632)

In re GLUCKMAN'S WILL. (No. 72.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(*Syllabus by the Court.*)

1. WILLS §206—PROBATE—RIGHT.

A will properly proved to have been executed with due legal formality by a testator whose testamentary capacity is not questioned is entitled to probate, in the absence of fraud, undue influence, or mistake in the identity of the document executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 513, 514.]

2. WILLS §289 — PROBATE — BURDEN OF PROOF—KNOWLEDGE OF CONTENTS.

Physical or educational disability, however, as blindness or inability to read the language, if accompanied by circumstances leading the court to suspect possible imposition, subjects proponents of a will to the additional burden of showing to the satisfaction of the court that testator knew its contents so that he understood them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661.]

3. WILLS §302(3)—PROBATE—UNDERSTANDING OF CONTENTS — SUFFICIENCY OF EVIDENCE.

This burden is sustained by satisfactory proof that the testator was made acquainted with and understood the contents of the will to the same extent that he would have done if the disability had not existed and he had read the will himself. The extent of the burden is measured by the effect of the disability.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 702.]

4. WILLS §206 — PROBATE — VARIANCE BETWEEN WILL AND INSTRUCTIONS.

In the absence of fraud or of undue influence, a variance between the will and the instructions from which it was drawn will not defeat probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 513, 514.]

5. WILLS §152—PROBATE—MISTAKE.

In the absence of fraud or of undue influence, mistake, except in identity of the instrument executed, will not defeat probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 369, 370.]

6. WILLS §152—PROBATE—MISUNDERSTANDING OF LEGAL EFFECT.

Misunderstanding of the legal effect of the provisions of a will, whether resulting from erroneous legal advice or otherwise, will not, in the absence of fraud or of undue influence, defeat probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 369, 370.]

Appeal from Prerogative Court.

In the matter of the last will and testament of Isaac Gluckman, deceased. From a decree of the Supreme Court (98 Atl. 831), affirming a decree refusing probate, proponents appeal. Reversed and matter remitted to Prerogative Court for an order admitting the will to probate.

This is an appeal from an order of the Prerogative Court affirming an order of the Hudson county orphans' court denying probate to a document offered as the last will and testament of Isaac Gluckman, late of the city of Bayonne, deceased. Gluckman left a widow, but no descendants. The will in question was drawn and executed two days before his death when he was about to undergo an operation for appendicitis, and it gave his entire estate to his executors to pay his widow, out of the income, "a weekly allowance of forty dollars and such other sum or sums as may be necessary during the term of her natural life," she to remain in the residence, and after her death the entire residue of the estate to go to such Home for Old People as the widow should by

will direct, or in default of such direction, as should be selected by the executors. It appointed as executors Mahnken, the president of a bank with which testator did business, Annett, testator's real estate agent, and Judge Roberson, his lawyer who had represented him during a period of 25 years, and who drew the will. Testator was unable to read or write (except his own signature) in the English language, but could talk and understand that language, although somewhat brokenly and imperfectly. He was in bed when he gave instructions for drawing the will, and his lawyer testified that the instructions as given were:

"All of the property for Mrs. Gluckman for life. I want Mr. Roberson and Annett and Mahnken to be executors. The debts of the estate are so many that I do not know when she will get any income; allow her forty dollars a week out of the income. Not move from the house until she die."

Then he said after I had stopped writing:

"Give her as much more as is necessary for her support, and after her death to Home for Old People."

The lawyer produced a short abbreviated memorandum made by him as these instructions were given. He says he understood or interpreted the part of the instructions after the one for the appointment of executors to be a modification of the first sentence of the instructions; that he went into an adjoining room and at once drew the will in accordance with this interpretation, brought it back and read it paragraph by paragraph to the testator, who fully understood it and nodded assent to each paragraph; that he told testator that the provision of the will which directed the executors to pay the widow in addition to the \$40 weekly allowance, "such other sum or sums as may be necessary during the term of her natural life," would permit the executors to give and allow her the whole income after the debts were paid, and that the testator said: "All right. That's good." The will was then executed with complete formality in all respects. There was evidence that after the execution of the will and immediately before the operation testator told his wife and others that he had left everything to his wife. The estate consisted of about 100 small houses, estimated to be worth from \$200,000 to \$250,000, but subject to \$101,000 of mortgages and \$9,000 or \$10,000 of unpaid back taxes. There were also outstanding promissory notes of the testator amounting to from \$16,000 to \$25,000.

There was a former will, executed some four years earlier, and which is still in existence, which, if unrevoked, gave \$5,000 each to a brother and to a sister of testator, \$1,000 to the widow of a deceased brother, and the remainder of testator's estate to his widow absolutely. The brother and sister are the caveators, and testator's widow, while not formally a caveator, was represented by counsel who took the chief part in opposing the probate.

Elmer W. Demarest, Lindley M. Garrison, and Gilbert Collins, all of Jersey City, for appellant. Max Levy, of Bayonne, and Clarence Linn, of Jersey City, for caveators. Joseph M. Noonan, of Jersey City, for respondent Rosa Gluckman.

WHITE, J. (after stating the facts as above). The question involved is one of probate under the statute, pure and simple, and not one either of construction or of reformation.

[1] The document offered for probate is of testamentary character; it is in writing; it was signed by the testator; it was both signed by the testator and declared by him to be his last will in the presence of two witnesses who were present at the same time, and who subscribed their names thereto, as witnesses, in the presence of the testator, and at his request. It has not been revoked and the testator is now dead. No question is raised involving lack of testamentary capacity on his part. A will so executed, under these circumstances, is entitled to probate unless it be the result of fraud or of undue influence or (within certain limitations) of mistake. Fraud (and this involves bad faith on the part of its perpetrator) willfully deceives free agency; undue influence overmasters it; while mistake, whether self-induced or the result of the innocent error of another, misleads free agency, without bad faith or domination on the part of any one.

[5] Where a testator, in addition to complete testamentary mental capacity, is in full enjoyment of average physical and educational faculties, it would seem that in the absence of fraud or of undue influence a mistake, in order to defeat probate of his entire will, must in substance or effect really amount to one of identity of the instrument executed; as, for instance, where two sisters, in one case, or a husband and wife, in another, prepared their respective wills for simultaneous execution and through pure error one executed the other's, and vice versa. Anon., 14 Jur. 402; *Re Hunt*, L. R. 3 P. & D. 250; *Nelson v. McDonald*, 61 Hun, 406, 16 N. Y. Supp. 273. Short of this, however, or of something amounting in effect to the same thing, it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless.

[2, 3] Where, however, a testator, by reason of physical or educational disability, as by blindness or by inability to read the language in which the will is written (as in the case sub judice), is unable by the exercise of his own faculties to see for himself that the

will expresses his testamentary desires, an additional burden is imposed upon the proponents of the will, where there are any circumstances which lead the court to suspect that he may have been imposed upon (*Patton v. Hope*, 37 N. J. Eq. 522), namely, that of showing to the satisfaction of the court that such a testator was made acquainted with the provisions of the will so that he understood them. *Day v. Day*, 31 N. J. Eq. 549; *Harris v. Vanderveer's Executor*, 21 N. J. Eq. 561; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465. Most frequently where a physical or educational disability of this character exists, contested will cases are founded upon fraud or upon undue influence.

In the present case, however, the learned trial judge of the orphans' court of Hudson county before whom the issue was tried, and the learned vice ordinary who heard it on appeal to the Prerogative Court, were both of the opinion that neither fraud nor undue influence entered into the making of this will. A careful examination of the evidence leaves us in entire and emphatic accord with this view. Both of these judges, however, were convinced that, by reason of what they thought was an error on the part of the lawyer who drew the will in misinterpreting the testator's intentions, and also in advising testator of the legal effect of one of its provisions, the will as executed did not in at least one very important respect carry out the intention of the testator, and that it was not, in this respect, understood by him when he executed it. For this reason probate was refused. We think this was error. While we agree that a situation arose under the evidence (by reason of testator being unable to read the English language, taken in connection with the testimony tending to show a state of mind or intention on his part inconsistent with that indicated by the will as executed) which put the burden upon proponents of showing to the satisfaction of the court that testator was made acquainted with the provisions of the will so that he understood them, we nevertheless think that proponents successfully sustained this burden.

The contrary view of the learned trial judge below seems in reality to have been based upon two uncontrolling elements, namely: (1) What they thought was a variance between the will as executed and the instructions from which it was prepared; and (2) what, if it existed, amounted to a pure mistake upon the part of the testator (whether self-induced or resulting from erroneous legal advice of his lawyer) as to the practical effect of a provision of the will which he knew it contained and thoroughly understood.

[4] As to the first of these, it is quite immaterial whether the will did or did not correctly embody the instructions, if in point of fact the testator, when he executed it, was made acquainted with and understood its

contents. As was said by Vice Ordinary Reed in *In re Livingston's Will* (Prerog.) 37 Atl. 770:

"It is said * * * that her instructions were not followed in drafting the will; * * * and that the will, as drafted, * * * does not carry into effect that wish. * * * But whether it does or not, if she was capable of making a will, and there was no fraud practiced upon her by which she was misled into signing what she did not wish to sign (and there is no proof of fraud in this case), it would not matter what variation there might be between the instructions and the executed instrument."

[6] As to the second: Assuming that the lawyer's assurance that the "such-sum-or-sums-as-may-be-necessary" clause would permit the executors to pay over the entire income after the debts were satisfied, was intended and understood as legal advice upon the construction of this clause, and that it was legally unsound (which, under the circumstances, we think it was not), that also, in the absence of fraud or of undue influence, is insufficient to defeat probate of the will. It is no new thing for provisions in wills to turn out, under the established rulings of the courts, to have a very different meaning from that which the testators themselves, under the honest but mistaken advice of counsel, thought they had when the wills were executed, but this has never been a ground for refusing probate. The learned vice ordinary recognized this rule, citing *Collins v. Elstone*, L. R. [1893] Probate Div. 1, but thought the situation was different where the testator could not read nor write. We think the difference is limited by the effect of the disability which gives rise to it. If a blind testator makes a will and through pure mistake a clause which he intended, and gave instructions, to insert, is left out, the will is entitled to probate if the testator was made acquainted with and understood what it did contain, in spite of the fact that he intended to insert another clause which by inadvertence was omitted. A tinge of fraud or of undue influence might shed an entirely different light, but in the absence of either of these, the error becomes a mistake, pure and simple, not resulting from, and therefore not protected by, any failure to conform to any rules devised to overcome the disadvantage of the disability.

So in this case, the testator was made acquainted with and understood the fact that the will which he was about to execute provided that his wife should get, during her lifetime, from the executors, out of the income, \$40 per week and such additional sums as should be necessary. Knowing and understanding that, he knew and understood exactly what he would have known and understood, if he could have read the English language with average intelligence and understanding and had read this will himself instead of its being read to him. We think, therefore, that the honest legal advice (if it was legal advice) given him as to what the executors could legally do under the clause

in question can, even if legally unsound, have no more effect in preventing probate of the will in the one case than in the other, which is none at all.

This brings us to the one material question in the case, which is, Did the testator when he executed this will know and understand its provisions to the same extent that he would have done had he been able to read and understand written English with average facility and comprehension, and had he read the will himself instead of having it read to him? We think this question must be answered in the affirmative. He was a keen business man, in full possession of his faculties, and thoroughly intelligent (as is evidenced by his being "well versed in Hebrew lore"), able and accustomed perfectly to understand and be understood by Judge Roberson, who had been his close and constant legal and business counsel while testator pursued the road from penury to comparative affluence, during a period of 25 years, and the will was read to him and expressly assented to by him paragraph by paragraph. The clause in question is of such a nature that to hear it read would necessarily convey the knowledge of what it said. It said the executors were to pay the widow out of income such sums in addition to the \$40 per week as should be necessary during her life, with a remainder over after her death to a Home for Old People to be selected in the manner directed. Obviously upon hearing this clause read by his lawyer testator knew and understood exactly what he would have known and understood if he could have read English with perfect facility and had read it himself. That this is so is also evidenced by the fact that when the lawyer told him this clause would permit the executors to pay all the income to the widow when the debts were paid, he said: "All right. That's good." We think, therefore, that proponents have sustained the burden of showing that testator knew and understood the contents of the will when he executed it, and that it should be admitted to probate.

We may say in this connection also that we are not at all certain that there was any mistake whatsoever made by anybody in the preparation of this will or in what was said as to the practical effect of the provision in question. When the testator's personality was withdrawn by death it left this heavily involved estate in a most precarious condition, and no one understood better than the testator when he made his will that this would be so. He knew that his estate, consisting, as it did, exclusively of 100 small houses worth maybe \$200,000, but subject to over \$100,000 of mortgages and also to shrinkage in rental and market value from deterioration and obsolescence, not to mention the cost of constant repairs and renewals, with \$10,000 of unpaid taxes in arrear, and up-

wards of \$25,000 of floating debt, was a leaky ship in a stormy sea, and that if his wife was to get any real benefit from it at all, there must be skillful handling. He provided for such handling by securing the services, as executors, of the three men who had assisted him most in the very lines where strength would be needed, namely, his banker, his real estate man, and his lifelong lawyer. If they were to succeed they would need leeway, discretion, full control. Also it is quite likely that the practical effect of the clause in question may turn out to be to permit the payment of all the income to the widow after the debts are paid, just as the lawyer said it would. It does not seem probable that the net income will amount to more than will be necessary for the widow to live upon in the manner her husband would have desired, and her age and the assistance she rendered him entitle her to enjoy, as soon as the dangers which threaten the entire estate are safely passed. This testator may well have thought he was adopting the very best way possible under the circumstances of securing to his wife the entire income for her life. That may have been what he thought when he told her and others that he had left everything to her. Certainly he did not mean that assurance literally, as the provision over after her death to a Home for Old People, which he included in his instructions and discussed and approved the details of as fixed by the will, thoroughly demonstrates.

But be this as it may, we are quite satisfied that for the other reasons herein stated the will should receive probate and the order of the Prerogative Court affirming the order of the orphans' court denying probate is therefore hereby reversed, and the matter remanded to the Prerogative Court in order that an order may be duly made admitting the will to probate. The costs will be paid out of the corpus of the estate.

(30 N. J. Law, 682)

GUARRAIA v. METROPOLITAN LIFE INS. CO. (No. 120.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

1. APPEAL AND ERROR \S 644(1)—FAILURE TO FILE TRANSCRIPT WITHIN TIME ALLOWED—WAIVER OF OBJECTION.

The failure to file transcript within 15 days after judgment was waived by service and acceptance of the printed state of the case, and the limitations of objection thereto that certain documentary evidence had not been printed, which was afterwards supplied.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2795-2798.]

2. INSURANCE \S 291(4) — APPLICATION FOR LIFE POLICY — CONSTRUCTION — INCOMPLETE ANSWERS.

The failure to complete a printed statement in application for life policy stating that insured had not had specified diseases, "except ———,"

amounted to a definite statement that he had not had such diseases, and was not a mere incomplete answer accepted by the insurer without insistence upon completion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 687.]

3. INSURANCE ⇐265—APPLICATION FOR LIFE POLICY—EFFECT OF MISSTATEMENT—WARRANTY OR MISREPRESENTATION.

If a misstatement in application for life policy was a warranty, the policy fails; if only a misrepresentation, intentional falsehood is necessary to avoid policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560.]

4. INSURANCE ⇐668(6) — ACTION ON LIFE POLICY—MISREPRESENTATION—QUESTION FOR JURY.

Where insured was an Italian, unacquainted with the English language, and confronted with an English-speaking doctor, question of his intentional falsehood in making application held for the jury; the policy providing that all statements by insured "shall, in the absence of fraud, be deemed representations, and not warranties."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737-1740, 1758-1760.]

5. INSURANCE ⇐559(2) — FAILURE TO FILE PROOF OF DEATH—WAIVER—DENIAL OF LIABILITY.

The requirement that a beneficiary file proof of death was waived, where insurer wrote beneficiary's lawyer that they did not propose to pay because the policy was procured in fraud.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392.]

6. APPEAL AND ERROR ⇐1057(3)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In action on a life policy, error in excluding prescriptions tending to show that deceased had a disease, was harmless, where it might be assumed that he did have such disease.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4199.]

Appeal from Supreme Court.

Action by Giovannina Guarraia against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On appeal from the Supreme Court, in which the following per curiam was filed:

"In this case we dismissed the appeal on the ground that the printed case did not set forth the rules to show cause why a new trial should not be granted in the district court, and especially whether such rules reserved the points of law taken at the trial; the statute requiring that there be such a reservation to support an appeal. C. S. p. 2017, § 213f. The petition for rehearing sets up that such reservation was made, and on June 28th we heard counsel, and the cases were reinstated so far as omission of the rules to show cause and reservations are concerned; but there remained the motion to dismiss the appeal made on the further ground that the state of the case was not filed within the 15 days specified in the statute. If this point is resolved against the respondent, then we consider the merits of the appeal.

[1] "We think the failure to file the transcript within 15 days after judgment was waived by the service and acceptance of the printed state of the case and the limitations of objection thereto that certain documentary evidence had not been printed which was afterwards supplied. Taking this view, the application to dismiss fails, and we are brought to a consideration of the merits.

[2] "The defense was breach of warranty, misrepresentation, and concealment of facts, and the errors relate to the refusal of the court to direct a verdict and also instructions to the jury. Among the statements subscribed by insured in the application were declarations that he had not had bronchitis and whether he had been attended by a doctor within a certain period. These statements were for the most part printed, and stated that he had not had various diseases catalogued therein 'except _____' (and here follows a blank for a statement of the exceptions). No exceptions were stated, and the claim is that this amounted to a definite statement on his part that he had not had any of the diseases mentioned. On the other hand, it is urged that they were simply incomplete answers which were accepted by the company without any insistence upon completion. The trial court so held in denying a motion to direct. We do not take this view, but, on the contrary, think that the silence with respect to the exception should properly be taken as a statement that there is no exception; and consequently, if the insured had in fact had one or another of the diseases, there was a false statement with respect to that fact.

[3, 4] "The question then is with reference to the effect of the statement. If it was a warranty, the policy fails; if it was only a misrepresentation, the question of intentional falsehood becomes material. The policy says: 'All statements by the insured shall, in the absence of fraud, be deemed representations and not warranties.' The result of this seems to be that they are made the legal equivalent of representations in any case, and we must look for fraud in order to vitiate the policy. Here we are met by the fact that the insured was an Italian, apparently not well acquainted with the English language, confronted with an English-speaking doctor, who probably conducted the examination in the usual more or less perfunctory manner and had the insured sign the paper more or less as a matter of form. The judge left it to the jury to say whether there had been intentional misrepresentation. We are inclined to think that this course was right. There is little doubt that the deceased had consumption, or that he probably had chronic bronchitis and probably other diseases, but the terms of the policy require the company to show that he had intentionally misrepresented these matters, and we do not think that this was shown as a court question. This disposes of the motion to direct.

[5] "The next point is that the plaintiff failed to show any proof of death. There was no formal proof of it, but the plaintiff relied on a letter of the insurance company declining to pay the policy because it had been procured in fraud or misrepresentation, and claimed that this was a waiver of the proof of death. This is attacked on the authority of an unreported opinion of a justice in this court which is quoted in the brief. We do not know the facts in that case, and cannot tell whether it covers the present situation, but are inclined to say that under the terms of this policy such a letter may be considered a waiver. The policy fixes no time in which the proofs of death are to be submitted, so that they could be presented within any reasonable time; and consequently, when some three months after the death the lawyer wrote to the company asking whether the claim was going to be paid, and the company said, 'No; we don't propose to pay, because the policy was procured in fraud,' it should not be held necessary for the claimant thereafter to put in proofs which would be entirely nugatory.

"The next point is that the judge erred in charging the jury in effect that in order to vitiate the policy it must appear that the deceased was knowingly stating a falsehood to the company. This is in line with what has been said.

[6] "Finally it is stated that there was error in excluding certain prescriptions. These, if evidential, would have tended to show that the deceased had in fact consumption or bronchitis or what not. In the view we take of the case it may be assumed that he did, and on that assumption the error would become harmless. "These views lead to an affirmance of the judgment."

McCarter & English, of Newark, for appellant. John J. Stamler, of Elizabeth, for appellee.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

(90 N. J. Law, 685)

GUARRAIA v. METROPOLITAN LIFE INS. CO. (No. 121.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

Appeal from Supreme Court.

Action by Giovannina Guarraia against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McCarter & English, of Newark, for appellant. John J. Stamler, of Elizabeth, for appellee.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per curiam in Guarraia v. Metropolitan Life Ins. Co., No. 120 of the present term of this court, 101 Atl. 298.

(87 N. J. Eq. 504)

CLARK et al. v. CLARK et al. (No. 87/403.)

(Court of Chancery of New Jersey. May 14, 1917.)

1. TRUSTS ¶308—ACCOUNTING—EVIDENCE—PROCEEDS OF SALES.

In a suit by the executors of a father against those of a son for an accounting, the son's estate was properly charged with the consideration for the sale of land notwithstanding that the money was not traced into the son's hands; the transfer, amount, and exclusive negotiation by the son being admitted.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 428.]

2. EVIDENCE ¶357 — LETTERS — ADMISSIBILITY.

In a suit by the executors of a father against those of his son for an accounting wherein it was sought to charge the son's estate with the proceeds of a mortgage cashed by the son letters from the father concerning the mortgage, although unanswered, held admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1492-1499.]

3. GIFTS ¶49(6)—BURDEN OF PROOF.

In a suit to charge a son's estate with the proceeds of a mortgage assigned to him by the father, the assignment alone was not sufficient to show a gift of the mortgage, the burden, where fiduciary relations exist, being upon the person in whom confidence is reposed to show that the transaction was fair and well understood.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 95.]

4. TRUSTS ¶308 — ACCOUNTING — RELIEF — PROCEEDS OF SALE.

In a suit for an accounting by the executors of a father, his son's estate was properly charged with the proceeds of land sold, where the land was shown to have belonged to the father, and that the son always recognized him as the beneficial owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 428.]

5. TRUSTS ¶88 — ACCOUNTING — EVIDENCE — GIFTS.

In a suit to charge a son's estate with the proceeds of a sale of the father's land by absolute deed for the uses of the grantee, proof of a resulting trust is admissible, since, where a fiduciary relation of trust and confidence exists, the rules excluding oral testimony to vary a written instrument are superseded by the equitable rule that a conveyance will not be upheld as a gift unless it affirmatively appears that it was so intended and understood.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130, 131, 133.]

6. TRUSTS ¶321 — ACCOUNTING — CREDITS — COMPENSATION.

In a suit for an accounting by the executors of a father against his son's estate, compensation was not allowed for the son's services as manager of the father's property where the son had despoiled the estate of nearly one-third of its assets.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 466-473.]

7. TRUSTS ¶309—ACCOUNTING—CONVERSION—INTEREST.

Where a son had converted a large share of his father's estate, on a decree in accounting by the father's executors, interest at the legal rate should be charged from the date of each conversion and compounded as a punishment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 429.]

Bill by Samuel A. Clark and others against Maria S. Clark and others for an accounting. On exceptions by both parties to a master's report. Defendant's exceptions overruled, complainant's exceptions sustained.

S. W. Eldridge, of Elizabeth, for complainants. Foster M. Voorhees, of Elizabeth, for defendants.

BACKES, V. O. This bill is for an account and was referred to a master, whose report has been excepted to in the particulars hereafter mentioned.

Amos Clark died October 30, 1912, at the age of 82, in Boston, where in the latter years of his life he made his home. He had large real estate holdings in Elizabeth and Union county, and some in Tarrytown, N. Y. His son, William A. Clark, had the sole and exclusive management and control of his property, attending to the collection of rents, and negotiating sales of the realty, and handled his financial affairs generally. William A. Clark died a year after his father, and this bill was filed against his executors by his father's executors for an accounting. The master was directed to take an accounting for the period of six years next preceding the death of Amos Clark, and he has reported that during this time William A.

Clark received \$229,503.63 and disbursed \$173,261.54, leaving unaccounted for and due to the complainants \$56,242.09, besides interest. A stipulation was entered into by counsel attesting the correctness of these charges and discharges, reserving the items to which the present exceptions are directed, and some others which the master has allowed and to which no exceptions have been taken.

[1] The first and second exceptions are to two items of charges of \$1,000, respectively. These sums were part consideration price of the sales of two tracts of land, one to William C. Haugaard, the other to the Murray Hill Heights Company. The single ground of objection is that the moneys were not traced into the hands of the agent, and therefore the proofs fall short of the legal requirement. No such duty is imposed upon the complainants. The transfers and amounts are admitted, and as the son negotiated the sales exclusively, which is also conceded, the inference is inevitable that he collected the proceeds. Moreover, the evidence satisfactorily establishes the charges and sustains the master's findings.

[2] The third exception relates to a charge of \$4,556.21, the proceeds of a bond and mortgage made to Amos Clark by Dorothy Miller. That William A. Clark cashed this mortgage is not disputed. The contention is that it was his property by gift from his father. The mortgage was assigned by Amos Clark to William A. Clark on March 28, 1910, and by the latter hypothecated with Plainfield Trust Company for a personal loan of \$3,500 three days later, and afterwards assigned to the Fidelity Trust Company. One thousand dollars was paid on account of the loan out of trust funds, and the balance liquidated by the assignee; the surplus being deposited by William A. Clark in his trust account. Letters by Amos Clark to his son, and found in the latter's possession, written at the time the mortgage was assigned, concerning the purpose of the assignment, and others of much later dates, inquiring as to the interest and the disposition, if any, made of the mortgage, and the application by William A. Clark of part of the proceeds to the credit of the trust estate, evinces beyond peradventure that the assignment from the father to the son was made for convenience of sale or cancellation, or was procured by the latter to serve the ulterior purpose to which it was put. For the purpose of illuminating the transaction, the letters, although unanswered, were competent. *State v. MacFarland*, 83 N. J. Law, 474, 83 Atl. 993, Ann. Cas. 1914B, 782.

[3] There is another reason for sustaining the charge. There is no proof to establish the alleged gift. The written assignment alone—and this is all the defendants rely upon—is not sufficient. The rule is that:

"In all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is

naturally inspired, is presumed, or in fact reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed and who has acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open, and voluntary, but that it was well understood." *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Parker v. Parker*, 45 N. J. Eq. 224, 16 Atl. 637; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520.

[4] The fourth exception is to a charge of \$17,500, the proceeds of the sale to Thomas A. Sperry of a tract of land of 36.54 acres, and of "the gristmill lot and the lot of .45 acres" adjacent. The tract of 36.54 acres was conveyed by Amos Clark to his son on May 29, 1907, for the consideration of \$1. The title to the gristmill lot and the one adjoining was also at one time in Amos Clark. The history of these lands is fully set forth in the evidence and the master's report, and it is only necessary to remark that it satisfactorily appears that they at all times belonged to Amos Clark, and that in his dealings with them William A. Clark recognized and acknowledged the beneficial ownership of his father.

[5] The gristmill lot and the .45 acre lot formed an inconsequential part of the sale to Sperry, and was not adverted to in the argument, except to reflect William A. Clark's ownership of the larger tract conveyed to him by his father. It is not pretended that any consideration was paid for this latter conveyance, but the contention is that, as the deed is absolute on its face and declares the uses to be for the grantee, proof of a resulting trust is inadmissible, and therefore, and because there was none of an express trust within the statute of frauds, the defendants cannot be called upon to account. This would ordinarily be so. *Fretz v. Roth*, 68 N. J. Eq. 516, 59 Atl. 676. But where a fiduciary relation of trust and confidence exists, the rules of evidence which exclude oral testimony to vary a written document are superseded by the equitable rule above quoted from the *Otterson* Case, to the effect that a conveyance of land will not be upheld as a gift unless it is shown affirmatively that it was so intended and understood. There is no such evidence.

[6] Fifth exception: The master allowed \$15,000 commissions for services, at the rate of \$2,500 a year, to which both complainants and defendants except, the former contending that none should have been allowed, or, at the most, \$2,000 per annum, while the defendants claim that the services were reasonably worth \$5,000 a year.

There is no evidence of an express contract to remunerate. The declaration of William A. Clark that his father was paying him \$2,000 a year is not competent to prove an agreement, although it might be considered in limiting the amount of compensation.

The character of the services and the cir-

cumstances under which they were rendered were such as to imply a promise to pay for them. Although they were performed by the son for the father, they were not rendered as members of the same household in the usual family relationship, and no countervailing presumption arises that they were discharged gratuitously. *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678.

Compensation, however, is allowed only when the servant has faithfully performed his duty. Here the son was guilty of most flagrant abuses of his trust. He kept no accounts, mingled the funds with his own, from time to time appropriated them to his own use and finished with a defalcation of over \$71,000. This deficiency covers a period of six years only, and how much more of the estate was absorbed before and from the time the trust began can only be conjectured. I am unable to comprehend upon what theory, with principle and authority against it, the master arrived at his conclusion. It was suggested that Amos Clark was habitually careless in the matter of accounts, and especially so with reference to his son's, and that this ruling passion influenced the latter and was in a large measure responsible for his failure to keep a faithful record of his stewardship. Indeed, I observe that the master indulges in some palliative sentiments along this line, but I fail to recognize any heritable quality in the parental trait. The chaotic and deplorable condition in which the accounts were found, and which required the services of two experts to extricate and bring to an intelligent understanding, was undoubtedly due to an indifference to duty; but the toleration of the father was not a license to plunder. The relation was most intimately confidential, intensified by a father's high esteem and great natural love and affection, and thus, aged and helpless, he intrusted all of his material interests to his son, relying implicitly upon his fidelity, in unbounded assurance that all was well husbanded and conserved. And this confidence was repaid by despoiling the estate of nearly one-third of its assets, at the rate approximately of \$1,000 a month; and during a period when the father's allowance for the support of his family, consisting of himself, wife and niece, was reduced to \$200 a month, presumably by arrangement, in the belief that that was all that the estate could afford, and when the son knew that his father was frequently distressed for want of money. Compensation, under such circumstances, would reward faithlessness and duplicity and is unthinkable. For offenses venial in comparison commissions have been uniformly denied, as for failure to keep accurate records or to render an account, permitting trust funds to lie idle or remain unsecured, or without distinct and separate investment, for mingling them with one's own funds, etc. The cases are collected

in *Re Walsh's Estate*, 80 N. J. Eq. 565, 74 Atl. 563. The rule has also been applied where the compensation was fixed by agreement. *Ridgeway v. Ludlam*, 7 N. J. Eq. 123. See, also, *Wright v. Smith*, 23 N. J. Eq. 106.

[7] Sixth exception: The master reported that the interest upon the amount of the defalcation be computed at the rate of 4 per cent. from the death of Amos Clark. There is no room for compassion in this case. The master should have calculated interest at the legal rate. Exact justice demands that interest be reckoned from the date of each conversion, and compounded as a punishment. *Frey v. Frey*, 17 N. J. Eq. 71. As the exception challenges only the rate, the report will be modified to that extent.

The defendants' exceptions will be overruled, and the complainants' exceptions sustained, with costs. The master's report will be confirmed, except as to the compensation and interest, and as to these it will be corrected, and a decree advised accordingly.

(116 Me. 263)

LEMAIRE v. CROCKETT et al.

(Supreme Judicial Court of Maine. July 3, 1917.)

1. STATUTES \S 251—EMERGENCY CLAUSE—POLICE COMMISSION—CONSTRUCTION—"HOME RULE."

Under Const. art. 31, § 16, providing an emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health, or safety, and shall not include an infringement of the right of home rule for municipalities, as Priv. & Sp. Laws 1880, c. 293, delegated to the city of Lewiston the appointment of its own police force, and has not been modified or repealed, the emergency clause attached to act of 1917 approved March 8, 1917, providing a police commission for the city of Lewiston, is invalid, as infringing the right of "home rule," which is "the right of self-government as to local affairs," since the fact that, at the time the infringing act is passed, the right is lodged with the municipal government, is sufficient to forbid the attaching of the emergency clause.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 332.]

For other definitions, see Words and Phrases, First and Second Series, Home Rule.]

2. STATUTES \S 64(4)—VALIDITY—EFFECT OF PARTIAL INVALIDITY.

As an act creating a police commission in a city and an emergency clause are clearly separable, the act, otherwise constitutional, is not affected by the invalidity of the emergency clause, and will take effect as a nonemergency act, permitting the invoking of the referendum.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 61, 195.]

3. QUO WARRANTO \S 10—JURISDICTION.

Quo warranto would not be the proper remedy by the mayor of a city against members of a police commission appointed under an alleged invalid act, where the defendants are not exercising the duties of an office to which plaintiff claims title.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 10-12.]

4. INJUNCTION ~~85~~(2)—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill in equity, brought by the mayor of a city, would lie to test the validity of an emergency act appointing police commissioners, as plaintiff has no adequate remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 156.]

Appeal from Supreme Judicial Court, Androscoggin County, in Equity.

Action by Charles P. Lemaire against Ralph W. Crockett and others. From a judgment overruling a demurrer to and dismissing the bill, plaintiff appeals. Bill and appeal sustained, and decree ordered in accordance with opinion.

Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, and MADIGAN, JJ.

McGillcuddy & Morey, of Lewiston, for appellant. Ralph W. Crockett, of Lewiston, for appellees.

CORNISH, C. J. This is a bill in equity, brought by the plaintiff, as mayor of the city of Lewiston, against the three members of the police commission appointed under an act of the Legislature approved March 8, 1917, entitled "An act to provide a police commission for the city of Lewiston and to promote the efficiency of the police department thereof." The bill asks this court to declare that the Legislature had no constitutional power to pass the act with the emergency clause attached, that the act is rendered thereby invalid, that all appointments already made by the defendants are of no effect, and that the defendants be enjoined from interfering with, controlling, or directing the police force of the city of Lewiston.

The defendants filed an answer to the bill, with a demurrer inserted therein. The sitting justice ruled as follows:

"To sustain this bill would be to rule in effect that the police commission act is unconstitutional, in that it infringes the right of home rule. But, according to the established and uniform course of procedure in this state, a statute will be presumed by a single justice to be constitutional until the contrary has been established by the law court."

He accordingly ruled pro forma that the act was constitutional, and dismissed the bill, at the same time overruling the demurrer.

Two questions are involved: First, whether the act violates section 16 of the thirty-first amendment to the Constitution, that an emergency bill shall not include an infringement of the right of home rule for municipalities; second, if it is such a violation, whether the act is wholly unconstitutional, or only the emergency clause is invalid, leaving the act itself valid, and subject to the referendum, if invoked.

Section 16 of article 31 of the Constitution of this state, adopted by the people in 1908, and commonly known as the emergency

clause of the initiative and referendum provides as follows:

"Sec. 16. No act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the Legislature passing it, unless in case of emergency (which with the facts constituting the emergency shall be expressed in the preamble of the act), the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety and shall not include (1) an infringement of the right of home rule for municipalities," etc.

The last clause is the one vitally involved here. Did the act creating this police commission, and taking the entire management and control of the police department of the city of Lewiston away from the municipal officers, where this power had resided since 1880, and giving it to a commission of three appointed by the Governor, constitute an infringement of the right of home rule, as prohibited in the Constitution? If it did, the Legislature was expressly prohibited by the Constitution from attaching to it the emergency clause, thereby taking from the people the right to invoke the referendum, and causing the act to go into effect immediately upon its approval by the Governor.

[1] In our opinion, this act did infringe upon the right of home rule under the facts of this case, and therefore the emergency clause was invalid.

The Constitution of this state confers upon the Legislature—

"full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this Constitution, nor to that of the United States." Article 4, pt. 3, § 1.

As was said in the Opinion of the Justices, 99 Me. 531, 60 Atl. 85:

"One of the main purposes of this general grant of power was to vest in the Legislature a superintending and controlling authority, under and by virtue of which they might enact all laws, not repugnant to the Constitution, of a police and municipal nature, and necessary to the due regulation of the internal affairs of the commonwealth."

The exercise of such a power is absolutely indispensable in a well-governed community.

A necessary corollary to this fundamental proposition is this: That the Legislature has the constitutional power to designate the instrumentality which shall execute and carry into effect the laws made for the benefit of the people under this section. It may intrust their execution to a board created by itself and to be appointed in a designated way, or to the municipality itself where the power is to be executed. The latter is the more common method. But, having adopted one method, the Legislature is not forever

bound thereby, but may substitute another, whenever it sees fit. *Commonwealth v. Plaisted*, 148 Mass. 375-386, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

In this instance it is obvious that, prior to passage of the police commission bill in 1917, the right to regulate and control the police department of Lewiston had been delegated by the Legislature to the city itself. It had been made a matter of local self-government, which is but another name for home rule. "Home rule" has been defined to be, what the term itself clearly indicates, "the right of self-government as to local affairs." *Words and Phrases*, Second Series, p. 902.

"Home rule means that, as to the affairs of a municipality, which affects the relation of citizens with their local government, they shall be freed from state interference, regulation, and control; that the system of public improvements, the building of streets and alleys, the appointment of officers, the designation of their duties and how they shall be performed, and all other matters purely of local interest, advantage, and convenience, shall be left to the people for their own determination." *People v. Johnson*, 34 Colo. 143, 86 Pac. 233.

It is true, as was said in *Andrews v. King*, 77 Me. 224, that the officers in the police department are essentially state officers, in that it is their duty to preserve the public peace, the peace of the state, and the people of the whole state are interested to have such legislation as will secure the most efficient administration of the department. What that legislation shall be, however, is for the Legislature to determine, and, as the court also said in the same opinion, while the appointment is usually delegated to the municipal government, it is competent for the Legislature to intrust it to the Governor.

In the case at bar this power had long prior to 1917 been delegated to the municipal government.

By chapter 293 of the Private and Special Laws of 1880, entitled "An act to promote the efficiency of the police force of the city of Lewiston," it was provided that the police officers of that city, including the marshal and deputy marshal, should be appointed by the mayor with the advice and consent of the aldermen, and the mayor was given the power to suspend any policeman, which suspension should be in force until the next meeting of the aldermen. By this act the Legislature delegated to the municipality the appointment of its own police force and conferred upon it the sole right to administer the affairs of the police department. So long as that right, so delegated, continued, and that act remained unmodified and unrepealed, the city of Lewiston had the right of home rule so far as its police department was concerned. The Legislature still had the power to withdraw that right, and confer it upon some other board or commission, as it did by the act of 1917 under consideration; but, so long as the act of 1880 remain-

ed in force, the right of local self-government in the police department existed. This right of home rule is not, as we have seen, and need not be, absolute and indefeasible, in order to bring its infringement as an emergency act within the inhibition of section 16. If at the time the infringing act is passed the right is lodged with the municipal government, that is sufficient to forbid the attaching of an emergency clause, and that was the situation here.

That the commission act infringed upon the previously delegated right of local self-government is obvious. It took the control of the police department from the municipality, and conferred it upon a commission appointed by the Governor, in express and decisive terms. Section 4 of the act reads as follows:

"The board of police commissioners hereby created shall have full power and authority, subject to the provisions of this act, to organize and establish the police force of the city of Lewiston and to make all rules and regulations for the government, control and efficiency of the same. Said board shall have and exercise all the powers and be charged with all the duties relative to the organization, appointment and control of said police force now conferred or imposed upon the mayor, the municipal officers or the city council of Lewiston, and such other powers as are given them by the terms of this act."

The Legislature had the constitutional right to make this transfer, but section 16 of the thirty-first article expressly forbids an emergency clause to be attached to such a bill. There is a clear distinction, which must not be overlooked, between the legislative power to pass the act and the power to pass it as an emergency measure. The first is permitted; the second is prohibited. The attempt to do so in this case was futile. The emergency clause is clearly invalid.

[2] This invalidity, however, affects only emergency clause and the date when the law may take effect. Instead of becoming a law immediately upon approval by the Governor, it will not take effect until 90 days after the recess of the Legislature, thus becoming a nonemergency act, and permitting, in the meantime, the invoking of the referendum. The act itself is valid. It was within the constitutional power of the Legislature to pass it. The emergency clause is invalid. The Legislature was expressly prohibited from attaching it. The two are clearly separable. The one stands; the other falls. *Riley v. Carico*, 27 Okl. 33-37, 110 Pac. 738.

[3, 4] So far as the demurrer is concerned, we would only add that both parties desire the decision of the case on its merits apart from technicalities. And were technicalities to be considered we think the bill would lie. Quo warranto would not be the proper remedy, because the defendants are not exercising the duties of an office to which the plaintiff claims title; nor has the plaintiff any adequate and complete remedy at law. We

think the sitting justice did not err in overruling the demurrer.

The entry must be:

Appeal sustained.

Bill sustained, with costs.

Decree in accordance with the opinion.

(116 Me. 269)

DOHERTY et al. v. RUSSELL.

(Supreme Judicial Court of Maine. July 5, 1917.)

1. WILLS §496—CONSTRUCTION—BENEFICIARY.

Where a life estate is devised to a person named and "his wife," the identity of the cotenant is fixed as firmly as if her individual name had been used.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1065, 1066.]

2. DIVORCE §322—PROPERTY RIGHTS.

Upon the granting of a divorce by a decree which makes no disposition as to the property rights of the parties, each holds the legal title to half of real estate which was devised to them as cotenants.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825.]

3. DIVORCE §322—PROPERTY RIGHTS.

The property rights of the parties to a divorce suit are not affected by the decree unless they are brought before the court in some appropriate manner.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825.]

4. LIFE ESTATES §4—TERMINATION.

Where a life estate is devised to husband and wife as cotenants, the property rights of the wife are not affected by her divorce and remarriage, nor by the fact that, having deserted her first husband, she re-enters into possession of the property on his death, accompanied by her second husband.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 6-10.]

5. LIFE ESTATES §4—TERMINATION.

One to whom a life estate has been devised as cotenant with her husband does not, by abandoning him, leaving the property in his sole possession for 23 years, and making no claim to it during that period, show an intention to abandon her interest in the real estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 6-10.]

6. ABANDONMENT §2—NATURE AND ELEMENTS.

There can be no abandonment without both the intention to abandon and the external act by which the intention is carried into effect (citing Words and Phrases, Second Series, Abandonment).

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 1.]

7. ABANDONMENT §5—PRESUMPTIONS AND BURDEN OF PROOF.

An intention to abandon will not be presumed, and the burden of showing an abandonment rests on the one asserting it.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. §§ 7-9.]

8. HUSBAND AND WIFE §16—ADVERSE POSSESSION—EVIDENCE.

Where a life estate is devised to a husband and wife as cotenants, and the husband, after

the wife has deserted him, occupies the whole property as before, making no claim to additional rights and performing no act hostile to defendant's title except to secure a divorce and remarry, his possession was not adverse.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100-106.]

9. LIFE ESTATES §8—ADVERSE POSSESSION—DECLARATIONS.

A life tenant cannot, by his declaration, acts, or claims of a greater or different estate, make it adverse so as to enable himself, or those claiming under him, to invoke the statute.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28.]

10. LIMITATION OF ACTIONS §1—NATURE OF STATUTE.

All statutes of limitations are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 1-3.]

11. TENANCY IN COMMON §15(2)—ADVERSE POSSESSION—ACTUAL OUSTER.

As between cotenants, evidence of long continued, visible, uninterrupted, and even exclusive occupation by one cotenant is not enough to bar the rights of the other cotenant; there must be evidence from which a putting out and keeping out of the other cotenant can be inferred.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 43.]

12. REMAINDERS §17(2)—RIGHT OF ACTION.

Remaindermen cannot maintain a real action for entry upon land against the life tenant of such property.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 13; Limitation of Actions, Cent. Dig. § 231.]

Report from Supreme Judicial Court, Knox County, at Law.

Action by John E. Doherty and others against Mary S. Russell. On report. Judgment for defendant.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and MADIGAN, JJ.

Frank B. Miller, of Rockland, for plaintiffs. L. M. Staples, of Washington, Me., for defendant.

HANSON, J. Real action, reported to this court upon the following agreed statement of facts:

"Cornelius Hanrahan of Rockland, Me., died April 15, 1893, testate, his last will and testament being duly proved and allowed by the probate court of the county of Knox on the third Tuesday of May, 1893. The sixth and forty-third items of said will, and which are the only items applicable to the purpose of this case, are as follows:

"6th. I give, bequeath and devise to J. W. Simmons and his wife, the use and occupancy of the farm and buildings thereon where they now reside, in said South Thomaston, for and during their natural lives and the survivor of them for the period of his or her natural life, and all the stock and farming tools on said farm and all fire wood and fuel on said premises necessary for their family use. The provision, however is made to said Simmons and his wife on condition that they or the survivor of them, shall

make no strip or waste of the wood land, nor shall they or the survivor of them, cut the same for the purpose of selling it in the market, and said parties, Simmons and his wife, shall keep the taxes on said farm and property fully paid from year to year, so long as the same may be occupied by them or either of them.'

"43d. I give, bequeath and devise the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated to my sister, Mary Doherty to have and to hold the same to her, her heirs and assigns forever.'

"No disposition of the Simmons farm at the termination of the life estate was made by said Hanrahan in his will other than what appears by said 43rd item.

"Mary Doherty died January 14, 1912, testate, and her will has been duly proved and allowed by the probate court of said Knox county. With the exception of \$1 given to each of her several heirs, all her estate, both real and personal, was devised and bequeathed to her two sons, John E. Doherty and Wm. Doherty, the plaintiffs in this action.

"John W. Simmons was in possession of the premises at the time said Hanrahan will was probated, and remained continuously in possession until his death on the 23d of April, 1916.

"On the 26th of September, 1896, a divorce was granted John W. Simmons from Mary S. Simmons, who was his wife at the time of the execution and probating of the will of said Hanrahan for the cause of desertion. Mary S. Simmons subsequently contracted a marriage with one Edward G. Russell, with whom she is now living.

"During the month of July, 1916, the said Mary S. Russell, formerly Mary S. Simmons, entered upon the premises described in full in the declaration annexed to the writ in this action, cut and removed grass therefrom, and undertook to enter and occupy the buildings thereon.

"John W. Simmons remarried after the divorce decreed him, and was living with his wife on the premises at the time of his death. The widow has administered the estate, her first and final account having been filed and allowed by the judge of probate of said Knox county. Mrs. Simmons is not now in possession of the premises, she having removed therefrom shortly after the death of her husband."

The plaintiffs' attorney claims that the defendant's interest in the life estate was extinguished: (1) by desertion and subsequent remarriage; or (2) by abandonment of the premises; but we are unable to adopt either view.

[1] The testator made life tenants of husband and wife; the language used created a life tenancy in one as well as in the other, the husband by name, the defendant, by designation as "his wife," fixing her identity as firmly as if her individual name had been used instead of the words employed by the scrivener, and no other construction is possible from reading the whole will. The case is unique; nevertheless, the principles involved in its solution are well settled.

From the agreed facts it appears that the defendant deserted her husband and cotenant some 23 years prior to the assertion of her present claim to the premises, and that her husband thereupon, for the cause of desertion, divorced her.

[2] In the absence of a decree affecting her property rights in the divorce proceed-

ings her interest as a life tenant in the property involved in the suit remained unaffected by the decree of divorce. Such decree terminated the marriage relation. The property rights of the husband prior to the divorce became his individual property after the divorce, and the separate property of the wife became her individual property. As to conveyances to them both, each holds the legal title to one-half under such circumstances. 5 R. C. L. 862, 11 L. R. A. (N. S.) 103.

[3] The property rights of the parties are not affected by the decree unless they are brought before the court in some appropriate manner. *Id.* See *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500.

[4] As to remarriage, we are persuaded that, since the conveyance was to her as an individual, she had the right, divorce having been had, to remarry, and that such marriage did not affect her rights as a tenant for life, and cotenant with her former husband. Nor does her remarriage and resumption of possession accompanied by her second husband jeopardize her rights any more than the remarriage and occupancy of the property by her first husband and his second wife affected his rights. The terms of the will indicate no barrier to such act on the part of either, nor does the will prohibit the defendant taking possession the day her husband died, and, if unmarried, remarrying immediately. It is clear that anything lawful not prohibited by the will, the life tenant may legally do.

Abandonment:

[5] The same elements enter into the consideration of counsel's claim that the "defendant's life estate was extinguished by abandonment," and our conclusion is reached from a study of the same facts, and necessarily so. The defendant did abandon her husband and her marital relations, and intended to, but did she at the same time intend to abandon her property rights? That question must be answered clearly by the facts in the case, before the plaintiffs may prevail, and, as found in the claim to desertion and remarriage, we look in vain in the record to discover satisfactory evidence of an intention on her part to abandon her interest in the real estate. The plaintiffs insist that leaving the property in the sole possession of her husband for 23 years, and making no claim during the period, is conclusive upon the question of abandonment, and cite the following cases as decisive in favor of their position.

"Abandonment is the relinquishment of a right, the giving up of something to which one is entitled—it must be by the owner—without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing." *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054, 1058.

"To constitute an abandonment of a right there must be a clear, unequivocal, and decisive

act of the party, showing a determination not to have the benefit intended." *Banks v. Banks*, 77 N. C. 180.

"There must be not only an intention to abandon, but an actual abandonment." *Stevens v. Norfolk*, 42 Conn. 377; *Hickman v. Link*, 116 Mo. 123, 22 S. W. 472.

"A seisin once acquired is presumed to continue until it is shown that there has been an ouster or disseisin, or an abandonment." *Smith, Adm'r, v. Booth Bros. Hurricane Isle Granite Co.*, 112 Me. 297, 92 Atl. 103.

And we adopt the citations as authority here, and concur in the conclusions as being the settled law.

[8, 7] It is not questioned that abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Cyc. vol. 1, p. 4; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600. In determining whether one has abandoned his property or rights, the intention is the first and paramount inquiry; there can be no abandonment without the intention to abandon. 1 R. C. L. 5. An intention to abandon will not be presumed, and the burden of showing an abandonment rests upon the one who asserts it. 1 Cyc. 7. See *Adams v. Hodgkins*, 109 Me. 361, 84 Atl. 530, 42 L. R. A. (N. S.) 741; *Batchelder v. Robbins et al.*, 95 Me. 59, 49 Atl. 210; *McLellan v. McLellan*, 114 Me. 242, 95 Atl. 1025. It will not be said as matter of law that an absence from the land for any specified time amounts to an abandonment, even though such a fact might be strong evidence of abandonment. 1 R. C. L. 7, 135 Am. St. Rep. 903, note.

Nonuser is not of itself sufficient to show an abandonment of a right; nor will neglect for more than 20 years to assert a title to an undivided interest in land, by one who has a valid title, operate as an abandonment, where there is no adverse possession. 1 Cyc. p. 6; *Great Falls Co. v. Worster*, 15 N. H. 412; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Adams v. Hodgkins*, *supra*. Words and Phrases (2d Series) p. 8; 1 Cyc. 1975.

[8] Was there adverse possession? After divorce the former spouses may ordinarily, hold adversely to each other. 1 R. C. L. 756, and cases cited. Mr. Simmons, the husband, occupied the property just the same after the separation as before. He occupied the whole property in defendant's absence, as he had a right to do. Having the right to occupy the whole, what was there left to hold adversely, what part did he select and determine to hold in hostility to the defendant's rights? What could he add to his prior holding and right of occupancy?

It is difficult to see what new right or privilege he could assert or enjoy unless it were the right to live without the society of the defendant and that she had accorded

him. He made no claim even to additional rights, and performed no act which may be said to be in hostility to the defendant's title, except to secure a divorce and remarry, and these alone are not sufficient to establish adverse possession.

[9] It is well settled that a life tenant cannot, by his declaration, acts, or claims of a greater or different estate, make it adverse so as to enable himself or those claiming under him to invoke the statute. 1 Cyc. 1057, and cases cited.

[10] All statutes of limitations are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action; and to hold the bar of the statute could run against the title of a person so circumscribed would be subversive of justice, and would be to deprive such person of his estate without his day in court. *Metzler v. Miller*, 129 Ill. 630, 22 N. E. 529.

It is not questioned that one cotenant may oust the others, and set up an exclusive right of ownership in himself, and that an open, notorious, and hostile possession of this character for the statutory period will ripen into title as against the cotenants who were ousted. 1 R. C. L. 7. See *Soper v. Lawrence*, 98 Me. 277, 56 Atl. 908, 99 Am. St. Rep. 397, quoting *Richardson v. Richardson*, 72 Me. 409.

[11] In *Mansfield v. McGinniss*, 86 Me. 118, 29 Atl. 956, 41 Am. St. Rep. 532, an action under the statute by one tenant in common of an undivided tract of land against a cotenant for cutting trees upon the land, without giving the statute notice, the defendant claimed to have disseized the plaintiff, and thus to have acquired a title to the whole tract by an adverse possession for more than 20 years, the court say:

"As between cotenants, evidence of long continued, visible, uninterrupted and even exclusive occupation by one cotenant, is not enough to bar the rights of the other cotenants. There must be evidence from which an ouster, a putting out and a keeping out, of the other cotenants, can be inferred."

No such evidence appears in the case stated.

[12] It is therefore the opinion of the court that the defendant has not abandoned her rights as life tenant of the demanded premises, nor has she been deprived of the same by disseizin or adverse possession. It follows that the plaintiffs as remaindermen are not justified in asserting their claim upon the reasons set up, for the right of action of the remaindermen or reversioner does not accrue until the death of the tenant for life. 1 R. C. L. 743; *Hooper v. Leavitt*, 109 Me. 70, 82 Atl. 547.

Judgment for the defendant.

(257 Pa. 196)

HENSCHKE et al. v. MOORE et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. CONTRACTS §117(4, 5) — RESTRAINT OF TRADE — GENERAL OR PARTIAL RESTRAINT — VALIDITY.

In this state there is a distinction between contracts in general restraint of trade covering the entire country and those in partial restraint of trade covering only a small area; and contracts in general restraint of trade are void, while those in partial restraint of trade are valid if reasonable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 559, 560.]

2. CONTRACTS §116(7)—RESTRAINT OF TRADE — INVALIDITY.

A contract granting the exclusive right to manufacture and use a patented apparatus, and providing that upon surrender of license the licensee would not thereafter engage in manufacturing or selling the same or any competing material in the United States, was an unreasonable restraint of trade.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 552.]

3. CONTRACTS §116(1)—RESTRAINT OF TRADE — ENGAGING IN BUSINESS.

A contract which attempts to restrain a party from engaging in a business which has previously been open to him in common with the general public is unreasonable, and such restriction will not be enforced by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542, 543, 545, 546.]

4. CONTRACTS §117(8)—RESTRAINT OF TRADE — TIME.

Such contract was also unreasonable in that the restriction on the licensee, being unlimited as to time, extended the restraint farther than was necessary for the reasonable protection of the licensor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 566.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by Bruno Henschke and Karl Ersel, copartners doing business under the name of Haensel & Co., against Edgar B. Moore and others. Injunction awarded, and defendants appeal. Reversed.

Argued before BROWN, C. J., and POTTER, MOSCHISKER, FRAZER, and WAL-LING, JJ.

John G. Johnson and Charles H. Edmunds, both of Philadelphia, and M. H. Regensburg, for appellants. Henry J. Scott, of Philadelphia, for appellees.

POTTER, J. The form of the bill filed by complainants in this case indicates that they sought to restrain the infringement of certain letters patent of the United States granted to Oswald Hansel for an improvement in apparatus for feeding horsehair from a bundle to a wrapping device. If that were in fact the issue involved, we would be without jurisdiction to determine it, as the infringement of a patent is a question exclusively for

consideration by the federal courts. The real controversy here turned, however, upon the force of a contract entered into concerning the use to be made of certain machines embodying the said invention, and no rights are involved except such as arise out of the contract.

It appears that on February 21, 1913, Haensel & Co., the plaintiffs, entered into a written contract with the defendant Edgar B. Moore, "acting for himself and his undisclosed associates," whereby they granted to the said defendant, in consideration of his agreement to pay certain royalties, the sole and exclusive right to manufacture and use "an apparatus for feeding horsehair from a bundle to a wrapping device," which was protected by letters patent of the United States owned by plaintiffs. Provision was made for the cancellation or surrender of the license under certain circumstances, with a stipulation that in the event of cancellation or surrender "the licensee will not thereafter, either directly or indirectly, engage in the business of manufacturing or selling the same or any competing material in the United States." This statement is not clear. The license was for the use of a machine, and the language would naturally imply an engagement not to manufacture or sell any such machines, but it is conceded that what was intended was an engagement not to manufacture or sell horsehair yarn or thread similar to the product of the machine, or which would compete therewith. As thus understood, we have, then, a contract for a license to manufacture and use a machine, with a provision that, in case of surrender of the license, the licensee shall be prohibited from making or selling, not the machines which were protected by the patent, but any horsehair yarn which would compete with the product of the machine. The court below held that complainants were entitled to the relief they sought. Exceptions were dismissed, and a final decree entered by which the defendants were enjoined "until the 7th day of March, A. D. 1928 (the expiration of the patent), from making or selling, directly or indirectly, endless horsehair yarn or cloth made therefrom similar to that under the patent of the complainants, as set forth in the bill of complainants filed in this cause, and the manufacture and sale of any competing endless hair yarn and cloth made therefrom." An accounting for profits arising out of the manufacture and sale of hair yarn or cloth made therefrom since September 30, 1914, was also ordered. Defendants have appealed, and their counsel contend that the covenant by which the licensee was bound, in the event of the surrender of the license, not to manufacture or sell anywhere in the United States at any time material similar to that which was the product of the machine described in the patent was a contract in re-

straint of trade, which a court of equity will not enforce. In a late text-book discussion of the subject, 6 *Ruling Case Law* (1915) 785, it is said:

"The doctrine relating to contracts in restraint of trade appears to have undergone distinctive stages of transformation or development. According to the early common law of England, an agreement in restraint of a man's right to exercise his trade or calling was void as against public policy. * * * Although the courts continued to treat contracts in general or total restraint of trade as void, they began to enforce contracts in partial restraint of trade provided such contracts were not unreasonable. The classification of contracts into those which are in general restraint of trade and those which are in partial restraint of trade seems to have been made for the purpose of distinguishing between restrictive agreements covering the entire country and restrictive agreements covering a small area. This distinction is still adhered to in some jurisdictions. But, as will be seen, many of the courts have, in view of changed conditions, abandoned the rule that contracts in general restraint of trade are necessarily void. In its place they have substituted the more flexible rule that contracts in unreasonable restraint of trade are void, while contracts which impose a reasonable restraint upon trade are valid. The tendency of modern decisions is to adopt this rule as the one governing the subject."

[1] Our Pennsylvania cases follow the distinction between contracts in general restraint of trade and those in partial restraint. In the former case we have held the restriction to be void, and in the latter that it might be sustained if reasonable. The decision in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088, 105 Am. St. Rep. 812, 2 Ann. Cas. 951, was cited by the court below, and is relied upon by both parties to this appeal, as defining the present state of the law upon the subject. It was there said (210 Pa. page 302, 59 Atl. page 1093 [105 Am. St. Rep. 812, 2 Ann. Cas. 951]):

"When a contract is presented which in some degree restrains trade, we do not at once decide that it is void as against public policy, but we go further and inquire, is it limited as to space or time, and is it reasonable in its nature?"

Mr. Justice Dean then called attention to the facts that the contract there under consideration was limited as to time, ten years, limited as to space, the immediate territory adjacent to three navigable rivers, and their tributaries, and related to the sale of the good will of a business. He expressly gave as one reason for enforcing the contract that "the time was not an indefinite period as in some of the cases."

[2] In the case at bar the complainants do not expressly aver a breach of the covenant contained in the seventh paragraph of the contract, in which the licensee agrees that in the event of the surrender of the license he will not "engage in the business of selling the same or any competing material in the United States." The only sentence in the bill that can be construed to refer to that covenant is the averment that "respondents are continu-

ing to take orders for and are manufacturing and have delivered large quantities of cloth containing said hair yarn of the exact appearance as that made and sold heretofore by respondents under your orator's patent." Yet the court below, without reference to the prayers of the bill that infringement of plaintiffs' patent be restrained, and for an account and award of damages for such infringement, has considered the bill as if it had been filed to enforce the contract not to manufacture and sell material similar to that which was to be produced on the machine described in the patent. The licensee was entirely within his rights in surrendering the license. The testimony shows that the machines described in the complainants' patent would not produce hair yarn which was satisfactory to defendants. That being the case, was the restriction reasonable which prevented the licensee from making hair yarn upon some other machine, after surrendering his license under complainants' patent? We are clearly of the opinion that it was not. Hair yarn, and hair cloth made therefrom, were at the time old and well-known products long in public use. The license granted by complainants was merely for the use of a machine, and it did not apply at all to the hair yarn which was the product of the machine. The license covered only one method of making hair yarn. Other methods which did not infringe the claims of the patent were open to the public. For the use which was made of the machine complainants were compensated by the royalty. When the license was surrendered, complainants received everything to which they were entitled. They had their patent then in their own hands and could use it themselves, or license others to use it. There was nothing to justify them in seeking to restrain defendants from engaging in the business of manufacturing hair yarn by the use of any machine which did not infringe their patent. This transaction is not properly to be compared with the sale of a business in which there is an agreement upon the part of the seller not to compete with the purchaser for a limited term. To do so in such a case would be a breach of faith, as it would depreciate the value of the property or business sold. A case analogous to the present one would be that of the sale of a business in consideration of the payment of a yearly sum as compensation, coupled with a provision that, in case the purchaser exercised his right to discontinue the business, he should never be allowed to engage in the same or a similar business at any time or any place. Such a contract in restraint of trade would be clearly unreasonable. So in the present case is the attempt to restrain defendants from doing something which they were at perfect liberty to do before the granting of the license, that is, manufacture hair yarn by the use of a machine which does not infringe

plaintiffs' patent. Any restriction which prevents them from doing the same thing after the surrender of the license which they in common with the public were at liberty to do before taking a license for the use of plaintiffs' machine is palpably unreasonable. Such a requirement is not at all necessary for the proper protection of the rights of the plaintiffs, and it is oppressive to defendants.

[3] The restriction here is also unreasonable in that it is unlimited as to time. The court below endeavored to overcome this fault by enjoining defendants only during the balance of the term of plaintiffs' patent. But here again we must repeat that the patent, which was for a machine, did not apply to the subject-matter of the restriction, which was the manufacture and sale of hair yarn. The only thing to which plaintiffs had a right to protection was the subject-matter of their patent, and when the restriction went beyond that, and attempted to restrain defendants from engaging in the manufacture and sale of haircloth, a business which had been previously open to them in common with the general public, the restraint was unreasonable. In *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (87 U. S.) 64, 22 L. Ed. 315, Mr. Justice Bradley said:

"It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

In *Union Strawboard Company v. Bonfield*, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346, the contract was in connection with the sale of a business, and a reasonable restriction was justified, but it was there said:

"The courts will not enforce any contract which excludes a party generally from following any lawful trade or business beneficial to the community and to him."

In *Lanzit v. J. W. Sefton Mfg. Co.*, 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171,

which also involved the sale of a business, it was held that a contract in restraint of trade throughout the United States was unreasonable and void, and also that it could not be divided so as to apply to a single state only, as such a contract would also be void.

[4] In the case at bar the contract in restraint of trade, being unlimited as to time, and as to space extending over the entire country, must be regarded as extending the restraint further than is necessary for the reasonable protection of the covenantee. Reference to the nature and subject-matter of the restriction makes its unreasonableness more clearly apparent. As we have already indicated, payment of the royalty was full compensation for the use of the patent, and as the plaintiffs contributed nothing but the patent, there was no consideration whatever to support that portion of the agreement which bound the licensee after the surrender of the license to refrain from the manufacture, by methods which did not infringe plaintiffs' patent, of an article of commerce in common use. Such a restriction upon the rights of the licensee was in its very nature unreasonable and void.

Nor is there any merit in the suggestion that plaintiffs were entitled to relief in order to protect trade secrets. The contract had no relation in any way to trade secrets. It related solely to the use of a patented machine, the specifications of which are a matter of public knowledge and record. To secure a valid patent, the law requires the specification to be plain and clear, and to describe the invention in such a manner as to enable the public to practice it from the specification alone. There was therefore no room in this case for the addition of any trade secrets to make the alleged invention workable.

Holding, as we do, that the contract in question is an illegal restraint of trade, and cannot be enforced in a court of equity, the question whether the relief sought should be confined to the single defendant Edgar B. Moore need not be considered.

Of the 44 assignments of error, all except the last one are to the dismissal of various exceptions filed by defendants to the findings of fact and conclusions of law of the trial judge. Without disposing specifically of these assignments, it is sufficient to say that the forty-fourth, which is to the final decree, is sustained, and the decree of the court below is reversed, at the cost of the appellees.

(257 Pa. 206)

HENSCHKE et al. v. MOORE et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Bruno Henschke and Karl Ersel, copartners doing business under the name of Haensel & Co., against Edgar B. Moore and others, doing business under the name of E. B. Moore & Co. From a decree awarding an injunction, defendant H. R. Sack appeals. Reversed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Julius C. Levi, of Philadelphia, for appellant. Henry J. Scott, of Philadelphia, for appellees.

POTTER, J. This is a separate appeal by H. R. Sack, from the same decree which was brought before us in the appeal at No. 297, January term, 1916, 101 Atl. 308. The opinion which was there filed is conclusive of the only questions which call for consideration here. For the reasons therein set forth, the decree of the court below is reversed, at the cost of the appellees.

(257 Pa. 81)

In re **TABER'S ESTATE.**Appeal of **GIRARD TRUST CO.**

(Supreme Court of Pennsylvania. March 12, 1917.)

TAXATION @—878(1) — **INHERITANCE TAX—PROPERTY SUBJECT.**

Where the collateral heirs of a decedent contested her will and obtained a settlement whereby they received more than two-thirds of the estate and whereby it was agreed that a certain fee be paid to counsel for the proponent, the amount received in settlement, including the amount of its fee, was subject to a collateral inheritance tax.

[For other cases, see Taxation, Cent.Dig. § 1700]

Appeal from Orphans' Court; Philadelphia County.

The Girard Trust Company, executor of the estate of Augusta Taber, deceased, appeals from a decree dismissing exceptions to adjudication in the estate. Affirmed.

Argued before BROWN, C. J., and MES-TREZAT, POTTER, STEWART, and FRAZER, JJ.

Franklin S. Edmonds and Howard Schell Baker, both of Philadelphia, for appellant. Edwin S. Ward, of Philadelphia, and Francis Shunk Brown, Atty. Gen., for the Commonwealth.

BROWN, C. J. Augusta Taber died January 15, 1909, unmarried and without issue. Soon after her death application was made to the register of wills of Philadelphia county for admission to probate of what purported to be her last will and certain codicils thereto, in which the Girard Trust Company was named as executor. First cousins of the decedent objected to the probate of these papers, on the ground that she was of unsound mind when she executed them, and an issue devisavit vel non was directed to the

court of common pleas No. 5 of the county of Philadelphia. Shortly before the date fixed for its trial the parties interested in the contest agreed, in writing, to a compromise, by the terms of which the contestants were to receive \$60,589.68, or more than two-thirds of the estate, which had been bequeathed largely to charities. In addition to this it was agreed that the sum of \$7,500 should be paid to counsel as compensation for professional services rendered to the proponent of the will. In pursuance of this agreement a verdict was taken sustaining it, and letters testamentary were duly issued to the appellant. At the audit of its account, which showed that the estate amounted to \$89,915.37, the commonwealth claimed collateral inheritance tax on the sum of \$60,589.68 to be paid to the contestants of the will and codicils, as well as on the sum of \$7,500 to be paid as counsel fees under the terms of the agreement of settlement. The auditing judge allowed both of these claims, and, from the decree of the court in banc sustaining him, the executor of the testatrix has appealed.

As Augusta Taber was unmarried, and left neither father nor mother nor lineal descendants, there became due to the commonwealth a tax "of \$5 on every hundred dollars of the clear value" of her estate. No matter how it passed—whether by will or under the intestate laws—it was liable to this tax. If there had been no contest over the will, the tax would have been payable; if those who contested it had succeeded in setting it aside, they would have taken under the intestate laws, but the tax would have been payable before any one of them could have received a dollar from the estate. In the face of this, the contestants of the will contend that, because the estate has been partitioned by them and the legatees under an agreement as to how it shall be divided, the portion allotted to them—more than two-thirds of it—shall be exempt from the payment of collateral inheritance tax. If they had received from the testatrix legacies amounting to \$60,589.68, would they have pretended that the commonwealth had no claim for collateral inheritance tax on so much of her estate? Or, if that sum had been coming to them under the intestate laws, would they have questioned its liability to this tax? Surely not; and yet they seek to escape the tax because an amicable division of the estate has been made by them and the beneficiaries named in the will. The estate which has been so partitioned is the one of which Augusta Taber died seised, but of this her cousins seem to be blind, for, if they would see, they would know that the act of May 6, 1897 (P. L. 79), in plainest terms, makes the clear value of the whole estate liable to collateral inheritance tax. The process by which the attempt is made to prevent the state from getting what is so manifestly due

to it is as offensive to reason as it is to the statute.

It is hardly needful to say that the three cases upon which reliance seems to be placed as authorities for disallowing the claim of the commonwealth for the tax on \$60,589.68 are without application. In *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353, the sum which was held to be exempt from collateral inheritance tax had never been received by the legatees, but was paid by the executor directly to a son of the testator in settling with him when he withdrew a contest over the will, the success of which would have given him the entire estate of his father, free from collateral inheritance tax, for he was in the exempt class under the act of 1887. If the whole of his father's estate would have been exempt from taxation had it passed to the son, either by will or under the intestate laws, the same was true of any portion of it which he took in settlement of a claim which, in effect, was that of a sole lineal descendant of a father who had died intestate. This is what that case decided. In *Kerr's Estate*, 159 Pa. 512, 28 Atl. 354, Elizabeth S. Palmer left all of her property by will to Mary Jane Kerr, a friend. Mrs. Palmer's heirs at law and next of kin began proceedings to contest the will. Mrs. Kerr died during their pendency, and the contest was subsequently compromised by her heirs at law and next of kin entering into an agreement by which they withdrew all claim to Mrs. Palmer's personalty and to the one-half of her realty. In assessing the collateral inheritance tax upon Mrs. Kerr's estate the register of wills declined to make any deduction by reason of what had been surrendered in the Palmer estate. The collateral inheritance tax had been paid upon the entire estate of Mrs. Palmer, and only so much of it as remained after the recognition of the rights of those who claimed under the intestate laws became the estate of Mary Jane Kerr, her beneficiary. It was therefore held that no more than this was taxable as her estate. The amount held to be exempt from tax in *Hawley's Estate*, 214 Pa. 525, 63 Atl. 1021, 6 Ann. Cas. 572, was the sum paid to the employes of the decedent, who insisted that his will, the validity of which his heirs denied, contained a provision in the nature of a contract. They resisted the attempt to set the instrument aside, and a settlement was made with them as creditors, after the orphans' court had determined what amount was due to each of them. In holding that what they so received was exempt from tax, Mr. Justice Fell said:

"They claimed that the writing was a valid will and that the provision for their benefit was in discharge of an obligation of the decedent. The heirs denied the validity of the writing as a will because of the want of testamentary capacity. A settlement was made in which the employes were treated as creditors and allowed a part of their demands. This was clearly a compromise of a doubtful right to avoid litigation,

by which the heirs parted with a portion of the estate in the purchase of peace. The employes took nothing under the will, and the money paid them was not subject to tax, unless the whole arrangement was collusive."

[2] As to the liability to tax of the \$7,500 to be paid to counsel, it need only be said that the parties to the agreement as to how the estate should be divided had no more right to set that sum aside for the purpose stated, at the expense of the commonwealth, than they had to take \$60,589.68 from the estate, exempt from collateral inheritance tax. An executor is not bound to defend his testator's will. If he undertakes to do so, it must be as the agent and in the interest of those benefited by his action. He must look to them for expenses incurred in the contest over the will, and may not charge the same to the estate unless it is benefited by the proceeding. *Yerkes's Appeal*, 99 Pa. 401. No benefit resulted to the estate of the testatrix in the case before us through the proceeding to contest her will; but it did largely benefit her next of kin.

Appeal dismissed, and decree affirmed at the costs of the appellant.

(257 Pa. 88)

WEIL et al. v. NORTHWESTERN PA.
RY. CO.

(Supreme Court of Pennsylvania. March 12, 1917.)

RAILROADS §195(2) — BONDHOLDERS' COMMITTEE—SERVICE OF ATTORNEY—LIABILITY OF CORPORATION.

In a suit for counsel fees for services rendered a bondholders' committee which had effected a reorganization of a railway, where it appeared that the contract for services was the contract of the committee, and not of the railway, and where the jury found that the contract had not been subsequently adopted by the railway, plaintiffs could not recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 656½.]

Appeal from Court of Common Pleas, Crawford County.

Assumpsit for counsel fees by A. Leo Weil, Charles M. Thorp, and S. Leo Ruslander, partners doing business under the firm name of Weil & Thorp, against the Northwestern Pennsylvania Railway Company. Judgment for defendant, motions for new trial and for judgment n. o. v. denied, and plaintiffs appeal. Affirmed.

The following is the opinion of Prather, P. J., in the court below:

"Assumpsit for counsel fees. From the record it appeared that the defendant company was in effect the result of the merger of two street railway companies. For the purpose of effecting such merger and protecting their respective bondholders and lien creditors, on December 13, 1910, a written agreement was entered into by a so-called bondholders' protective committee, of the first part, and George A. Gaston, of the second part, in which it was recited that the committee had come into possession of a large amount of bonds of the two companies to be

merged and that a reorganization was in contemplation. Under the agreement the committee was to cause foreclosure proceedings to be prosecuted and become purchasers of the property, franchises and assets of the insolvent traction companies. The committee agreed to convey and transfer all the property and assets of the old companies to the new company free and clear of all liens, incumbrances, and debts, and the party of the second part agreed to purchase from the committee bonds of the new company in a large amount. Foreclosure proceedings were duly had, and on January 14, 1911, the committee became the purchasers of the property and assets and received a deed therefor on February 7, 1911. On February 24, 1911, the new organization was effected under the corporate name of the Northwestern Pennsylvania Railway Company, and on March 7, 1911, final transfer of all assets was made to the new company.

On December 18, 1910, the bondholders' protective committee engaged Weil & Thorp as attorneys to effect the incorporation of the new company. The professional services were rendered and the advances made by plaintiff at the request of and by the direction of the persons who composed the committee, all of whom, with the exception of plaintiffs and one other, became directors and officers of the defendant corporation upon its organization.

The facts were undisputed that the plaintiffs were employed by the bondholders' protective committee to perform the services declared upon, and that a large part, if not the larger part, of such services were performed by virtue of that employment for the bondholders' committee prior to the date of defendant company's formal incorporation; that defendant company never took any action recognizing or adopting such services as incurring any liability to the company; that the terms of the bondholders' committee contract wherein it undertook to create or organize a corporation were known to plaintiffs at the inception of their employment and were known to the company from its organization; and that the bondholders' committee was still in full life and activity under said written agreement at the time of the commencement of the present action.

Verdict for defendant and judgment thereon. Plaintiffs appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRA-
ZER, JJ.

L. Pearson Scott, of Pittsburgh, and George F. Davenport, of Meadville, for appellants. Frank J. Thomas, of Meadville, and C. K. Fauver, for appellee.

PER CURIAM. In its opinion discharging the rules for a new trial and for judgment for the plaintiffs non obstante veredicto, the correct conclusion of the learned court below was that the defendant was entitled to binding instructions, for the reasons: (1) The contract sued upon was not the defendant's contract and there was not sufficient evidence of its adoption of the same; (2) the bondholders' committee in its written agreement undertook to create the defendant company, and all the circumstances repel any inference that services were performed upon the credit of the company; and (3) the plaintiffs were employed by the bondholders' committee before the company was created, and the plead-

ings should have averred such employment and a subsequent adoption of it by the defendant. Though the plaintiffs failed to aver any such adoption, the question of its adoption was submitted to the jury, whose finding was that it had not been adopted by the defendant.

The assignments of error are therefore overruled, and the judgment is affirmed.

(257 Pa. 132)

FISCHER v. TAYLOR.

(Supreme Court of Pennsylvania. March 12, 1917.)

FRAUD \Leftrightarrow 64(1) — ACTION — EVIDENCE — NON-SUIT.

In an action in deceit for damages by reason of defendant's fraudulent representations as to the character and output of a mine inducing plaintiff to buy certain mining stock, a nonsuit was properly entered, where it did not appear that plaintiff sustained any damage by reason of the purchase of the stock or that defendant intentionally deceived her by statements which he knew were not true or which were so reckless that an inference could be drawn that he knew they could not be true.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67, 71.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for deceit by Mary F. Fischer against William R. Taylor. From a judgment refusing to take off a nonsuit, plaintiff appeals. Affirmed.

From the record it appeared that plaintiff sued to recover \$10,000 as damages by reason of the sale to her by the defendant of 1,200 shares of stock of the Guanacavi Tunnel Company at \$5 a share. Plaintiff testified defendant told her the company owned and operated a fully developed gold mine, with ore running from \$2 to \$21 a ton; that it cost \$2 to work and mill, and there would be a net profit of \$2 a ton; that there were 22,500,000 tons of ore thoroughly explored and blocked out that would yield the company \$50,000,000; that the ore would run \$4 a ton on the average, and it would cost \$2 to work it, and there would be \$2 profit; that it was working two shifts of people, and there was new machinery and a new stamping mill, and a larger mill had been bought and was on its way to Mexico to be put in, and there were thousands of tons of ore on the dump outside the shaft and outside of the tunnel; that these veins alone that were really blocked out and thoroughly explored would allow the company to run a lifetime, at least; the mines would run a lifetime at a large profit. Plaintiff also stated defendant gave her certain pamphlets and told her the matters in the pamphlets were true facts; that he knew them to be true facts of his own knowledge.

There was no testimony that any of these alleged representations were untrue except the testimony of one witness that the mine was not fully developed. It was not shown

that the defendant knew that the representations which it was alleged were made were untrue. There was no testimony to show what the real value of the stock which the plaintiff purchased was at the time she purchased it. Other facts appear in the opinion of the Supreme Court.

The trial judge entered a compulsory nonsuit, which the court in banc subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Trevor T. Matthews, of Philadelphia, for appellant. William T. Connor and John R. K. Scott, both of Philadelphia, for appellee.

PER CURIAM. This is an action in deceit for the recovery of damages which the appellant avers she sustained by reason of fraud practiced upon her by the appellee in inducing her to buy certain mining stock. From the refusal of the court to take off the nonsuit entered when the plaintiff closed her case we have this appeal. Our examination of the testimony has satisfied us that the nonsuit was properly entered, and the action of the court below in refusing to take it off is sustained for the following reasons given by the learned trial judge in directing it to be entered:

"We do not know but what Mrs. Fischer may have sold the stock before the company came to disaster, if it did come to disaster. We do not know anything about it. There is no evidence that she sustained any damage at all, but the thing which influences me in granting a nonsuit is that there is no evidence that Mr. Taylor deceived Mrs. Fischer intentionally, that is to say, that he said something which he knew was not true, or that he said something so wild and extravagant and reckless that an inference could be drawn that he knew it could not be true."

Judgment affirmed.

(257 Pa. 113)

In re CHAMBERLAIN'S ESTATE.

Appeal of DOOLING.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. CONVERSION ¶15(1) — REALTY — REQUISITES.

To work an equitable conversion of realty there must be either a positive direction to sell or an absolute necessity therefor in order to execute the will, or such a blending of real and personal estate in the will as to clearly show that testator intended to create a fund out of both real and personal estate and to bequeath the fund as money.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28, 29, 33-35, 52.]

2. CONVERSION ¶16(1) — DISCRETIONARY POWER.

A bare power of conversion, such as a discretionary power, will not work a conversion until exercised.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 38.]

3. CONVERSION ¶15(1)—BLENDING OF REAL AND PERSONAL ESTATE.

The mere blending of real and personal estate without a clear intent to create a common fund and to bequeath it as money will not constitute a conversion.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28, 29, 33-35, 52.]

4. TAXATION ¶867(1)—INHERITANCE TAX—CONVERSION.

A nonresident testator owning personal property, and owning real estate in the state, bequeathed legacies and made a bequest to a charitable institution and also made it his residuary legatee, and provided that if the estate should be insufficient to meet the bequests, the deficiency should be deducted from the charitable bequest, and gave his executor power to sell realty in his discretion and to execute deeds therefor. *Held*, that the will did not work a conversion of the realty, so that it was liable to a collateral inheritance tax in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1631.]

Appeal from Orphans' Court, Philadelphia County.

John T. Dooling, executor of the will of Leander T. Chamberlain, deceased, appeals from a decree dismissing an appeal from a decision of the register of wills assessing a collateral inheritance tax upon the real estate of the decedent. Appeal dismissed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Henry B. Patton and Howard Lewis Fussell, both of Philadelphia, for appellant. William M. Boenning, of Philadelphia, for the Commonwealth.

WALLING, J. The question in this case is, Does testator's will work an equitable conversion of his real estate? Dr. Leander T. Chamberlain, a clergyman of the city of New York, made his last will in 1909, and died in 1913, and thereafter the will was duly probated. It was drawn by testator, contains 14 paragraphs, and provides for the payment of his debts and funeral expenses and for the care of his burial lot, bequeaths a niece all his personal chattels, makes bequests aggregating \$65,000, to certain named religious, benevolent, and scientific organizations; also gives to a certain institute, located in Turkey, which he had projected and which was under his fostering care, a bequest of \$100,000, and makes the institute his residuary legatee. The will further provides that, should testator's estate prove insufficient to meet all of the devises and bequests, the deficiency to be deducted from the \$100,000 bequest.

When the will was made the testator's personal estate amounted to about \$30,000, and at his death to about \$10,000; and he was the owner of real estate situate in Colorado, Massachusetts, and Pennsylvania. Dr. Chamberlain's income was sufficient to meet his personal expenses, and he also derived a

small revenue from the sale of books of which he was the author. Prior to the making of his will, and as a result of the San Francisco fire, he had suffered financial losses from shrinkage of the value of stocks held by him in certain fire insurance companies. His estate was derived from his wife, the late Frances Lea Chamberlain, who died in 1894; and his several charitable bequests were given largely to perpetuate her memory, and to the institutions in which she had shown special interest. John T. Dooling, Esq., of New York, was made sole executor of the will; and authority to sell real estate was conferred upon him in the following language:

"And I hereby grant to and confer on the said John T. Dooling, full power to sell any or all of my real estate, either at public or private sale, at such time or times, upon such terms and for such price or prices, as to him shall seem best, and upon such sale or sales to execute and deliver to the purchaser or purchasers deeds or conveyances in fee simple or any less estate as the case may be."

[1, 2] The real estate in Pennsylvania was appraised, for the purpose of collateral inheritance tax, at the sum of \$62,210; but, as testator was a nonresident, it is not liable to such tax unless it retains its character as real estate. The learned auditing judge, and orphans' court, held there was no conversion, and that the real estate as such was liable for the tax, from which the executor took this appeal.

In Hunt's Appeal, 105 Pa. 128, 141, Mr. Justice Paxson, speaking for this court, says:

"In order to work a conversion, there must be either: First, a positive direction to sell; or second, an absolute necessity to sell in order to execute the will; or third, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

Here there is a discretionary power of sale, but no positive direction to sell. A bare power of sale, such as a discretionary power, will not work a conversion until exercised. Peterson's Appeal, 88 Pa. 397; Sheridan v. Sheridan, 136 Pa. 14, 19 Atl. 1068; Darlington v. Darlington, 160 Pa. 65, 28 Atl. 503. And, as the residuary legatee could elect to take the real estate as such and pay the pecuniary legacies, there might be no absolute necessity to sell in order to execute the will here in question.

[3] Mere blending of real and personal estate without a clear and indubitable intent to create a common fund and bequeath it as money will not constitute a conversion. Lindley's Appeal, 102 Pa. 235. Such blending will create a charge upon the land, but to produce a conversion there must also be an intent to bequeath the fund so created as money. As was said by Judge Penrose:

"The question of conversion is to be determined from the will itself, and is not affected by the accidental fact that the personal estate may

prove insufficient for the payment of legacies." Curry's Estate, 19 Phila. 92.

Conversion is a matter of intention, and it must have been in the mind of the testator when the will was made. The law seems to be that, "A necessity to sell real estate which was not foreseen by the testator will not work a conversion."

[4] The provision in the will as to the abatement of the \$100,000 bequest in effect makes it a part of the residuary estate; and testator may have anticipated that his personal estate would ultimately prove sufficient to meet the other legacies. In fact such personal estate had been much larger than it was when the will was made. Dr. Chamberlain may have intended to dispose of parts of his real estate in his lifetime, as in fact he endeavored to do. There may also have been other reasons why he anticipated that his personal estate would be increased before his death. This case is not ruled by Vanuxem's Estate, 212 Pa. 815, 61 Atl. 876, 1 L. R. A. (N. S.) 400, for there the sale was expressly authorized for the purpose "of administration, distribution or otherwise," language not found in the will of Dr. Chamberlain; as therein no reason or object is expressed for the discretionary power of sale. The law does not favor a conversion, the presumption is against it, and in our opinion the language of the will in question does not work a conversion of the real estate.

The assignments of error are overruled, and the appeal is dismissed at the costs of testator's estate.

(267 Pa. 153)

COSMOS BUILDING & LOAN ASS'N v. COURTENAY.

(Supreme Court of Pennsylvania. March 12, 1917.)

JUDGMENT ~~¶~~162(4) — DISCHARGE—INSUFFICIENT AFFIDAVIT OF DEFENSE.

A rule to show cause why a judgment entered for want of a sufficient affidavit of defense should not be opened was properly discharged, where the testimony in support of the petition for relief was insufficient to sustain its averments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 322.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Cosmos Building & Loan Association against Patrick J. Courtenay. Judgment discharging a rule to open judgment for want of a sufficient affidavit of defense discharged, and defendant appeals. Dismissed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

R. H. Locke, of Philadelphia, for appellant. David Bortin, Jacob Singer, and Emanuel Furth, all of Philadelphia, for appellee.

PER CURIAM. The judgment in this case was entered for want of a sufficient affidavit of defense. Shortly after it was entered a rule was granted, upon the application of defendant, to show cause why it should not be opened for reasons set forth in his petition for relief from it. The burden was upon him to support the averments of fact which he made in asking that the judgment be opened, and to negative the averments of fact contained in the answer to his petition. After a very careful review of what he showed in support of his averments, the learned court below concluded that they had not been supported by sufficient evidence, and the rule to show cause was discharged. We concur in this conclusion, and the appeal is dismissed at appellant's costs.

(257 Pa. 155)

In re VAN BEIL'S ESTATE. In re OTTO'S ESTATE. Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. March 12, 1917.)

TAXATION \Leftrightarrow 895(6) — **INHERITANCE TAX — STOCKS AND BONDS—DEDUCTION.**

The amounts paid as a New Jersey transfer tax on stocks and bonds should be deducted in appraising the clear value of an estate subject to collateral inheritance tax in this state, where such transfer tax is a charge upon the stocks and bonds, and the value thereof is reduced by the amount of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1719.]

Appeal from Orphans' Court, Philadelphia County.

Appeals by the Commonwealth from decree affirming appraisements of the register of wills for purpose of settling collateral inheritance taxes in the estate of Mary Van Bell, deceased, and *In re Estate of Eliza Otto*, deceased. Dismissed.

Argued before **BROWN, C. J.**, and **MESTREZAT, POTTER, FRAZER, and WALLING, JJ.**

In Van Beil's Estate:

John Hyatt Naylor, Special Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth. R. W. Archbald, Jr., of Philadelphia, for appellee.

In Otto's Estate:

H. Horace Dawson, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth. Howard H. Yocum, of Philadelphia, for appellees.

PER CURIAM. These two appeals were argued together. The contention of the commonwealth in each of them is that, in appraising the clear value of an estate subject to collateral inheritance tax in this state, the sums paid as New Jersey transfer tax upon stocks and bonds should not be deducted. Each of the learned courts below held such deduction proper, and each appeal is

dismissed with costs upon the following from the opinion of the president judge of the orphans' court of Montgomery county, which is in accord with the view of the orphans' court of the county of Philadelphia:

"The collateral inheritance tax imposed by our state is upon the clear value of the property or estate passing to the legatee or devisee. The transfer tax of New Jersey is made a charge on the stocks of its corporations belonging to a resident or nonresident passing by will or intestate law, which must be paid before they can be transferred by the executor or administrator. The value of the stock is reduced by the amount of the tax which the executor or administrator must pay. Its net worth passes to those who are entitled to the estate under the will of this testator. We conclude that the transfer tax of New Jersey, being a charge imposed upon the stocks of corporations of that state owned by the decedent, a tax upon the property, necessary to be paid by the executors in order to reduce the same to possession for the purposes of administration and distribution, the amount thereof was properly allowed by the appraiser in finding the net value of the estate liable for collateral inheritance tax."

(257 Pa. 86)

WILSON v. MITTON.

(Supreme Court of Pennsylvania. March 12, 1917.)

MUNICIPAL CORPORATIONS \Leftrightarrow 706(5)—**COLLISION IN STREET—QUESTION FOR JURY.**

In trespass for damages for personal injury when struck by defendant's horse while endeavoring to cross the street, evidence held to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by May Wilson against John F. Mitton, to recover damages for personal injury. Judgment for plaintiff, and defendant appeals. Affirmed.

From the record it appeared that on April 3, 1915, about 11 a. m., the plaintiff, a woman 36 years of age, was walking north on the east side of Twelfth street, in the city of Philadelphia. She intended to cross Market street, and when she came to the south curb of Market street at the east side of Twelfth street, she stopped on the curb a few minutes until she saw the way was clear. She saw a west-bound car standing on the northerly side of Market street and a south-bound Twelfth street car at the regular stopping place on Twelfth street north of Market street. She waited until the Twelfth street car left the stopping place and began to cross Market street. The highway of Market street at this point is 62 feet wide. At the time the car left this point she noticed a wagon going south in the easterly part of the highway of Twelfth street alongside of the car. Under the traffic regulations in Philadelphia the traffic moves southward only, on Twelfth street, and, when it is moving, pedestrians on the crosswalks are allowed to cross north and

south across Market street at the east and west sides of Twelfth street. While the south-bound traffic is moving on Twelfth street, the east and west-bound traffic on Market street is stopped entirely. The plaintiff, observing that other people were beginning to cross Twelfth street, and seeing nothing coming east or west, proceeded. She was holding an umbrella over her right shoulder, which did not interfere with her view. She was walking directly on the crosswalk. When she came to the south-bound track she looked about again and then saw that the horse had suddenly been turned from its southerly course into an easterly course and was directly upon her. She was knocked down by the horse and severely injured. It was snowing at the time. Verdict for plaintiff for \$3,450, and judgment thereon. Defendant appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRAZ-
ER, JJ.

Winfield W. Crawford and Robert P. Shick,
both of Philadelphia, for appellant. Victor
Frey and Augustus Trask Ashton, both of
Philadelphia, for appellee.

PER CURIAM. This is a close case, and the jury might very fairly have found in favor of the defendant, not only on the question of the alleged negligence of his driver, but also on the contributory negligence of the plaintiff. We are of the opinion, however, after an examination of all the testimony, that both of these questions were for the jury, and, finding nothing in any of the assignments of error calling for a reversal of the judgment, it is affirmed.

(257 Pa. 157)

WASHINGTON v. GULF REFINING CO.
(Supreme Court of Pennsylvania. March 12,
1917.)

**MUNICIPAL CORPORATIONS § 706(6, 7)—COL-
LISION OF AUTOMOBILES — QUESTION FOR
JURY—NEGLIGENCE AND CONTRIBUTORY NEGLI-
GENCE.**

In action by employé of gas and electric company for personal injury from a collision between its auto truck in which he was going to a fire and defendant's auto truck coming from the opposite direction, *held*, on the evidence, that defendant's negligence and plaintiff's contributory negligence were questions for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Court of Common Pleas,
Montgomery County.

Trespass by Schuyler L. Washington against the Gulf Refining Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared that the plaintiff was an employé of the Suburban Gas & Electric Com-

pany, and on October 27, 1914, sustained an injury to his leg while riding in one of the company's small automobile trucks to render assistance at a fire. There was one seat on the truck, and this was too small for three men to sit on comfortably and leave room for the driver to operate the car. Plaintiff, who was the last of the three men to get on the truck, first sat partly on the center of the seat between the driver and the other occupant of the car and partly on the latter's lap. There was a canvas curtain on the front of the car with mica squares in front on a line with the driver's eyes. Plaintiff testified that from his elevated position on the seat his head was too high for him to see through the mica square in the curtain, and as it was necessary for him to be on the lookout, as the exact location of the fire was not known, he assumed a seat on the floor of the truck with his legs hanging over the ledge of the body of the car, but not extending out as far as the wheels. His legs were sufficiently far from the front wheel and axle that had the wheel turned against the body of the car it could not have touched his legs or feet.

The defendant's large oil tank truck approached the gas company's truck from the opposite direction, and, although it was 6 o'clock and dark, plaintiff and his companions noticed the defendant's truck when the two cars were 500 feet apart. Although the evidence was undisputed to the effect that the small truck approached on its right side of the highway and gave ample room for the large truck to pass, a collision occurred between the two machines, the left-hind wheel of the defendant's truck striking the hub cap of the left front wheel of the small truck, forcing the front axle of the latter from its fastenings and pushing it back so that the wheel or axle pressed the plaintiff's leg against the body of the small truck seriously injuring it.

Plaintiff's witnesses testified that at the time of the collision their truck was standing still, while defendant's witnesses declared that it was in motion and going at the rate of 15 or 20 miles an hour, and that the accident occurred as a result of the small truck turning suddenly to its right before the two cars had completely cleared each other.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

C. Townley Larzelere, of Norristown, and Franklin L. Wright and Nicholas H. Larzelere, both of Philadelphia, for appellant. Aaron S. Swartz, Jr., John M. Dettra, Samuel H. High, and Montgomery Evans, all of Norristown, for appellee.

PER CURIAM. We have not been con-
vinced that the learned trial judge erred in

refusing to take this case from the jury. Under the testimony it was for them to pass upon the negligence of the defendant and the contributory negligence of the plaintiff, and, as nothing in the third, fourth, fifth, sixth, and seventh assignments of error calls for a retrial, the judgment is affirmed.

(257 Pa. 226)

SUDNIK v. SUSQUEHANNA COAL CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

MASTER AND SERVANT §278(10) — FAILURE TO FURNISH MINE SUPPORTS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In action by miner for personal injury from fall of the roof of the mine alleged to have been caused by failure to furnish supports after request therefor, evidence held sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 964.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Charles Sudnik against the Susquehanna Coal Company, to recover damages for personal injury. Verdict for plaintiff for \$6,000, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

W. H. M. Oram, of Shamokin, Henry A. Gordon, of Wilkes-Barre, and John Hampton Barnes, of Philadelphia, for appellant. Bertram D. Rearick, of Philadelphia, for appellee.

MOSCHZISKER, J. The plaintiff recovered a verdict to compensate him for personal injuries alleged to have been caused by his employer's negligence; judgment was entered thereon, and the defendant has taken this appeal.

The various issues involved were submitted to the jury in a comprehensive charge, which is not complained of; but the appellant contends that, on the evidence, it was entitled to binding instructions, and now should have judgment non obstante verdicto.

A careful reading of the testimony has not convinced us that the case properly could have been withdrawn from the jury. When the evidence is viewed in the light most favorable to the plaintiff, as the verdict shows the jury looked upon it, a mind desiring only to do justice between the parties might find therefrom the following material facts: The plaintiff was a laborer in the employ of the defendant company. June 24, 1915, while working in the latter's colliery, he was injured by the fall of a large piece of hard material from the roof immediately over the place where he was mining. The dangerous condition at that point was in no sense obvious, and, had the roof been supported by timbers placed thereunder in the manner

usually pursued by miners, in order to insure safety, the plaintiff would not have been injured; there had been no timbers suitable for this purpose in or about the location in question for at least two weeks prior to the accident; three days before his injury, the plaintiff called at the office of defendant's general superintendent, where the latter official and the mine foreman were together at the time, and asked for timber; the office where he made this application was the usual place for the purpose; the superintendent and foreman told the plaintiff "to go ahead," and they would send the timber to him. At the time he made this request he was working in shoot 31, mining a "monkey heading," or air passage, into the adjoining shoot, 32. No timber arrived, and on the day of the accident, while the plaintiff was working in No. 32, he again applied therefor to the same two officials, being told a second time to "go ahead; * * * we will send it." He proceeded with his work, and a short time thereafter the accident occurred.

It is to be noted that, when the plaintiff first applied to the foreman and the mine superintendent, he did not specify timber to be used in shoot 31, and there is nothing in the testimony to indicate that either of the latter so understood his request. Apparently, he desired this material for use in the general locality where he was working, and, as already pointed out, the job at which he was engaged, from the time of the first request until the happening of the accident, was in or about shoots 31 and 32 and the passageway between them. With these facts in mind, we feel the evidence was quite sufficient to put the defendant's superintendent on notice that the plaintiff needed timber, and, thereunder, it was for the jury to say whether or not the renewed request on the day of the accident was enough to fix the superintendent with knowledge that the mine foreman had failed to comply with plaintiff's previous demand, made three days before. Under the facts in this case, *Collins v. Northern Anthracite Coal Co.*, 241 Pa. 55, 88 Atl. 75, is a controlling authority, which the learned court below very properly followed.

The assignments of error are all overruled, and the judgment is affirmed.

(257 Pa. 230)

ASHBY v. BUTZ.

(Supreme Court of Pennsylvania. March 19, 1917.)

BILLS AND NOTES §537(1) — ACTION — DEFENSE—DIRECTED VERDICT.

In action on a note by the executrix of a decedent's estate against the maker, defended on the ground of its cancellation under an agreement with decedent, held, on the evidence, that a directed verdict for plaintiff was proper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871-1875, 1891-1893.]

Appeal from Court of Common Pleas, Lehigh County.

Assumpsit on a note by Harriet Ashby, executrix of the estate of Henry S. Keck, deceased, against Harvey E. Butz. Verdict directed for plaintiff for \$2,364.81 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

George M. Lutz and Calvin E. Arner, both of Allentown, for appellant. Allen W. Hagenback and Fred E. Lewis, both of Allentown, for appellee.

PER CURIAM. The defense of the appellant in this action, brought to recover the amount due on a promissory note which he executed and delivered to appellee's decedent, is that the same was canceled in pursuance of the terms of an agreement entered into by him and the decedent. Though, under the testimony, the agreement was to have been prepared and executed and the note canceled in pursuance of it, it never was executed. There was merely an understanding between the parties that the agreement should be prepared and executed, but this was never carried out, and the absolute liability of appellee on his obligation had not been impaired at the time of the death of Henry S. Keck.

This was the correct view of the learned court below in directing the verdict for plaintiff, and the judgment is therefore affirmed.

(257 Pa. 231)

In re **PENROSE'S ESTATE.**

Appeal of **MOORE et al.**

(Supreme Court of Pennsylvania. March 19, 1917.)

PERPETUITIES ⇨ 8(3)—**DEVISE**—**CHARITABLE USE.**

A bequest of real and personal property in trust for a son for life, and on his death to his issue, to be paid to them respectively upon reaching 21 years, and in case either of such issue should die without issue before reaching that age a devise of his share to the survivors, and if all the son's issue died without issue before reaching 21 then over to a charitable use, violated the rule against perpetuities, and the gift, to the charitable use was void.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 59, 66.]

Appeal from Orphans' Court, Bucks County.

Alfred Moore and David N. Fell, Jr., executors of the will of Evan R. Penrose, appeal from a decree sustaining exceptions to report of auditor in the estate of Pauline R. Penrose, deceased. Reversed, and report of auditor absolutely confirmed.

Ryan, P. J., filed the following opinion in the orphans' court:

It appears by the order of the Supreme Court remanding this case to this court that the ques-

tion whether the remainder created by the decedent's will in favor of the Richland Monthly Meeting of Friends offends the rule against perpetuities was raised and argued before that court. It had not been considered by this court or its auditor, for the reason that it had not been raised either here or before him. The learned auditor found that the rule in *Shelley's Case* applied to the devise, and that therefore an absolute estate vested in Evan R. Penrose, the first taker. This court did not agree with him in his conclusion, but held that the said Evan R. Penrose took but an equitable estate; the testatrix having created an active trust to preserve the remainders given in the alternative in her will. This conclusion was not contested upon the appeal.

The question now presented to us for determination is this: Is the gift over to the Richland Monthly Meeting of Friends void for remoteness? The testatrix left a fund including both real estate and personal property, to a trustee, in trust for her son, the said Evan R. Penrose, for life, providing further in her will as follows: " * * * And from and immediately after the decease of my said son I give and devise and bequeath the said ground rent and moneys unto the lawful issue of my said son Evan R. Penrose share and share alike to be paid to them respectively upon their arriving at the age of twenty-one years the same to be put out at interest by the above named trustee and the interest accruing therefrom to be applied to their maintenance and education respectively until their arrival at the age of twenty-one years and in case either of said issue should die before arriving at the age of twenty-one years without issue I give and bequeath the share of the one or ones so dying unto the survivor or survivors thereof. And if all the lawful issue of my son should die without issue before arriving at the age of twenty-one years then I give, devise and bequeath the said ground rent and moneys unto Richland Monthly Meeting of Friends (at the said Borough of Quakertown) the interest accruing therefrom to be applied from time to time in accordance with the direction of said Monthly Meeting."

The interest given to the Richland Monthly Meeting of Friends is clearly a contingent remainder. It is limited to take effect upon the "dubious and uncertain event" of the line of Evan R. Penrose becoming extinct. It does not vest in the event of his issue failing to reach the age of 21. The testatrix has prescribed the additional condition that his issue must die before that age without issue. It cannot, therefore, be said that under the provisions of this will the interest of the Monthly Meeting must vest not later than 21 years after a life in being at the creation of the interest. The rule is thus stated in *Gray on Perpetuities*, § 201: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." In *Coggins' Appeal*, 124 Pa. 10, page 30, 16 Atl. 579, page 681 [10 Am. St. Rep. 565], Paxson, C. J., declared: "It is a conceded principle that the future interest must vest within a life or lives in being and 21 years. It is not sufficient that it may vest. It must vest within that time or the gift is void—void in its creation. Its validity is to be tested by possible and not by actual events. And if the gift is to a class, and it is void as to any of the class, it is void as to all. Authority is scarcely needed for so familiar a proposition. It is sufficient to refer to *Leake et al. v. Robinson et al.*, 2 Mer. 363; *Porter v. Fox*, 6 Sim. 485; *Blagrove v. Hancock*, 16 Sim. 371; *Dodd v. Wake*, 8 Sim. 615; *Newman v. Newman*, 10 Sim. 51; *Vawdry v. Geddes*, 1 Russ. & M. 203; *Williams on Real Property*, 305; 1 *Perry on Trusts*, § 381; *Lewis on Per-*

petuities, 456; *Hillyard v. Miller*, 10 Pa. 326; *Smith's Appeal*, 88 Pa. 492."

Under the language employed by the testatrix, can it be said that the interest given to the Monthly Meeting must vest within the limit of time fixed by the rule? Had Evan R. Penrose died leaving a son who lived to be 20 and then died leaving a son who died at 20, the vesting of the interest given to the Monthly Meeting would have been postponed beyond the period of 21 years following the death of Evan R. Penrose. That this did not happen is immaterial. That it could have happened, and postponed the vesting of the interest given by the will to the Monthly Meeting beyond the limit of time fixed by the rule against perpetuities, is fatal to the gift in remainder. Even if we accept the contention of the appellee that "issue," as used by the testatrix, means "children," we encounter the same difficulty in trying to escape the operation of the rule. We then find the testatrix providing a possible postponement of the vesting of the remainder in the Monthly Meeting until after the death of possible great-grandchildren under the age of 21. We find in this will no such case of doubt as must be resolved in favor of the vesting of the remainder. We conclude that this will provides a gift over on an indefinite failure of issue. "In Pennsylvania a gift over on failure of issue when the failure must take place within the periods prescribed by the rule is good, while a gift over on indefinite failure of issue is bad. The rule is the same, whether the subject-matter of the gift is real estate or personal property." *Foulke on Rules Against Perpetuities, etc.*, page 196.

We have reached the conclusion that the gift over to the Richland Monthly Meeting of Friends was void in its creation and that as to that interest the testatrix died intestate. The fund should therefore be distributed to the executors of Evan R. Penrose, deceased. The decree of this court of August 2, 1915, directing the auditor to make distribution to the Richland Monthly Meeting of Friends, should be reversed, and the original schedule of distribution reported by the auditor reinstated. As the appeal is still pending in the Supreme Court, this court is without power to enter a decree in accordance with the foregoing conclusions. This opinion is respectfully submitted in conformity with the order of the Supreme Court.

The court dismissed exceptions to the second report of the auditor.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHISKER, and
WALLING, JJ.

Henry Spalding, of Philadelphia, and Ar-
thur M. Eastburn, of Doylestown, for appel-
lants. Thomas Ross and George Ross, both
of Philadelphia, for appellee.

PER OURIAM. After argument of this
appeal, at the January Term, 1916, the fol-
lowing order was made:

"And now, February 11, 1916, it appearing
that neither the auditor nor the orphans' court
has considered or determined a controlling ques-
tion whether the remainder offends the rule
against perpetuities which has been argued here,
the case is remanded to the orphans' court, that
the parties may be heard and the question may
be determined. After the opinion has been filed
by the court below, either party may move this
court to advance the cause on the argument list."

The record was accordingly returned to the
court below, which referred the question in-
volved to the auditor, who filed an opinion,
holding that the remainder offended the rule
against perpetuities and was void. Excep-
tions to this report were dismissed by the
court, the conclusion of its opinion being as
follows:

"We have reached the conclusion that the
gift over to the Richland Monthly Meeting of
Friends was void in its creation and that as to
that interest the testatrix died intestate. The
fund should therefore be distributed to the ex-
ecutors of Evan R. Penrose, deceased. The de-
cree of this court of August 2, 1915, directing
the auditor to make distribution to the Richland
Monthly Meeting of Friends, should be reversed,
and the original schedule of distribution report-
ed by the auditor reinstated. As the appeal is
still pending in the Supreme Court, this court is
without power to enter a decree in accordance
with the foregoing conclusions. This opinion
is respectfully submitted in conformity with the
order of the Supreme Court."

The conclusion of the auditor, concurred in
by the learned court below, that the gift
over to the Richland Monthly Meeting of
Friends is void as offending the rule against
perpetuities, is clearly correct, and the de-
cree appealed from is now reversed, and the
report of the auditor, filed September 11,
1913, is absolutely confirmed.

Appeal sustained, at appellee's costs.

(40 R. I. 491)

MARANDA v. GAULIN. (No. 5018.)

(Supreme Court of Rhode Island. July 5, 1917.)

MASTER AND SERVANT ~~288~~(11), 289(10) —
QUESTION FOR JURY—ASSUMPTION OF RISK
—CONTRIBUTORY NEGLIGENCE.

In an action by servant for injury from dynamite blast, plaintiff claiming he was inexperienced and was directed to use a short fuse, plaintiff's assumption of risk and contributory negligence were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1079-1082, 1100.]

Vincent, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Alexander Maranda against Alphonse Gaulin. Verdict for plaintiff, and defendant excepts. Exceptions overruled, and case remitted, with directions.

Fitzgerald & Higgins, of Providence, for plaintiff. Elphege J. Daignault, of Woonsocket, and Boss & Barnefield, of Providence, for defendant.

PARKHURST, O. J. This is an action of the case for negligence, wherein the plaintiff, who was a servant of the defendant, seeks to recover damages for injuries claimed to have been sustained by plaintiff when working under the direct supervision and order of the defendant as master on the 23d day of September, 1912.

The case was tried before a justice of the superior court sitting with a jury in May, 1916. It is claimed by plaintiff that on September 23, 1912, the plaintiff was working with and for the defendant, owner of a farm, in the blasting of rocks on the farm by the use of dynamite placed in drill holes; that several blasts had been exploded in the morning; that a cessation of work took place from about 11:30 a. m. to 2:30 p. m.; that after 2:30 p. m. the work of blasting was resumed by the parties, and that after several blasts had been exploded a blast lighted by plaintiff exploded so suddenly that plaintiff had not time to get away from the rock to a place of safety or even to turn around, and that he was severely injured in the left eye, left ear, and left hand; that by reason of the injury he lost his left eye, was made permanently deaf in his left ear, and permanently lost the efficient use of his left hand and suffered greatly during the illness which followed and as a result of necessary surgical operations.

The method of blasting was by placing a sufficient amount of dynamite in the bottom of a drill hole in a rock, then placing in contact therewith an explosive cap at the end of a powder fuse which was cut long enough to extend upwards and outwards beyond the drill hole, and then filling the drill hole with

earth pressed down to cover the charge, and then lighting the fuse. The plaintiff claimed as to the rock which exploded prematurely that the drill hole was about four and one-half inches in depth; that under orders from the defendant the plaintiff loaded the hole with the dynamite, and received from the defendant a fuse cut by the defendant about six inches in length with a cap attached thereto, placed it in the drill hole, and placed the earth in the hole, and found that the fuse extended only about two inches above the surface of the rock; that the defendant gave him a match to light the fuse, and that he, the plaintiff, then said to defendant, in substance, that the fuse was short; that he was afraid, and asked the defendant what he should do about it; that the defendant told him it was all right and ordered him to light it; and that, acting under that order, he did light it, with the result above set forth.

The plaintiff and defendant were the only persons present, at the time of the explosion. The defendant's account of the occurrence was in most respects a complete denial of all the material statements of the plaintiff. He told a different story as to the explosion, claiming that there were two explosions, that the first explosion was of fuses and dynamite in a pan or kettle in which fuses were kept and carried about during the progress of the blasting, and seeming to claim, though not very clearly, that this explosion of the materials in the pan or kettle was the one which injured the plaintiff and was caused by plaintiff's negligence in throwing a lighted match therein, and that the explosion of the rock occurred thereafter, but was not the cause of the injury to the plaintiff. The defendant also denied all of the plaintiff's statements in regard to plaintiff's lack of knowledge and experience in blasting, and denied having exercised any supervision or having given any orders to plaintiff or having cut any fuses for plaintiff to use.

At the close of all the testimony the defendant moved that the jury be directed to return a verdict for the defendant on the ground that the plaintiff's own testimony showed that he had such knowledge and experience of blasting and such appreciation of the risks which he took, and of the danger attendant upon his acts, that he should be held as a matter of law to have assumed the risk of what he did and to have been guilty of contributory negligence in his reckless disregard of danger which was obvious to him.

The trial judge refused to direct a verdict for the defendant as requested. The case was submitted to the jury, which returned a verdict for the plaintiff in the sum of \$4,000. The defendant did not ask for a new trial in the superior court, but in due time filed and prosecuted his bill of exceptions to this court; and the case is now before us upon

the bill of exceptions. The only exception pressed before this court is that taken to the ruling of the trial judge in denying the defendant's motion for direction of a verdict in his favor.

The sole question before this court is whether upon the plaintiff's own testimony, which must for the purpose of this decision be taken as true, it conclusively appears that the plaintiff assumed the risk of injury or was guilty of contributory negligence as a matter of law, so that the trial judge erred in submitting the case to the jury.

In substance, the plaintiff testified that in 1908 he came from Canada, where he had worked on a farm, and had had no experience or knowledge whatever of blasting; that he went to work for the defendant as a farm hand in 1908, and worked for defendant from that time (except in winter) until the time of the injury; that the farm of defendant had many stones and rocks, and that during 1908 and two years following special men were employed by defendant (two or three at a time) to do blasting; that during 1908 plaintiff did no such work, nor does it appear to what extent he had opportunity to watch the operation; that a Mr. Lefebvre (who was a nephew of defendant and had worked for him for some years before 1908) was at times working on the farm; that gradually as time went on the plaintiff, working with Mr. Lefebvre, learned to drill holes in rocks for blasting, sometimes drilling them alone in small rocks, and sometimes holding the drill for Lefebvre to strike in drilling big rocks. Plaintiff says that in doing this work he was under the direction of Lefebvre, who bossed the job. Plaintiff says that he never up to the day of the injury lighted any fuses to set off blasts, but that Mr. Lefebvre always did that after they had drilled holes. He admits that he may have loaded the holes a few times with dynamite before that day, and may have cut a few fuses under Lefebvre's supervision, but says that he never until the day of the injury lighted any fuses or himself conducted the operation of blasting, which was therefore done by Lefebvre; that on the day of the injury Lefebvre was not present; that on that day Gaulin the defendant took the plaintiff to the farm and set him to work at blasting rocks, told him what to do and what rocks to blast, and directed him to dig around stones to loosen them; that defendant carried about with him an uncovered pail or pan (of metal) in which were fuses, caps, and dynamite, and directed plaintiff to load the holes (which appear to have been drilled and made ready before); that defendant cut all the fuses and directed plaintiff to place the fuses in the holes. No suggestion is made anywhere in the testimony that anything dangerous happened in any of the blasts during the day until the fifth blast in the afternoon. Plaintiff in substance says,

as to this blast, that defendant ordered him to dig more around the stone (which he did), and then ordered him to load the hole, and handed him or laid upon the rock a fuse cut by defendant with a cap attached and ordered him to finish loading; that, when the fuse had been inserted and the loading finished, the fuse only projected above the hole about two inches; that plaintiff was not sure whether or not the fuse was too short for safety, was afraid it might be and called defendant's attention to it, and asked if he should light it, said he was afraid, and asked what he should do with it; and that defendant handed him a match to light it with, told him to go on and light it, and said that it was all right; that defendant stood where he could see the fuse, had cut it himself and knew its length; that plaintiff regarded defendant as his boss, knew he was paying plaintiff to work for him and expected plaintiff to obey orders, and knew that defendant had more knowledge of dynamite and explosives than plaintiff had; that he obeyed the order, and was immediately injured by the blast before he had time even to turn around.

From plaintiff's testimony the jury had a right to find that never at any time had the plaintiff been called upon to use his own judgment as to the proper length in the cutting of fuses; that never at any time had he had experience as to how long it would take a given length of fuse to burn; it does not appear that he had ever seen or known of a premature explosion or that he had any knowledge as to how short a fuse could be used safely.

The questions whether the plaintiff assumed the risk and whether he was guilty of contributory negligence are questions of fact. Many cases have arisen where the testimony is so clear and conclusive upon the plaintiff's own admission of his knowledge and skill and appreciation of danger that courts have found such facts to be fully and conclusively proved so that it would be error to submit them to the jury.

But in this case we have the fact that the plaintiff, not being sure of the danger, though apprehensive, and being under the direct supervision of his master, calling his master's attention to the possible danger, and receiving his master's assurance that it is all right, obeys his master's direct order and is injured as a result of such obedience.

The cases cited on behalf of the defendant in support of his exception are all cases where the evidence clearly showed that the plaintiff was a man of such long experience and full knowledge of the danger of his acts which resulted in his injury that he either assumed the risk or was guilty of contributory negligence. We do not find in any of these cases circumstances similar to the case at bar, where the servant, being apprehensive of possible danger, appealed to

his master, and received his assurance of safety, coupled with an order to go ahead and do the thing which resulted in the injury.

In the cases cited on behalf of the plaintiff we find ample authority, under circumstances similar in principle to those appearing in the case at bar, for the submission of the questions of assumed risk and of contributory negligence to the jury as questions of fact for its determination.

In *Pinney v. King* (1906) 98 Minn. 160, 107 N. W. 1127, it appeared that dynamite was used for the purpose of blowing up a wreck under water; that it was necessary to heat the dynamite to a certain temperature; that the plaintiff was a laborer working under a foreman (who was held to be a vice principal of the master), and under his orders was engaged with others in the work of heating up an old boiler, and, after heating, of placing sticks of dynamite on boards upon the heated grate bars; that, owing to the inattention of the vice principal and others, the boiler became overheated and caused the dynamite to explode, killing several men and injuring the plaintiff; the same questions substantially were raised by the defense in that case as in the case at bar. After speaking of the plaintiff's lack of experience in this manner of treating dynamite, and of his reliance upon the foreman for guidance and direction, the court said (98 Minn. 163, 107 N. W. 1128):

"It appears that he was nervous and somewhat agitated during the time the dynamite was being warmed, because, in his opinion, the boiler was overheated, and that he called the attention of the foreman to the fact. The foreman assured him that it was all right, and ordered him to let it alone. Because he was fearful of danger, it does not follow, as a matter of law, that he fully appreciated the risks and hazards of his situation. The question was properly left to the jury."

See, also, *Randall v. Abbott Co.*, 111 Me. 7, 12, 87 Atl. 376 (1913); *Jensen v. Kyer*, 101 Me. 106, 113, 63 Atl. 389 (1905); *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 500, 33 Am. Rep. 423; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; *Haley v. Case*, 142 Mass. 316, 320, 7 N. E. 877; *Mahoney v. Dore*, 155 Mass. 513, 520, 30 N. E. 366; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 74, 42 N. E. 501; *Shannon v. Shaw*, 201 Mass. 393, 397, 87 N. E. 748; 4 Labatt's *Master and Servant* (2d Ed.) p. 3927 et seq.

In our opinion, the questions raised by defendant in the case at bar were properly submitted to the jury, and we find no error on the part of the trial judge in refusing to direct a verdict for the defendant.

The defendant's exception is overruled, and the case is remitted to the superior court sitting in the county of Providence, with di-

rection to enter judgment for the plaintiff upon the verdict.

VINCENT, J., dissents.

(40 R. I. 383)

NEWPORT TRUST CO. v. CHAPPELL et al.
(No. 381.)

(Supreme Court of Rhode Island. June 26, 1917.)

1. WILLS ¶539—CONSTRUCTION—BEQUEST TO DAUGHTER.

Testatrix's will provided that she gave one moiety of all her property to her daughter, and that she gave the other moiety of her property to her husband in trust for the benefit of her son, and directed that so long as the husband should live there should be no division of the estate, and the income should be divided equally between the husband, the daughter, and the husband as trustee. A following clause of the will directed that, if the daughter should die without issue, her portion of the estate should go to the husband as trustee for the son. *Held*, that it was testatrix's intention to give her daughter, if living at her death, a vested interest in half of the estate, but to postpone the time when the daughter should come into possession until the death of her father, and where the daughter survived the father, she became entitled at his death to have the half turned over to her, less charges and expenses of administration chargeable against the half.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1163, 1302-1309.]

2. WILLS ¶674, 684(9)—TRUSTS—BEQUEST TO TRUSTEE—SPENDTHRIFT TRUST.

Testatrix's will provided that she gave a moiety of all her property to her husband for the benefit of her son, directing that, so long as the husband should live, there should be no division of the estate, but that the income should be divided equally between the husband, the daughter, and the husband as trustee for the son, also directing that if the husband, as trustee, should become fully satisfied at any time that the son had fully reformed his life, so that he could safely be trusted with the management of property, the husband, as trustee, should transfer the property to the son as fully as if the trust had never been created, and that the trust should thereby terminate. *Held*, that the son's trustee, the husband, was only to receive one-third of the income for the son's benefit so long as he, the husband, lived, and that the trust for the son was in the nature of a spendthrift trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1585, 1627.]

3. WILLS ¶686(1)—TERMINATION OF TRUST.

Where testatrix's will created a spendthrift trust for her son, appointing her husband trustee, with provision that the husband might terminate the trust if the son reformed his mode of living, but the son did not fully reform his life, and the trust was never terminated during the husband's lifetime, and the son never claimed or attempted to have the trust terminated during his father's lifetime or afterwards, the trust continued until the son's death; the mere fact that no new trustee was appointed after his father's death not operating to terminate the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631, 1633, 1637.]

4. WILLS ¶684(9)—CONSTRUCTION—BEQUEST OF INCOME.

Testatrix's will gave a moiety of all her property to her daughter, and gave the other

moiety to her husband, in trust for the benefit of her son, directing that so long as the husband should live there should be no division of the estate, and the income should be divided equally between the husband, for himself, as trustee for the son, and the daughter. *Held*, that after the father's death the son was entitled to receive the income from half the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1627.]

5. WILLS ⇐688(4)—TERMINATION OF SPENDTHRIFT TRUST.

Where by his mother's will a son was entitled to receive one-third the income of the estate prior to his father's death, and after his father's death was entitled to receive the income from half the estate, the will having created a spendthrift trust in half the estate for the benefit of the son, and named the father as trustee, the making by the son in favor of his wife of a trust deed to a trust company after the death of his father, and after the trust company was appointed administrator with the will annexed of the mother, and had received the estate into its custody as such, did not operate to terminate the trust, which could only have been terminated under the will by the act of a trustee, if the latter became fully satisfied that the son had reformed his life, but merely transferred the son's right to the income of half the estate to the trustee for the benefit of his wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1636.]

6. TRUSTS ⇐243 — SUBSTITUTED TRUSTEE — POWERS—STATUTE.

Under Gen. Laws 1896, c. 208, § 5, providing that every trustee appointed pursuant to the chapter shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed trustee by the instrument, if any, creating the trust, and section 8, providing that the preceding sections shall apply to trusts heretofore as well as those hereafter created, and shall be considered in addition to the ordinary equity powers of a court of chancery, a new trustee, appointed under a will in place of the trustee named therein, who died, would have had the same powers and discretions as the original trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 350.]

7. TRUSTS ⇐243 — SUBSTITUTED TRUSTEE — POWERS.

Where testatrix's will created a spendthrift trust in favor of her son, and gave her husband, the trustee, power to terminate the trust if he became satisfied that the son had reformed his life, so that he could be trusted with the management of property, the power and discretion vested in the husband to transfer to the son free of trust was a power and discretion annexed to the office of trustee, and therefore passed to a succeeding trustee, even in the absence of statute, since, without such power, the purposes of the trust might have been defeated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 350.]

Case certified from Superior Court, Newport County.

Suit by the Newport Trust Company, administrator cum testamento annexo of the estate of Abby D. Chappell, against Levinia A. Chappell and others. On certification to the Supreme Court for its determination under Gen. Laws 1909, c. 289, § 35, as being ready for hearing for final decree. Decree directed to be presented for approval.

Burdick & MacLeod, of Newport, for complainant. Sheffield & Harvey, of Newport, for Levinia A. Chappell. Charles H. Koehne, Jr., and William Williams, both of Newport, for Ida Douglas Jack.

PARKHURST, C. J. This is a bill in equity brought by the Newport Trust Company, as administrator with the will annexed of the estate of Abby D. Chappell, late of Newport, deceased, having in its possession as such administrator certain personal property which was bequeathed under said will, and asking for the appointment of a new trustee under said will and for instructions as to the proper disposition of said property. Such disposition involves the construction of said will.

The bill was filed in the superior court in the county of Newport November 10, 1916, and, after answers were filed and testimony taken, was duly certified to this court for its determination under the provisions of Gen. Laws R. I. 1909, c. 289, § 35, as being ready for hearing for final decree.

It appears by admission in the pleadings that Abby D. Chappell, late of Newport, died May 10, 1904, leaving the last will referred to, and that the same was duly admitted to probate June 13, 1904, and that James H. Chappell, husband of the testatrix, named as executor in the will, was duly appointed and qualified, and thereafter acted as such executor until his death, and died intestate September 20, 1914, without having fully administered the estate, leaving as his only heirs at law and next of kin said Ida Douglas Jack and said Henri Q. Chappell, and that the complainant on October 5, 1914, was duly appointed and qualified as administrator with the will annexed; that as such administrator it received the sum of \$6,495.91 as the property of the estate of said Abby D. Chappell, and has since held, and now holds, said estate.

It further appears that Henri Q. Chappell (son of the testatrix), one of the beneficiaries named in said will, on November 9, 1914, made a deed of trust of all his property, "whether legal or equitable in fee or in remainder," to said Newport Trust Company, in trust to pay the net income thereof to his wife, the respondent Levinia A. Chappell, during his lifetime, and upon his death to pay over the principal of said trust fund, or what should remain thereof, to said Levinia, or to such person or persons as he should by his last will appoint in the event of her death before him.

It further appears that said Henri Q. Chappell died at Newport, February 28, 1916, leaving his wife, Levinia, surviving him, but leaving no children or issue of children surviving him, and that he left a will in which he gave all his property to his wife, but said will has never been offered for probate.

The said Abby D. Chappell and James H. Chappell had two children, a daughter, Ida Douglas Chappell, and a son, Henri Q. Chappell. The daughter married, and in her mother's will she is named as Ida Jack, of Washington, in the District of Columbia. It appears also that she survived her mother and her father and her brother and was still surviving at the time when this bill was filed, and, so far as appears, she still survives. The said Ida Douglas Jack and the said Levinia A. Chappell are the sole parties named as respondents in the bill.

The will provides as follows:

"This is the last will and testament of me, Abby D. Chappell, wife of James H. Chappell, of Newport, Rhode Island.

"First. Subject to the payment of my just debts, if any, and all proper charges against my estate, I give devise and bequeath the one moiety of any property, of every kind, real and personal, wheresoever situated or being, belonging to me at the time of my decease, whether acquired prior or subsequent to the execution of this will, to my daughter, Ida Jack of Washington in the District of Columbia, and in case of the death of said Ida I give devise and bequeath the same to her children.

"Second. I give devise and bequeath the other moiety of my property, of every kind, real and personal, wheresoever situated or being, belonging to me at the time of my decease, whether acquired prior or subsequent to the execution of this will to my husband James H. Chappell in trust, for the benefit of my son Henri Q. Chappell of said Newport.

"Third. It is my will that so long as my husband shall live that there shall be no division of my estate and the rents, income and profits thereof, shall be divided equally between my husband, my daughter, and said trustee. I also direct, that if the said trustee shall become fully satisfied at any time, that my son Henri has fully reformed his life, so that he can safely be trusted with the management of property and this trust, that he transfer said property to my son as fully as if it had never been created, and that the same thereby terminate.

"Fourth. It is my will, that if said trust shall continue until the death of said son, if he leave issue, the residue of said trust shall be transferred to said issue; if he leave no issue, the residue shall become the property of my daughter Ida.

"Fifth. It is my will and I so direct that, if my daughter Ida shall decease leaving no issue, her portion of my estate shall go to said trustee, in trust, as aforesaid. But if said trust has been surrendered by the trustee as provided in this will, then the portion of said Ida shall go to said Henri direct. If both of my children die without issue, I give devise and bequeath all of said property not expended to the next of kin of said Ida according to the present statutes of this state, excluding her husband from any part share and right therein.

"Sixth. Finally I nominate and appoint my husband James H. Chappell to be the sole executor hereof without giving any bond, and to carry out the provisions hereof as strictly as may be; and I revoke all other former wills by me made, and publish, and establish this, and this only, as my last.

"Witness hand and seal this 25th day of June, A. D. 1887. Abby D. Chappell. [L. S.]"

The will bears the usual witness clause and names of witnesses. It is undisputed that all the property which passed under the will was personal property; and all the property now held by complainant is personal property.

The complainant in its bill contends that the estate of Abby D. Chappell in its hands after deducting the expenses of administration should be turned over to a trustee to be appointed by the court to hold in trust to pay the income to Ida Douglas Jack during her lifetime, and upon her death to pay the principal to her issue living at her death, and in default thereof to her next of kin, as provided in the fifth clause of the will.

The respondent Ida Douglas Jack by her answer claims the whole of the fund in the hands of the complainant, after deducting the necessary expenses of administering said estate.

The respondent Levinia A. Chappell is under guardianship, and William M. Arnold, the guardian of her person and estate, has been brought in as a party respondent. He makes answer as guardian claiming on her behalf that she is entitled to have paid over to her after deducting the expense of administration one moiety of the estate under the provisions of the will.

At the first reading of the will above set forth it seems to be somewhat confusing and inconsistent in its several provisions. But upon a careful consideration thereof we are of the opinion that the intention of the testatrix quite clearly appears.

The scheme of the will is to divide the estate into two parts, one of which is by the first clause, as we construe it, bequeathed to Ida Jack, if living at the death of testatrix; if Ida is not then living, to Ida's children. The other part is by the second clause bequeathed to James H. Chappell, husband of testatrix, in trust for the benefit of her son, Henri Q. Chappell. This scheme is, however, modified and suspended in its fulfillment by the third clause, which evinces a primary and paramount intention temporarily to suspend the division of the estate during the lifetime of her husband, and to leave the estate undivided in his hands during his lifetime, and to divide the rents, income, and profits equally between her husband, her daughter, and her husband as trustee for Henri; and this provision is also subject to the direction to said trustee to transfer the one-half of the estate bequeathed in trust for the benefit of Henri to him if "the said trustee shall become fully satisfied at any time, that my son Henri has fully reformed his life," etc.

[1] As we construe these provisions, we find that it was the intention of the testatrix to give to her daughter, Ida Douglas Jack, if living at the death of testatrix, a vested interest in one-half of the estate, subject to the provisions of the second clause, which postponed the time when Ida should come into possession until the death of her father; and, inasmuch as Ida survived her father, she became entitled at his death to have this one-half turned over to her, less such charges and expenses of administration, if any, as would be properly chargeable against the

same. We think it clear that there was no intention on the part of testatrix to postpone Ida's enjoyment of this one-half of the estate beyond the death of her father, and that Ida's children took no interest in this portion of the estate in case Ida survived her mother.

The provisions in clause 1 and clause 5 are somewhat analogous to the provisions construed in the case of *Harris v. Dyer*, 18 R. I. 540, 542, 28 Atl. 971, 972, where it was said:

"There have been a number of cases of devises where a gift over in fee has been followed by a gift over in case the devisee die with or without issue, in which the event of death has been referred to the lifetime of the testator [citing numerous cases]. This construction has been adopted to avoid repugnancy, inasmuch as the alternative limitations over, if not so qualified or restricted, would reduce the prior devise from a fee to a life estate. It is based on the obvious reason that, if the testator had intended to give only a life estate in the first instance, he would have said so in the terms of the gift itself."

We are of the opinion that the bequest in the first clause, gave an absolute estate to Ida in the one moiety of the estate therein bequeathed in the event that she survived her mother, with the right to the possession thereof postponed under clause 3d to the time of her father's death; and that in the provisions of the fifth clause directing that "if my daughter Ida shall decease leaving no issue, her portion of my estate shall go to said trustee," etc., the event of Ida's death therein contemplated, is to be referred to the lifetime of the testatrix.

[2] As to the one moiety of the estate bequeathed by clause 2 to James H. Chappell in trust for the benefit of Henri Q. Chappell, it is clear that this trust is so far modified by the language of the third clause that the trustee for Henri was only to receive one-third of the income for the benefit of Henri, so long as the husband of testatrix lived. It is further clear that the trust constituted in the second clause and modified in the third clause was in the nature of a spend-thrift trust, as indicated by the words directing the transfer to Henri "if the said trustee shall become fully satisfied at any time, that my son Henri has fully reformed his life," etc.

[3] There is nothing in the record to show that Henri ever did fully reform his life so as to give effect to the provision for the transfer of one-half of the estate to him; and in view of the fact that the trust was never terminated during the lifetime of the father, trustee, and that it does not appear that Henri ever claimed or attempted to have the trust terminated either during his father's lifetime or afterward, we are of the opinion that the trust continued until the death of Henri, and that never at any time was he entitled to have the trust terminated by the transfer of one-half of the estate to him. The mere fact that no new trustee was appointed after his father's death did not operate to terminate the trust. Being a

trust for the protection of Henri against his own improvidence and incapacity, we may assume that there was a reason for its continuance, until his death.

[4, 5] After his father's death he was entitled to receive the income from one-half of the estate; and it does not appear that he did not so receive it. The making of his trust deed to the complainant November 9, 1914, after the death of his father, and after the complainant was appointed administrator with will annexed of the estate of Abby D. Chappell, and had received the estate into its custody as such administrator, simply operated, so far as this property was concerned, to transfer Henri's right to the income of one-half of the estate to the trustee for the benefit of the wife, Levinia. It may be that other property was conveyed by this trust deed. As to that the record is silent. But the making of this trust deed did not operate to terminate the trust, which could only have been terminated under the terms of the will by the act of a trustee in the event that such trustee should have become "fully satisfied at any time, that my son Henri has fully reformed his life, so that he can safely be trusted with the management of property," etc. It was the plain intent of the testatrix that only in such event should one-half of her property be transferred to Henri free of trust. A trustee to administer this trust under the will could have been appointed if the parties in interest had so desired. In view of the fact that the estate consisted only of personalty in the hands of the complainant as administrator, it was probably deemed unnecessary. No claim is made that the income of the one-half of the estate was not after November 9, 1914, paid over by the complainant to Levinia so long as Henri lived.

As to the continuance of the trust and the appointment of a new trustee after the death of James H. Chappell, the case is analogous in principle to the case of *Burdick v. Goddard*, 11 R. I. 516, where a trust of personal estate was created under the Halsey will for the benefit of a married woman, to pay over to her—

"for her sole and separate use and benefit, and upon her sole and separate receipt and discharge, such part of said fund, whether of interest or principal, or both, at such times and in such sums as they in their discretion shall consider expedient, necessary, and proper."

It appeared that in the lapse of time all of the original trustees had died, the fund was on deposit, and was in the control of the executors of the last surviving trustee; that the cestui que trust had become a widow and had married again and was covert at the time of filing the bill, which asked for a termination of the trust by payment of the whole fund to the complainant, Mrs. Burdick, with an alternative prayer for the appointment of a new trustee, and defining his powers. It was held that the powers and discretions given to the trustees to pay over

the fund as above set forth were essential to the purposes of the trust, and passed to the successors in trust of the original trustees, that the trust extended over the new coverture, and that, the original trustees being dead, the court would appoint a new trustee with the powers given by the will, but would not order the trust fund paid over to the beneficiary to end the trust. See, also, *Blakely, Petitioner*, 19 R. I. 324, 33 Atl. 518; *Smith v. Hall*, 20 R. I. 170, 173, 37 Atl. 698.

It may be noted that after the decision of *Burdick v. Goddard*, supra (1877), a statute (Gen. Laws 1896, c. 208, §§ 5, 8, in operation on and after February 1, 1896) was enacted whereby it was provided (section 5) that every trustee appointed pursuant to the provision of that chapter shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust; and section 8 provides that the preceding seven sections shall apply to trusts heretofore as well as those hereafter created, and shall be considered in addition to the ordinary equity powers of a court of chancery. *Smith v. Hall*, supra, 20 R. I. 173, 37 Atl. 698. See, also, *Godfrey v. Hutchins*, 28 R. I. 521, 68 Atl. 817; *Hayes v. Robeson*, 29 R. I. 220, 69 Atl. 686. The same statute was re-enacted in Gen. Laws 1909, c. 259, §§ 5, 8, in operation December 31, 1909.

[6] This statute was in force at the death of James H. Chappell in 1914, and now remains in force, and under it it is clear that a new trustee, had one been appointed under the will in place of James, deceased, would have had the same powers and discretions as he had.

[7] We are of the opinion that it was clearly the intention of the testatrix to protect her son, Henri, from his own lack of capacity in the management of property, and to provide for the continuance of the trust during his life except in the event that he should have "fully reformed"; that the power and discretion vested in the trustee under her will to transfer to Henri free of trust was a power and discretion annexed to the office of trustee, and would have passed to a succeeding trustee, in the absence of the statute above referred to, inasmuch as without such power the purposes of the trust might have been defeated. The question whether Henri Q. Chappell had "fully reformed in his life" could have been as well determined by a successor in the trust as by the original trustee.

We therefore find that the trust continued until the death of Henri Q. Chappell (fourth clause); that at his death he left no issue; and that accordingly at his death the one-half of the estate held in trust for Henri became the property of Ida Douglas Jack.

In view of the foregoing, under the facts, the fifth clause has no effect; none of the

conditions therein enumerated having happened.

Our opinion is that Levinia A. Chappell has no estate or interest in the fund in the hands of the complainant; that Ida Douglas Jack is entitled to receive the whole fund, after deduction of the necessary expenses of administering the estate; that Ida Douglas Jack is entitled to an accounting from the complainant unless the complainant and she can agree upon a settlement; that, inasmuch as the trust terminated at the death of Henri Q. Chappell, there is no need of the formal appointment of a trustee under the will, since all of the fund is in the hands of the complainant, and the complainant can settle an account with Ida Douglas Jack without the intervention of any new trustee.

The parties may present for our approval a decree in conformity with the above on Monday, July 2, 1917, at 10 o'clock in the forenoon.

(40 R. I. 485)

MORAN v. TUCKER. (No. 4906.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. FRAUD \Leftrightarrow 31 — REQUISITES — AFFIRMANCE OF CONTRACT.

Ordinarily a deceit action for damages caused by fraudulent misrepresentations in procuring a contract is predicated on the contract's affirmance.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 27.]

2. FRAUD \Leftrightarrow 34 — AFFIRMANCE OF CONTRACT — NECESSITY.

A purchaser after making a part payment may sue his vendor in deceit for fraudulently securing the contract without completing the payments thereunder.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 29.]

Exceptions from Superior Court, Providence and Bristol Counties; John W. Sweeney, Judge.

Action by Edward R. Moran against Francis E. Tucker. Verdict for plaintiff, and defendant excepts. Exceptions overruled, and case remitted, with directions to enter judgment upon the verdict.

O'Shaunessy, Gainer & Carr, of Providence, for plaintiff. Green, Hinckley & Allen, of Providence (Chauncey E. Wheeler and Harold P. Salisbury, both of Providence, of counsel), for defendant.

SWEETLAND, J. This is an action of trespass on the case in deceit brought to recover damages for alleged fraudulent misrepresentations made by the defendant to the plaintiff in a transaction between them relating to the sale of certain land.

The case was tried before a justice of the superior court sitting with a jury, and resulted in a verdict for the plaintiff. Said justice denied the defendant's motion for a new trial. The case is before us upon the

defendant's exception to the decision of the justice on said motion and upon the defendant's exceptions to certain rulings of the justice made in the course of the trial.

From the evidence the jury were warranted in finding the following: Through the efforts of the defendant eight persons purchased from the Canadian Pacific Railway Company certain land in the province of Alberta, in the Canadian Northwest. The defendant was the purchaser of one section of said land known as section No. 27. Section No. 27 stood on the records in the name of the defendant's wife. These lands were held in severalty; but the owners had entered into an agreement to cultivate said land jointly. This joint enterprise they termed the syndicate. The defendant was made the manager and treasurer of said syndicate. In the spring of 1913 he went upon the land and made some arrangements for the purchase of machinery and supplies to cultivate said syndicate land. The defendant also claimed that he had procured from the Canadian Pacific Railway Company an option for the purchase of an additional $1\frac{1}{2}$ sections of land adjoining the land of the syndicate. In April, 1913, the defendant came to Providence and met the plaintiff. The defendant then represented to the plaintiff that the affairs of the syndicate were in a sound, prosperous, and profitable condition; that he intended to plant a number of sections of the syndicate land largely with flax; that everything was in readiness for the immediate planting of several sections of said land; that he himself intended to increase his holdings in the syndicate until he owned 5 sections; that for \$1,000 in cash and a four months' note for \$400 he would purchase for the plaintiff one-half section of the section and one-half of land upon which he held said option and make arrangements that the plaintiff might put the land thus purchased into the syndicate and share in the profits of that enterprise. These representations were false. The affairs of the syndicate were not prosperous; the defendant knew that he was not able and he did not intend to plant a number of sections of the syndicate land; he had learned that it was too late in the season to plant flax and that said land was not suited to the cultivation of flax; he did not intend to increase his holdings in said syndicate, but was at that time endeavoring to dispose of the section which he did own; he did not intend to use said \$1,400 to purchase one-half section of land for the plaintiff from the Canadian Pacific Railway Company, but did intend to turn over to the defendant one-half of section No. 27, a portion of the land which he held in the syndicate. From the evidence the jury were warranted in finding that the defendant obtained the \$1,000 cash and the four months' note for \$400 from the plaintiff through false representations.

Upon learning that the defendant had de-

ceived him the plaintiff gave the defendant notice that he rescinded the contract; and he demanded that the defendant return to him said \$1,000 in cash and the four months' note for \$400. The defendant claims that because the plaintiff did not go on and complete the payment of \$1,400, but did disaffirm the contract and demanded a return of the money fraudulently obtained from him, the plaintiff has lost his right to sue in deceit.

The jury found specially that when he made the contract with the plaintiff it was the intention of the defendant to sell to the plaintiff one-half of section No. 27 which he held in said syndicate, and that he did not intend to purchase for the plaintiff a one-half section of the $1\frac{1}{2}$ sections of land on which the defendant claimed that he had an option. This finding was fully supported by the defendant's letter of June 1, 1913, to the plaintiff, and by other evidence in the case. It thus appears that the defendant not only by fraudulent misrepresentations induced the plaintiff to enter into a contract with him for the sale of land, but also that in further fraud of the plaintiff the defendant did not intend to procure for the plaintiff the land which the defendant had promised to purchase.

[1, 2] Generally an action in deceit for damages caused by fraudulent misrepresentation in procuring a contract in based upon the theory of an affirmation of the contract. It has been held that in the case of an executed contract the party defrauded has the right to pursue one of two remedies, either he may rescind the contract, return what he has received under it, and sue to recover back what he has paid, or he may affirm the contract and sue for his damages in an action for deceit; but he cannot pursue both remedies. This is a reasonable rule, for the contract has been executed, and the victim of the fraud, without incurring the risk of further loss, is free to elect the remedy which appears more beneficial to him. In many cases where the contract is only partially executed it would be unjust to hold, because of the theory on which the action of deceit is said to be based, that the party defrauded shall lose the advantage which in our practice attaches to a tort action, unless he makes further venture in the transaction into which he has been induced by fraud to enter. The force of this is apparent in a case like that at bar. By fraud the defendant has obtained \$1,000 of the money of the plaintiff. The plaintiff knows of that fraud, and he also knows from the actions and the statements of the defendant that the defendant does not intend to make performance of the contract on his part. In those circumstances the plaintiff should not be required to pay \$400 more to the defendant before the plaintiff shall be permitted to sue in deceit to recover the damages which he has already suffered by the fraud. In *Warren v. Cole*, 15 Mich. 285, the court said:

"This is not, as claimed by Warren, a suit to enforce a contract. On the contrary it is an action of tort, to recover damages for a deceit and imposition claimed to have been practiced on Cole and Arnold, whereby they were fraudulently induced to make an agreement they would not have made had they known the truth. This being the character of the suit, it cannot be seriously contended that a person repudiating a contract for fraud cannot sue for redress, if he has suffered damage from it."

If, after being informed of the fraud which had been practiced upon him, the plaintiff had gone on and completed his payments and had received the land which the defendant fraudulently intended to substitute for that which he had undertaken to purchase, under the authority of some of the cases the plaintiff should be held to have condoned the fraud and to have lost his right to sue in deceit. A carefully considered case in support of that position is *Kingman v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413. In *Simon v. Goodyear Metallic Rubber Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745, Mr. Justice Lurton said:

"If one, after full knowledge of the fraud and deceit by which he has been induced to make a sale of property, goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is voluntarily incurred. The maxim '*Volenti non fit injuria*,' has application to all loss resulting from the voluntary execution of a nonobligatory contract with full knowledge of the facts which render it voidable."

Selway v. Fogg, 5 Mees. & W. 83, was an action in assumpsit to recover payment for certain work the value of which amounted to £20. The defendant claimed a contract on the part of the plaintiff to do the work for £15. The plaintiff insisted that that contract had been obtained by fraudulent misrepresentation on the part of the defendant. Baron Parke said:

"I also think that, upon discovering the fraud, (unless he meant to proceed according to the terms of the contract), the plaintiff should immediately have declared off, and sought compensation for the bygone time in an action for deceit; not doing this, but continuing the work as he has done, he is bound by the express terms of the contract, and if he fail to recover on that, he cannot recover at all."

In *Vernol v. Vernol*, 63 N. Y. 45, the court held, as appears in the headnote of the case, that:

"Where a party is induced to enter into an executory contract for the purchase of lands by means of false representation on the part of the vendor, if, after discovery of the fraud, he accept a conveyance, he cannot set up the fraud as a defense in an action for the purchase money."

See *People v. Stephens*, 71 N. Y. 527.

It should be noted, however, that many cases hold in the case of a contract procured by fraud that the party defrauded may go on after knowledge of the fraud and perform the contract and not lose his right to an action of deceit when it appears that there has been no waiver of the claim for damages. We are not called to pass upon

this point, as the plaintiff did not go on with the contract in question; and we are fully of the opinion that in refusing to go on the plaintiff did not lose his right of action in deceit.

The defendant's exception to the ruling of said justice denying the defendant's motion for the direction of a verdict and the defendant's exception to the decision upon his motion for a new trial should not be sustained, either on the ground that there has been a waiver by the plaintiff of an action for deceit or on the ground that the issue of fraud raised by the declaration was not supported by the evidence.

The other exceptions of the defendant are without merit, and require no discussion in this opinion.

The defendant's exceptions are all overruled, and the case is remitted to the superior court, with direction to enter judgment upon the verdict.

(91 Conn. 684)

WHITNEY CO., Inc., v. CHURCH et ux.

(Supreme Court of Errors of Connecticut.

June 14, 1917.)

1. ARBITRATION AND AWARD \S 34—PROCEDURE—INTRODUCTION OF EVIDENCE.

In arbitration proceedings, where the arbitrators stated they would require plaintiff to prove the value of extra work done by him, but plaintiff elected to rely upon the conclusiveness of the architect's statement as to the value, and defendant introduced evidence as to the value, plaintiff could not complain that it was error not to reopen the case to show the value.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 177-183.]

2. CONTRACTS \S 287(2)—CONSTRUCTION—ARBITRATION.

A building contract, providing that if extra work was required, it should be valued by the architect and the contract price be increased according to his valuation, but that if the valuation was not agreed to, there should be an arbitration, the architect's certificate of value was not conclusive.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1332.]

3. ARBITRATION AND AWARD \S 34—CONDUCT OF PROCEEDINGS—PREJUDICE.

Plaintiff in arbitration was not harmed by act of arbitrators in receiving letter from defendant reiterating defendant's testimony as to a proposition on which the arbitrators ultimately ruled in entire accord with plaintiff's contention.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 177-183.]

4. ARBITRATION AND AWARD \S 31—CONDUCT OF PROCEEDINGS—PREJUDICE.

Plaintiff in arbitration was not harmed by act of one arbitrator outside a session in talking with a witness, who admitted a mistake in his testimony, resulting in an allowance more favorable to plaintiff than would otherwise have been made.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 156-164.]

5. ARBITRATION AND AWARD \S 31—CONDUCT OF PROCEEDINGS—PREJUDICE.

Plaintiff in arbitration was not harmed by conduct of one arbitrator after decision against

plaintiff as to existence of trade custom in asking a contractor outside of sessions what the trade custom was.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 156-164.]

6. ARBITRATION AND AWARD ~~§ 29~~—POWERS OF ARBITRATORS—LIMITING SCOPE.

Under agreement to arbitrate, providing that the arbitrators are fully authorized and empowered to determine and make a decision on all questions in controversy of every kind and character submitted hereunder, the arbitrators could not, by a rule of their own, limit their powers.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 147-154.]

Appeal from Superior Court, Fairfield County; James H. Webb, Judge.

Arbitration of controversy between the Whitney Company, Incorporated, and Alfred W. Church and wife. From a judgment for remonstrants against the Whitney Company, such Company appeals. No error.

John E. Keeler, of Stamford, and William A. Moore, of New York City, for appellant. Spotswood D. Bowers, of Bridgeport, for appellees.

SEUMWAY, J. The controversy between the parties arose out of a building contract in which the Whitney Company was contractor and A. W. Church was the owner of the building. The cause was submitted to arbitration under a rule of court. The arbitrators, having made an award, returned the same to the superior court. The defendants moved the court to accept the award and render judgment thereon as provided in section 957 of General Statutes. To the acceptance of the award the plaintiff remonstrated, alleging that the arbitrators, "misconducted themselves in such manner as evinces partiality toward the defendant and prejudice against the plaintiff," specifying as such misconduct that the arbitrators called before them in secret session a witness who had testified in behalf of the defendants, and examined the witness in the absence and without the consent of the plaintiff or its counsel; that the arbitrators addressed a letter to one of the defendants, and received from him an answer, "containing matter of an evidential nature"; that one of the arbitrators made an inquiry of a certain contractor as to the construction as understood by contractors of a clause in the building contract, the subject of this action. The remonstrant further alleged that the arbitrators departed from the principles announced by them as governing their hearing, "and specifying as such departure certain rulings upon the admission and rejection of evidence, as well as making erroneous rulings as to the legal interpretation of the building contract between the parties, and that the arbitrators made an award upon matters not in any way submitted to them." The superior court overruled the remonstrance and accepted the award and rendered judgment

for the defendants to recover of the plaintiff, the Whitney Company, \$5,200.21 damages. The plaintiff appealed from the judgment, and at the plaintiff's request the court made an extended finding, setting out in detail the proceedings before the arbitrators. The matters contained in the third paragraph of the remonstrance in the superior court raise the most important question in the case, and justly it was so regarded by that court. The allegations in the paragraph named are, in substance, that the arbitrators refused, "to admit and consider proper competent and relevant testimony" offered by the contractor as to the value of certain items claimed by the plaintiff to be extra work. The clause in the contract covering the "extra work" that might be required in carrying out the contract is as follows:

"Should any alterations be required in the work shown or described by the drawings or specifications a fair and reasonable valuation of the work added or omitted shall be made by the architect and the sum herein agreed to be paid for the work according to the original specifications shall be increased or diminished as the case may be. In case such valuation is not agreed to the contractor shall proceed with the alterations upon the written order of the architect and the valuation of the work added or omitted shall be referred to three (3) arbitrators (no one of whom shall have been connected with the work to which these presents refer) to be appointed as follows: One by each of the parties to this contract and the third by the two thus chosen, the decision of any two of them shall be final and binding upon both parties."

[1, 2] The Whitney Company contended before the arbitrators that under this clause in the contract, the valuation placed upon this "extra work" by the architect was conclusive. This claim of the Whitney Company was properly overruled by the arbitrators, and they informed counsel or the parties that they, the arbitrators, would expect them to offer some evidence tending to prove that the items of "extra work" were of the value in respect to time and material as indicated in their statement of claim, and this while the Whitney Company was presenting its evidence. The position taken by the arbitrators and the ruling upon the question was repeatedly called to the attention of plaintiff's counsel, but he closed the testimony for the plaintiff without offering the evidence indicated. The defendants as part of their case having offered evidence of the value of the "extra work," the plaintiff asked to be allowed to again open the evidence as to the value of "extra work." The defendants objected, and the arbitrators sustained them; the arbitrators ruling that it was not rebuttal testimony. By this ruling of the arbitrators, the plaintiff was deprived of no right. It had full opportunity to prove its case, but preferred to rest upon its claim that the valuation of the architect was conclusive upon the defendant. Although the ruling of the arbitrators might have been

thought to be erroneous, it was the plaintiff's duty to abide by and comply with the ruling and conduct his case in accordance therewith or take his chances of losing all right to produce the evidence if the rulings of the arbitrators should be finally sustained. The ruling of the arbitrators was correct, and if the plaintiff had lost some substantial right, it could not complain, for it had full opportunity to prove its case if it had seen fit to do so. But this ruling affected but few items in the plaintiff's claim, and these not in any substantial manner unless the claims of the plaintiff had been fully sustained.

[3-5] Referring now to the claimed misconduct of the arbitrators in writing a letter to one of the defendants without the knowledge or consent of the plaintiff, it appears that this letter was written after the defendant had testified, and in his reply to the letter he reiterated in substance his testimony before the arbitrators. Notwithstanding the letter and the testimony, the arbitrators awarded to the plaintiff the full amount of the item as claimed by the plaintiff to which the communication referred. One Conklin had testified before the arbitrators as to the value of certain plumbing work, and in his testimony had submitted figures showing the value of the work. These figures were received with the plaintiff's consent. This testimony was under discussion in private session, and one of the arbitrators claimed there was an error in Conklin's figures. One of the arbitrators happened to meet Conklin in the building where they were conferring, and called his attention to the claimed mistake. Conklin admitted there was a mistake. The amount awarded by the arbitrators was \$156.50 less than the figures submitted by Conklin and to that amount more favorable to the plaintiff. The finding shows that there was a controversy over the doors which the plaintiff furnished for the building. The specifications required they should be $1\frac{1}{2}$ inches thick. The defendants claimed they should be allowed the expense of putting in doors $1\frac{1}{2}$ inches thick. The plaintiff claimed that there was a trade custom to the effect that specifications calling for doors $1\frac{1}{2}$ inches in thickness meant a door $1\frac{3}{4}$ inches thick. The arbitrators decided against the claim of the plaintiff. After the arbitrators had decided this question in this manner, one of the arbitrators met a contractor, one Mr. Bottomley, and asked him if there was such a trade custom. The fact of this conversation was reported to the counsel of the plaintiff before the final award and no protest was made or other action taken until the remonstrance was filed in the superior court.

Certainly there was nothing in these several acts of claimed misconduct on the part of the arbitrators that was harmful to the plaintiff or showing any partiality or prejudice, and the award should not be set aside on account of them.

The plaintiff has also assigned as error the action of the court in holding that the arbitrators in allowing damages to the defendant on account of delay in the work from June 28, 1913, to December 1, 1913, was not contrary to the provisions of the submission to arbitration, and contrary to the principles of procedure announced by the arbitrators. The original contract in question was made in the spring of 1912. Differences having arisen between the parties, the work was discontinued, and the parties made a supplemental agreement on June 24, 1913, in which latter agreement it stipulated that the work should be completed by December 1, 1913. The agreement to arbitrate provided, among other things:

"The arbitrators are fully authorized and empowered to determine and make a decision on all questions in controversy of every kind and character submitted hereunder."

The very first clause of the agreement to arbitrate was this:

"That all questions in controversy as to damages for delay be submitted to arbitration."

There is some question whether the defendants should recover damages for the delay between June 28, 1913, the date of the agreement to arbitrate, and December 1, 1913, the time when by that agreement the plaintiff was to complete the work, but it does not appear from the finding that they did allow damages for that period. The defendants' claim as stated in their counterclaim was as follows:

Rental value of premises 13 months at	
\$700 per mo.....	\$9,100
Rental value of portion of premises 2	
mos. at \$400 per mo.....	800
	<hr/> \$9,900

The finding states that the arbitrators considered these two sums, \$9,100, and \$800, together, and the "lump sum" of \$6,500 was allowed as a compromise between the arbitrators. The evidence showed that by the original agreement the plaintiff agreed to complete the contract by May 1, 1913, and the residence was completed about September 1, 1914, and the contract called for an expenditure of upwards of \$99,000. The damages suffered by the defendants by reason of the failure of the plaintiff to keep its contract was a question of fact, and it does not appear that any illegal elements were included in the amount awarded.

This court has uniformly held that an award of arbitrators will be set aside only for partiality and corruption in the arbitrators or mistake in their principles. In re Curtis-Castle, 64 Conn. 516, 30 Atl. 769, 42 Am. St. Rep. 200; Brown v. Green & Noyes, 7 Conn. 542.

[6] In this case the submission was broad and comprehensive, and a rule adopted by the arbitrators as to their method of procedure could not operate to limit their powers under the submission, especially as in this case, if there was an announcement that hearings

would be conducted as a case in court, such intention was abandoned and—
 "it was decided to go ahead and have counsel present, but that the arbitrators were not to be bound by the strict rules of evidence, and that they should have the right to go outside the record and make such inquiry as they saw fit to get light upon it and to get information to help in making a fair award, which was apparently consented to by the parties."

There is no error. The other Judges concurred.

(91 Conn. 586)

ACAMPORA v. WARNER.

(Supreme Court of Errors of Connecticut.
 June 1, 1917.)

1. MORTGAGES ⇐497(1)—FORECLOSURE—EFFECT.

Under Gen. St. 1902, § 4123, providing that foreclosure of a mortgage bars further action on the debt unless the persons liable for payment thereof are made parties, the foreclosure operates as a payment of the debt, unless the creditor makes all persons, liable for the payment, parties to the foreclosure proceedings.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471, 1473.]

2. MORTGAGES ⇐559(4)—FORECLOSURE—EFFECT.

Such method is not the only one by which a deficiency may be determined.

3. MORTGAGES ⇐505(1)—FORECLOSURE—DEFICIENCY JUDGMENT—APPRAISAL.

When a mortgage is foreclosed the mortgagor, being a party, may demand an appraisal to determine the value of the property as a means of fixing any deficiency, but when there is no appraisal a further suit on the judgment is not barred.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1501.]

Appeal from City Court of New Haven; John R. Booth, Judge.

Action by Raphael Acampora against Hubert E. Warner, Jr. Judgment for plaintiff, and defendant appeals. No error.

Henry W. Stowell, of New Haven, for appellant. Arthur C. Graves and Robert J. Woodruff, both of New Haven, for appellee.

RORABACK, J. On January 5, 1913, the plaintiff obtained a judgment against the defendant in the court of common pleas for New Haven county for \$327. An execution was issued upon this judgment on January 31, 1913, and a deputy sheriff levied upon a certain automobile belonging to the defendant and took it into his possession. The defendant desired to use the automobile in his business, and requested the plaintiff's attorney to accept as temporary security for the payment of the judgment a note and mortgage for \$327 upon two pieces of real estate of which the defendant was the record owner. The lien upon the automobile was then released. The plaintiff was not present when the defendant offered his note as security for the judgment, but the plaintiff's attorney accepted this note and mortgage with the distinct understanding that they were re-

ceived as temporary security only for the payment of the judgment. The defendant represented to the plaintiff's attorney that he intended to settle this judgment within a short time, and merely gave the note and mortgage temporarily. At the time of giving this mortgage, the defendant grossly magnified the value of the mortgaged property, and represented to the plaintiff's attorney that one piece represented in the mortgage was worth at least \$4,500, and was mortgaged for only \$2,500, and that the other piece was worth \$3,500, and was mortgaged for only \$1,700. As a matter of fact, both of these pieces of real estate were worth less than the first mortgages upon them, and the defendant's interest in both was worthless. After failing to keep many promises to pay the judgment made by the defendant, the plaintiff on February 24, 1913, brought foreclosure proceedings on the mortgage, and on March 21, 1913, obtained a judgment of strict foreclosure thereon. On or about the date of final judgment in the foreclosure proceedings, the plaintiff was himself foreclosed by the holders of prior mortgages, and the plaintiff failed to realize anything upon his judgment debt against the defendant. No deficiency judgment was asked for or taken in the foreclosure suit. The defendant contended that the judgment of foreclosure against the defendant, upon the mortgage, operated ipso facto as an extinguishment of the judgment debt.

[1] Prior to 1833, the foreclosure of a mortgage operated as a bar to any subsequent action on a mortgage note. Chapter 18 of the Public Acts of 1833 removed this bar, and ever since then the right of a mortgagee to a deficiency judgment after strict foreclosure has always been coupled, in this state, with some provision for fixing the actual value of the property as of the date of the foreclosure, and for making that valuation a basis for determining the existence and amount of any claimed deficiency. Rev. 1849, title 12, c. 3, p. 341, § 27; Rev. 1866, title 18, c. 3, p. 396, § 28; Rev. 1875, title 18, c. 7, p. 358, § 2; General Statutes of 1883, § 3011; General Statutes of 1902, § 4124. See *Staples v. Hendrick*, 89 Conn. 100, 103, 93 Atl. 5. Section 4123 of the General Statutes of 1902 provides that:

"The foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure."

This statute plainly indicates:

"That the foreclosure of a mortgage should operate as a payment of the debt to secure which the mortgage was given, unless the creditor chose to make all the persons liable for the payment of such debt parties to the foreclosure proceedings." *Ansonia Bank's Appeal from Commissioners*, 58 Conn. 257, 259, 18 Atl. 1030, 1031.

"If the mortgagee is not willing to take the property mortgaged as full payment for his debt he has only to make all the persons to

whom he may wish to resort for further payment parties to his foreclosure suit." *Ansonia Bank's Appeal* from Commissioners, *supra*.

[2] There is no merit in the defendant's contention that the method laid down by the statutes is an exclusive method by which a mortgagee may collect the deficiency, if any, and is the only method by which a supposed deficiency may be determined. As we have stated such a procedure is binding only as to those upon whose motion the sale was ordered.

[3] The defendant was a party to the foreclosure suit, but there was no appraisal. The Legislature did not intend to bar suits where there was no appraisal. It did intend that the mortgage debtor as well as the creditor should have an opportunity to have an appraisal. This is optional, not compulsory. The statute proceeds upon the theory that the debtor has an interest in having an appraisal; therefore he may move for the appointment of appraisers. *Windham County Savings Bank v. Himes*, 55 Conn. 433, 436, 12 Atl. 517.

There is no error. The other Judges concurred.

(91 Conn. 702)

ROWELL v. ROSS et al.

(Supreme Court of Errors of Connecticut.
June 14, 1917.)

1. JUDGMENT \S 78—ERRONEOUS JUDGMENT—CONSENT OF DEFENDANT.

Where a defendant appeared and admitted his liability and consented in open court to entry of judgment against him for the full amount of the ad damnum clause, it was error for the court to give judgment in his favor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 133.]

2. ATTORNEY AND CLIENT \S 103—EMPLOYMENT OF ASSISTANT COUNSEL—RATIFICATION.

Defendant employed H., knowing that he had not been active in the practice of law of late years, and that it might be necessary for him to employ counsel in some other state. Shortly thereafter H. employed plaintiff as counsel in the matter and informed defendant thereof. Defendant made no objection then or later when the matter was talked over in plaintiff's office. *Held* defendant was liable to plaintiff for the reasonable value of his services.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154.]

3. TRIAL \S 11(3)—TRANSFER OF CAUSES—TIME.

Where the requests to transfer the case to the jury docket were not made either within 30 days of the return day or within 10 days after an issue of fact was joined as required by statute, the court did not err in granting a motion ordering the issues tried to the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30.]

4. APPEAL AND ERROR \S 1211—RIGHT TO TRANSFER TO JURY DOCKET ON REMAND.

Where a case was sent back to the superior court for a new trial, it remained on the court docket, and unless an issue of fact was after-

wards joined, there was no right of transfer to the jury docket.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4711, 4712.]

Appeal from Superior Court, Fairfield County; William H. Williams, Judge.

Action by George P. Rowell, an attorney at law, against P. Sanford Ross and one Hance to recover for professional services rendered. Judgment for plaintiff and defendant Hance. Defendant Ross and plaintiff appeal. Error on plaintiff's appeal; no error on defendant's appeal.

Israel J. Cohn, of Bridgeport, for appellant Ross. John C. Chamberlain, of Bridgeport, and George P. Rowell, of Stamford, for appellant plaintiff.

BEACH, J. [1] This is the third appearance of this case in this court. The material facts are stated in 87 Conn. 157, 87 Atl. 355. On the last appeal a new trial was ordered largely because the trial court excluded the testimony of the defendant Hance as to the terms of his employment by the defendant Ross, and thus deprived the defendants of a fair trial as to that branch of their defense. When the case was tried again the defendant Hance did not appear as a witness in his own behalf, or on behalf of Ross, but admitted his liability and consented in open court to a judgment against himself for the full amount of the ad damnum clause. Nevertheless, the court gave judgment in Hance's favor, and this we think was error. The plaintiff was induced by the consent to withhold his proofs as against Hance, and it is hardly fair to require him on this appeal to make out a case, which he was not required to make in the trial court. Moreover, it is conceded on the brief by counsel who represented Hance on the trial that the court erred in rendering judgment in Hance's favor.

[2] The appeal of the defendant Ross turns almost wholly upon the question whether Hance as attorney for Ross had general or special authority to employ the plaintiff as personal attorney for Ross so as to charge Ross with liability for the reasonable value of the plaintiff's services; and, if not, whether Ross has made himself liable therefor by dealing with the plaintiff as his personal counsel after knowledge that he was acting as such.

The findings of the trial court are sufficient to support the judgment against Ross upon either of these theories. They are vigorously attacked, and it is assigned as error that the trial court erred in finding as appears by 14 separate paragraphs of the finding, and in refusing to find as requested in 24 separate paragraphs of the draft finding. It is, however, unnecessary to pursue these assignments of error in detail, because the essential facts on which the lia-

bility of Ross rests are not seriously disputed. It is sufficiently established by the evidence that at the time Ross employed Hance to collect the judgment, he knew that Hance had not been active of late years in the practice of the law, and had reason to believe that it might be necessary for him to employ counsel in some other state; that within a few weeks after Hance employed the plaintiff Ross was informed of the fact, and made no objection to it; that he was thereafter informed from time to time in a general way of the services that the plaintiff was rendering, and that about a year and a half after Hance had employed the plaintiff Ross came with Hance to the plaintiff's office and was fully informed as to services which had been rendered and would probably be rendered thereafter by the plaintiff. These services finally resulted in a judgment for \$17,500, which the plaintiff settled for \$12,500. The court has found that there was no express agreement between Ross and Hance that the latter should collect the judgment upon the so-called 10 per cent. basis. This finding is excepted to, but the depositions and testimony of the defendants on this point were so contradictory and unsatisfactory as to justify the court in finding as it did. Moreover, as pointed out in 87 Conn. 162, 87 Atl. 355, the character and extent of the plaintiff's services and the subsequent conduct of Hance when the plaintiff consulted him as to his fees are not consistent with the existence of a special contract between the plaintiff and Hance; and they are equally inconsistent with the existence of such a contract between Hance and Ross.

The defendant relies on the rule that an attorney has no general authority to employ counsel or associate attorneys at his client's expense, and claims that there was no sufficient evidence of special authority or ratification. The rule relied on is correct, but we cannot assent to the proposition that the defendant Ross can take the benefit of the plaintiff's services, knowing that he was employed as counsel in the case, and assenting by his conduct to such employment, without becoming liable for the reasonable worth of the services rendered. The authorities on this subject are quite numerous and some of them very much in point. "It is elementary law that an attorney in a particular case has no general authority, by virtue of his retainer, to employ other counsel, either by way of substitution or as assistant or associate counsel, at the expense of his client. But where the employment of the original attorney is general in its character, and amounts to an agency in the legal business of the client, or where the authority or the subsequent assent on the part of the client to the employment of additional counsel can fairly be inferred from the facts of the case, the client will be bound by such employment."

Northern Pac. Ry. Co. v. Clarke, 106 Fed. 794, 797, 45 C. C. A. 635, 637. "If the attorney, who has the management of the suit, employ an assistant at the trial, and the client is present, and sees the person, thus employed, assist in managing and conducting the suit the inference would be strong, if not irresistible, that he consented to such employment, and that he would be liable for the fees of the assisting counsel." *Briggs v. Town of Georgia*, 10 Vt. 68, 70.

Where an attorney employs counsel it is a question of fact whether he did not become personally liable for his fees, although for the benefit of his client. But if the client be present at the trial, he is liable for the services of counsel, although there was a secret agreement by the attorney that he should pay for them. *Weeks on Attorneys* (2d Ed.) p. 504. "The plaintiff was employed in the case through the agency of Porter, who was the attorney of record of the defendant in the suit, and who also had the management and preparation of the case for trial. The plaintiff, being thus introduced into the case, assumed the relation of counsel in the presence of the defendant, * * * and the defendant consulted with him on the trial. This would ordinarily be quite sufficient to render the party liable for the services performed. But it is said that there was a special agreement made between the defendant and the attorney of record, that if senior counsel should become necessary, the attorney would pay such counsel, and that the defendant should be at no expense in relation thereto. This was a secret arrangement, unknown to the plaintiff, and one which, in the ordinary course of professional services, he had no reason to suppose might exist. It may operate as a valid contract between the parties to it; but as respects the plaintiff, it cannot under the circumstances avail the defendant. * * * We think it was the defendant's duty, before thus knowingly receiving the plaintiff's services and accepting him as counsel to manage his case, to inform him of the special agreement with Mr. Porter, and that the defendant was to be at no expense for the fees of the senior counsel. Not having done so, but remaining silent on the subject when he should have spoken, and when the plaintiff might have withdrawn from the case, the defendant, after choosing to avail himself of the professional services of the plaintiff, cannot now avoid a personal liability for the payment of a reasonable compensation therefor." *Brigham v. Foster*, 89 Mass. (7 Allen) 419, 421. See, also, 6 C. J. 668, 669, and numerous cases referred to in the notes.

The above excerpts state the rule applicable to this case with such fullness and clearness that we deem it unnecessary to add any further comment.

[3, 4] The defendant also claims to have been illegally deprived of a jury trial. On

the first trial a jury was waived by stipulation. When the time for the second trial approached the defendants, having filed separate answers involving new issues of fact claimed the case again for the jury docket, but failed to file within 3 weeks after the new issues were joined any written notice stating which, if any, of the issues they desired to be tried to the jury. For this reason the court granted a motion to erase from the jury docket and ordered the issues tried to the court. Since then no new issues of fact have been joined. When the case came back for the second time to the superior court for a new trial on the old issues of fact, the defendants again attempted to have the case put on the jury docket, and their various requests and motions to that effect were denied. In this the court did not err. These last requests that the case be entered on the jury docket were not made either within 30 days of the return day or within 10 days after an issue of fact was joined as required by statute. When a case is sent back to the superior court for a new trial, it goes back to the same docket as before. If to the court docket, it remains there unless an issue of fact is afterward joined, when it may be transferred to the jury docket on request within 10 days thereafter. But the statutes make no provision for the transfer to the jury docket of a case which has been tried to the court and sent back for a new trial, unless an issue of fact is joined after the case is remanded, or the court in its discretion orders it to be tried to the jury.

There is error on the plaintiff's appeal. There is no error on the defendant's appeal. The other Judges concurred.

(257 Pa. 213)

LAND TITLE & TRUST CO. v. SHOEMAKER.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. MORTGAGES \S 567(2) — FUND — DISPOSITION.

An owner of real estate executed a mortgage thereon to a trust company for \$40,000, when only \$32,000 had been loaned, and gave the mortgagee a demand note, providing that the securities pledged and any thereafter pledged should apply in the same way to the payment of his future obligations, and that the securities should stand as a general continuing collateral security for the whole obligation. Thereafter the mortgagor gave the trust company a bond to indemnify it against loss from issuing a title policy in favor of mortgagee of other property owned by the mortgagor, and later gave a second mortgage upon the property covered by the first \$40,000 mortgage; the second mortgagee having notice that only \$32,000 had been loaned on the first mortgage. The trust company's mortgage was thereafter foreclosed and the property sold. *Held*, that under the agreement between the mortgagor and the trust company a potential obligation such as that created by the bond of indemnity related back to the time of the execution of the mortgage, when it became a fixed liability, and that the trust

company was entitled to payment of the full amount of the \$40,000 mortgage in preference to the second mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1636, 1637.]

2. MORTGAGES \S 50, 90—CONTRACT FOR FUTURE AFFIRMANCE—RECORD.

Where a contract for advances or for the assumption of future obligations accompanies a mortgage, it is not essential to its validity that the engagement as to advances be placed on record or expressly referred to in the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 133-140, 199, 200.]

3. MORTGAGES \S 16, 115—FUTURE ADVANCEMENTS—CONSTRUCTION.

Where a contract for advances or for the assumption of future obligations accompanies a mortgage, there is a sufficient consideration for the mortgage, and the lien of payments made under the contract relates back to the date of the mortgage, even though the advances are liquidations of assumed responsibilities incurred after the date of subsequent or junior incumbrances placed upon the mortgaged property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 18, 19, 229.]

4. APPEAL AND ERROR \S 731(4) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error complaining of dismissal of exceptions to findings and conclusions of an auditor are defective, where not containing in totidem verbis the court's action on the particular exception, and where not showing where the matter referred to is to be found in the paper books or the appendix.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3020.]

Appeal from Court of Common Pleas, Philadelphia County.

Scire facias sur mortgage by the Land Title & Trust Company against Samuel Shoemaker. From an order dismissing exceptions to report of auditor distributing fund realized from the proceeds of a sheriff's sale, Emma C. Bergdoll appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Nicholas H. Larzelere and R. Stuart Smith, both of Philadelphia, for appellant. Edward Brooks, Jr., and Frederick J. Geiger, both of Philadelphia, for appellee.

MOSCHZISKER, J. This case involves the distribution of a fund raised at sheriff's sale upon the foreclosure of a mortgage. The matter was referred to an auditor, whose report was confirmed by the court below. Emma C. Bergdoll has appealed from the decree of confirmation.

Samuel Shoemaker owned a property at Fifty-Second street and Wynnefield avenue, Philadelphia, which, on September 9, 1909, he mortgaged to the Land Title & Trust Company for \$40,000; the mortgage was forthwith recorded. Subsequently, in 1914, foreclosure proceedings were instituted thereon and a judgment entered against the mortgagor for \$43,946.67; thereafter, on February 2, 1915, the property was sold at sheriff's sale re-

alizing \$46,600; at settlement, after paying taxes and charges, \$35,560 of this amount was handed to the mortgagee, and the balance, \$9,305.57, was paid into court for distribution, being the fund in controversy. The \$40,000 mortgage was intended as collateral, and when executed the trust company loaned only \$32,000 to Mr. Shoemaker. At that time the latter gave the mortgagee his demand note, containing the following provision:

"It is further agreed that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment of any * * * future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one general continuing collateral security for the whole of said obligations."

August 5, 1912, Mr. Shoemaker gave to the trust company a bond for \$150,000, reciting that whereas, the obligee had agreed to insure the erection and completion, free of liens, of a certain building on Wayne avenue, Philadelphia, in favor of the holders of a mortgage thereon, the obligor agreed to indemnify the obligee "of and from all loss, damage, costs, charges, liability, or expense" caused by this undertaking. Thereupon the trust company issued its policy of insurance in the sum of \$150,000 to Eli K. Price et al., executors, in connection with a mortgage of like amount executed by Samuel Shoemaker et al. The building was not completed by Shoemaker, and mechanics' liens were filed against it. Suit was brought upon the \$150,000 mortgage, and judgment recovered. The property was sold under execution on this judgment, but the sum realized was \$6,892.62 short of the amount required to pay the holders of the mortgage their debt, interest and costs. This deficiency was paid by the trust company under its title policy, on account of the loss sustained by the mortgagees through the noncompletion of the building; in addition, the company was obliged to deposit with a referee \$16,000 to meet certain mechanics' liens filed against the premises, should such liens be sustained at law in a proceeding pending to test their validity.

May 28, 1913, Samuel Shoemaker gave Emma C. Bergdoll, the appellant, his note for \$18,000. This instrument recited that Mr. Shoemaker had on the same day executed and delivered to the holder thereof a bond and mortgage for a like amount, secured upon the property at Fifty-Second street and Wynnefield avenue, being the same premises covered by the before-mentioned \$40,000 mortgage. The note contained also a clause to the effect that it was to secure past and future obligations. The \$18,000 bond and mortgage was duly recorded as a second lien upon the property in question, subject to the \$40,000 mortgage. At the date of the execution of the mortgage to Mrs. Bergdoll, and at the time she made her claim against the fund in controversy, Mr. Shoemaker owed her at least \$18,000. There were several claimants on the fund; but the contest we have to de-

cide is between the trust company and Mrs. Bergdoll.

The former contends that, on the facts as we have recited them, the \$40,000 mortgage, in accordance with the agreement executed at the time of the original \$32,000 loan, was executed and delivered, not only as collateral for this first loan, but also to secure payment of any "future obligations" of Mr. Shoemaker which might thereafter be held by the mortgagee; that the \$150,000 bond accepted from Mr. Shoemaker, in 1912, is such a "future obligation"; that therefore the trust company is entitled to recover out of the fund in court the amount which this latter obligation has and will cost it. On the other hand, Mrs. Bergdoll contends that, when she took her mortgage in 1913, although the trust company then held the \$150,000 bond executed by Mr. Shoemaker, and had issued its policy of title insurance in connection therewith, yet at that date its liability on such policy was merely potential; that the trust company never paid any actual losses thereunder until May, 1914, some months subsequent to the date of her mortgage; hence that she has a prior lien and is entitled to the fund in court. The learned auditor accepted the view of the trust company, and made his award accordingly. In so doing, he finds that the latter is entitled to the sum of \$6,892.62, with interest from May 14, 1914, and to the balance of the fund, should the liens upon the property whose completion it insured be declared valid; but he adds that, if these liens are not sustained, then the distribution will have to be restated.

[1-3] The questions we have to decide are narrow, but very nice. They may be reduced to these: (1) When the trust company, in 1912, accepted and became the holder of Mr. Shoemaker's \$150,000 bond, did it, by issuing the policy of title insurance recited therein, to the holders of the mortgage in that transaction, bind itself in effect to Mr. Shoemaker and his then present mortgagees to advance to the latter, on the former's account, such sums of money as might be necessary to indemnify the mortgagees against loss by reason of noncompletion of the building covered by their mortgage? (2) If this was the effect of the transaction just referred to, then should the contract made in 1912, when the trust company accepted the \$150,000 bond and issued its title policy, be treated as a supplement to the original agreement of 1909? (3) If, as a matter of law, it should be so considered, then, as against Mrs. Bergdoll's mortgage of 1913, should this contract of 1912 be given the same effect as though its terms originally had been expressly incorporated into the agreement of 1909?

We think all the propositions just enumerated must be answered in the affirmative. The bond accepted in 1912 was an obligation of Mr. Shoemaker, the original mortgagor, which recited the title policy issued by the trust company as part of the agreement then

entered into; hence both of these instruments must be considered in deciding as to the nature of that agreement, and, when so considered, it seems plain that the agreement in question formed a binding contract on the part of the trust company, if called upon so to do, to pay on Mr. Shoemaker's behalf any losses which his default in finishing the building described in the bond and title policy might cause to the parties insured by the latter instrument, which, in effect, was a contract to make future advances. For these advances Shoemaker was liable to the trust company on the \$150,000 obligation, to secure which the latter held the \$40,000 mortgage as collateral. We make this last statement, as the agreement of 1909 was that the mortgage in question should stand as collateral, not only for Shoemaker's \$32,000 obligation, but also for any future obligations of the debtor which might come into the mortgagee's hands. This contract was in full life when the trust company accepted the \$150,000 bond, which instrument fell squarely within the definition of a "future obligation"; and, at the time of the acceptance thereof, the company agreed in connection therewith to make the advances already referred to. Under these circumstances, there is no reason apparent why, after 1912, this agreement should not be considered just as effective between the parties thereto, and all others dealing with the property covered by the \$40,000 mortgage, as the original contract executed in 1909 when the mortgage was first taken as collateral. Had the terms of the 1912 agreement been originally incorporated into the contract of 1909, there can be no question as to their effect, for it is now established in Pennsylvania that, when a contract for advances or the assumption of future obligations accompanies a mortgage, it is not essential to its validity that the engagement governing the advance be placed upon record or even expressly referred to in the mortgage. *Moroney's Appeal*, *infra*. It is also established that, when such a contract obligates the mortgagee either to make advances or assume future responsibilities on behalf of the mortgagor, this lends a sufficient consideration to the mortgage, and the lien of payments made under such an agreement relates back to the date of the mortgage; furthermore, this is true, even though the advances or liquidation of assumed responsibilities occur after the date of a subsequent, or junior, incumbrance placed upon the mortgaged premises. See authorities, *infra*.

If, under an arrangement such as we have before us, we should be obliged to hold, as contended by the appellant, that the \$40,000 mortgage would have no lien to protect the trust company's present claim until the date of the actual payments made by the latter on its title policy, it would be practically impossible for such corporations, when issuing pol-

icies like the one at bar, adequately to protect themselves against loss by the acceptance of mortgages upon real estate as collateral, which would be an unfortunate state of affairs for both real estate investors and trust companies. We are convinced, however, that neither the facts of this case nor the applicable principles of law call for, or necessitate such a ruling. When Mrs. Bergdoll negotiated with Mr. Shoemaker in 1913, she knew there was at that time a first mortgage of \$40,000 upon the property offered as security. She also had actual notice that the loan made at the date of this mortgage was only \$32,000—all of which was sufficient to put her on inquiry as to the exact status of the \$40,000 incumbrance, to which she in express terms made her \$18,000 mortgage subject. Had she exercised ordinary care in this respect, she would have ascertained that, in addition to the \$32,000 actually paid out when the \$40,000 mortgage was created, the trust company, under a binding supplemental agreement, entered into when accepting from the mortgagor a "future obligation," had agreed to make advances on his behalf, if called upon so to do, to an amount more than sufficient to cover the remaining \$8,000. Under the circumstances, the auditor did not err in holding that, as between Mrs. Bergdoll and the trust company, the former's incumbrance was subject in all respects to the \$40,000 mortgage held by the latter, and hence that the trust company had a first lien on the fund for distribution.

For discussion of the general principles involved in the present case, reference is made to the following authorities, most of which were cited to us by both sides: *Lyle v. Ducomb*, 5 Bin. 585; *Stewart v. Stocker*, 1 Watts, 135, 140; *Garber v. Henry*, 6 Watts, 57; *Irwin v. Tabb*, 17 Serg. & R. 418; *TerHoven v. Kerns*, 2 Pa. 96 (in connection with last three cases, see *Moroney's Appeal*, *infra*); *Parmentier v. Gillespie*, 9 Pa. 86; *Moroney's Appeal*, 24 Pa. 372; *Bank of Montgomery County's Appeal*, 36 Pa. 170; *Bank of Commerce Appeal*, 44 Pa. 423; *McClure v. Roman*, 52 Pa. 458; *Parker v. Jacoby*, 3 Grant Cas. 300; *Taylor v. Cornelius et al.*, 60 Pa. 187, 196; *Kerr's Appeal*, 92 Pa. 236; *Mitchell v. Coombs et al.*, 96 Pa. 430; *Farabee v. McKerrhan*, 172 Pa. 234, 242, 33 Atl. 583, 51 Am. St. Rep. 734; *Neff's Estate*, 185 Pa. 98, 39 Atl. 830; *Dahlem's Estate*, 175 Pa. 444, 453, 34 Atl. 806; *Mullison's Estate*, 68 Pa. 212, 215. A study of our writings in the above cases will show a general accord with the conclusions here reached; and, while there may appear some conflict in certain statements to be found in the various opinions touching the general subject now before us, yet, when the development of the law is taken into account, it will be seen that these differences are not material.

[4] We have not felt called upon to pass separately on the several specifications of

error, for all of them are defective in form; in each instance they assert the court below erred in dismissing a certain exception to a designated finding or conclusion of the auditor, but in no instance do they contain—in totidem verbis—the court's action on the particular exception, nor do they show where the matter referred to is to be found in the paper books or the appendix. See *Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 269, 270, 88 Atl. 439; *Markleton Hotel Co. v. Connells-ville & State Line Railway Co.*, 242 Pa. 569, 572, 573, 89 Atl. 703; *Pfaff v. Bacon*, 249 Pa. 297, 300, 95 Atl. 71. A proper form for such assignments will be found in the first of these cases.

The decree is affirmed.

(257 Pa. 192)

KIRSTEIN v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

RAILROADS — 222(5) — OBSTRUCTION OF CROSSING — DELAY OF FIRE ENGINE — NON-SUIT.

In an action against a railroad for damages for injury in consequence of its obstruction of a grade crossing by its trains so as to delay a fire engine in reaching plaintiff's burning building where it did not appear that those in charge of the train knew or ought to have known of the fire when they were using or about to use the crossing, or that until the gates were raised it was reasonably practicable for defendant to have cleared the crossing and enabled the engine to sooner reach the fire, a compulsory nonsuit was properly ordered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 724.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Herman Kirstein against the Philadelphia & Reading Railway Company to recover damages for injury to plaintiff's buildings caused by fire. From a final order refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES- TREZAT, POTTER, STEWART, and FRA- ZER, JJ.

Frederick S. Drake, Samuel L. Howell, and John Weaver, all of Philadelphia, for appel- lant. Wm. Clarke Mason, of Philadelphia, for appellee.

STEWART, J. The plaintiff was the own- er of a wheelwright shop located about half a square north of a point where the tracks of the defendant company cross at grade Frank- ford avenue in the city of Philadelphia. About 12:45 p. m., on Saturday, September 18, 1909, a fire broke out underneath a shed in the yard adjoining the shop. The fire de- partment promptly responded to an alarm sent it, and dispatched several fire engines to the scene of the fire. When the engines reached the railroad crossing, a half square from the fire, their further progress was ob-

structed by the gates to the crossing which were then closed. A train of empty cars was then approaching the crossing from the east, and within about 400 feet of it. At the same time another train of empty cars was approaching from the west, but at somewhat greater distance. The gates were closed to give the trains the exclusive right of way over the crossing, and they remained closed until both trains had cleared, a period of from 10 to 13 minutes, during which time the fire engines were prevented from proceeding to the fire. The plaintiff's contention was that this delay was the result of the defend- ant's negligence, and that it increased materi- ally his loss from the fire. The action, charging negligence, was brought to recover compensation. A nonsuit was directed, and from the refusal of the court to take it off we have this appeal.

If the evidence submitted would have sup- ported a finding of failure on part of the de- fendant's employes to perform a manifest duty important to the plaintiff by way of pre- venting the injury which he claims to have sustained, the case should have been sub- mitted to the jury; otherwise the court was right in directing a nonsuit. By the term "manifest duty" we mean a duty which it would be willfulness or wantonness to disre- gard, as distinguished from a duty the non- observance of which is to be referred to in- attention or thoughtlessness. The former is always predicated on purpose or design, the latter never. If the employes of the defend- ant company knew, when their several trains were approaching the crossing, that a fire was endangering or destroying the plaintiff's property but a half square distant, and that the use of the crossing by the railroad com- pany for its own purpose would prevent the fire engines from reaching the scene of the fire and rendering timely service in extin- guishing the fire, it would have been a mani- fest duty resting on them to do whatever was reasonably practicable to remove any ob- struction to the immediate crossing of the fire engines. When it is sought to charge a railroad company with negligence for allow- ing such obstruction as here occurred, it is first of all essential that it be made to appear that those in charge of the trains, who were directly responsible for their con- trol, knew or ought to have known when they were employing or about to employ the crossing with their trains of the unforeseen conditions existing which made such employ- ment, or use of the crossing likely to cause the injury for which recovery is sought. We see nothing in the evidence indicating even in remote way that any of the defendant's em- ployes knew of the existence of this particu- lar fire. It does not appear that it was at any time within their view. They saw that the gates were closed as they passed along on the tracks, and they saw the fire engines standing there awaiting their removal, and

they may or may not have heard the call of the several bystanders who testified that they called, "Cut the train!" but this comes very far short of showing such knowledge of the situation as would charge them with a manifest duty to do something out of the usual to meet an emergency that could not have been foreseen, and about which they could at best only conjecture. In what we have said we include as well the gateman or flagman. It does not appear that he saw, or could have seen, the fire from where he was placed. One witness testified that having himself discovered the fire he told the gateman of the fact; just what he said does not appear, but it was at a time when the gates were already closed. No one testified that the closing of the gates occurred after the fact of the fire had become known, or that they remained closed unduly after the trains had cleared the crossing.

Again, it is quite as essential to a recovery that the plaintiff show that he sustained loss by and in consequence of what the party charged did, or failed to do. The detention of the fire engines was from 10 to 13 minutes. There is not a suggestion in the testimony coming from any one that from the time the gates were closed until they were raised or lifted it was reasonably practicable for the defendant to adopt other methods than it did of clearing the crossing that would have enabled the fire engines to sooner reach the fire. Certainly a jury is not to be allowed to assume the affirmative of such proposition in the absence of evidence. Apart from other considerations, except as another method existed, reasonably practicable, of clearing the tracks so as to admit of the crossing of the fire engines with shorter delay, no liability could rest on defendant.

We see no merit in the appeal. The judgment is affirmed.

(257 Pa. 306)

BABAYAN v. REED et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. MASTER AND SERVANT §40(2)—BREACH OF CONTRACT—MITIGATION—EVIDENCE.

In an action for breach of a contract whereby plaintiff had sold his cigarette business to defendants and was to be employed by defendants at a weekly salary for a term of years, it was competent for defendants to show in mitigation of damages that plaintiff might by reasonable effort have secured other employment in the same locality.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 48.]

2. EVIDENCE §547 — EXPERT TESTIMONY — FORM OF QUESTION.

Questions to an expert in the cigarette business as to whether an expert cigarette maker, blender, and buyer commanded a big salary and was in demand in the trade were bad in form and indefinite as to time, place, and amount, so that the court could not say that their exclusion was error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364.]

3. WITNESSES §237(1) — EXAMINATION — QUESTION ASSUMING FACT.

A question assuming that plaintiff terminated the contract by leaving defendants' employment was properly excluded, where such fact was neither conceded by plaintiff nor found by the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 829.]

4. CONTRACTS §352(6)—RESCISSION — QUESTION FOR JURY.

Whether such contract had been rescinded by mutual consent held, on the evidence, a question for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1200.]

5. CONTRACTS §349(7)—ACTION FOR BREACH — EVIDENCE.

In an action for breach of contract whereby plaintiff sold his cigarette business to defendants and was to be employed by defendants, the admission of plaintiff's testimony as to what he told defendants as to his former earnings in the business was not error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1098, 1795, 1817.]

6. DAMAGES §120(2)—BREACH OF CONTRACT.

In such action the amount of plaintiff's weekly salary under the contract was a question for the jury to consider in arriving at his damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 292, 296, 297.]

7. DAMAGES §122 — DELAY — ADDITIONAL DAMAGES.

Plaintiff in such case being entitled to his damages, if at all, as of the date of the breach, it was not error to permit a jury in their discretion to give additional damages for delay not exceeding 6 per cent. per annum.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 309-319.]

8. TRIAL §233(10) — INSTRUCTIONS — REQUESTS—DENIAL.

In such case defendants' request that plaintiff could not recover if the jury found that on his demand defendants tendered him a return of the cigarette brand claimed, or if he had agreed with defendants to cancel the contract, were properly declined, as ignoring plaintiff's claim of a balance due him for merchandise as to which the evidence was conflicting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 621, 622.]

9. TRIAL §139(4)—REQUESTS FOR DIRECTED VERDICT—DENIAL.

Where a plaintiff's claim consists of separate branches as to each of which the evidence is conflicting, defendant's request for a general verdict if the jury find the facts for him as to one branch of the case cannot be granted.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for breach of contract by Mardiros Babayan against John C. Reed and others. Verdict for plaintiff for \$3,625, and judgment thereon, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Maurice Bower Saul, Frank P. Prichard, and John G. Johnson, all of Philadelphia, for appellants. Paul Reilly, of Philadelphia, for appellee.

WALLING, J. This is an action for damages for an alleged breach of contract relating to the manufacture, etc., of cigarettes. In the early part of the year 1913 the plaintiff was engaged in a small way in the manufacture and sale of cigarettes, his place of business being on Fifty-Second street, Philadelphia. In the course of his business plaintiff became acquainted with defendants, who were engaged, inter alia, in the banking business in said city. Plaintiff seems to have had quite an extended experience in the tobacco and cigarette business, but was without capital to enlarge the same. His acquaintance with defendants soon became one of mutual confidence, as a result of which they agreed, in substance, to take over and finance said cigarette business and to purchase at least a part of plaintiff's property and effects connected therewith, including the trade-name or brand "Deran," and pay him for such property; also to pay plaintiff for five years a weekly salary of \$50, and, in case he devoted his entire time to the business, then the further sum of 15 per cent. of the net profits. The business was to be conducted in plaintiff's name, but to belong solely to defendants, and he was not to use their credit or make any purchase without their written authority. The contract, so far as reduced to writing, was executed by the parties May 6, 1913. However, some parts thereof remained in parol. Pursuant to this arrangement a factory and place of business were established and opened at 1028 Chestnut street, Philadelphia, to which place plaintiff removed his business and had his internal revenue license transferred. In the establishment of the new business, including the purchase of new machinery, etc., and a large amount of tobacco, defendants expended about \$24,000. They knew nothing about the cigarette business or the purchase of tobacco therefor, except plaintiff's word and the sampling of his cigarettes. In the agreement, drawn by one of the defendants and signed by all the parties plaintiff is represented as honest and an expert cigarette blender and maker and tobacco buyer.

The business seemed to develop unfavorably, and friction soon arose between the parties, and defendants became dissatisfied to such an extent that on July 8, 1913, they wrote plaintiff a letter declaring the contract canceled and at an end, because of certain alleged violations thereof by plaintiff; and same day, on his declining to surrender to them his key, changed the locks on the door of their said place of business and excluded plaintiff therefrom. He was paid by them \$50 a week from May 3, to July 12, 1913, and also \$610 on account of the property. Later plaintiff brought this suit, wherein he claimed \$757.91, as balance for merchandise, also claimed \$2,000 for his trade-name "Deran," and large amounts for loss

of earnings and profits resulting from defendants' alleged breach of contract. The defendants denied plaintiff's allegations, and set up a counterclaim for a large amount for alleged breaches of contract by plaintiff, all of which were denied by him. The case was stubbornly contested, and turned largely on questions of fact which were submitted to the jury, who gave plaintiff a verdict for \$3,625. Defendants abandoned their motion for a new trial, and on this appeal assigned as errors certain portions of the charge of the learned trial judge, and also rulings on offers of evidence.

[1, 2] Defendants asked of one of their witnesses, who had qualified as an expert in the business, the following questions:

"Q. Does an expert cigarette maker and blender and buyer command a big salary?"

"Q. Is an expert cigarette maker, blender and buyer in demand in the trade?"

"Q. Has such an expert any difficulty in obtaining employment?"

To each a general objection was made, which was sustained by the court. No offer was made and no reason given for the objections. It was competent for defendants to show in mitigation of damages that plaintiff might by reasonable effort have secured employment elsewhere in the same locality. *Emery v. Steckel*, 126 Pa. 171, 17 Atl. 601, 12 Am. St. Rep. 857. But the above questions are bad in form and indefinite in substance, especially so as to time, place and amount; and we cannot say that their exclusion was error.

[3] The jury found that plaintiff had not broken his contract, and therefore whether defendants got a trade-name for their cigarettes was immaterial. The question embraced in the sixth assignment of error assumes that plaintiff terminated his contract by leaving defendant's employ, a statement neither conceded by him nor found by the jury, hence its exclusion was justified, and, in view of the verdict, the amount defendants expended after plaintiff ceased to be in their employ was immaterial.

[4] The allegation that the contract was canceled by reason of a certain conversation had about June 25, 1913, between plaintiff and defendant Starr cannot be sustained under the facts of the case. Mr. Starr's testimony as to that is:

"Q. Repeat again what took place? A. He was very angry because I would not pay him any money, and he told us unless we paid him this money he would get an injunction and prevent us from using the brand and he would cancel the contract. I told him that was satisfactory to me. He said then he was going out to see his lawyer, and he started out the door and went down the steps, and that is the last I saw of him that day."

But that did not terminate the contract, especially in view of the fact that plaintiff kept at work until July 8th, and that no such claim is set up in the letter of that date, or in the pleadings.

[5] We cannot say that the admission of plaintiff's testimony as to what he told de-

tendants as to his earnings and profits in his Fifty-Second street business, was error. It was part of the negotiations leading up to the contract, and defendants offered testimony along the same line; and besides neither party claims that the entire contract was ever reduced to writing, and the court did not submit to the jury plaintiff's claim for loss of profits either in the old or new business.

[6] Plaintiff's suit was for a breach of the contract, and his damage was the loss he sustained thereby; nevertheless the amount of his weekly salary under the contract was a matter for the jury to consider in arriving at the damages.

[7] Plaintiff was entitled to his damages, if at all, as of the date of the breach; and it was not error to instruct the jury that they might in their discretion give additional damages for delay, not exceeding 6 per cent. per annum.

[8] Defendants' second request was in effect that plaintiff could not recover if the jury found that on his demand defendants tendered him a return of the brand "Deran." And their third request was:

"If the jury find that the plaintiff agreed with the defendants to cancel the contract, the plaintiff is not entitled to recover."

[9] Both of these requests were properly declined, as they ignore plaintiff's claim of a balance due him for the merchandise, and as to that the evidence was conflicting. Where a plaintiff's claim consists of separate branches, as to each of which the evidence is conflicting, a request by defendant for a general verdict in his favor, in case the jury find the facts for him as to one branch of the case, cannot be granted. And, as above stated, the evidence would not sustain a finding that the contract in question had been canceled by agreement of the parties. We find no reversible error in the record.

The judgment is affirmed.

(257 Pa. 104)

JACKSON et al. v. MYERS.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. TAXATION \S 856—INHERITANCE TAX—NATURE.

The collateral inheritance tax is not levied upon an inheritance or legacy but upon the estate of the decedent, and only the estate remaining after the payment of such tax passes to the heir or devisee.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1673.]

2. COMPROMISE AND SETTLEMENT \S 12—EFFECT—SALE OF INTEREST IN LAND—CONSTRUCTION OF CONTRACT—MARKETABLE TITLE—TAX.

A contract whereby the guardian of minors having an interest in a decedent's estate agreed in settlement of litigation to sell to other heirs the interest of such minors for cash, without any deduction whatever, and to give a fee-simple title, good and marketable, contemplated a sale of the minors' interest after the payment

of a collateral inheritance tax; that not being a lien or incumbrance within the terms of the contract.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. \S 54-74.]

3. TAXATION \S 890—SALE OF INTEREST IN LAND—PAYMENT TO PERFECT TITLE—RECOVERY AGAINST PURCHASER.

In such case, where the purchaser in order to perfect his title was compelled to pay the collateral inheritance tax on the vendor's interest in the estate of a decedent, he could not recover the amount from the guardian of the minor grantors.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1711.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Joseph A. Jackson and others against Arthur J. Myers for the amount of a collateral inheritance tax paid by plaintiff upon a decedent's real estate. Judgment for plaintiffs for want of a sufficient affidavit of defense, and defendant appeals. Reversed, with procedendo.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, and FRAZER, JJ.

James W. Laws, of Philadelphia, for appellant. Albert T. Bauerle, John G. Kaufman, and V. Gilpin Robinson, all of Philadelphia, for appellees.

MESTREZAT, J. This is a rule for judgment for want of a sufficient affidavit of defense. The rule was made absolute, and the defendant has appealed.

George W. Jackson died intestate, unmarried, and without issue, leaving to survive him Joseph A. Jackson, a half-brother, Bessie A. Jackson Curtis, a half-sister, and Joseph Jackson Restein and James Restein, sons of a deceased half-sister, who are the plaintiffs in this action. He also left surviving him two nieces, Lillian M. Jackson and Ariel K. Jackson, minor children of a deceased brother of the whole blood, Daniel W. Jackson, and their guardian, Arthur J. Myers, is the defendant. Prior to the institution of this suit the parties had been for some time involved in litigation, and in order to effect a compromise and settle the differences between them they entered into a contract by which the guardian of the two minor children, the defendant in this action, agreed, subject to the approval of the orphans' court, to sell to the plaintiffs, who agreed to buy, "all the right, title, and interest of the said minors of, in, and to the estate of George W. Jackson, deceased, real and personal, for the sum of \$40,000 in cash without any deduction whatever, * * * title to be in fee simple, good and marketable, and such as will be insured by any reputable trust company, subject only to such incumbrances as appear by" two bills in equity filed in the court of common pleas of Philadelphia county, and two ground rents. The sale was of an interest in both real and per-

sonal property. The guardian applied to the orphans' court for leave to make sale of his wards' interest in the real and personal estate of George W. Jackson, deceased, upon the terms contained in the agreement, and, the court being of the opinion that the sale of the minors' interest for the sum of \$40,000 was to their advantage a decree was entered approving the report of the examiner and master recommending that the guardian be authorized and empowered to sell the interest of his wards in the property. The collateral inheritance tax upon the estate of George W. Jackson, deceased, was not paid at the time the settlement was made, and the guardian refused to pay it, claiming that, under the agreement and the order of the orphans' court authorizing the sale, he was not required to pay the tax. The plaintiffs contended that the guardian should pay the tax, that it was a lien upon the interest of the minors in the estate which the plaintiffs had purchased, and that, under the terms of the agreement, the defendant was required to pay it. The plaintiffs having previously agreed to sell the property to another purchaser, and in order to avoid liability for breach of their contract, accepted the deed from the guardian and paid under protest the sum of \$40,000 without deducting the tax. In a subsequent partition proceeding in the estate of George W. Jackson, deceased, some real estate was sold, and from the proceeds the commonwealth collected the collateral inheritance tax; the amount due upon the share of the estate conveyed to the plaintiffs being \$2,085.21. This suit was instituted by the plaintiffs to recover this sum.

The facts are set out in detail in the statement and affidavit of defense. The single question involved is whether under the contract of sale the plaintiffs or the defendant should pay the collateral inheritance tax on that part of the estate of George W. Jackson, deceased, in which the defendant's wards had an interest, which was sold by the defendant to the plaintiffs. The plaintiffs claim that the tax was a debt due from the defendant's wards, heirs of the decedent, and that it was a lien on the estate of the decedent which, under the terms of the agreement, the defendant was required to satisfy and remove, and the plaintiffs, having been compelled to pay the tax in order to convey the property unincumbered to a purchaser, are entitled to be reimbursed for the amount of the tax paid by them. The defendant denies the right of the plaintiffs to recover, on the ground that he sold to the plaintiffs and conveyed only the right, title, and interest of the minors in the estate of George W. Jackson, deceased, for the net sum stipulated, and that this interest was limited to such property as remained after the collateral inheritance tax was paid upon the estate. The learned court below held that the defendant was liable for the tax,

inasmuch as the agreement to sell stipulated in terms that the title should be good and marketable and such as would be insured by any reputable trust company, subject only to such incumbrances as were specifically excepted in the agreement.

[1] The act of assembly imposing the payment of a collateral inheritance tax provides that "all estates * * * passing from any person, who may die seised or possessed of such estates [to collateral heirs] * * * shall be and they are hereby made subject to a tax of \$5 on every \$100 of the clear value of such estate or estates." The executors and administrators and their sureties are only discharged from liability for the tax with which they are charged when they have paid it, and the tax is made a lien on the estate until it is settled and satisfied. The register of wills is made the agent of the commonwealth for the collection of the tax, and he is authorized to enforce payment of a collateral inheritance tax against real or personal property by proceedings in the orphans' court.

It will be observed that the statute imposes the tax on the estate of the decedent. It becomes a lien and is fastened upon the estate from the moment of the decedent's death, and must be discharged by payment before the estate passes to the collateral heir. It is levied on the estate in the hands of the personal representative who, with his sureties, is made liable for its payment. The state becomes a preferred beneficiary under the act imposing the tax, and it is entitled to its share of the estate before the claims of heirs or devisees can be recognized or satisfied. The latter take only such part of the decedent's estate as remains after the payment of the tax which is not levied upon the inheritance or the legacy, but, as already observed, upon the estate of the decedent. What passes to the heir or devisee, and to which he acquires title, is the portion of the estate remaining after the payment and satisfaction of the collateral tax.

This interpretation of the statute imposing the collateral inheritance tax is sustained by the decisions of this court. In *Strode v. Commonwealth*, 52 Pa. 181, a leading case on the subject, the question was whether that part of a decedent's estate passing to collaterals, which consisted of bonds of the United States that were exempt by law from state taxation, was liable to collateral inheritance tax. We held that the collateral inheritance tax is not levied on a specific article, but on the estate of the decedent, and that therefore it is not a tax upon the bonds but upon the estate of which they are a part. In delivering the opinion Mr. Chief Justice Woodward said (52 Pa. 183):

"The mistake of the learned counsel for the plaintiff in error consists, we conceive, in treating this as a tax on the government bonds, when it is really a tax upon a decedent's estate, dying without lineal heirs. * * * That estate passed into the hands of the executor for adminis-

tration, and is taxed in his hands as an estate. The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees, and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it."

Finnen's Estate, 196 Pa. 72, 74, 46 Atl. 269, 270, was an appeal from an assessment of collateral inheritance tax. In delivering the opinion Mr. Chief Justice Green said:

"That which the legatee gets and keeps is the aggregate sum bequeathed, less the amount of the tax. The tax must be retained by the person who has the decedent's property in charge. It is therefore not a tax upon the property or money bequeathed, but a diminution of the amount that otherwise would pass under the will or other conveyance, and hence that which the legatee really receives is not taxed at all. It is that which is left after the tax has been taken off. It is only imposed once, and that is before the legacy has reached the legatee and before it has become his property."

The learned Chief Justice then cites with approval *Strode v. Commonwealth*, supra, and quotes part of the opinion of the court below in that case, which we affirmed, wherein it is said that:

The tax is "a restriction upon the right of acquisition by those who under the law regulating the transmission of property are entitled to take as beneficiaries without consideration. The state is made one of the beneficiaries. It lays its hands upon estates under such circumstances, and claims a share, and whether the share is exacted as a tax or duty or whatever else, or the machinery employed in levying an ordinary tax is adopted or not, it is of no consequence."

Orcutt's Appeal, 97 Pa. 179, is then cited as holding the same doctrine.

[2, 3] The collateral inheritance tax law of the state, as thus interpreted, did not impose a lien upon the interest of the defendant's wards in Jackson's estate. The failure of the learned court to observe the distinction, clearly pointed out in the authorities above cited, between a lien on the estate of the decedent and on the interest of the defendant's wards in that estate, led it to the erroneous conclusion that the tax was a lien within the meaning of the contract of sale which the defendant was required to discharge. The estate of George W. Jackson, deceased, did not pass to the collateral heirs until the tax had been paid. If Jackson's representative delivered the personal estate to the beneficiaries before the payment of the tax, the statute unmistakably fixed him for it. If the heirs took possession of the real estate, the tax being unpaid, it was subject to the statutory lien, but the residue after payment of the lien was discharged from the payment of the tax, and their title was only to that part of the estate "which is left after the tax has been taken off." In selling their right, title, and interest in and to the estate of the decedent, the defendant's wards could sell only the part of the estate left after the payment of the tax. It was that title which they were required to make good, marketable, and such as would be insured by a reputable trust company. If there were no incum-

brances against it, the plaintiffs could not complain. The lien reported by the trust company was against Jackson's estate, and not against the part of his estate to which the heirs succeeded.

In construing a contract which is ambiguous or contains apparently repugnant clauses, the court should consider the negotiations leading to its formation, its subject-matter, the consideration, the circumstances under which the parties contract, and the objects to be accomplished. Interpreting the contract in the present case in the light of the circumstances and under a proper construction of the collateral inheritance tax law, we are clear the parties intended that the plaintiffs should pay the defendant, as stated in the agreement, "\$40,000 in cash, without any deduction whatever." The parties had been engaged in much litigation over their rights to the decedent's property, and both sides desired that it should be ended. The title of the minors to the property was attacked and they were without means to carry on litigation. If this attack had been successful, they would have been penniless. There were many reasons why the other parties also should desire an end of the litigation. The story of their disputes and disagreements is a long one, and is told in detail in the pleadings. It was under these circumstances that the contract of sale of the minors' interest in the estate of the decedent was entered into, and which, it was supposed, would end the existing feuds. The contract fixed by clear and explicit language what the plaintiffs were to pay and what the defendant was to receive for the interest of the minors in the property. It was "\$40,000 in cash, without any deduction whatever." The negotiations between the parties and the construction put upon the agreement by the orphans' court when it granted the guardian the authority to sell clearly show that this provision of the contract unmistakably carried out the intention of the parties. The master appointed by the orphans' court reported, *inter alia*, as follows:

"The substance of this agreement (so far as the minors' interests are concerned) is that the guardian shall sell, and the other parties to said agreement shall buy, the entire interest of the minors in the estate of George W. Jackson, deceased, for the net sum of \$40,000 in cash."

Other parts of his report also show that he interpreted the contract as providing for a net consideration of the stipulated sum, and hence he reported that the sale contemplated by the agreement "for the sum of \$40,000 would be for the best interests of the minors." The petition presented to the orphans' court for leave to make the sale was joined in by the plaintiffs and it was therein set forth, *inter alia*, that the plaintiffs had offered in writing to purchase the minors' interest in the property "for the sum of \$40,000 in cash" with the provision that "all adverse claims set up against said minors' estate in all the

above proceedings" should be taken care of by the purchasers, and that all costs and expenses "shall be assumed by said purchasers, and said minors' estate entirely relieved therefrom." It is therefore difficult to see how "any deduction whatever" can be made from the stipulated purchase price without infringing the contract of sale. It is true that the contract required the title to be good and marketable, and provided against incumbrances, but, so far as the record discloses, the title is good and marketable, and the only alleged incumbrance against the title of the minors is the collateral inheritance tax levied against the estate of the decedent. We must assume that the parties dealt with full knowledge of the law, and therefore knew that the estate of George W. Jackson, deceased, passing to the minors, was subject to a collateral inheritance tax which was a lien and must be paid before the minors received and could convey it. With this knowledge, the plaintiff contracted to pay the defendant "\$40,000 in cash, without any deduction whatever," for their interest in the estate. The natural and necessary inference is that the parties meant what their contract clearly imports; that the stipulated price was to be paid without deducting the collateral inheritance tax. We think, therefore, that the case must be ruled against the plaintiffs on a proper interpretation of the contract.

The judgment of the court below is reversed, with a procedendo.

(257 Pa. 120)

RICE v. KINNEY.

(Supreme Court of Pennsylvania. March 12, 1917.)

EXECUTION \S 242—SHERIFF'S DEED—CONFIRMATION.

An appeal from the action of the common pleas court in dismissing the exceptions to the confirmation of a sheriff's deed for property sold under a venditioni exponas was properly dismissed, where nothing in the record showed error; any remedy for refusal to vacate the judgment under which the property was sold being by appeal.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 669-772.]

Appeal from Court of Common Pleas, Philadelphia County.

Exceptions to the confirmation of a sheriff's deed in the case of Elmer C. Rice against Robert D. Kinney. From an order dismissing the exceptions, defendant appeals. Appeal dismissed.

From the record it appeared that on March 31, 1913, the appellee, Elmer C. Rice, issued a summons in assumpsit against the appellant, Robert D. Kinney, which was served, and on April 2, 1913, filed his statement of claim, wherein he claimed upon and set forth in said statement true copies of six promissory notes, each of the sum of \$200. An affidavit of defense was filed by appellant,

Robert D. Kinney, and the cause came on for trial May 5, 1914, and resulted in a verdict on May 7, 1914, in favor of appellee, Elmer C. Rice, for \$1,597.20. A rule was taken for a new trial, which was discharged. Other rules were taken by appellant, Robert D. Kinney, all of which were discharged. Judgment was entered upon said verdict July 11, 1914, from which no appeal has been taken. On August 21, 1916, after issuance of an alias venditioni exponas, the real estate of appellant, Robert D. Kinney, was sold by the sheriff of Philadelphia, on the third Monday of September, 1916, for the price of \$250, to Albert W. Mylin. Exceptions were filed to the confirmation of the sale, complaining, inter alia, of the action of the court in refusing to vacate the judgment and grant a new trial. The court dismissed the exceptions.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Robert D. Kinney, of Philadelphia, in pro. per. John B. Rutherford, of Philadelphia, for appellee.

PER CURIAM. This appeal is from the action of the court below in dismissing exceptions to the confirmation of a sheriff's deed for property of the appellant, sold on an execution issued May 9, 1916, upon a judgment entered against him on a verdict on July 11, 1914. Nothing whatever appears showing that the court below erred in dismissing the exceptions. If the appellant was aggrieved by its action on his rule to show cause why the judgment should not be vacated, the verdict set aside, and a new trial granted, his remedy was by appeal from such action within the statutory period.

Appeal dismissed, at appellant's costs.

(257 Pa. 118)

DOUGHERTY v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. EVIDENCE \S 547—EXPERT TESTIMONY—TROLLEY WHEEL LEAVING WIRE.

In an action against street railway for personal injury from fall of a trolley pole, where there was uncontradicted evidence that pole and equipment were in good condition after the accident, the refusal to permit a witness to state whether a trolley wheel would leave the wire if the pole was properly adjusted was not error, where there was no offer to prove that the equipment was the same at the time of the accident as when the witness acquired his special knowledge, and where the actual condition of the equipment was susceptible of direct proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364.]

2. EVIDENCE \S 514(4)—EXPERT TESTIMONY—TROLLEY WHEEL LEAVING WIRE.

Where there was a network of wires at the place of the accident, it was reversible error to refuse to permit plaintiff to prove by an ex-

pert who had worked for the railway that trolleys would often leave the wires, and that at such a place there was danger of the trolley wheel catching in the wires and pulling the pole out of its socket, and that it was dangerous to cross such wire without holding the trolley rope.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2322.]

3. STREET RAILROADS §117(3)—ACTION FOR INJURY—QUESTION FOR JURY.

In action against street railway for personal injury from the fall of a trolley pole, *held*, on the evidence, that the conductor's negligence in failing to hold the trolley rope, at place of accident and whether it was the proximate cause of the injury, were for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 241, 242, 251, 252.]

4. NEGLIGENCE §121(2), 134(1)—HAPPENING OF ACCIDENT—EVIDENCE.

The happening of an accident which in the usual course of things and in the exercise of proper care does not happen is not itself evidence of negligence, but the quantum of proof necessary to establish negligence under the circumstances need be very slight.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225, 267, 271.]

5. STREET RAILROADS §112(2)—HAPPENING OF ACCIDENT—EVIDENCE.

In action against street railway for personal injury from fall of trolley pole, where plaintiff, in showing how the accident happened, was not limited to direct evidence, but may make out her case by circumstantial evidence, the accident was not itself, evidence of negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228.]

6. LIMITATION OF ACTIONS §127(14)—AMENDMENT OF PLEADING.

In such action, where the statement of claim averred that it was defendant's duty to inspect and repair its cars and to operate them in a careful manner, so as not to injure pedestrians by the falling of the trolley pole, etc., the refusal of an amendment, after the statute of limitations had run, to aver that defendant was required to have a special automatic device upon its cars to keep its trolley poles from catching in car wires, or to require the conductor to hold the trolley rope, was not error.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Elizabeth Dougherty against the Philadelphia Rapid Transit Company to recover damages for personal injury. From an order refusing to take off a compulsory nonsuit, plaintiff appeals. Reversed, with a venire facias de novo.

Argued before BROWN, O. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Frederick J. Shoyer, Martin Feldman, and Henry Arronson, all of Philadelphia, for appellant. Harold B. Beitler, of Philadelphia, for appellee.

MOSCHISKER, J. This is an appeal from the refusal to remove a nonsuit. The assignments of error raise numerous ques-

tions; but we shall discuss only such of them as are in some sense controlling.

On September 24, 1910, at about 2 o'clock in the afternoon, the plaintiff, a pedestrian upon the streets of the city of Philadelphia, was suddenly struck and knocked down by a detached trolley pole which fell from the top of one of defendant's cars, at the junction of Ridge avenue, Tenth and Callowhill streets. When the case came to trial, the defendant produced its motorman and conductor, as well as the inspector who examined the car in question, all three of whom were placed upon the stand by the plaintiff. So far as the notes of testimony indicate, these witnesses were willing and fair; but their examinations failed to disclose anything unusual or defective in the construction or maintenance of the offending car or its appliances. On the contrary, it appears that, immediately after the accident, the trolley pole showed no blemishes or defects; that it was replaced in its socket, in apparently good condition, and the car operated as usual; further, that, when the car was turned in for inspection, the pole was "straight" and all its parts were in good repair; finally, the inspector said that his examination did not disclose or throw any light upon what caused the trolley to leave its wire.

In addition to the witnesses already referred to, a Mr. Mulford was called by the plaintiff. It appears from this man's testimony that there were single lines of trolley wires suspended over both Tenth and Callowhill streets, and a double line over Ridge avenue, all of these crossing one another and forming a network at the point of the accident; that, when he arrived upon the scene, the injured woman was lying on the ground; and that the wire upon which the trolley pole in question operated was "flopping up and down," the rise and fall covering a distance of from five to six inches. The motorman said that, just before the accident, he got a signal from the conductor to start, and "went ahead"; that almost immediately "the power left the car," and it stopped; that he stepped off to see what had happened, and found the pole lying in the street. The conductor testified that, when the car started, "it gave a certain crack," and the trolley pole fell to the street.

We have summarized all the material evidence in the case, excepting that the motorman stated there was nothing he saw or knew of which could have caused the detachment and fall of the pole; and this excludes the theory of the possible intervention of an external agency. With the testimony thus, plaintiff offered two experienced trolley car operators, as experts, and the rejection of certain questions put to them are the principal matters complained of in the various assignments of error.

[1] The first expert had worked a consider-

able period for the defendant company, leaving their service about five years before the accident, and, so far as the record shows, his experience with trolley cars was all gained at that time, he having subsequently gone into another line of employment. There was no offer to prove the trolley equipment, etc., was the same at the date of the accident as when the witness in question acquired his alleged special knowledge. Hence, with this lack in the evidence, his opinion on the questions put to him would not have been a safe guide for the jury; but, aside from this aspect of the matter, after mature thought, we do not see that there was sufficient foundation to justify the following interrogatory, put to the witness by counsel for plaintiff: "As a result of your experience, could a trolley wheel leave the wire if the pole was properly adjusted?" The question just stated, which was disallowed by the trial judge, covers in substance the point sought to be raised by several of the assignments of error; and its evident purpose was to prove, if possible, by opinion testimony that which was susceptible of proof by direct evidence, i. e., the fact as to whether or not the pole had been properly adjusted.

As previously stated, the notes of testimony show that the plaintiff had no difficulty in securing the attendance of the defendant's employes, and, furthermore, the latter's evidence indicates that, after the accident, the pole and other trolley appliances were in good condition. If the plaintiff wanted to inquire as to the inspection and adjustment of this pole, prior to the accident, there was nothing to prevent him from so doing. Had such a preliminary inquiry developed testimony from which the jury might have reached the conclusion that the pole had not been properly adjusted, and had this testimony been met by counter proofs, then, perhaps, the question under consideration would have been a proper one; but, on the record as it stands, we see no error in the ruling of the court below with reference thereto.

[2] The other expert had gained his experience by working as a conductor for the defendant company during a period of ten years, from 1905 to 1915. The plaintiff offered to prove by this witness that trolleys "would frequently leave the wire; that, as a result of leaving the wire, at an intersection such as Tenth and Callowhill streets and Ridge avenue, there was constant danger of the trolley wheel catching in the wires, the result of which would be, if the car moved on, to pull the pole out of the socket; * * *" again, that "it would be dangerous to cross a network of wires such as there was at this place [the point of the accident] without taking hold of the trolley rope to prevent it [the trolley wheel] being caught in the wires above; and that the instructions were to conductors, at that time, to take hold of the rope at such a place." These

offers were rejected, and the plaintiff secured proper exceptions.

It is true that the printed rules of the company, produced by the defendant, did not provide any instructions to conductors such as suggested in the offer; but the fact that the printed rules failed in this respect did not render it impossible that oral instructions might have been given, as contended by the plaintiff. Whether or not such instructions were given, however, if it could be shown as a fact that trolleys frequently leave their wires, that, on such occasions, there is constant danger of the trolley wheel catching, and that this danger is well known and could be avoided by the conductor holding the rope, it would be a question for the jury whether or not, under the conditions existing at the point of this accident, the present car was operated with ordinary, due care when the conductor failed to hold the rope.

[3] There was some direct proof that this trolley left the wire, and, in addition, we have the circumstance of the latter flopping up and down. On the whole, we think that there was sufficient circumstantial evidence to require its submission to the jury, so that they might determine whether or not the trolley pole had been pulled from the top of the car by becoming enmeshed in the wires, and, further, if they so found, whether or not the conductor was guilty of negligence in failing to hold the rope at the place in question; finally, if he was so guilty, whether or not his neglect was the proximate cause of the accident.

[4] Outside of Pennsylvania, there is a strong line of cases which hold that the mere happening of such an accident as the one here under investigation puts the burden of explanation upon the defendant. These cases go upon the principle that, "Where a thing is shown to be under the management of the defendant and his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it offers reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care" (see leading case of *Scott v. London & St. Katherine Docks Co.*, 3 Hurlstone & Coltman, 594); but we have not gone this far. See *Lanning v. Pittsburgh Railways Co.*, 229 Pa. 575-577, 79 Atl. 136, 32 L. R. A. (N. S.) 1043; *Clark v. Philadelphia Rapid Transit Co.*, 241 Pa. 437, 88 Atl. 683; *Benson v. Philadelphia Rapid Transit Co.*, 248 Pa. 302, 93 Atl. 1009; *Zercher v. Philadelphia Rapid Transit Co.*, 50 Pa. Super. Ct. 324—all trolley cases, the last three concerning the fall of poles. In *Gelser v. Pittsburgh Railways Co.*, 223 Pa. 170, 172, 72 Atl. 351, 352, however, where a pedestrian upon the street was injured by a car which jumped its track, near a switch, and the only evidence of negligence was the fact that "the switch point was worn flat,"

we held the jury might draw the inference that the accident was occasioned by the worn condition of the switch point. There we affirmed *per curiam*, adopting the opinion of the court below, wherein the applicable principle is stated thus:

"It is still the rule of law that the happening of the accident, in cases such as this one, is not evidence of itself of negligence, but the quantum of proof necessary to establish negligence, under certain circumstances, need be very slight."

[5] We feel that the rule as just stated should be applied in the present instance. While, before the plaintiff can recover, she must show how the accident happened and fix the defendant with negligence, yet, in so doing, she is not restricted to direct evidence; she may make her case out by circumstantial proofs sufficiently strong to carry conviction to a reasonable mind. As already indicated, we feel that certain parts of the testimony offered should have been allowed as evidence, and that the issues heretofore suggested should have been submitted to the jurors for their determination. In addition to the authorities already cited, see *Caffrey v. Philadelphia Rapid Transit Co.*, 249 Pa. 364, 94 Atl. 924; *Janock v. Balto. & Ohio R. R. Co.*, 252 Pa. 199, 97 Atl. 205.

[6] One other matter calls for consideration. The accident happened in 1910; the suit was instituted and the statement of claim filed in 1911. Plaintiff averred that it was the duty of the defendant properly and carefully to "inspect and repair" its cars and appliances, and to operate and control them upon the streets of the city in a proper and careful manner, so that "pedestrians crossing the said streets * * * should not be injured by said cars or by the falling from said cars of any part or appliance thereof"; that, disregarding these duties, the defendant negligently suffered one of its cars to remain out of repair, and so negligently managed, operated, and controlled this car that "the pole which was attached to the top * * * suddenly and without warning fell from said * * * car and struck the plaintiff." In 1916 the plaintiff asked leave to amend her statement, by adding an averment to the effect that it was the duty of the defendant to operate its cars in such a way as to hinder the trolley wheel from catching in cross wires; that it was known to the defendant that trolleys frequently left their wires at intersecting streets; and that it was the duty of the defendant to have a special automatic device upon its cars to keep its trolley poles from becoming caught in such wires in case they should leave their lines; finally, that, when a device of this kind was not used, it was the duty of the conductor, in approaching street intersections such as the one in this case, to take hold of the rope attached to the trolley pole, in order to control the latter and pre-

vent accidents. The court below refused to permit these amendments.

There is nothing in the proposed amendments which could not properly be proved under the original statement, except the averment as to the automatic device, and we agree with the learned court below that this could not be added to plaintiff's case after the statute of limitations had run; for the charge of nonperformance of duty on the part of the defendant in not equipping its cars with such a device would raise a new element calling for a defense entirely different from that required by the averments of the original declaration. If there is such a safety device in general use as alleged in the proposed amendments, of course the defendant ought to install it; but the latter's legal obligations so to do, under penalty of being found guilty of negligence, is a point which, on the pleadings in this case, we are not called upon to discuss or decide. There is no merit in the present assignment.

All specifications of error which direct attention to rulings in conflict with the views here expressed are sustained, and the judgment is reversed, with a *venire facias de novo*.

(257 Pa. 168)

SMITH v. McCLURE et al.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. FRAUDULENT CONVEYANCES §237(1)—ACTION TO SET ASIDE — JURISDICTION OF EQUITY.

Equity has concurrent jurisdiction with law of actions to set aside alleged fraudulent conveyances of realty to defeat creditors, though where there is an adequate remedy at law and the jurisdiction of equity is raised by demurrer or answer, the case will be remitted to the law side of the court.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 674-677, 685.]

2. EQUITY §42(1) — FINDING OF JURISDICTION—CONCLUSIVENESS.

Under Act June 7, 1907 (P. L. 440), the decision of a court of equity in favor of its jurisdiction is conclusive upon the plaintiff.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 119.]

3. EQUITY §42(1) — JURISDICTION — OBJECTION.

Where a party seeks relief in a court of equity against fraudulent conveyances and insists on its jurisdiction, he cannot thereafter complain because the court sustains his contention and disposes of the case on its merits.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 119.]

4. JUDGMENT §645—RES ADJUDICATA—VALIDITY OF DEED.

Where one filed a bill in equity against a grantee averring that a deed was in fraud of creditors and seeking to have it declared void, and the grantee filed a denial and claimed that complainant was not entitled to equitable relief and complainant filed a replication and insisted on equity jurisdiction, a decree on final hearing, dismissing the bill, was *res adjudicata* as to a subsequent suit of ejectment against the gran-

tor and grantee, setting up the alleged fraudulent character of the deed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158.]

Appeal from Court of Common Pleas, Chester County.

Ejectment by C. Shillard Smith against Hattie C. McClure and husband. Judgment for defendants on demurrer to their answer, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-TREZAT, STEWART, MOSCHZISKEB, and WALLING, JJ.

W. E. Greenwood, of Coatesville, for appellant. S. Duffield Mitchell, of West Chester, for appellees.

WALLING, J. On January 9, 1915, Henry C. McClure executed and delivered to his wife, Hattie C. McClure, a deed for certain land in the borough of Coatesville, which deed was duly recorded on February 12th of the same year. Between the delivery and recording of the deed Mr. McClure gave C. Shillard Smith, the plaintiff herein, a judgment note for an existing indebtedness, on which judgment was entered prior to the recording of the deed. Thereafter plaintiff filed a bill in equity in the court of common pleas of Chester county against Hattie C. McClure, averring that the deed was in fraud of the rights of the creditors of Henry C. McClure, and particularly in fraud of the rights of plaintiff, and praying that it be decreed fraudulent and void, and as such expunged from the record. To this Mrs. McClure filed answer, denying the allegations thereof, and further averring that complainant was not entitled to equitable relief, and that a court of equity was without jurisdiction therein. Plaintiff insistently contended at every stage of the proceeding that the court had jurisdiction. He filed a replication, and the case proceeded to trial on the merits. On the conclusion of the testimony submitted by plaintiff, the court, being of the opinion that the right to equitable relief had not been substantially proven, entered a decree dismissing the bill at costs of complainant, and later dismissed the rule to strike off the decree, whereby it became final. Thereafter plaintiff issued execution on his said judgment, by virtue of which the land was sold to him by the sheriff; and then plaintiff brought this action of ejectment against Mr. and Mrs. McClure, and bases his right to recover on the alleged fraudulent character of the deed. Defendants' answer sets up the decree in the equity suit, and avers that thereby the question as to the validity of said deed is res adjudicata; and, on plaintiff's demurrer thereto, the court below entered judgment for the defendants.

[1-3] The rule urged for appellant, that jurisdiction of the subject-matter cannot be acquired by consent, is sound as a general proposition, but has no application to this

case, because equity has concurrent jurisdiction with the law side of the court of actions to set aside alleged fraudulent conveyances of real estate. However, where there is an adequate remedy at law and by reason of which defendant raises the question of jurisdiction by demurrer or answer, the case will be remitted to the law side of the court. Act of June 7, 1907, P. L. 440 (Purdon's Digest [13th Ed.], vol. V, page 5465. Under that act the decision of a court of equity in favor of its jurisdiction is conclusive upon the plaintiff. Here appellant sought relief in a court of equity, and insisted on its jurisdiction, and he cannot now complain because the court sustained his contention and disposed of the case upon its merits. In a case like this, where the parties voluntarily proceed to trial upon the merits, the decree in equity is valid, and the plaintiff is not relieved therefrom because the defendants vainly sought to oust the jurisdiction of the court.

Even a defendant waives his right to an issue, or to a trial upon the law side of the court, unless he demands it promptly. "While objection to the jurisdiction can generally be made at any stage of the proceedings, objections to the jurisdiction of equity on the ground that the proceedings should have been instituted on the law side of the court will not be entertained, unless made within a reasonable time after bill filed. 'Whether a case may be brought in the chancery form is only a question of form and not of jurisdiction, and the objection is waived if not made in due season.'" *Penna. R. R. Co. v. Bogert*, 209 Pa. 589, 602, 59 Atl. 100, 105.

Equity has concurrent jurisdiction with law where property has been fraudulently conveyed or incumbered in order to defeat the claims of creditors. *Orr v. Peters*, 197 Pa. 606, 47 Atl. 849. And see *Kemmler v. McGovern*, 238 Pa. 460, 86 Atl. 304, and *Wagner v. Fehr*, 211 Pa. 435, 60 Atl. 1043, 3 Ann. Cas. 608.

The case of *Hyde v. Baker*, 212 Pa. 224, 61 Atl. 823, 108 Am. St. Rep. 865, is not parallel to this; for in that case the defendants appealed; and, aside from that, the creditor there first pursued his remedy at law by a sheriff's sale of the land in question, of which he became the purchaser; and it was there held that his only remaining step was an action of ejectment and not a bill in equity. And that case was determined prior to the passage of the said act of 1907.

Where a plaintiff at all stages of the proceeding insisted that equity had jurisdiction, he cannot, after the bill has been dismissed upon the merits, have the case certified to the law side of the court. *Nissley v. Drace*, 242 Pa. 105, 88 Atl. 914.

[4] Neither can he maintain an action at law for the identical cause of action already determined against him in equity. "Jurisdiction will not be taken in equity to retry on the same facts a cause of action that has been

decided in proceedings at law." *Megahey v. Farmers' & Mechanics' Savings Fund & Loan Ass'n*, 215 Pa. 351, 64 Atl. 546. And the same rule applies generally to courts of concurrent jurisdiction. Plaintiff had his day in court in a forum of his own selection, and is concluded by the decree there entered, from which he took no appeal.

The judgment is affirmed.

(257 Pa. 163)

STRATFORD v. FRANKLIN PAPER MILLS CO.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. TAXATION §114 — INSOLVENCY OF CORPORATION — EFFECT.

The fact that a corporation was insolvent and in the hands of a receiver did not affect the right of the state taxing officer, as it was the receiver's duty to make the returns called for by the law, and upon his failure to do so, it was the right and duty of the auditor general to assess taxes on its capital stock, etc.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 208-210, 271, 273.]

2. TAXATION §407 — RETURNS — NOTICE.

Where the formal notices of tax settlements sent to a company in the hands of a receiver stated that "after repeated requests" it had neglected to furnish a report it would be assumed, without averment or proof to the contrary, that the receiver had knowledge in law or in fact that such reports were required, and that if not furnished the state officials would proceed to appraise and settle accounts against the company for its taxes; prior notice of an intention to assess such taxes not being essential.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 674.]

3. TAXATION §451 — HEARING — APPEAL.

Every taxpayer is entitled to an opportunity to be heard by the taxing authorities before a tax is conclusively settled against him, but there is no rule requiring that he be afforded a further appeal to a court of law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 805, 808.]

4. TAXATION §446 — CORPORATIONS — FINDINGS OF TAXING OFFICIALS — REVIEW.

A settlement of a state tax on the capital stock of a corporation under Act June 1, 1889 (P. L. 420), Act June 7, 1911 (P. L. 673), and Act July 22, 1913 (P. L. 908), involves findings of fact by duly authorized officials and no other tribunal, unless one duly authorized, may inquire into or set aside such findings.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 784-786.]

5. TAXATION §446 — CORPORATIONS — ASSESSMENTS.

When the taxing authorities have general power to assess the subject-matter involved, an assessment made as authorized by law cannot be questioned or set aside except in the way provided by the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 784-786.]

Appeal from Court of Common Pleas, Delaware County.

Exceptions to report of auditor dismissed, and claim of Commonwealth for taxes in

case of Frank B. Stratford against the Franklin Paper Mills Company disallowed, and the Commonwealth appeals. Reversed and remitted to the court below, with direction.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

Wm. M. Hargest, Deputy Atty. Gen., Francis Shunk Brown, Atty. Gen., and J. C. Taylor, of Chester, for the Commonwealth. William C. Alexander, of Media, for appellee.

MOSCHZISKER, J. On April 21, 1914, the Franklin Paper Mills Company, a Pennsylvania corporation, became insolvent and went into the hands of a receiver, who turned its assets into cash; an account was filed and referred to an auditor; May 27, 1915, the commonwealth presented claims before the latter for 1914 taxes on capital stock and corporate loans; these accounts had been duly settled by the proper authorities, May 5, 1915, for want of the annual reports which the law requires from such corporations; but the learned auditor, instead of accepting the settlements in question as conclusive, took testimony and found that all the assets of the paper company were used in manufacturing, further, that the bonds taxed were held exclusively by nonresidents; on these findings, he concluded as a matter of law that the state was not entitled to the taxes claimed; the court below decreed accordingly, and the Attorney General has appealed.

The ultimate controlling question is: Was the court below obliged to accept the tax settlements presented by the commonwealth as conclusive?

[1] The fact that the corporation was insolvent and in the hands of a receiver did not limit, restrict, or affect the right of the state taxing officers, for it was the duty of the receiver to make the returns called for by the laws of the commonwealth, and, upon his failure so to do, it was the right and duty of the auditor general to assess against the corporation the taxes here involved. *Commonwealth v. Runk*, 26 Pa. 235; *Penna. Bank's Assignees' Account*, 39 Pa. 103; *Philadelphia & Reading R. R. Co. v. Commonwealth*, 104 Pa. 80.

[2] Since the formal notices of the tax settlements sent to the paper company state that, "after repeated requests," it had "neglected or refused to furnish a report," in the absence of any averment or proof to the contrary, we must assume the receiver had knowledge, not only in law but in fact, that the prescribed reports were required and, if not furnished, the proper state officials would proceed to appraise and settle accounts against the corporation for the taxes in question. It has been held, under circumstances closely approximating those at bar, that prior notice of an intention to assess

such taxes is not essential. See *Commonwealth v. Runk*, 26 Pa. 235, 236, 237.

[3] Every taxpayer is entitled to an opportunity to be heard by the taxing authorities before a tax is conclusively settled against him (*Wharton v. Birmingham Borough*, 37 Pa. 371; 11 *Modern American Law*, p. 428, § 48); but there is no rule or principle which directs that he must be afforded a further appeal to a court of law (*Van Nort's Case*, 121 Pa. 118, 128, 129, 15 *Atl. 473*; 11 *Modern American Law*, p. 428, § 49).

[4, 5] Under the relevant acts of assembly in our state, when a corporation fails to make the reports called for in the statutes, an appraisal is made and taxes of the nature here involved are settled by the auditor general, such settlements being approved by the state treasurer before they become conclusive; but the act of March 30, 1811 (5 *Sm. L.* 228, § 16), authorizes and requires these officials, "at the request of each other or of the party" (meaning the party taxed), to "revise any settlement made by them, except such as have been appealed from, * * * if such request be made within twelve months of the date of settlement, * * *" and the act of April 8, 1869 (P. L. 19), authorizes a board consisting of the auditor general, state treasurer, and Attorney General to revise any tax settlement, even after the year's limit. *Commonwealth v. Penna. Co.*, 145 Pa. 266, 278, 283, 23 *Atl. 549*. Under these two statutes, a practice of tax revision has grown up and become established (recognized in the recent act of April 9, 1913, P. L. 48), which affords ample protection to corporate taxpayers who, because of neglect to make the prescribed reports, have had accounts for taxes settled against them, without right of appeal. See act of June 1, 1889 (P. L. 420), as amended by the act of June 8, 1891 (P. L. 229, p. 236). In instances where appeals are allowed from tax settlements, the court of common pleas of Dauphin county is the only tribunal with original jurisdiction to hear such cases. See section 11, act of March 30, 1811, *supra*, and the act of April 7, 1870 (P. L. 57).

Where, in any given case, the taxing authorities have general power to assess the subject-matter involved, an assessment made in manner and form authorized by law, cannot be questioned or set aside except in the way provided in the statutes. *Hughes v. Kline*, 30 Pa. 227, 231. In other words, such an assessment, or settlement, cannot be attacked collaterally. *Clinton School District's Appeal*, 56 Pa. 315, 317; *Van Nort's Case*, 121 Pa. 118, 128, 129, 15 *Atl. 473*; *Moore v. Taylor*, 147 Pa. 481, 484, 23 *Atl. 768*. While there is a line of decisions holding that, where a municipal subdivision, or other governmental agency possessing a limited power to tax, endeavors to make a levy upon a subject-matter over which it has no right of taxation, the courts generally have jurisdic-

tion in equity to restrain this usurpation, yet we have been referred to no case where a Pennsylvania court sitting in equity has undertaken to stay the hand of the commonwealth from the collection of a duly settled state tax upon a subject-matter within the general jurisdiction of its taxing officers, much less where, on the audit of an account, a common pleas court, in the exercise of its general authority, has, in effect, attempted so to do; which is the case at bar.

Since the act of June 1, 1889 (P. L. 420), amended by the act of June 7, 1911 (P. L. 673, 675), and the act of July 22, 1913 (P. L. 903, 905), provides that "every corporation * * * from whom a report is required [which includes companies such as the present one] shall be subject to * * * a tax * * * upon each dollar of the actual value of its whole capital stock," an exemption being allowed only of "so much * * * as is invested purely in * * * manufacturing," in making tax settlements, it becomes the duty of state officials vested with power in the premises not only to appraise capital stock, but, in each instance, to determine how much thereof is subject to taxation; hence the tax settlements now before us, *ex necessitate*, imply certain findings to the effect that the capital taxed was not involved in manufacturing, also that the bonds in question were held by residents of the commonwealth. On this last point, see *Commonwealth v. Lehigh Valley R. R. Co.*, 129 Pa. 429, 18 *Atl. 406, 410*; *id.*, 186 Pa. 235, 246, 40 *Atl. 491*; *Commonwealth v. Penna. Salt Mfg. Co.*, 145 Pa. 53, 22 *Atl. 215*. The officials who made these settlements being vested with appropriate power, no other tribunal, unless one duly authorized, would have the right to inquire into or set aside their findings of fact, which, in effect, is what the court below was obliged to do in order to gain jurisdiction of this case. In brief, the common pleas of Delaware county had neither authority to entertain an appeal from the tax settlements here involved nor jurisdiction to restrain the state from proceeding to collect the taxes assessed therein; hence it was beyond the power of that tribunal to accomplish by indirection that which it could not do directly; therefore the decree appealed from, so far as it affects the taxes claimed by the commonwealth, must be reversed and set aside.

Many acts of assembly and decided cases are referred to in the printed arguments; we have examined all, but cite comparatively few of them. Although all the authorities mentioned in the course of this opinion may not contain rulings directly upon the principle in connection wherewith they are cited, yet, we think, whenever this is a fact, either rulings on analogous points or relevant enlightening discussion will be found present.

In a supplemental paper book filed after argument, the appellee suggests that the assignments of error are not in proper form, counsel at the same time stating that they

would not raise such a "technical point" if their case were not a "hard one," which latter fact the appellant admits; but, on the other hand, the Attorney General contends that he cannot, in the due performance of his official duty, permit the precedent established by the court below to stand, very truly saying:

"The legal machinery of the state would not be sufficient to travel around the commonwealth for the purpose of sustaining tax settlements which might be collaterally attacked, if the judgment of the court below * * * should be affirmed."

While the assignments are open to just criticism, yet under the circumstances, we do not feel that the violation of our rules is such as to justify a dismissal of the appeal. We take occasion to say, however, that, if the facts are as found by the auditor, and not denied by the appellant, the state should grant some form of relief in this case; for, as said in *Commonwealth v. Penna. Salt Mfg. Co.*, supra, "the commonwealth does not ask that which is against good conscience."

So far as affected by the rulings here contained, the decree is reversed, and the record is remitted to the court below, with direction to revise its distribution accordingly.

(257 Pa. 91)

PROVIDENT LIFE & TRUST CO. v. KLEMMER et al.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. STATUTES ⇨184—CONSTRUCTION—REASON FOR ENACTMENT.

In the construction of a statute, it is proper to consider the previous state of the law, the circumstances which led to the enactment, and especially the evil which it was designed to correct.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262.]

2. TAXATION ⇨113—CORPORATIONS—PERSONAL PROPERTY TAX—STATUTES.

Act June 7, 1911 (P. L. 873), imposing a state tax on the capital stock of corporations, and providing that corporations liable to such taxes should not be required to pay any further tax on mortgages and securities owned by them, and in which the whole body of stockholders or members as such had the entire equitable interest in remainder, was not repealed by Act June 17, 1913 (P. L. 507), imposing a tax on personal property, bonds, certificates of indebtedness, etc., for state and county purposes, as the two acts are in pari materia, so that a bill in equity to restrain the question of a tax under the act of 1911 would be dismissed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 207.]

3. TAXATION ⇨908—CORPORATIONS—PERSONAL PROPERTY TAX—CONSTRUCTION.

Act June 17, 1913 (P. L. 507), is a codification of the former laws relating to personal property tax, and its principal purpose was to give the tax to the counties, instead of, as theretofore, having it collected as a state tax, and part of it paid to the counties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1740.]

4. STATUTES ⇨159—REPEAL—INTENTION.

The legislative intent is the vital force of an act of assembly, and though a subsequent statute is strictly contrary to a previous one, yet, if the intention appears that the previous statute shall not be repealed, it remains unaffected.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229.]

5. STATUTES ⇨232—REPEAL—EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

Where an act repeals a prior act, or certain sections of a prior act, all other prior acts, or sections of the act, must be regarded as still in force, under the maxim "expressio unius est exclusio alterius."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 313.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by the Provident Life & Trust Company of Philadelphia against Joseph H. Klemmer and another, Assessors, and Simon Gratz and others, members of the Board of Revision of Taxes, for the City and County of Philadelphia, the City of Philadelphia, and W. Free-land Kendrick, Receiver of Taxes. Injunction awarded, and defendants appeal. Reversed, and bill dismissed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, and FRAZER, JJ.

Wm. M. Hargest, of Harrisburg, and Mayne R. Longstreth, Asst. City Sol., and John P. Connelly, City Sol., both of Philadelphia, for appellants. Abraham M. Bettler, Henry S. Drinker, Jr., R. Stuart Smith, and Charles E. Morgan, all of Philadelphia, for appellee.

MESTREZAT, J. This bill was filed by the Provident Life and Trust Company of Philadelphia to restrain the assessors, the board of revision of taxes, and the receiver of taxes of the city and county of Philadelphia, from levying and collecting the personal property tax of four mills on the mortgages, bonds, and other securities, known as the plaintiff company's insurance assets, aggregating \$59,172,072.01. The plaintiff has paid the tax on its capital stock, on the securities held by it as trustee, etc., the eight mills tax upon the gross premiums received in its life insurance business, taxes upon its real estate in Pennsylvania, and taxes imposed in the other states where it has agencies. It denies liability for the four mills tax on its insurance assets under the tax laws of this state. The single question in the case, therefore, is whether the defendants are authorized to levy and collect the personal property tax of four mills on the securities, which constitute the so-called insurance assets of the plaintiff, a corporation liable to a capital stock tax.

[1] In determining the question at issue, which requires the interpretation of existing legislation imposing the personal property

tax, it will aid materially to advert to the charter acts of the plaintiff company and a part of the subsequent legislation conferring authority to tax corporate assets in this state. In the construction of a statute, it is proper to consider the previous state of the law, the circumstances which led to the enactment, and especially the evil which it was designed to correct. Black, *Interp. Laws*, § 91.

The plaintiff was incorporated and organized under the act of March 22, 1865 (P. L. 555), which authorized it to do an insurance and a trust business. The act provides that its "affairs shall be managed by nine directors, stockholders of said company," and fixes the amount and par value of the capital stock. The supplementary act of February 18, 1869 (P. L. 194), provides that the net profits to be derived from the business of life insurance shall be divided pro rata among the policy holders. Since its incorporation, the plaintiff has been conducting the business of an insurance company and a trust company.

The act of June 7, 1879 (P. L. 112), entitled "An act to provide revenue by taxation," was the first general revenue act adopted by the Legislature, and imposed a tax on different classes of personal property made taxable by prior legislation, and provided the machinery for its collection. The fourth section of the act imposed a tax for state purposes upon the capital stock of corporations, except banks, savings institutions, and foreign insurance companies, and the seventeenth section laid a tax of four mills on mortgages, money owing by solvent debtors, etc., "in the hands of individual citizens of the state," but exempted from all taxation, except for state purposes, mortgages, judgments, recognizances, and money due on articles of agreement for sale of real estate. The act of June 30, 1885 (P. L. 193), made no change in the subjects of taxation nor any provision for a capital stock tax. It imposed a state tax of three mills on mortgages, etc.

The act of June 1, 1889 (P. L. 420), is a supplement to the act of 1879. It is comprehensive in its terms and re-enacts all prior tax legislation, both as to personal property and capital stock. The first section imposes a three mills tax for state purposes on the personal property therein enumerated, owned by any individual or corporation, except as therein excepted, whether held in his or its own right or in a fiduciary capacity, and the following 17 sections provide the necessary machinery for the assessment and collection of the tax. The nineteenth section requires corporations to be registered, the twentieth section to report to the auditor general for taxation of capital stock, and the twenty-first section imposes a tax on capital stock of corporations, to be computed in the manner therein specified. It is provided in the last named section that corporations liable to tax on capital stock, under this section,

shall not be required to pay any further tax on the securities "belonging to them and constituting any portion of their assets included within the appraised value of their capital stock." The capital stock of manufacturing corporations is exempted from taxation. The act repeals certain sections, including section 4, of the act of 1879, and part of the act of 1885, and all other sections of those acts and other acts inconsistent therewith or substantially re-enacted by this act.

The act of June 8, 1891 (P. L. 229), supplementary to the former acts, changed the personal property tax from three to four mills and amended various sections of the act of 1889, including sections 1, 20, and 21, so that corporations liable to a capital stock tax under the last-named section should not be required to make report or pay any further tax on the securities owned by them in their own right. The act of June 8, 1893 (P. L. 353), amended only section 21 of the act of 1891, and made no substantial change in the exemption proviso to that section of the act. An ineffectual attempt was made by the passage of the act of June 7, 1907 (P. L. 430), declared unconstitutional by reason of the defective title (*Provident Life and Trust Co. v. Hammond et al.*, 230 Pa. 407, 79 Atl. 628), to amend the act of June 7, 1879, so as to insert in the proviso to the act of 1893 the words, "and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder," found in the subsequent act of June 7, 1911 (P. L. 673). The act of May 11, 1911 (P. L. 265), amended only the first section of the act of 1889, as amended, and relieved fire companies, etc., from taxation.

The act of June 7, 1911, amends the act of 1879, as supplemented by the acts of 1889, 1891, and 1893, "relating to taxing bonds, mortgages, and other securities." It amends only section 21 of the act of 1893 which was a supplement to the act of 1889. It imposes a state tax of five mills on the capital stock of corporations, with the following proviso:

"That corporations * * * liable to tax on capital stock under this section shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them, and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; but corporations * * * owning or holding such securities as trustees * * * or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them, as in the case of individuals."

It will be observed that this amendment omits the phrase, "in their own right," contained in the act of 1893, and inserts "in which the whole body of stockholders or members, as such have the entire equitable interest in remainder." We decided in *Provident Life & Trust Co. v. McCaughn*, 245 Pa. 370, 91 Atl. 672, that the plaintiff's insurance assets were held for the policy holders as

equitable owners in remainder, and not for the whole body of stockholders, and that therefore these assets were not exempt from taxation under the act of 1911.

The next and final legislation on the subject are the two acts of 1913. Act June 17, 1913 (P. L. 507), and Act July 22, 1913 (P. L. 903). It is conceded that the first act covers only the subject-matter of the first 18 sections of the act of 1889, as amended. It provides in the first section for levying and collecting a tax for county purposes on the personal property therein enumerated, and exempts therefrom securities held by corporations in their own right, and, in the seventeenth section, for a state tax of four mills on scrip, bonds, or certificates of indebtedness. The subjects of taxation are substantially the same as in former laws, but the act exempts from its provisions life and fire insurance corporations "having no capital stock." It is provided in sections 1 and 17 that corporations liable to a capital stock tax shall not pay any further tax, local or state, on the securities named in those sections and owned by the corporations in their own right, but they shall pay the tax on such securities when held in trust. This is essentially the same exempting proviso as was contained in the valid legislation imposing the capital stock tax passed prior to the act of June 7, 1911. The act specifically repeals, *inter alia*, the first 18 sections of the act of 1889 and parts of the act of 1891, "and all other sections and parts of the said acts which are inconsistent herewith, or which are hereby substantially re-enacted, and all other acts or parts of acts inconsistent herewith or which are hereby substantially re-enacted." It does not cite for repeal, nor repeal in terms, sections 19, 20, and 21 of the act of June 1, 1889, as amended, imposing the capital stock tax, nor the act of June 7, 1911, nor any part thereof. The acts repealed relate to the personal property tax.

The plaintiff company relies on the act of June 17, 1913, to relieve it from taxation on its insurance assets. It contends that the act repeals the act of June 7, 1911, or the clause in the exempting proviso of that act, "and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder," and that the act of June 17, 1913, is the only act which imposes a tax for either state or county purposes on mortgages, bonds, or other securities.

As the briefs filed by counsel of both parties disclose, the plaintiff company has on numerous occasions been required to defend in the courts its right, under the tax laws of the state, to exemption from taxation of its insurance assets. In 1900 the plaintiff filed a bill to restrain the tax officers of Philadelphia from taxing the property, and we sustained its contention, and held that these assets were not taxable under the tax legislation then in force, as by the proviso to sec-

tion 21 of the act of 1891 corporations paying a tax on their capital stock were not required to pay a further tax on the securities held by them in their own right. *Provident Life & Trust Co. v. Durham*, 212 Pa. 68, 61 Atl. 636. In 1907 another unsuccessful effort was made by the tax authorities of the city to tax these assets under the act passed that year, but we held the act to be unconstitutional. *Provident Life & Trust Co. v. Hammond*, 230 Pa. 407, 79 Atl. 628. This decision was immediately followed by the passage of the act of June 7, 1911, amending the twenty-first section of the act of 1889, as amended, which imposed a capital stock tax on corporations with the exemption above noted. The plaintiff again declined to pay a tax on its insurance assets, and, on a bill filed to restrain its collection, the trial court entered a decree in its favor. An appeal was taken to this court. *Provident Life & Trust Co. v. McCaughn*, 245 Pa. 370, 91 Atl. 672. In that case the company attacked the constitutionality of the act of 1911, contending that it was unjustifiable classification, and that its application to the company would result in unlawful discrimination and double taxation. We reversed the decree of the court below, sustained the act, and held that it created a new and valid classification for the purposes of taxation, and that the plaintiff company was within the class.

We are clear that the Legislature did not intend to and did not repeal the nineteenth, twentieth, and twenty-first sections of the act of 1889, as amended by the subsequent legislation down to and including the act of 1911, when it passed the act of June 17, 1913. If this conclusion be correct, *Provident Life & Trust Co. v. McCaughn*, *supra*, rules this case in favor of the defendants, and the insurance assets of the plaintiff are taxable under the provisions of the present tax laws of the commonwealth. We think the legislative intent in the enactment of the statute of 1911 is shown by the general course of prior legislation on the subject and the decisions of this court to which we have referred, as well as by the manifest purpose of the last two statutes. To repeal an express enactment by implication requires a strong and clear inconsistency between the laws. *Street v. Commonwealth*, 6 Watts & S. 209; *Commonwealth ex rel. Graham v. De Camp*, 177 Pa. 112, 35 Atl. 601; *Jackson v. Penna. R. R. Co.*, 228 Pa. 566, 77 Atl. 905. Under the legislation prior to the act of 1911, the plaintiff's insurance assets, as decided by this court, were not subject to the personal property tax. The purpose of the Legislature to tax the property was disclosed as far back at least as 1907, when that body made the abortive attempt to amend section 21 of the act of 1889, so as to limit or narrow the exemption from payment of the personal property tax to securities held by corporations "in which the whole body of stockholders or members, as such, have the entire equitable interest in

remainder." As the litigation discloses, the tax officials believed prior to this time that the assets were taxable under the legislation then in force in the state. When, and as soon as, it was judicially determined that this was an erroneous view of the law, the Assembly passed the act of 1907. Within a few months after that act had been declared unconstitutional, the Legislature made another effort to tax these assets, which resulted in the passage of the amendatory statute of 1911. This act, as we have seen, limited the exemption to which corporations were entitled under section 21 of the act of 1889 to securities held by them in which the whole body of stockholders, as such, had the entire equitable interest in remainder, and, with the other amendments to that statute, it then constituted the law in this state authorizing the taxation of personal property and the capital stock of corporations.

[2-6] We see no evidence of a legislative intent to repeal the act of 1911 in passing the act of June 17, 1913. On the contrary, the two acts of 1913 show unmistakably the intention to continue in force the act of 1911 including the limitation on the exemption clause. Immediately prior to the passage of the act of June 17, 1913, as will be observed, the personal property tax was levied and collected under the first 18 sections of the act of 1889, as amended, and a capital stock tax under section 21 of that act, as amended by the act of 1911. These acts were in pari materia, and, as pointed out above, constituted the whole body of law on the subject when the act of June 17th was passed. This last act contains 19 sections, including the repealing section. The history of the legislation taxing personal property in this state shows that the act of June 17, 1913, is a codification or compilation of the prior laws relating to a personal property tax. The principal purpose of the enactment, we think, was to give the tax to the counties, instead of, as theretofore, having it collected as a state tax, and part of it paid to the counties. It provides in section 1 for levying and collecting a personal property tax for county purposes, and in section 17 for a state tax of four mills on scrip, bonds, or certificates of indebtedness issued by private and public corporations. There is no provision in the act imposing a capital stock tax on corporations. A proviso in the two sections, however, relieves corporations liable to a capital stock tax for state purposes from the payment of taxes on the securities, named in the respective sections, owned by the corporations in their own right. This exempting provision clearly recognizes a law then in force imposing a capital stock tax, which, as will be observed, was the act of 1911.

If we turn to the repealing section (19) of the act of June 17, 1913, it is still more apparent that the Legislature did not intend to abrogate the act of 1911, nor any part of its provisions. The repeal of statutes by impli-

cation is not favored, and, unless a statute is repealed in express terms, the presumption is always against an intention to repeal, if there is not an irreconcilable repugnancy between the provisions of the two acts. It is a well-recognized principle of statutory construction that a merely affirmative statute shall not be held to repeal a previous one, if by fair and reasonable construction both can stand consistently together. *Homer & Son v. Commonwealth*, 106 Pa. 221, 226, 51 Am. Rep. 521; *Rodebaugh v. Philadelphia Traction Co.*, 190 Pa. 358, 361, 42 Atl. 953. The legislative intent is the vital force of an act of assembly, and even if a subsequent statute, taken strictly and grammatically, is contrariant to a previous statute, yet if, at the same time, the intention of the Legislature is apparent that the previous statute shall not be repealed, it remains unaffected by the subsequent one. *Crales, Sta. Law*, 311. In *Sifred v. Commonwealth*, 104 Pa. 179, 181, we said:

"The leaning * * * of the courts is strongly against repealing the positive provisions of a former statute by construction. * * * The more natural, if not necessary, inference in all such cases is that the Legislature intends the new law to be auxiliary to, and in aid of the purposes of, the old law. There should therefore be such a manifest and total repugnancy in the provisions of the new law as to lead to the conclusion that the latter law abrogated, and was designed to abrogate, the former."

It is a cardinal rule of construction, in ascertaining the legislative intent in the enactment of a statute, that where an act repeals a prior act, or certain sections of a prior act, all other prior acts, or sections of the act, must be regarded as still in force under the maxim "expressio unius est exclusio alterius." *Broom, Legal Maxims* (8th Eng. Ed.) 514, says that no maxim of the law is of more general and uniform application, and that it is never more applicable than in the construction and interpretation of statutes.

Tested by these well-settled principles of statutory interpretation, it is clear, we think, that it was not the intention of the Legislature of 1913 that the act of June 17, 1913, should repeal the act of 1911, nor any of its provisions. The first 18 sections of the act of 1889, as amended, imposed the personal property tax and provided for its collection. These sections of the act of 1889, parts of the act of 1891, the act of May 11, 1911, and certain other acts were repealed in terms by the act of June 17, 1913. The fourth section of the act of 1879 authorizing a capital stock tax was repealed by the act of 1889 which in its twenty-first section reimposed a capital stock tax on corporations and in sections 19 and 20 provided for its collection. Section 21 of the act of 1889 was amended by the acts of 1891, 1893, and 1911, and under the latter act we held in the *McCaughn Case* that the insurance assets of the plaintiff company were taxable. The sections of the several

acts imposing the capital stock tax have not in terms been repealed and if they are not now in force it is only because they are inconsistent with or substantially re-enacted by, the act of June 17, 1913.

The learned counsel for the plaintiff contend that they are inconsistent with the provisions of the act of June 17, 1913, but we think the contention untenable. If the Legislature of 1913 had intended to repeal the three sections of the act of 1889, as amended, imposing the capital stock tax, it would have repealed in terms the first 21 sections, instead of the first 18 sections, of the act as it did. There can be no reason, real or apparent, for excluding the 3 sections from the repealing clause of the act of 1913 if they were to be stricken from the tax laws of the state. It is manifest that their exclusion was intended to leave in full force the 3 sections dealing with the capital stock tax. By parity of reasoning, the act of 1911, amending section 21 of the act of 1889, as amended, was not intended to be repealed. The repealing section of the act of 1913, as will be observed, specifically repeals, not only parts of certain acts, but other entire acts dealing with the subject. Why was the act of June 7, 1911, omitted from the repealing section if intended to be repealed in whole or in part, while the act of May 11 of the same year was specifically included in the section? Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the subject. Sedgwick on Construction of Stat. & Const. Law (2d Ed.) 106; Howard Association's Appeal, 70 Pa. 344.

The Legislature of 1913 is presumed to have had knowledge of the act of 1911, and of all its provisions, imposing a capital stock tax, with the limitations on the exemptions contained in it. The Legislature is not only presumed to have known of the act of 1911, but had actual knowledge of it, as there was pending before it at the same time another bill, citing the act for amendment, which subsequently became the act of July 22, 1913. That act is identical with the act of 1911, except that it does not apply to corporations organized for laundering purposes. In view of these facts, it is inconceivable that the Legislature of 1913 regarded the act of 1911, or any of its provisions, or intended that it should be considered, as inconsistent with the act of June 17, 1913. This act did not repeal the only statute imposing the capital stock tax, but, as pointed out above, recognized it as in force, and supplied the repealed sections of the act of 1889, imposing a personal property tax. This act and that of 1911 are in pari materia, and cover the provisions of prior legislation providing for levying and collecting a personal property tax and a capital stock tax on corporations, and our construction of the recent acts makes the legis-

lation on the subject a consistent and harmonious system.

We have considered with care the elaborate briefs of counsel as well as the prior legislation imposing taxes for revenue in this state, to which our attention has been directed, and are all of opinion that, in passing the act of June 17, 1913, it was not the intention of the Legislature to amend or repeal the act of June 7, 1911, nor any of its provisions, and that the earlier statute is still in force. It follows, therefore, that the learned court below erred in sustaining the plaintiff's bill, and restraining the assessment and collection of the personal property tax on the plaintiff's insurance assets.

The decree is reversed, and the bill is dismissed, at the costs of the plaintiff.

(115 Me. 547)

SHERBURNE v. BOUGIE.

(Supreme Judicial Court of Maine. June 6, 1916.)

1. INDEMNITY \S 15(7) — ACTION BY MASTER AGAINST SERVANT—EVIDENCE.

In an action by an employer against his employé to recover damages paid to a third person in a suit for injuries received when struck by a box which fell from a wagon the employé was driving caused by the alleged negligence of the employé, evidence held to support a jury finding that defendant pursuant to the instructions of plaintiff's foreman was doing the work without the rope used to tie the boxes to the wagon, so that his negligence was excused.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. \S 44.]

2. APPEAL AND ERROR \S 1001(1)—REVIEW—VERDICT.

Where there is evidence to support a verdict, the Supreme Court is not authorized to disturb it on motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 3923-3933.]

On Motion from Supreme Judicial Court, York County, at Law.

Action by Fred S. Sherburne against Joseph Bougie. Verdict for defendant. On motion in the Supreme Court for a new trial. Motion overruled.

George M. Hanson, of Calais, for plaintiff. Allen & Willard, of Sanford, for defendant.

PER CURIAM. An action on the case to recover damages for the alleged negligence of the defendant while a servant of the plaintiff, for which the plaintiff was obliged to pay, for injuries received by Mr. Couturie by reason of the negligence. The verdict was for the defendant, and the case is before this court upon a motion for a new trial.

The defendant, in April, 1913, was employed by the plaintiff as a teamster, and while driving the plaintiff's team loaded with boxes along the highway in Sanford, the boxes not being properly loaded, and not tied to the cart by a rope which was used when

boxes were hauled with the team, one of the boxes fell from the cart and struck Mr. Couturie, knocked him from his bicycle, and bruised and injured him.

December 23, 1913, Couturie sued the plaintiff for the damages sustained by reason, as he alleged, of the negligence of the teamster, the defendant in this case, and recovered damages which the defendant in that case, the plaintiff in this case, paid, and thereupon brought this suit to recover of the defendant the damages which he alleges he was obliged to pay by reason of the negligence of this defendant while driving his team as aforesaid.

The only issue of fact was whether the defendant was performing his duties in accordance with such directions from his principal (the plaintiff) as would excuse his negligence.

[1, 2] There was evidence that tended to prove that the defendant was instructed to use, when he hauled the boxes on the cart, a rope, and to tie the boxes to the cart, and it is admitted that he did not use the rope the day the accident happened. There was also evidence that the rope had been misplaced before the accident, and that the defendant so reported to the foreman who had charge of the defendant, and whose orders and instructions as to his work it was the duty of the defendant to obey, and that the foreman instructed him to do the work without the rope. There was nothing improbable in the defendant's version, and the jury having seen and heard the witnesses upon both sides of the disputed question of fact, and there being evidence that, if believed by them, justified them in believing the defendant's version, we are not authorized to substitute our judgment for theirs.

Motion overruled.

(115 Me. 548)

HILL v. KEEZER.

(Supreme Judicial Court of Maine. July 18, 1916.)

1. NEW TRIAL \Leftrightarrow 70—SUFFICIENCY OF EVIDENCE—MOTION IN APPELLATE COURT.

It is not enough to sustain a verdict that there is evidence which if believed would justify it; but such evidence must be so reasonable and probable that an unprejudiced man, when considering all the evidence and circumstances, would be justified in believing it, and, such not being the case, new trial will be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143.]

2. NEW TRIAL \Leftrightarrow 70—SUFFICIENCY OF EVIDENCE—MOTION IN APPELLATE COURT.

Evidence in action involving question of payment or theft of a note by defendant *held*, under the rule of reasonableness, when considered with all the evidence and circumstances, insufficient to sustain verdict for defendant against motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143.]

On motion from Supreme Judicial Court, Penobscot County, at Law.

Action by George F. Hill against Arthur A. Keezer. Verdict for defendant, and plaintiff moves for new trial before the full court. New trial granted.

Morse & Cook, of Bangor, for plaintiff.
G. E. Thompson, of Bangor, for defendant.

PER CURIAM. An action for replevin for one horse, one meat cart, and one jigger carriage, alleged to be of the value of \$225. The verdict was for the defendant, and the case is before this court on motion.

The plaintiff claimed title to the property by virtue of a mortgage given by the defendant to him on the 15th day of June, 1914, for \$200. It is the claim of the plaintiff that on January 2, 1915, there was a settlement of the accounts between himself and the defendant, but not of mortgages and notes; and the plaintiff claims that March 6, 1915, the defendant came to his house in Corinth, and pretended that he wanted to pay him \$200, a portion of which was to be applied to a \$63 note, and the balance applied to some other notes which the plaintiff held; that he went to his safe and took out all the various notes and mortgages given by the defendant, with the exception of one note and mortgage, and that, while the plaintiff was figuring the interest on the \$63 note, the defendant looked over the other papers, and when the plaintiff had finished reckoning the interest the defendant deliberately took all the notes and mortgages belonging to the plaintiff, including the one of the property described in the replevin writ, put them in his pocket, and started to leave the house; that the plaintiff made an effort to stop the defendant and called his wife, who was in an adjoining room, and who immediately called the plaintiff's son on the telephone. The plaintiff and his wife were aged people, and not able to stop the defendant from leaving the house. After leaving the house the defendant drove away. Thereupon the plaintiff commenced foreclosure proceedings and replevied the personal property described in the writ. The record shows that the plaintiff and his wife both testified in substance as above.

The defendant claimed, through his counsel, that at some time between the 17th and 21st of December, 1914, he and his wife paid the plaintiff between \$212 and \$213 and took up the mortgage; that after they returned home the wife cut the signature from the note and the mortgage. The instruments were produced at the trial in that mutilated condition. The claim of the defendant is supported solely by the testimony of his wife. He did not take the stand to testify.

The evidence of the plaintiff and his wife is that in February, after the defendant's wife testified the note was paid and the note and mortgage delivered to her and her husband, they called at the house of the plain-

tiff and wanted an extension of three weeks to pay the same mortgage note that she testified at the trial they had paid between the 17th and 21st of the preceding December. Her testimony is further weakened by her husband's financial condition during the month of December, when she testified this amount of money was paid. The evidence shows that he carried an account in the bank, and during that month made only a few small deposits; that he was being pressed by his creditors, and letters written by his wife, who did the corresponding, show that they were putting off the payment of small claims for goods used in their store, claiming they could not pay them when requested, but would do so shortly. It does not seem probable that during the time the defendant was so embarrassed in his business that he could not take care of small bills for goods furnished his store, and carried such a small bank account, they would be carrying around in money between \$212 and \$213 and pay the mortgage note of the plaintiff and not have the mortgage discharged.

The defendant was charged by the positive testimony of two witnesses with the crime of larceny from a feeble old man, whose conduct at the time in telephoning for help, and in taking out a warrant against the defendant for the larceny charged, strongly corroborated the plaintiff's version. The defendant, although so openly charged with the crime in open court, where the jury was endeavoring to ascertain the truth, did not deny the testimony charging him with the crime, or even testify to a payment which his wife's unsupported testimony sought to prove, although contradicted by two witnesses and the circumstances of the case.

It is incredible that an honest man, defending an unjust claim charging him with such a crime, would allow such testimony as was given against the defendant in this case to go uncontradicted or unexplained. No inference can be drawn from such conduct except that which sustains the plaintiff's version. The only inference under the circumstances is that the defendant knew that the testimony was true, and did not care to deny it, and thereby committing the crime of perjury.

[1, 2] It is not enough to sustain a verdict that there is evidence which, if believed by the jury, would justify them in returning it. That evidence must be so reasonable and so probable that an unprejudiced man, when considering all the evidence and all the circumstances in the case, would be justified in believing it. The record in this case does not show such a state of facts, and it is evident that the jury, through bias, prejudice, or misapprehension of the weight of evidence and the rules of law, returned a verdict not authorized, and the entry must be:

Motion sustained.

New trial granted.

(78 N. H. 398)

WHITE MT. FREEZER CO. v. MURPHY
et al.

NASHUA CO-OP. CO. v. SAME.

FLATHER FOUNDRY CO. v. SAME.

(Supreme Court of New Hampshire. Hillsborough. May 1, 1917.)

1. WITNESSES \S 83—COMPETENCY—PARTIES TO SUIT.

In an action for injunction against the officers and members of a labor union to enjoin a strike called pursuant to a conspiracy to injure and ruin plaintiffs' business, the business agent of the union, although a party, was a competent witness, and could be required to testify as to statements made by him as to the object of the strike both during a conference between the parties before the labor commissioner and at other times.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 217-220, 227-238.]

2. CONSTITUTIONAL LAW \S 70(1)—PRIVILEGED COMMUNICATIONS—COMMUNICATIONS TO LABOR COMMISSIONER—LEGISLATIVE QUESTION.

Whether or not public policy requires that all communications to the labor commissioner should be privileged is a matter for the Legislature, and not a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137.]

3. APPEAL AND ERROR \S 1082(2)—REVIEW—QUESTIONS NOT PRESENTED IN TRIAL COURT.

Questions not presented when the case was argued in the superior court will not be considered by the Supreme Court on transfer of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1133-1136, 4281-4284.]

4. WITNESSES \S 71—PRIVILEGE—JUDGE.

If a witness was a judge called to testify as to proceedings before him, that fact would not render his testimony incompetent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 185.]

5. WITNESSES \S 216—PRIVILEGE—LABOR COMMISSIONER—STATUTE.

Under Laws 1893, c. 48, Laws 1911, c. 198, and Laws 1913, c. 186, creating and defining the duties of the office of labor commissioner, to collect, assort, arrange details relating to all departments of labor in the state, and to attempt to bring about an amicable adjustment between employers and employees or to induce them to submit to the state board of conciliation and arbitration, and on failure to secure such reference to investigate the causes of the controversy and publish a report assigning responsibility therefor, and requiring him to hear all parties and advise them in certain circumstances, the labor commissioner is not given a judicial power which will excuse him from testifying as to proceedings had before him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 779.]

6. WITNESSES \S 71—PRIVILEGES.

The duty rests upon every citizen to disclose, when called upon, facts within his knowledge essential to the administration of justice, and judges are not exempt from the performance of this duty, and as a class are necessarily impressed with its importance.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 185.]

7. WITNESSES \S 71—PRIVILEGES—JUDGES OF COURTS OF RECORD.

Any privilege exempting judges from testifying as to proceedings had before them has been

confined to judges of courts of record where some other person can testify to such proceedings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 185.]

8. APPEAL AND ERROR — 843(1) — REVIEW — MOOT QUESTIONS.

It is not the practice of the Supreme Court to consider mooted questions involving difficult questions of law which may not arise when the facts are found, and where the allegations of a bill seem to be regarded as sufficient, while the requests to rule amount to an inquiry whether plaintiff may not recover upon proof of much less than they have alleged, the views of the Supreme Court are properly expressed only upon the express questions raised by exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3335, 3337-3341.]

9. CONSPIRACY — 18 — LABOR UNION OFFICERS—UNLAWFUL COMBINATION — PRIMA FACIE CASE.

A bill against the officials of a labor union alleging a combination for the purpose of compelling the plaintiffs to employ only union men and the calling of a strike pursuant to such combination made out a prima facie case, and in the absence of evidence of justification refusal to rule that such action would constitute a conspiracy as a matter of law in the absence of justification was error.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

10. TORTS — 10—STRIKES — INTERFERENCE WITH BUSINESS—JUSTIFICATION.

Where interference with plaintiffs' business by a strike to enforce a closed shop is proved, justification therefor may be found either in the circumstances, irrespective of motive, or in the motive alone, or in the circumstances and motive combined.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10.]

11. TORTS — 28—LABOR STRIKES—INTERFERENCE WITH BUSINESS — JUSTIFICATION — QUESTION OF FACT.

The question of justification for a strike to enforce a closed shop is one of fact and to be determined as a matter of law only if on the evidence reasonable men could come to but one conclusion.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 35-37.]

12. TORTS — 27—LABOR STRIKES—INTERFERENCE WITH PERSONAL RIGHTS—BURDEN OF PROOF.

In a suit to restrain a strike for the purpose of enforcing a closed shop, the fact that the burden remains on the plaintiffs to establish a legal interference with their right, unreasonable upon all the evidence, does not destroy their prima facie case made by the allegation of such interference.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 34.]

13. TORTS — 10 — LABOR STRIKES — ILLEGAL INTERFERENCE WITH PERSONAL RIGHTS—PICKETING.

If a strike is an unreasonable interference with business, picketing during such strike is not unlawful unless unreasonable in fact or forbidden by legislative mandate.

[For other cases, see Torts, Cent. Dig. § 10.]

Transferred from Superior Court, Hillsborough County; Pike, Judge.

Suits for injunction by the White Mountain Freezer Company, by the Nashua Co-operative Company, by the Flather Foundry Com-

pany, and by the William Highton & Sons Company against Eugene L. Murphy and others. Transferred from the superior court in advance of trial. Cases discharged.

Bills in equity for injunctions. The bills allege that the plaintiffs are manufacturers of machinery at Nashua, employing a large number of persons, many of whom are moulders; that the defendants are officers and members of a voluntary unincorporated association known as International Moulders' Union of North America, Local, No. 257; that on or about October 11, 1916, the defendants demanded that the plaintiffs compel all their moulders not members of said local, No. 257, to join the same, and that thereafter only members of such union should be employed by the plaintiffs, who should thereafter conduct a "closed shop" where only members of the union would be employed; that the plaintiffs refused to accede to these demands, and informed the defendants that they would at all times thereafter conduct an "open shop" making no discrimination in the employment of persons because of their membership in the union or otherwise; that thereupon the defendants, conspiring together to injure and ruin the plaintiffs' business, and in pursuance thereof, induced and ordered the plaintiffs' employes to enter upon a strike against them for the purpose of compelling them to accede to their demands; that said strike is now in progress and is being maintained for such purpose; that since said October 11, 1916, the defendants by themselves and others have threatened, intimidated, and annoyed the persons remaining in their employ for the purpose of inducing and compelling them to join said union, have picketed and caused others to picket said plaintiffs' factory for the purpose of annoying and intimidating their employes.

The cases were sent to a master for the finding of facts. In the course of the hearing certain evidentiary questions arose which the presiding justice was requested to pass upon. The issue on trial was the object of the strike. Eugene L. Murphy, called as a witness by the plaintiffs, testified that he was the business agent of the International Moulders' Union of North America, and as such represented the members of the local union in relation to the strike; that he represented the men after the strike; that he called the attention of the labor commissioner to the fact that a labor controversy existed at Nashua, and in consequence thereof the labor commissioner called him and the plaintiffs together for a general conference. The court ruled subject to exception that the witness should answer inquiries as to admissions made by him to the labor commissioner and to the plaintiffs as to the object of the strike. Mr. Davie, the labor commissioner, also called as a witness by the

plaintiffs, testified that he had had some correspondence with Murphy in reference to the controversy, and that shortly before October 27, 1916, he received a communication from him, but declined to produce or to answer the question whether at an interview before him between Murphy and the plaintiffs the plaintiffs requested of Murphy a statement in writing as to the demands of the union.

The defendants objected to these questions, and the witness declined to answer upon the ground that the conference between him as labor commissioner and the parties was of a confidential nature. The court ruled in reliance upon *Hale v. Wyatt*, 78 N. H. 214, 98 Atl. 379, that, as a quasi judicial officer, the commissioner could not be required to answer and the plaintiffs excepted.

The plaintiffs claimed and asked the court to rule that, if it should be established that the defendants combined to bring about a strike in the plaintiffs' shops for the purpose of compelling the plaintiffs to employ only union men in their shops, and the strike was inaugurated for that purpose, the facts stated would constitute a conspiracy as matter of law. The court ruled otherwise, and the plaintiffs excepted. The case adds:

"Assuming the facts upon which this ruling is made to have been established, the court could not find therefrom that the defendants' conduct was unreasonable."

The court was asked to rule before trial that all organized picketing, that is, picketing, by order of the International Moulders' Union, by twos who parade the streets, observe who are entering and leaving the plaintiffs' shops, in order that they may argue and persuade them to join the strike, is unlawful. The court declined so to rule, and the plaintiffs excepted. The case was transferred upon the foregoing rulings by Pike, C. J., in advance of a trial upon the ground that the advance decision of these questions might shorten or avoid a trial of the facts.

John R. Spring and Ivory C. Eaton, both of Nashua, and Herbert A. Baker and Joseph J. Feely, both of Boston, Mass. (Joseph J. Feely, of Boston, Mass., orally), for plaintiffs, William H. Barry, of Nashua, and Frederick W. Mansfield, of Boston, Mass. (Frederick W. Mansfield, of Boston, Mass., orally), for defendants.

PARSONS, C. J. [1] The defendant Murphy, called as a witness by the plaintiffs, testified that he represented the other defendants after the strike, and was inquired of as to statements made by him as to the object of the strike both during a conference between the parties before the labor commissioner and at other times. To the ruling requiring the witness to answer the defendants excepted. Murphy, though a party, was a competent witness and could be required to testify. *Whitcher v. Davis*, 70 N. H. 237, 48 Atl. 458. He could not, of course, be required to give testimony tending to incriminate

himself, to detail an offer of compromise or disclose privileged communications. But it does not appear that the questions asked him had such tendency. There is no evidence of an offer of compromise by either party. If there had been, an admission of an independent fact like that inquired about, the object of the strike, would be competent. *Colburn v. Groton*, 68 N. H. 151, 158, 28 Atl. 95, 22 L. R. A. 763. The defendants contend that as matter of public policy all communications to the labor commissioner should be privileged.

[2] This is matter for the Legislature. The statutes on the subject in force at the time contain no such provision, but, on the other hand, indicate a legislative belief that the public good demands publicity rather than secrecy as to the controversies which the office was designed to adjust. *Laws 1911, c. 198, §§ 3-8; Laws 1913, c. 186, §§ 3, 4.*

[3] Since the argument of this case the Legislature has amended section 4 of chapter 198, *Laws 1911*, renumbered by section 1, c. 186, *Laws 1913*, by adding at the close:

"Neither the proceedings nor any part thereof before the labor commissioner by virtue of this section shall be received in evidence for any purpose in any judicial proceeding before any other court or tribunal whatever."

This amendment was adopted April 10, 1917. Section 4, referred to, prescribes the duty of the commissioner "whenever any controversy or difference arises relating to the conditions of employment or rates of wages between an employer * * * and his * * * employes." Section 7 of the same act relates to his action when he had knowledge a strike is threatened or has occurred. Whether the matters inquired about arose in proceedings under section 7 or section 4, whether the amendment applies to proceedings under 7 as well as under 4, and whether the amendment will be applicable in further proceedings in this suit, pending when the legislation was adopted (*Rich v. Flanders*, 39 N. H. 304; *Kent v. Gray*, 53 N. H. 576), are questions which were not presented when the case was argued, and which therefore are not now considered.

[4] The labor commissioner did not put his objection to testifying upon ground that he was judge of a court, but upon the ground that the communications made to him were privileged. If the witness was a judge called to testify as to proceedings before him, that fact did not render his testimony incompetent (*Hale v. Wyatt*, 78 N. H. 214, 98 Atl. 379), and, as the court had already ruled the matter inquired about was not privileged, the defendants' objection to the questions should have been overruled. The court suggested that, if the commissioner objected, he could not be compelled to testify because he was a quasi judicial officer. This suggestion was made in reliance upon the decision in *Hale v. Wyatt*, *supra*. The

office of labor commissioner was created in 1893. The duties of the office as then defined were "to collect, assort, arrange, and present in annual reports * * * statistical details relating to all departments of labor in the state." Laws 1893, c. 48, § 5. By the legislation of 1911 additional duties of investigation, prosecution, advice, and persuasion and report are imposed upon the commissioner.

[5] He is not to hear and decide controversies between employers and employes, but to endeavor to bring about an amicable adjustment, and, failing that, to induce the parties to submit the dispute to arbitrators or to the state board of conciliation and arbitration, substituted two years later for the board of arbitrators. In case of failure to secure such reference in case of a strike, he is to investigate the causes of the controversy, ascertain which party is mainly responsible, and make and publish a report assigning such responsibility. But there is no suggestion such investigation is to be a judicial one. No machinery is provided for a judicial proceeding. The only trace of judicial action is found in the provisions of section 3 requiring him to hear all parties and advise them in certain circumstances what, if anything, ought to be conceded by either or both. Laws 1911, c. 198, § 3; Laws 1913, c. 186, § 1. While it may well be that the duty of conciliation imposed upon the commissioner can be better performed, as the Legislature now seem to think, if some or all communications to or before him are held privileged, the commissioner cannot claim the privilege of exemption as a witness in view of the numerous other duties imposed on him, unless at the time about which inquiry is sought of him he was engaged in a purely judicial duty. It does not appear that the information sought of him in the present case was obtained by him while acting in such a capacity. And it is clear that judicial power which would excuse him from appearing as a witness has not been given to him.

In *Hale v. Wyatt*, 78 N. H. 214, 98 Atl. 379, the judge of probate was called and testified upon appeal as to statements made in a hearing before him. The question was as to the competency of the evidence which was decided in the affirmative. What circumstances would justify a judge in refusing to testify to matters which occurred at a trial before him there was no occasion to discuss. The point was not presented.

"A judge of a superior court seems to have been regarded as exempt from attendance at common law." 4 Wig. Ev. § 2373 (3).

While it is stated generally in the textbooks and in some cases that a judge of a court of record cannot be required to testify as to matters occurring before him in court (1 Gr. E. § 249; *Welcome v. Batchelder*, 23 Me. 85), the right does not appear to have

often deprived the triers of the benefit of such knowledge.

[6] The duty rests upon every citizen to disclose when called upon facts within his knowledge essential to the administration of justice. *B. & M. R. R. v. State*, 75 N. H. 513, 518, 77 Atl. 996, 31 L. R. A. (N. S.) 539, Ann. Cas. 1912A, 382. Judges are not exempt from the performance of this duty, and as a class are necessarily impressed with its importance. If such privilege exists, it has been honored by breach rather than observance. In *Regina v. Gizard*, 8 Car. & P. 513, in 1838, the grand jury were advised by Mr. Justice Patterson not to examine against his objection the chairman of the Court of Quarter Sessions as to testimony in a case before him; the justice remarking that the proposed witness was "president of a court of record, and it would be dangerous to allow such an examination as the judges might be called upon to state what occurred before them in court." Unless *R. v. Harvey*, 8 Cox. Cr. 99, 103, and *Anon.*, 24 Solicitors' Journal, 393, cited by Wigmore are exceptions, the case in 8 Car. & P. is the only one found in which the judge's testimony was not produced. In 1872 in the House of Lords, the question being as to the admissibility of the testimony of an arbitrator in explanation of an award, Mr. Baron Cleasby said:

"First with regard to the competency of the umpire as a witness. I am not aware of any real objection to it. With respect to those who fill the office of judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent, their being examined." *Buckle v. Metropolitan Bd.*, L. R. 5 H. L. 418, 433.

[7] The privilege appears to be confined to judges of courts of record. This must necessarily be so; for if there is no recording officer but the judge or quasi judicial officer himself, proceedings before him can be proved only by calling him as a witness. In *R. v. Harvey*, 8 Cox. Cr. 103, although Byles, J., said he should refuse to appear if subpoenaed to produce his minutes of testimony, he added "that the rule did not apply to inferior magistrates." 4 Wig. Ev. c. 2372. If the labor commissioner had claimed to be excused on the ground of privilege, such claim should have been overruled.

[8] Certain other questions were then mooted bearing upon the maintenance of the proceeding upon which the court ruled subject to exception. These exceptions are also transferred with the suggestion that their determination in advance of a trial may shorten or avoid the hearing upon the facts. This procedure is one often employed when justice and convenience require, but it is not the practice to consider difficult questions of law which may not arise when the facts are found. *Glover v. Baker*, 76 N. H. 261,

263, 81 Atl. 1081. Questions considered in this way are ordinarily important ones necessarily involved in the action. *Hampton Beach Co. v. Hampton*, 77 N. H. 373, 92 Atl. 549, L. R. A. 1915C, 698. It is not the duty of the court under the guise of this procedure to advise the parties in advance as to their rights under all possible facts which might be proved. As suggested, the allegations of the bill seem to be regarded as sufficient while the requests to rule amount to an inquiry whether the plaintiffs may not recover upon proof of much less than they have alleged. In this situation the views of the court are properly expressed only upon the precise questions raised by exception.

Two questions were raised:

1. The court was asked to rule that, if the defendants combined to bring about a strike in the plaintiffs' shops, and the strike was accordingly inaugurated for the object of thereby compelling the plaintiffs to employ only union men, such action would constitute a conspiracy as matter of law. The court declined to so rule, and the plaintiffs excepted. The court then stated that he could not find from these facts that the defendants' conduct was unreasonable. It does not appear whether this statement was intended as a finding of fact or as a ruling of law. No exception is reported, and no question is transferred upon this statement. The plaintiffs' present contention is that a combination for the purpose of compelling them to employ only union men in their shops is unlawful and constitutes a conspiracy as matter of law. This appears to be the first controversy of this character in this jurisdiction, but the defendants claim that *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718, is decisive of the question now under consideration. There was no question of combination in *Huskie v. Griffin*. The acts of a single individual were under consideration. But an act unlawful for one to do is not made lawful because done by a combination.

If the defendants have undertaken by combination or otherwise to compel the plaintiffs to employ only certain individuals or a certain class in their shops, they have interfered with a right of the plaintiffs said in *Huskie v. Griffin* to be "inherent in the idea of Anglo-Saxon liberty" the right to freely deal or refuse to deal with others; "prima facie a man can demand an open market." *Huskie v. Griffin*, supra, 75 N. H. 347, 350, 74 Atl. 597, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718. The defendants concede the interference; they say in their brief:

"A strike to enforce a 'closed shop' may be unlawful, and it may be lawful. * * * A strike to enforce a closed shop is unlawful unless there is justification."

This is the view of *Huskie v. Griffin*, supra, quoting from *Parkinson Co. v. Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550:

"Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare."

In 75 N. H. at page 348, 74 Atl. at page 596 (27 L. R. A. [N. S.] 966, 139 Am. St. Rep. 718), and in 75 N. H. at pages 351, 352, 74 Atl. at page 598 (27 L. R. A. [N. S.] 966, 139 Am. St. Rep. 718):

"The authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification."

[8] The facts show an interference with the plaintiffs' right, and there is no evidence of justification. The plaintiffs have made out a prima facie case, and their bill is not to be dismissed on motion in the nature of a motion for nonsuit at law, which appears to have been understood to be the effect of the ruling, unless illegal action in the conduct of the strike appeared. The exception is sustained.

[10] The result on this point is not affected if, as is claimed, the correct statement of the plaintiffs' right is to be free from unreasonable interference in the management of their business. The interference being proved, the "justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined." *Plant v. Woods*, 176 Mass. 492, 499, 57 N. E. 1011, 1014 (51 L. R. A. 339, 79 Am. St. Rep. 330). The test laid down in *Huskie v. Griffin* is reasonable conduct, dependent upon all the circumstances of the case, the advantage and profit to one, and the unavoidable injury to the other. *Horan v. Byrnes*, 72 N. H. 93, 100, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670.

[11] Evidence of motive and object lies in the breasts of the defendants. If they refuse to disclose, they must submit to the adverse inference necessarily drawn from their silence. The question is one of fact to be determined as matter of law only if on the evidence reasonable men could come to but one conclusion.

[12] The defendants are called upon to justify their action. If on the whole case the burden remains with the plaintiffs to establish an illegal interference with their right, one unreasonable upon all the evidence, that does not destroy their prima facie case. Interference with the right of another without justification is unreasonable. Whether the motive of the strikers was an honest effort to benefit themselves or a malicious intent to injure the plaintiffs because they refused to aid in compelling other workmen to join the defendants' union is a question of fact upon which the case contains no evidence. The defendants contend that justification is to be found in the principle of competition, citing *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann.

Cas. 638. But there is no evidence of competition to sustain the claim. In the absence of evidence of justification, further discussion of possible grounds which might be proved will not be undertaken.

2. The second question raised relates to the conduct of the strike.

[13] The plaintiffs' counsel asked the court to rule that all organized picketing is unlawful. The court declined to so rule, but did rule that reasonable picketing was lawful; unreasonable, unlawful, and the plaintiffs excepted.

The term "picketing" is new in the law of the state. The only definition in the case is "picketing by twos, who parade the streets, observe who are entering and leaving the plaintiffs' shops in order that they may argue and persuade them to join the strike." The allegations of the bill lead to the inference that picketing may mean something more than peaceful parading, whatever that may mean. The dictionary defines "picketing" as "posting watchers at the approaches to a place of employment affected by a strike in order to ascertain those who work there and persuade them, or otherwise influence them, to give up the work." *Webst. Dict.* "picket"; *R. & J. Law Dict.* "picketing." The cases cited in the notes, 4 L. R. A. (N. S.) 302, and 50 L. R. A. (N. S.) 412, indicate that the term may include a wide range of action. The material question is whether the acts done in prosecution of the strike are lawful or unlawful, whether properly described as picketing or by some other term. Although the term is not found in the law of the state, P. S. c. 266, § 12, as amended by chapter 211, Laws 1913, and P. S. c. 264, §§ 1, 2, may be aimed at some acts included within the term or naturally resulting from the proceeding so called. The substance of the court's ruling was the application of the test of reasonable conduct under all the circumstances. Whether when the facts are found the acts of which the plaintiffs complain can be found to be reasonable in fact cannot be determined until the facts are found. If one may interfere with another's lawful business when it is a reasonable thing to do, it follows that he may do so in a manner not unreasonable in fact or because forbidden by legislative mandate.

Case discharged. All concurred.

(78 N. H. 422)

KELSEA v. PHOENIX INS. CO. et al.
(Supreme Court of New Hampshire. Coos.
June 30, 1917.)

1. INSURANCE — 235—FIRE INSURANCE—NOTICE OF CANCELLATION—WAIVER.

In an action on a fire insurance policy, evidence held sufficient to warrant a jury finding that insured waived written notice of cancellation and the right to a tender of the return premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 507.]

2. INSURANCE — 229(1)—CONDITIONS IN POLICY—WAIVER.

The provision in a fire policy requiring the insurer to give written notice and tender return premium before cancellation was for benefit of insured and could be waived by him.

3. INSURANCE — 229(1)—CONDITIONS IN POLICY—WAIVER.

That the condition in a fire policy requiring notice and tender of return premium by insurer before cancellation was in conformity to the statute afforded no objection to its waiver by insured, as statutory provisions for the benefit of individuals may be waived.

4. APPEAL AND ERROR — 1060(1)—ARGUMENT OF COUNSEL—PREJUDICIAL ERROR.

In an action on a fire policy, defendants' counsel's remarks in argument about plaintiff's witness: "Who is this Hollis Stevens? What kind of a chap is he to do business? He went in and trimmed Hammond until he picked him dry"—were prejudicial and transcended the limits of legitimate advocacy; there being no evidence to justify the statements.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135.]

Exceptions from Superior Court, Coos County; Sawyer, Judge.

Assumpsit by Ira A. Kelsea against the Phoenix Insurance Company and another. Trial by jury, and verdict for defendants, and plaintiff brings exceptions. Exceptions sustained.

Assumpsit to recover on an insurance policy placed by defendants on plaintiff's saw-mill and machinery. The policy was issued April 24, 1914, by Geo. W. Stevens & Son Company, agents at Lancaster, through John H. Finley, their local agent at Colebrook, and was for one year. The property insured was destroyed by fire January 29, 1915. Proof of loss was duly made and filed with the defendants February 19, 1915. No adjustment or payment of the loss has ever been made by the defendants. The defendants rested their defense upon the ground that the policy which had been marked "Canceled July 18, 1914," was legally canceled upon that day. The policy contained a provision that it might be canceled at any time at the request of the insured. It also contained the usual stipulation that the defendants could cancel the policy, after giving written notice to the insured and tendering to him the return premium; cancellation to take effect 10 days after such notice.

The defendants claim that notice of cancellation and payment of return premium before cancellation could become effective had been waived by the plaintiff. The plaintiff denies that the policy had ever been canceled, and testified that he left his insurance policies with Finley, and that they never were in his possession; that he never had any knowledge of the cancellation of the policies, and believed them to be in force at the time the mill was burned. At the close of the evidence the plaintiff moved for a judgment for the amount of the insurance on the mill building, and also for a verdict as to the cancellation,

on the ground that a sum equal to the rebate had never been paid or legally tendered to the insured. These motions were denied, subject to the plaintiff's exceptions. The plaintiff also excepted to the instructions of the court, and to remarks of defendants' counsel in his argument to the jury.

Jason H. Dudley, of Colebrook, and Goss & James, of Berlin, for plaintiff. Drew, Shurtleff, Morris & Oakes, of Lancaster, Rich & Marble, of Berlin, and Leach & Leach, of Franklin, for defendants.

PLUMMER, J. The exceptions of the plaintiff to the denial of his motions for a verdict and judgment cannot be sustained. The defendants' evidence tended to prove that Finley, who represented the defendants, notified the plaintiff that the insurance companies would not continue to carry the insurance on his mill because it was not running and requested a return of his policies; that Finley afterwards saw the plaintiff in Colebrook, and asked him if he had brought the policies, the plaintiff replied that he had not, and inquired of Finley in reference to writing to some one, and Finley said that he had, but that they (referring to the insurance companies) would not carry the insurance unless the mill was running; that on July 17, 1914, the day before the defendants' policy was marked canceled, the plaintiff came into Finley's office at Colebrook, and gave him the policy in question, together with other policies on his mill, and said, "Here is these policies;" that Finley told the plaintiff there would be a rebate on the policies, but that he did not know at that time how much; that there would be a credit come back in the next month's account, and whenever a credit came back to come in and they would fix up; that plaintiff did not make any objection to the arrangement until after the fire; that the plaintiff never came to Finley to fix up, and Finley did not adjust the matter with him before the fire; that the plaintiff stated in the presence of three witnesses at Colebrook in the summer of 1914 that he had had the insurance policies on his mill canceled.

[1] This and other evidence of the defendants would warrant the jury in finding that the plaintiff brought his insurance policies on his mill and machinery to Finley for the purpose of cancellation, and that there was an understanding between them that the policies should be canceled, and that the plaintiff agreed and understood that the rebate on his premium was not to be paid to him before the cancellation became effective, but that he was to adjust the matter with Finley after he received a statement of the amount of the rebate. In other words, the testimony was sufficient to justify the jury in finding that the plaintiff waived the written notice he was entitled to in case the defendants desired to

cancel his policy, and that he also waived the right to the tender of the return premium. The plaintiff requested the court to instruct the jury that "in order for the Phoenix Insurance Company to cancel its policy of insurance with Ira Kelsea, the company or its agents must first give a written notice to the insured notifying him that they desire to cancel said policy," and that "to cancel such policy the company or its agents must pay or tender to the insured a sum equal to the rebate or unearned premium." The court read these requests to the jury and stated that they correctly expressed the law, if each party had insisted upon the compliance with the strict letter of the law; but he told the jury that the parties to the policy had power to waive these provisions in relation to cancellation, and instructed them in substance that if the policy was canceled after the plaintiff understandingly surrendered his policy for the purpose of cancellation, and agreed with Finley that he should receive the return premium, and adjust that matter with the plaintiff later, then that would be a legal cancellation.

[2] The plaintiff excepted to the instructions of the court relating to waiver. There was no error in the instructions. The plaintiff contends that, as a matter of law, he could not waive the provisions in the policy in reference to notice of cancellation and payment of the return premium. This contention cannot be maintained.

[3] The stipulations in the policy relating to notice of cancellation and payment of return premiums were for the benefit of the plaintiff, and no reason is perceived why he could not waive them, the same, as it has been held, that insurance companies could waive provisions in policies that were for their benefit. *Perry v. Insurance Co.*, 67 N. H. 291, 296, 33 Atl. 731, 68 Am. St. Rep. 668; *Gleason v. Insurance Co.*, 73 N. H. 583, 64 Atl. 187; *Levi v. Insurance Co.*, 75 N. H. 551, 78 Atl. 617; *Flynn v. Insurance Co.*, 77 N. H. 481, 92 Atl. 737. The fact that the condition in the policy relative to cancellation is in conformity to the statute of the state affords no objection to its waiver by the plaintiff. "Statutory provisions for the benefit of individuals may be waived by those for whose benefit they are intended." *Battle v. Knapp*, 60 N. H. 361. The principle of waiver has a much broader application than the requirements of this case demand. "The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested." *State v. Albee*, 61 N. H. 423, 428, 60 Am. Rep. 325. In that case it was decided that the right of a respondent under the Bill of Rights to be tried in the county where the crime was committed may be waived. Numberless cases in this and other jurisdictions might be cited where the doctrine of waiver has been ap-

piled, and there is no question but that the plaintiff could exercise it in this case.

[4] Counsel for defendants in argument to the jury said: "Who is this Hollis Stevens? What kind of a chap is he to do business? He went in and trimmed Hammond until he picked him dry." To these remarks the plaintiff excepted. Hollis Stevens was a witness for the plaintiff, and had given material testimony in the case. There was no evidence to justify this statement. Hammond and Stevens had been partners, but there was no testimony that Stevens had cheated Hammond, and it cannot be fairly inferred from the evidence. This unwarrantable argument was for the purpose of convincing the jury that one of the plaintiff's material witnesses was a dishonest man, and that his testimony was not entitled to credit. It was prejudicial, and transcended the limits of legitimate advocacy. *Robertson v. Madison*, 67 N. H. 205, 29 Atl. 777. Whenever counsel in argument goes outside of the evidence, and makes statements that are material and prejudicial to the case, the verdict, if in favor of his client, must be set aside, unless he immediately retracts them, requests that the jury be instructed to disregard them, and obtains a finding by the presiding justice that "the error was cured and did not affect the result." *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233; *Story v. Railroad*, 70 N. H. 364, 376, 48 Atl. 288; *Hallock v. Young*, 72 N. H. 416, 422, 57 Atl. 236. There being no retraction of the objectionable remarks, nor finding by the court in reference to them, the verdict cannot be permitted to stand.

Exceptions to denial of motions for verdict and judgment and to instructions overruled; exception to argument sustained; verdict set aside; new trial granted. All concurred.

(78 N. H. 413)

LACOSS et al. v. TOWN OF LEBANON et al.
(Supreme Court of New Hampshire. May 1, 1917.)

1. DISCOVERY §13—PRODUCTION OF SKETCH AND PHOTOGRAPH.

That defendants made a sketch and photograph of the place and machinery after injury to their employé did not relieve them from the duty of producing them on bill of discovery by him.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 14.]

2. DISCOVERY §13—PRODUCTION OF SKETCH AND PHOTOGRAPH.

That defendants were under no duty to their injured employé to make a sketch and photograph of the place and machinery did not relieve them from the duty of producing such sketch and photograph, which they in fact made after the accident, if these were relevant to plaintiff's cause of action and their production would tend to promote discovery of the truth.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 14.]

3. DISCOVERY §13—PRODUCTION OF WRITINGS.

That defendant municipality reduced the evidence as to injury of its employé to writing no more relieved it from discovering it upon his bill of discovery than the fact that an individual committed the evidence to memory for the purpose of enabling him to defend any suit which might be brought would relieve him from the duty of discovering it.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 14.]

4. DISCOVERY §13—DEFENSES.

That documents material to a prospective suit are in possession of defendant's counsel does not help it on a bill of discovery for such documents.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 14.]

5. DISCOVERY §8—PRODUCTION OF DOCUMENTS.

While defendant cannot be compelled to discover either facts or documents relevant only to his defense, he can be compelled to discover any facts or documents within his knowledge or possession that are relevant to plaintiff's cause of action.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 8, 9.]

6. DISCOVERY §8—PRODUCTION OF WRITINGS.

When a writing evidences facts on which both parties rely, either may call for its discovery.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 8, 9.]

7. DISCOVERY §85—UNDER STATUTORY PROVISIONS—PARTIES.

Under Gen. St. 1867, c. 209, §§ 13, 14, providing that no person shall be excused from testifying by his interest, but that no party shall be compelled in testifying to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case, a party to an action stands in exactly the same position as any other witness, and can be compelled to answer any question or produce any writing such a person can be compelled to answer or produce, except that he cannot be compelled to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 121.]

8. DISCOVERY §84 — PRODUCTION OF WRITINGS.

Since, under such statutes, a party can be compelled to produce material writings at the trial, and the case may then be continued to give plaintiff time to examine them to prepare his case for trial, the court may on motion compel defendant to produce them in advance of the trial.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 108.]

9. TRIAL §18—PROCEDURE.

Outside of a few familiar situations in which the procedure is fixed by statute, the test usually applied to determine questions of procedure is to inquire as to what justice requires in the situation.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 37, 42½.]

10. DISCOVERY §97(1) — PRODUCTION OF WRITINGS.

If a bill of discovery be considered as a motion in an action at law, the test to determine whether defendant should be compelled to produce written documents at the time of

such motion is to inquire whether that is necessary to do justice between the parties.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 124-127.]

11. APPEAL AND ERROR §1010(1)—REVIEW—PRODUCTION OF DOCUMENTS.

The trial court's decision, on motion to compel defendant to produce documents, that it is just to compel defendant to do so, is final, if there is any evidence to warrant it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981, 4024.]

Exceptions from Superior Court, Grafton County.

Bill for discovery by Andrew Lacoss and others against the Town of Lebanon and others. Order for plaintiffs, and defendants except. Exceptions overruled.

On hearing the court found that the plaintiff, an employé of the defendant town, was injured by the breaking of a hoisting apparatus. Soon after the accident the defendant's officers caused a sketch of the place where the accident happened to be made, and a photograph of the hoisting apparatus to be taken, and the prayer of the bill is that the defendant be compelled to discover the sketch and photograph. The court found that the facts they evidence are material to the plaintiff's cause of action and that justice requires that they be produced at this time, and ordered the defendant to discover them, and it excepted.

Hollis & Murchie, of Concord, for plaintiffs. Martin & Howe, of Concord, for defendants.

YOUNG, J. [1-3] The defendant contends that it cannot be compelled to produce the sketch and photograph at this time, because it caused them to be made after the accident happened, to enable it to defend against any suit that might be brought against it because of the accident. The fact the defendant made the sketch and photograph after the accident happened will not relieve it from the duty of producing them; neither will the fact that the defendant owed the plaintiff no duty to make them, if they are relevant to the plaintiff's cause of action, and their production at this time will tend to promote the discovery of the truth. If it would, there would be but few cases in which a party could be compelled to produce material documents. So far as appears, the sketch and photograph, instead of being communications from the defendant to its counsel, were prepared before the plaintiff thought of this suit, to perpetuate the evidence of the situation as it existed at the time of the accident. But, however that may be, the fact the defendant reduced the evidence to writing no more relieves it from discovering it than the fact that an individual committed the evidence to memory for the purpose of enabling him to defend any suit that might be brought against him would relieve him from the duty

of discovering it. In short, the sketch and photograph are not communications from the defendant to its counsel, but documents that it prepared to perpetuate the evidence of the facts on which it relies as a defense to this suit.

[4, 5] The mere fact these documents are now in the possession of the defendant's counsel does not help it, for if the defendant can be compelled to discover them its counsel also can be compelled to produce them. In other words, a party cannot escape his duty of discovering material documents by merely handing them to his attorney. *Petition of Snow*, 75 N. H. 7, 70 Atl. 120; 4 Wig. Ev. § 2307. The question, therefore, is whether a party can be compelled to discover material documents when their production is essential to the discovery of the truth. The test to determine that question is to inquire whether the facts they evidence are relevant to the plaintiff's cause of action, or whether they are merely matters of defense; for, while the defendant cannot be compelled to discover either facts or documents that are only relevant to its defense, it can be compelled to discover any facts within the knowledge, information, or belief of its officers, or any documents in its possession, that are relevant to the plaintiff's cause of action.

[6] The fact the sketch and photograph evidence facts on which the defendant also relies is not enough to excuse it from discovering them, for when a writing evidences facts on which both parties rely either may call for its discovery. *Reynolds v. Company*, 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535. The plaintiff must show that the defendant's fault caused his injury, and it is clear that to do that he must reproduce the situation as it existed at the time of the accident, and it is obvious that he can get the necessary facts from the sketch and photograph. There is, however, another way of compelling a party to produce material writings, when their production is necessary to the discovery of the truth, that is more in line with modern ideas of efficiency than a bill of discovery.

Previous to 1857 neither a party to, nor one interested in the event of, a suit could be permitted or compelled to testify; but in that year a law was passed which provided that "no person shall be excused or excluded as a witness in any civil suit or proceeding at law or in equity, by reason of interest in the event of the same as a party or otherwise," with certain exceptions that are immaterial in so far as any questions before this court are concerned. Laws 1857, c. 1952, § 1. While this act put an interested party on the same footing as any one else in so far as calling him as a witness was concerned, it made no provisions for taking his depositions; but the next year an act was passed

which remedied that defect. This act contained the proviso that the party giving a deposition "shall not be obliged to answer any questions, or produce any document, the answering or producing of which would tend to criminate himself, or disclose his title to any property the title whereof is not material to the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case." Laws 1858, c. 2090, § 1. It is clear that, while these acts (Laws 1857, c. 1952, § 1; Laws 1858, c. 2090, § 1) were in force, a party who was called as a witness could, and one who was giving a deposition could not, be compelled to produce material writings; and that is true today, for, while certain material changes were made when these acts were incorporated in the Revision of 1867, there is nothing to show an intention on the part of the Legislature to relieve a party who is called as a witness from producing any writing that any other witness would be compelled to produce. These acts appear in the revision as G. S. c. 209:

"Sec. 13. No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise.

"Sec. 14. No party shall be compelled, in testifying or giving a deposition, to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his [own] case, nor, in giving a deposition, to produce any writing which is material to his case or defense."

—and are still parts of the law of this state. G. L. c. 228, §§ 13, 14; P. S. c. 224, §§ 13, 14. All the evidence, therefore, the history of this legislation, as well as the language the Legislature used, tends to the conclusion that a party to an action stands in exactly the same position as any other witness, except that he cannot be compelled to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case. A little thought will show why the Legislature provided that a party may be compelled to produce a writing when he is called as a witness that he would be excused from producing if he were giving a deposition.

The office of evidence is to enable the trier of facts to discover the truth in respect to the matters in dispute between the parties, and experience has shown that compelling a witness to produce a material writing at a given stage in the proceedings sometimes tends to prevent the discovery of the truth. Since this is so, the question of whether producing a writing at a given time will prevent or promote the discovery of the truth should be decided before a party is compelled to produce it. The court is the only tribunal that has jurisdiction of that question, and as a deposition is not taken in its presence the Legislature saw fit to relieve parties giving their depositions from producing writings or which they rely to prove their cases. As

that reason does not exist in the case of a witness, the Legislature placed a party who is called as a witness on the same footing as every one else in so far as the production of documents is concerned.

[7] It follows that, while a party cannot be compelled to produce material writings when he is giving a deposition, he may be compelled to produce them when he is called as a witness, whenever the court finds that that will promote the discovery of the truth. In a word, when a party is called as a witness, he cannot be compelled to give the names of the witnesses by whom nor the manner in which he proposes to prove his case, but in all other respects he stands the same as one who is not a party (*Whitcher v. Davis*, 70 N. H. 237, 46 Atl. 458), and can be compelled to answer any question or produce any writing that such a person can be compelled to answer or produce (*Railroad v. State*, 75 N. H. 513, 77 Atl. 996, 31 L. R. A. [N. S.] 539, Ann. Cas. 1912A, 382). There is nothing in the opinion in *Wentworth v. McDuffie*, 48 N. H. 402, in conflict with this view of the court's power to compel the production of material writings, for that case relates to the production of documents without reference to their competency as evidence and is based on the rules of the common law, and not on G. S. c. 209, §§ 13, 14.

[8, 9] Since a party can be compelled to produce material writings whenever the court finds that producing them will promote the discovery of the truth, the court can compel the defendant's officers to produce the sketch and photograph when the case comes to trial, and then continue the case to give the plaintiff time to examine them, if it finds that that is reasonably necessary to enable him to prepare his case for trial. Since this is so, that is, since the court can continue the case after it compels the defendant's officers to produce the sketch and photograph, if it finds that justice requires it, or that everything considered, that is the reasonable thing to do, it can, on motion, compel the defendant's officers to produce them in advance of the trial, unless there is some statute of this state or rule of procedure which forbids it. There is no statute which provides either in terms or by implication that a party cannot be compelled to produce material writings in advance of the trial, when that is necessary to prevent injustice; and it is almost true to say that the only common-law rule of procedure that is enforced in this jurisdiction is the one which makes it the duty of the court, in conducting trials, to do whatever is reasonably necessary to do justice between the parties, for notwithstanding the question of the result any given procedure will produce is one of fact, pure and simple. It used to be the custom to formulate rules for deciding all such questions, but for nearly half a century the practice of deciding them as

other questions of fact are decided has been growing, until now it is fair to say that, outside of a few familiar situations in which the procedure is fixed by statute, the test usually applied to determine questions of procedure is to inquire as to what justice requires in that situation. *Tinkham v. Railroad*, 77 N. H. 111, 88 Atl. 709; *Commonwealth Trust Co. v. Salem*, 77 N. H. 146, 89 Atl. 452; *Whitcher v. Association*, 77 N. H. 405, 92 Atl. 735; *Wheeler v. Company*, 77 N. H. 551, 553, 94 Atl. 265; *Sanborn v. Railroad*, 76 N. H. 65, 79 Atl. 642; *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474; *Glover v. Baker*, 76 N. H. 261, 81 Atl. 1081; *Moore v. Company*, 74 N. H. 47, 64 Atl. 1099; *Meloon v. Read*, 73 N. H. 153, 59 Atl. 946; *Gerrish v. Whitfield*, 72 N. H. 222, 55 Atl. 551; *Saucier v. Mills*, 72 N. H. 292, 56 Atl. 545; *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459; *Keenan v. Perrault*, 72 N. H. 426, 57 Atl. 335; *State v. Sunapee Dam*, 72 N. H. 114, 131, 55 Atl. 899; *Stone v. Mills*, 71 N. H. 288, 52 Atl. 119; *Marden v. Company*, 70 N. H. 269, 48 Atl. 282; *Wilcox v. Busiel*, 70 N. H. 626, 47 Atl. 703; *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082; *Tripp v. Company*, 69 N. H. 233, 45 Atl. 746; *Gregg v. Thurber*, 69 N. H. 480, 45 Atl. 241; *Johnson v. Association*, 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610; *Martin v. Wiggins*, 67 N. H. 196, 29 Atl. 450; *Crippen v. Rogers*, 67 N. H. 207, 30 Atl. 346, 25 L. R. A. 821; *Tucker v. Chick*, 67 N. H. 77, 37 Atl. 672; *Tucker v. Lake*, 67 N. H. 193, 29 Atl. 406; *Meredith v. Company*, 67 N. H. 450, 39 Atl. 330; *Mead v. Welch*, 67 N. H. 341, 39 Atl. 370; *Hickey v. Dole*, 66 N. H. 612, 31 Atl. 900; *Sleeper v. Kelley*, 65 N. H. 206, 18 Atl. 718; *Joyce v. O'Neal*, 64 N. H. 91, 6 Atl. 33; *Boody v. Watson*, 64 N. H. 162, 171, 9 Atl. 794; *Haverhill v. Hale*, 64 N. H. 406, 14 Atl. 78; *Brooks v. Howison*, 63 N. H. 382; *Cushing v. Miller*, 62 N. H. 517; *Clark v. Clark*, 62 N. H. 267; *Metcalf v. Gilmore*, 59 N. H. 417, 47 Am. Rep. 217.

[10, 11] If, therefore, this bill is considered as a motion in the action at law, the test to determine whether the defendants should be compelled to produce the sketch and photograph at this time is to inquire whether that is necessary to do justice between the parties. Consequently the only question of law raised by the defendant's exception to the court's finding that it is just for the defendant to produce the sketch and photograph, at this time, is whether there is any evidence to warrant it; it is enough, in so far as that question is concerned, to say that it cannot be said there is no such evidence.

Defendant's exception overruled.

(90 N. J. Law, 701)
LONG DOCK CO. v. STATE BOARD OF
TAXES AND ASSESSMENT et al.
(No. 48.)

(Court of Errors and Appeals of New Jersey.
May 24, 1917.)

APPEAL AND ERROR \Leftrightarrow 1094(1) — REVIEW —
SUPREME COURT FINDING.

Where there is evidence to support finding of facts by the Supreme Court, such finding is not reviewable in the Court of Errors and Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322, 4323.]

Appeal from Supreme Court.

Certiorari by the Long Dock Company against the State Board of Taxes and Assessment and others to review assessment of second class railroad property. From judgment of the Supreme Court (89 N. J. Law, 108, 97 Atl. 900), prosecutor appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. John W. Wescott, Atty. Gen., John Bentley, of Jersey City, and John R. Hardin, of Newark, for appellees.

PER CURIAM. Legal questions were first dealt with in the opinion of Mr. Justice Parker in the court below, so as to lay a foundation for the consideration of the facts, and those questions were, in our opinion, rightly decided. As there was evidence to support the finding of facts made by the Supreme Court, that finding is not reviewable in this court.

The judgment under review will be affirmed.

NOTE.—In the companion cases (Nos. 49, 50, and 51, 101 Atl. 367, 368) memoranda to be filed stating judgments affirmed, for reasons given in above per curiam.

(90 N. J. Law, 702)
LONG DOCK CO. v. STATE BOARD OF
TAXES AND ASSESSMENT et al.
(No. 49.)

(Court of Errors and Appeals of New Jersey.
May 24, 1917.)

Appeal from Supreme Court.

Certiorari by the Long Dock Company against the State Board of Taxes and Assessment and others to review assessment of second class railroad property. From judgment of the Supreme Court (89 N. J. Law, 108, 97 Atl. 900), prosecutor appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. John W. Wescott, Atty. Gen., John Bentley, of Jersey City, and John R. Hardin, of Newark, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per curiam in *Long Dock Co. v. State Board of Taxes and Assessment, etc.* (No. 48 of the present term of this court) 101 Atl. 367.

(90 N. J. Law, 702)

LONG DOCK CO. v. STATE BOARD OF TAXES AND ASSESSMENT et al.
(No. 50.)(Court of Errors and Appeals of New Jersey.
May 24, 1917.)

Appeal from Supreme Court.

Certiorari by the Long Dock Company against the State Board of Taxes and Assessment and others to review assessment of second class railroad property. From judgment of the Supreme Court (89 N. J. Law, 108, 97 Atl. 900), prosecutor appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. John W. Wescott, Atty. Gen., John Bentley, of Jersey City, and John R. Hardin, of Newark, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per curiam in Long Dock Co. v. State Board of Taxes and Assessments, etc. (No. 48 of the present term of this court) 101 Atl. 367.

(90 N. J. Law 703)

LONG DOCK CO. v. STATE BOARD OF TAXES AND ASSESSMENT et al.
(No. 51.)(Court of Errors and Appeals of New Jersey.
May 24, 1917.)

Appeal from Supreme Court.

Certiorari by the Long Dock Company against the State Board of Taxes and Assessment and others to review assessment of second class railroad property. From judgment of the Supreme Court (89 N. J. Law, 108, 97 A. 900), prosecutor appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. John W. Wescott, Atty. Gen., John Bentley, of Jersey City, and John R. Hardin, of Newark, for appellees.

PER CURIAM. The judgment under review will be affirmed for the reasons given in the per curiam in Long Dock Co. v. State Board of Taxes and Assessment, etc. (No. 48 of the present term of this court) 101 Atl. 367.

(90 N. J. Law, 406)

HORNER v. BOARD OF COM'RS OF MARGATE CITY et al.

(Supreme Court of New Jersey. June 19, 1917.)

(Syllabus by the Court.)

TAXATION §513—LIEN—CONTINUANCE.

Under the act entitled "An act for the assessment and collection of taxes" (P. L. 1903, p. 394 [4 Comp. St. 1910, p. 5075]), there is no limitation as to the lien of a tax assessed on lands against the owner, at least so long as he continues to be the owner, and a taxing district has in such case the right to enforce the payment of taxes assessed against the owner, although the sale is not made, or attempted to be made, within two years of the 20th day of December of the year for which the taxes are assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 951-955.]

Action by John G. Horner, receiver of the West Jersey Mortgage Company, for a writ of certiorari to the Board of Commissioners of Margate City and others to review a reso-

lution directing the tax collector to sell lands for taxes in arrears. Writ dismissed.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Harvey F. Carr, of Camden, for prosecutor. Joseph Thompson, of Atlantic City, for defendants.

BERGEN, J. In this cause a writ of certiorari was allowed to review a resolution of the defendant corporation directing its tax collector to sell lands for taxes in arrears.

The record is so meager that it is doubtful whether the precise question is presented in it, but we think it sufficiently supplemented by admissions on the argument and the briefs of counsel to justify the consideration of the real question in dispute, which is: Does the lien against the land for unpaid taxes expire in favor of the owner at the end of two years from the date when they are payable, where the owner against whom the assessment was levied still holds the title? The facts as we find them from the record and admissions of counsel are substantially as follows: In 1912 the Ventnor Syndicate was the owner of a tract of land in Margate City of which it is still the owner; in that year a tax was assessed against the land in the name of the owner which became payable December 20th of that year and is not yet paid; that October 9, 1916, the city passed a resolution directing the sale of the land to make the taxes in arrears, which is the resolution under review; that the collector advertised the land for sale on April 10, 1917; that February 21, 1912, the Ventnor Syndicate mortgaged the land of the West Jersey Mortgage Company for \$5,000, and, the latter company being decreed to be insolvent, the prosecutor was appointed its receiver October 1, 1915.

While we have concluded to consider the merits of the question presented, we do not thereby wish to be understood as conceding the right of a mortgagee to challenge the legality of a tax assessed in the name of the owner against the mortgaged premises, under such conditions as are present in this case; for it may well be that, even if the lien has expired as to the mortgagee, it might remain a lien against the interest of the owner sufficient in value in excess of the mortgage to raise the sum due for unpaid taxes, and that, if the lien had lapsed as to the mortgagee, a sale of the owner's interest would not affect the mortgagee's lien. This question we do not pass on for it is not raised, and defendant makes no objection to the prosecutor's standing.

The only reason filed by the prosecutor is that "the lien created" by the act of 1903 (P. L. 394; C. S. 5075) has expired, and the defendants, in consequence, have no right or power to sell the said lands, and can con-

vey no valid title thereto. This raises but one question, and the only one argued, viz.: Is there any limitation to the lien for taxes on the land against which they are assessed and levied where there has been no subsequent conveyance by the owner. We are of opinion that under the act of 1903 supra there is no limitation for the lien for taxes, so far as the owner is concerned against whom the tax was levied, at least so long as he retains the title. Prior to 1854 we had no statute making taxes a lien on land or limiting the lien for taxes. In that year (P. L. 429) an act was passed which provided (section 2) that an assessment for taxes against any person residing out of the state, or of corporations residing out of the county where the lands were located, should be a lien on the lands for the "space of two years" from the time when they were made payable, and in 1863 (P. L. 497) this was extended to all persons and corporations whether resident or not. This limitation was maintained in all subsequent statutes relating to the subject until the general revision of the tax act in 1903, so that under the statutes prior to 1903 taxes were made a lien on the land against which they were assessed for the space of two years after they were payable, except since 1888 (P. L. 372), when all taxes were made a first and paramount lien for the space of two years from and after December 20th in each year, to which all conveyances, mortgages, and other liens were subservient, and our courts in construing this legislation have uniformly held that the lien imposed expired at the end of two years from the due day. *Johnson v. Van Horn*, 45 N. J. Law, 136; *Pollon v. Rutherford*, 58 N. J. Law, 113, 32 Atl. 688; *Hohenstatt v. Bridgeton*, 62 N. J. Law, 169, 40 Atl. 649. With this statutory limitation regarding taxes continued in our law for a period of 40 years, together with its judicial construction, before it, the Legislature by the act of 1903 supra deliberately eliminated the limitation of the lien of taxes, and expressly repealed by P. L. 1903, p. 436, all the legislation relating thereto, and by section 49 of the Revised Statutes of 1903 declared that all unpaid taxes should be, after the 20th day of December next after the assessment, "a first lien on the land on which they are assessed, and paramount to all prior or subsequent alienations and descents of said land or incumbrances thereon, except subsequent taxes." Section 50 of the act requires the collector of each taxing district to file, on or before the first Tuesday of February in each year with the county clerk, except in cities having charter provisions for a public record of tax liens on land, a list of all unpaid taxes assessed the preceding year on real estate in his taxing district, setting forth against whom assessed, the description of the property and the amount of taxes assessed thereon, arranged alphabetically in the names of the owners, and then declares that:

"The said list when filed and the record thereof shall be constructive notice of the existence of the tax lien for two years from said first Tuesday of February but not thereafter against any parcel unless within said term of two years the sale of said parcel shall be noted in the record."

The same section further provides that a purchaser or mortgagee in good faith after the said first Tuesday of February, whose deed or mortgage is recorded before the collector has filed his list, shall hold his title free from the tax lien. The radical change made by this statute is that the lien of taxes is no longer subject to any limitation, they are made a lien paramount to all conveyances or mortgages except such as are taken after the first Tuesday in any February and recorded before the collector has filed his list. This was manifestly adopted to protect innocent purchasers and mortgagees in good faith against the default of the collector in not filing his list on the day required by law, but they are not protected if recorded after the list has been filed, so that, if such purchaser or mortgagee finds no list on file showing taxes in arrears against the land when he records his conveyance or mortgage, he may safely accept either. That part of section 50 relating to the limitation of constructive notice to two years does not destroy the tax lien in favor of an owner, for he has actual notice that he has not paid his taxes, and the Legislature could not have intended to do away with the actual notice which he had, and put in its place a constructive notice, which is one which the law implies and charges him with in absence of actual notice. This limitation of constructive notice only applies to persons who deal with the land without notice of any tax lien.

As to such persons the list filed is a notice which the law implies they have, but this implication falls, by force of the statute, after the lapse of two years from the beginning of the lien, after which the list is not constructive notice to a purchaser or mortgagee of the tax lien, and if he finds no list on file, or a sale noted, within two years, he may assume that there are no taxes in arrears which are a lien upon the property. It may well be doubted whether this statute applies in any case where the conveyance or mortgage is recorded prior to the assessment, for as was said by Mr. Justice Dixon in *Robinson v. Hulick*, 67 N. J. Law, 496, 51 Atl. 493:

"All persons interested, or about to become interested, in lands in New Jersey, are chargeable with notice of these laws and of their normal operation. Every purchaser or mortgagee of such land therefore must be deemed to have notice of the taxes which become a lien upon that land on every 20th day of December after he acquires his interest."

We are inclined to think that the statute with reference to the constructive notice to be derived from the filed list was intended for the protection of persons intending to become interested in the land, and that as to them the list is not a constructive notice for

more than two years after it is filed, so that if in searching the record he finds no list containing an assessment unpaid against the land he is not chargeable with notice of any assessment, although filed, which is not within the limited period, but if this be not sound we are of opinion that the limitation of the effect of the constructive notice provided by the statute does not apply where the owner had actual notice of a tax levied during his ownership, and that, so far as he is concerned, the tax remains a lien upon his land without limitation by any statute.

The result which we reach is that the prosecutor can take nothing by his writ, and that it should be dismissed, with costs.

(90 N. J. Law, 473)

DOLKER v. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY
et al. (No. 86.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1149—**JUDGMENT**
 \S 306—**REVIEW—AMENDMENT.**

It is the judgment, not the opinion, of a court below, which is brought before an appellate court for review. If the judgment of the lower court varies from its decision, it may be corrected only by amendment in that court; in the court above it can only be affirmed, reversed, or modified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4483-4496; Judgment, Cent. Dig. \S 596, 597.]

2. MUNICIPAL CORPORATIONS \S 336(1)—**CONTRACTS — "WORK" — "LABOR" — "MATERIALS"—STATUTE.**

The publishing of official advertisements for municipal corporations in newspapers is neither work, labor, nor materials furnished by the owners of the papers to such advertising customers, under P. L. 1912, p. 593.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 862.

For other definitions, see Words and Phrases, First and Second Series, Labor; Materials; Work.]

3. MUNICIPAL CORPORATIONS \S 327—**PUBLIC ADVERTISEMENTS — PRICE — REPEAL OF STATUTE.**

The act of 1909 (P. L. p. 92; 3 Comp. St. 1910, p. 3762), which regulates the price to be paid for public advertising, is not repealed by implication by act of 1912 (P. L. p. 503), there being no express repealer, specific or general, which latter act relates to expenditures by public bodies for the doing of work or the furnishing of materials or labor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 850.]

4. MUNICIPAL CORPORATIONS \S 336(1)—**ADVERTISING—AWARD OF CONTRACT—STATUTE.**

Although a municipal corporation advertises for bids or proposals for publishing all official advertising in newspapers, it is not required to award a contract to the lowest bidder, but may contract for such advertising at the price fixed in P. L. 1909, p. 92.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 862.]

Appeal from Supreme Court.

Certiorari from the Supreme Court by Thomas Dolker against the Board of Chosen Freeholders of the County of Atlantic and others. Judgment for prosecutor, and defendants appeal. Reversed.

Enoch A. Higbee, of Atlantic City, for appellants. Clarence L. Cole, of Atlantic City, for appellee.

WALKER, Ch. The board of chosen freeholders of the county of Atlantic called for sealed bids or proposals for the publication or printing of all public notices or advertisements authorized by the board, including monthly and annual financial statements. In response, bids were submitted by the South Jersey Star, Frank Breder, Atlantic City Review, Atlantic City Daily Press, and Atlantic City Union, and were as follows: South Jersey Star, seven-eighths cents per line; Frank Breder, six-eighths cents per line; Atlantic City Review, four cents per line for the first insertion and three cents per line for subsequent insertions; Atlantic City Press, ten cents per line for the first insertion and eight cents per line for subsequent insertions; Atlantic City Union, ten cents per line for the first insertion and eight cents per line for subsequent insertions. The proposals were referred to the printing committee and the minutes of the board show that on motion a contract was awarded to the Atlantic City Review and Atlantic City Press at the legal rate, as given in the bid of the Atlantic City Press. These two were not the lowest bidders.

The prosecutor respondent sued out a certiorari from the Supreme Court to test the legality of the award. That court in a per curiam held that the award of the contract was at a figure much in excess of the statutory limitation, and set the same aside, with costs. This appears to refer to the total cost of the advertising, which would exceed (according to a stipulation in the cause) the \$500 limit of expenditure, without advertising for proposals and awarding the contract to the lowest bidder, as provided by the act of 1912, *infra*. The respondent, the board, has appealed to this court.

[1] It is urged as a ground of appeal that the judgment in the Supreme Court is not in accord with its opinion, in that the *judgment* sets aside the *proceedings*, with costs, whereas the *opinion* directed the setting aside of the *contract*, with costs. It is not the opinion, but the judgment, of the court below, which is before this court for review. The reasoning of the judges in a court below is always considered, and, so far as it tends to support the conclusion reached by that tribunal, is given due weight by an appellate court; but the judgment entered in the court below, even if it is different from the court's decision, cannot be amended in the court

above. It can only be affirmed, reversed, or modified there.

The judgment entered upon the opinion of the Supreme Court in the case at bar recites that that court was of opinion that the *proceedings* under review should be set aside, and so ordered, with costs; the opinion concluding, as above mentioned, that the *contract* should be set aside. The form of judgment, however, if a matter of importance, could only be corrected by the court which rendered it. See *Hansen v. De Vita*, 76 N. J. Law, 330, 70 Atl. 688. However, the form of the judgment before us is of no importance in the view which we have reached, for, were it one setting aside the *proceedings* under review, instead of the *contract*, it would have to be reversed. And this brings us to the meritorious question in the controversy, which is one of statutory construction.

[2] Two statutes are involved. The first is P. L. 1909, p. 92 (Comp. Stat. p. 3762), and the other is P. L. 1912, p. 593. The title and pertinent section of the first reads as follows: "An act to regulate the price to be paid for official advertising.

"1. Hereafter the price to be paid for publishing all official advertising in the newspapers, published in cities of the first and second class, or in counties of the first or second class in this state, shall be at the rate of ten cents per agate (or 5½ point) line for the first insertion, and eight cents per agate line for each subsequent insertion; Provided, that in computing such charge per line, the lines shall average at least seven words."

And the second:

"An act relating to expenditures by public county, city, town, township, borough and village bodies.

"1. Where and whenever hereafter it shall be lawful and desirable for a public body of any county, city, town, township, borough or village to let contracts or agreements for the doing of any work or for the furnishing of any materials or labor, where the sum to be expended exceeds the sum of five hundred dollars, the action of any such public body entering into such agreement or contract, or giving any order for the doing of any work or for the furnishing of any materials or labor, or for any such expenditures, shall be invalid unless such public body shall first publicly advertise for bids therefor, and shall award said contract for the doing of said work or the furnishing of such materials or labor to the lowest responsible bidder: Provided, however, that said public body may, nevertheless, reject any and all bids."

The prosecutor, who bid for the South Jersey Star, was the lowest bidder, and claimed that the act of 1912, which provides that where a public body in any county, etc., shall make a contract or agreement for the doing of any work or the furnishing of any materials or labor, where the sum to be expended exceeds \$500, the action of such body shall be invalid unless it shall publicly advertise for bids and shall award the contract to the lowest responsible bidder, required that the contract should have been awarded to him. We do not think that this act applies at all to the case at bar. The advertising under

which the bids were received was for proposals for the publication or printing of all public notices or advertisements authorized by the board of chosen freeholders, including monthly and annual financial statements, and that the successful bidder, or the ones to whom the contract should be awarded, must enter into a written contract to publish such legal notices as should be authorized by the board for the price for which they bid, etc. The sort of advertising here called for was clearly official advertising, as provided for in section 1 of the act of 1909, and was not the doing of work or the furnishing of materials or labor comprehended in the act of 1912.

[3] It is urged on behalf of the respondent that the act of 1912 repealed the act of 1909 by implication; there being no express repealer, specific or general. The Supreme Court held that the two acts could stand together, and seems to have treated them as being in pari materia. We think they are not; that they contemplate two entirely different subjects—the one of 1909 the matter of official advertising, and the one of 1912 the doing of public work, or furnishing materials therefor.

[4] The act of 1909 does not require advertising for bids, and, consequently, the appellant was not required to award the contract to the lowest bidder. This court, in *Trenton v. Shaw*, 49 N. J. Law, 638, 10 Atl. 273, held that under a provision in the charter of Trenton requiring that all contracts for work or materials for any improvements should be given to the lowest bidder, did not apply to a contract to furnish rubber hose for the fire department, because that was not an improvement. In that case advertisement had been made for bids, but the contract was not awarded to the lowest bidder, and the action of the common council was set aside in the Supreme Court, but was upheld in this court. The doctrine of *Trenton v. Shaw* is applicable to the case at bar.

The judgment under review must be reversed, with costs.

(80 N. J. Law, 646)

DUFF v. PRUDENTIAL INS. CO. OF AMERICA. (No. 74.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

1. INSURANCE — 291(4)—INDUSTRIAL LIFE INSURANCE—WILLFUL MISSTATEMENT AS TO HEALTH—"FRAUD."

A finding of fact by the district court, supported by evidence, that in the application for a policy of life insurance a statement that the insured was not suffering from consumption was a willful untruth, vitiates the policy. This in effect is a finding that the policy was procured by fraud (citing 3 Words and Phrases, Fraud).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 687.]

2. INSURANCE ⚡265 — STATUTE—REPRESENTATIONS BY INSURED.

By statute (Act April 15, 1907; P. L. p. 133, § 1 (4)), statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations, and not warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560.]

3. APPEAL AND ERROR ⚡1010(1)—FINDINGS—REVIEW.

The Supreme Court cannot review the findings of fact of the district courts, when supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981, 4024.]

Appeal from Supreme Court.

Suit by Richard H. Duff, administrator, etc., of John Sullivan, deceased, against the Prudential Insurance Company of America. From a judgment of the Supreme Court, reversing a judgment of the district court of Jersey City in favor of the defendant, it appeals. Judgment reversed, and judgment of district court affirmed.

Randolph Perkins, of Jersey City, for appellant. Hershenstein & Finnerty, of Jersey City, for appellee.

BLACK, J. This was a suit brought on an industrial life insurance policy, issued to the decedent, John Sullivan, by the defendant company, for the sum of \$244, on September 21, 1914. The insured died of tuberculosis at the City Hospital, in Jersey City, June 13, 1915. The case was tried, in the First district court of Jersey City, by Judge Carrick, without a jury, resulting in a judgment rendered in favor of the defendant.

[3] The trial court found, as a fact, the statement made by the insured, in his application, that he had never suffered from consumption, in view of the previous history of the case, to have been a willful untruth, which vitiates the policy and prevents recovery thereunder. The evidence in the record amply supports this finding of fact by the trial court. The case was reviewed in the Supreme Court, which reversed the judgment of the district court, on the ground that the false statement in the application, if it was false, did not vitiate the policy, in the absence of proof that the company was induced to write the policy through fraud. The Supreme Court also said the case is substantially, though not precisely, similar to *Melick v. Metropolitan Life Insurance Co.*, 84 N. J. Law, 437, 87 Atl. 75, affirmed 85 N. J. Law, 727, 91 Atl. 1070, in which the determining factor was the continued acceptance of weekly premiums by the company. We do not agree with the conclusion reached by the Supreme Court. We think the judgment of the Supreme Court should be reversed, and the judgment of the district court affirmed.

[1, 2] In the application for the policy of insurance, which was dated September 9, 1914, the insured stated that he had never suffered from consumption, that he was in

good condition of health, and had no serious disease. The company defended on the ground of the falsity of these statements. The policy itself does not refer to the application for insurance. The statements in the application are not made warranties or conditions. The statute provides:

"All statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of this provision shall be void." P. L. 1907, p. 133, § 1(4).

The finding of facts by the district court was not the subject of review, by the Supreme Court. *Dordoni v. Hughes*, 83 N. J. Law, 355, 85 Atl. 353. It seems to us the necessary result of finding that an application for a policy of life insurance contains a willful untruth as to whether the applicant had consumption was necessarily a finding that the policy was procured by fraud. The Supreme Court thought there was no proof that this misrepresentation was material, or that the company may have been aware of its falsity and issued the policy regardless of that fact. The fact that the company asks the question shows it is material, and it is common knowledge to assume that life insurance companies do not accept for life insurance tubercular persons.

It is said the most essential element of fraud is deceit. What could be the purpose of the insured making a statement, that was a willful untruth, about his health, which he must have known was important and material, if it was not to deceive? Many definitions and illustrations of fraud, taken from adjudged cases, will be found collected in volume 3, Words and Phrases, page 2943. We agree with the district court that a statement which is a willful untruth, as found by the district court, in procuring the insurance policy, renders it void on the ground of fraud. This view results in a reversal of the judgment of the Supreme Court, and an affirmance of the judgment of the district court. It also renders unnecessary any further discussion of the points argued in the briefs of counsel.

The judgment of the Supreme Court is therefore reversed, with costs, and the judgment of the district court affirmed.

(90 N. J. Law, 540)

CHRISTY et al. v. NEW YORK CENT. & H. R. R. CO. (No. 91.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

1. EVIDENCE ⚡244(16) — ADMISSIONS — AGENT'S ADMISSION.

In a suit brought to recover damages for property destroyed by fire through the failure of the defendant railroad to use reasonable care to keep its right of way in New York state clear of combustible materials, a written statement made by the defendant's general manager (who

was charged with the duty of maintenance and care of such right of way) to the Public Service Commission of New York (when it was conducting a legally authorized investigation of the fire) to the effect that at the time of the fire the defendant company had not cleared its right of way of combustible materials was admissible in evidence against the defendant company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 933.]

2. EVIDENCE \Leftrightarrow 246 — ADMISSIONS — OFFICER OF CORPORATION.

The general rule is that, when a corporation authorizes an attorney to speak for it, the corporation may be confronted by testimony as to what was said by such attorney within the scope of his authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 945-949.]

3. EVIDENCE \Leftrightarrow 244(16) — ADMISSIONS — STATEMENTS OF ATTORNEY.

Where a railroad company had authorized its attorney to act and speak for it at a legally authorized hearing by the Public Service Commission at which a fire along the company's right of way, and the company's connection therewith, was under investigation, evidence as to such attorney's statements then and there made with respect to combustible matter on such right of way at the time of the fire are admissible in evidence against the company in a suit involving that issue, subject to the latter's right to disprove, rebut, or explain such statements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 933.]

4. PAYMENT \Leftrightarrow 66(5) — PRESUMPTION — EXPLANATION.

The presumption of payment or release arising from lapse of time is not necessarily a conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only when not satisfactorily accounted for or explained. But when so accounted for or explained the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 188.]

5. TRIAL \Leftrightarrow 261 — REQUESTED INSTRUCTION — REFUSAL.

When a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675.]

Appeal from Supreme Court.

Action by Charles R. Christy and others against the New York Central & Hudson River Railroad Company. From a judgment of the Supreme Court for plaintiffs entered upon the verdict of a jury at the Hudson circuit, defendant appeals. Affirmed.

See, also, 92 Atl. 395.

Vredenburgh, Wall & Carey, of Jersey City, for appellant. Edmund W. Wakelee, of Englewood, and Wendell J. Wright and Edward V. Thornall, both of New York City, for appellees.

TRENCHARD, J. This appeal brings up for review a judgment in favor of the plaintiffs below, entered upon the verdict of a jury, at the Hudson circuit. We are of the opinion that the judgment must be affirmed.

The action was brought by the plaintiffs, residents of New Jersey, against the defendant railroad, to recover the value of certain cut and piled timber at Long Lake West, Hamilton county, N. Y., which was destroyed by fire on September 27, 1908.

The only questions raised on this appeal are those points reserved in the rule to show cause why a new trial should not be granted, which was discharged.

The first challenges the admission in evidence at the trial of a communication by A. H. Smith, vice president and general manager of the defendant company, dated January 6, 1909, addressed to the Public Service Commission, Second district, state of New York.

The situation was this: At the trial of the present case the main issue was whether or not the defendant company was negligent in the maintenance and care of its right of way in violation of its common duty to exercise reasonable care to keep it clear of combustible matter, by reason of which negligence the plaintiffs sustained the damages sued for. The plaintiffs introduced evidence tending to show that the right of way of the defendant at and near where the plaintiffs' lumber was piled was filled with combustible materials. The plaintiffs also put in evidence section 72 of the Forest, Fish, and Game Law of the state of New York (Consol. Laws, c. 19), which enacts, among other things, that:

"Every railroad company shall, on such part of its road as passes through forest lands or lands subject to fires from any cause, cut and remove from its right of way along such lands, at least twice a year, all grass, brush or other inflammable materials."

And it also provides that:

"The Public Service Commission must upon the request of the forest, fish and game commissioner, and on notice to the railroad company or companies affected, require any railroad company having a railroad running through forest lands in counties containing parts of the forest preserve, to adopt such devices and precautions against setting fire upon its line in such forest lands as the public interest requires."

It was also proven and admitted: (1) That part of the forest preserve was in Hamilton county; (2) that after the fire in question the Public Service Commission of the Second district of the state of New York, upon the request of the forest, fish, and game commissioner, began an investigation into such fire to ascertain what the causes were, and to what extent railroad operations were responsible; (3) that the commission made an order directing the defendant company and others to show cause what precautions were being used by them against setting fires upon their respective lines in forest lands, etc.; (4) that at such hearing the defendant company was represented both by its general attorney and its local attorney, and submitted to the commission a communication in writing made by Mr. Smith, the vice president and general manager of the defendant

company. It was evidence of this communication which the defendant contends was error requiring reversal. We think not.

[1] The communication contained a statement from which the inference might properly be drawn that the defendant company, at the time of the fire in question, had not cleared its right of way of combustible materials, and the communication, having been made by its general manager, who, it appeared, was charged with the duty of maintenance and care of such right of way, was admissible in evidence against the defendant company. *Halsey v. Lehigh Valley R. R. Co.*, 45 N. J. Law, 26; *Agricultural Ins. Co. v. Potts*, 55 N. J. Law, 158, 26 Atl. 27, 537, 39 Am. St. Rep. 637; *Carey v. Wolff*, 72 N. J. Law, 510, 63 Atl. 270; *Jones v. Mount Holly Water Co.*, 87 N. J. Law, 106, 93 Atl. 860.

It is next argued that there should be a reversal because of evidence given of an oral statement made by Martin E. McClary, the local attorney of the defendant, before the Public Service Commission, at the hearing above referred to. We think there is no merit in this contention.

[2, 3] It satisfactorily appeared at the trial, apart from Mr. McClary's statement, that he was the defendant's local attorney, and was instructed by the defendant company to act and speak for it at the hearing respecting the defendant's relation to the fire in question. The statement in question was then and there made by him in pursuance of his instructions. It was in amplification of the written statement of Mr. Smith, and was that the condition of the right of way, with respect to combustible matter, was "bad and was one of the causes of the fire."

Now the general rule is that, when a corporation authorizes an attorney to speak for it, the corporation may be confronted by testimony as to what was said by such attorney within the scope of his authority. *Gallagher v. McBride*, 66 N. J. Law, 360, 49 Atl. 582; *Huebner v. Erie R. R. Co.*, 69 N. J. Law, 327, 55 Atl. 273; *King v. Atlantic City Gas Co.*, 70 N. J. Law, 679, 58 Atl. 345; *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95. And where, as here, the defendant railroad company had authorized its attorney to act and speak for it, at a legally authorized hearing by the Public Service Commission at which the fire in question, and the defendant's connection therewith, was under investigation, evidence as to such attorney's statements then and there made with respect to combustible matter on such right of way at the time of the fire was admissible in evidence against the company in this suit involving that issue, subject to the latter's right to disprove, rebut, or explain such statements.

The last reason urged for reversal is that the trial judge refused to charge as follows:

"Plaintiffs' right of action, if any, having accrued September 27, 1903, the law of this state presumes that plaintiffs' demands were paid or released within one year thereafter. This presumption has not been rebutted, and the verdict must be for the defendant."

The defendant's contention was and is that the plaintiffs, when they invoked the jurisdiction of a court of this state over such a cause of action arising in New York, must accept the limitations which would arise against one prosecuting such a cause of action which arose in this state, and that the courts of New Jersey will presume that such cause of action has been released or settled at the expiration of the period of one-year limitation found in section 58 of our General Railroad Act (P. L. 1903, p. 674). And since that section only applies to railroads within this state, the defendant filed pleas of payment and release in order to raise that question.

Assuming that the defendant's contention respecting the presumption of payment or release is sound to a certain extent, still the refusal of the instruction was right.

[4] The presumption of payment or release arising from lapse of time is not necessarily a conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only when not satisfactorily accounted for or explained, but, when so accounted for or explained, the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence. *Gullick v. Loder*, 13 N. J. Law, 71, 23 Am. Dec. 711; *Blue v. Everett*, 55 N. J. Eq. 329, 36 Atl. 990, and cases there cited.

At the trial, in order to meet the defendant's pleas of payment and release, and to account for and explain the delay of a few days beyond one year from the time of the fire, the plaintiffs proved that they had not been paid and had not released the defendant. They also introduced evidence tending to show that immediately after the fire they put their claim in the hands of their attorney who had many interviews and much correspondence respecting it with the duly authorized attorney of the defendant; that in the course of these negotiations, and about two weeks before the expiration of one year from the time of the fire, the defendant's attorney requested the plaintiffs' attorney to delay beginning suit until a day named, which, it appears, was one day beyond the one year period; that on that day the defendant's attorney informed the plaintiffs' attorney that further negotiations were useless, and within a few days thereafter this suit was begun. In this state of the proofs the trial judge was bound to and did submit the question of payment and release to the jury. So, too, he was bound to refuse the request to charge.

[5] Even if it be assumed that the first paragraph of the request was proper, clearly the second paragraph, which called for a

direction of a verdict for the defendant, was improper. And when a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether. *Dederick v. Central Railroad Co.*, 74 N. J. Law, 424, 65 Atl. 833.

The judgment under review will be affirmed, with costs.

(57 N. J. Eq. 615)

McDERMOTT v. WOODHOUSE. (No. 63.)
(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS §562(1)—INSOLVENT CORPORATIONS—STOCKHOLDERS' LIABILITY.

The receiver of an insolvent corporation can enforce a stockholder's liability for unpaid stock issued as full paid only in the right of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265, 2266, 2268.]

2. CORPORATIONS §230—STOCKHOLDERS.

The obligation of holders of unpaid stock in a corporation issued as full paid is to pay so much of what is unpaid on the stock as will satisfy the claims of corporate creditors and meet the expenses of winding up its affairs. *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585, followed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 877.]

3. CORPORATIONS §263(1)—STOCKHOLDERS' LIABILITY—ASCERTAINING.

The amount of a stockholder's liability on unpaid stock must be ascertained in the forum of the corporation's domicile, in a proceeding to which the corporation itself is an indispensable party. *Wetherbee v. Baker*, 35 N. J. Eq. 501, followed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1065.]

4. CORPORATIONS §262(2)—STOCKHOLDERS—LIABILITY.

A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member. Where an assessment for unpaid stock is made in a proceeding at the domicile of the corporation to which the corporation is a party, the stockholder cannot question the propriety or amount of the assessment, although he may contend in a subsequent action against him personally to collect the assessment that he is not liable at all.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1077, 2273.]

5. CORPORATIONS §263(2)—ASSESSMENTS—AMOUNT OF.

The propriety and amount of an assessment upon stockholders to pay creditors are internal affairs of the corporation with which the courts of another jurisdiction will not intermeddle.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 831, 1065.]

6. CORPORATIONS §259(2)—STOCKHOLDER'S LIABILITY—ENFORCEMENT.

A stockholder is not bound to pay an assessment on his stock until the assessment is made and he can know how much he has to pay. When his liability has been ascertained it must be enforced in a court of law unless some element of equity jurisdiction appears. *Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2; *Hood v. McNaughton*, 54 N. J. Law, 425, 24 Atl. 497, followed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1064, 2272.]

Appeal from Court of Chancery.

Bill by Charles M. McDermott, receiver, against William Woodhouse, Jr. From an order denying defendant's motion to strike the bill for want of jurisdiction (§9 Atl. 103), defendant appeals. Reversed, and record remitted to Court of Chancery for dismissal of bill.

John A. Hartpence, of Trenton, for appellant. James J. McGoogan, of Trenton, for appellee.

SWAYZE, J. The appellant moved to dismiss the bill for want of equity. His motion was denied, and he appeals.

The bill is a most extraordinary one. It is a bill filed by a receiver in insolvency of a New York corporation, who was appointed by our Court of Chancery, and seeks to establish a stockholder's liability for stock issued for property purchased, as is said, at a gross overvaluation. We pass over the informal statements contained in the bill, and put upon it the best face possible. The corporation itself is not made a party. There is nothing to show that a receiver has ever been appointed in New York, the domicile of the corporation. Nothing is averred in the bill which would justify our courts in appointing a receiver in insolvency of a New York corporation. The draftsman seems to have conceived the notion that under our statute a receiver in insolvency can be appointed for a foreign corporation by the same procedure that is authorized in the case of a New Jersey corporation. We mention these difficulties because they are of so fundamental a character that we ought not to pass them unnoticed, and thereby appear to justify what seems by the averments of the bill to have been an unwarranted interference by our courts in the internal affairs of a foreign corporation. Probably the proceedings for a receiver were ex parte, and the attention of the court was never called to the fact that the corporation was not a New Jersey corporation. The matter is important. The bill seeks to do what can only be done by a receiver in case he possesses all the powers of a statutory receiver in insolvency, and shows on its face that the utmost powers he could have would be those of a mere ancillary receiver to gather in the assets in this state.

[1, 2] To enforce a stockholder's liability for unpaid stock issued as full paid, the receiver can only act in the right of creditors. By the contract between the corporation and the stockholders the latter have no further obligation with respect thereto, but where stock has been issued for property at an overvaluation, the stockholders may in a proper case be held for the deficiency. But their obligation is no greater than the obligation of stockholders whose subscriptions were payable in cash, that is, to pay so much of what is unpaid on the stock as will sat-

Isfy the claims of corporate creditors and meet the expenses of winding up its affairs. *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627 to 629, 42 Atl. 585. In that case we reversed a decree which ordered payment of the whole amount remaining unpaid, and held that only so much should be paid as was necessary to satisfy creditors.

[3] Since this is the limit of the stockholder's obligation, it follows that the amount must be ascertained by a tribunal which has the power to ascertain the total amount of the debts and the total amount of the assets of the corporation. This cannot be done in a forum where only an ancillary receivership is possible. It must be done in the forum of the domicile. The bill in the present case, indeed, sets up an attempt to compel creditors to bring in their claims and the entry of an order barring creditors in the insolvency suit. As far as we know, the only authority for such a proceeding is section 75 of the Corporations Act (C. S. p. 1648); but this can only apply to a New Jersey corporation; our courts cannot force a New York creditor of a New York corporation to submit his claim to our tribunals under penalty of losing all right to participate in the distribution of the assets. It is manifestly quite as necessary to ascertain the total assets of the corporation as its total liabilities in order to fix the amount needed to pay creditors, and these assets can only be finally ascertained in the courts of the domicile to which assets may be remitted by courts of other forums acting through ancillary receivers, as in *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, 38 Atl. 680.

From the necessity of ascertaining the amount of assets and liabilities it follows that the corporation itself is a necessary party to the suit. We said in *Wetherbee v. Baker*, 35 N. J. Eq. 501, at page 508, that the corporation is indispensable as a party to a suit in which the amount of its property and the amount of its debts are involved. Whether it would have been possible to serve process on the corporation in this case we do not know; generally a foreign corporation could not be served, since few such corporations in comparison with the total number do business in this state or subject themselves to its jurisdiction. In the present case the complainant has not even made the corporation a party to the bill. This defect of itself is fatal.

[4] Again, in order to fix a stockholder's liability, he must be bound by the proceedings to determine the amount thereof. He cannot be bound without some sort of notice, and it can rarely happen in the case of a large corporation that all the stockholders are subject to a single jurisdiction, and it is probable that even in the case of a small corporation some of the stockholders reside in dif-

ferent jurisdictions. That seems to be the present case where the stockholders are only seven in number. For a time this difficulty of subjecting stockholders to the jurisdiction of a single tribunal seemed insuperable. It was finally settled in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, applying the rule of *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, that a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member. We have adopted this rule (*Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585), after expressing some doubt as to its soundness in *Meley v. Whitaker*, Receiver, 61 N. J. Law, 602, 604, 40 Atl. 593, 68 Am. St. Rep. 719. See, also, *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925. Where the assessment is made in a proceeding at the domicile of the corporation to which the corporation is a party, the stockholder cannot question the propriety or amount of the assessment, although he may contend in a subsequent action against him personally to collect the assessment that he is not liable at all. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 423, 35 Sup. Ct. 625, 59 L. Ed. 1027.

The propriety and amount of the assessment must be determined according to the statutes and jurisprudence of the domicile (*Glenn v. Liggett*, 135 U. S. 533, 548, 10 Sup. Ct. 867, 34 L. Ed. 262), and when so determined are binding everywhere (*Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619). That the practice has been to bring the action in the courts of the domicile is sufficiently shown by *Easton National Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 722, 64 Atl. 1095, and the cases therein cited.

[5] These considerations make it clear that the propriety and amount of an assessment to pay creditors are internal affairs of the corporation with which the courts of another jurisdiction will not intermeddle. Illustrations are to be found in analogous cases of assessments upon members of Mutual Insurance companies. *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 90, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Stockley v. Thomas*, 89 Md. 663, 43 Atl. 766; *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. Law, 145, 63 Atl. 899.

[6] So far, then, as the bill is to be looked on as a bill to compel an assessment upon stockholders to pay debts, it fails to make out a case. It is equally futile as a bill to compel a single stockholder to pay his individual liability. It is settled, on the clearest basis of reason, that the stockholder is not bound to pay until the assessment is made and he can know how much he has to pay. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. The court in *Scovill v. Thayer* was dealing with the defense of the statute of

limitations. After saying that by the contract between the stockholder and the company the stock was fully paid, and that no suit could have been maintained by the company to collect on the unpaid stock, and that it was only the right of creditors that made the action maintainable, the court added:

"In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payments. The defendant owed the creditors nothing, and he owed the company nothing, save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient with the other assets of the company, to pay its debt. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

Following that ruling, the logic and justice of which we do not question, no suit can be maintained against the demurring defendant until the amount of his liability has been ascertained by proceedings in New York. When that liability has been ascertained it must be enforced in a court of law (*Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2; *Hood v. McNaughton*, 54 N. J. Law, 425, 24 Atl. 497), unless some element of equity jurisdiction appears, not present in this case as far as the bill shows.

The decree must be reversed, and the record remitted to the Court of Chancery in order that the bill may be dismissed. The defendant is entitled to costs in both courts.

(90 N. J. Law, 704)

LOVELAND v. McKEEVER BROS., Inc.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. APPEAL AND ERROR ⇐1010(1)—SCOPE OF REVIEW—GROUNDS.

Grounds of appeal that the court refused to grant motion for nonsuit upon the evidence for plaintiff and refused to give judgment for defendant are unavailing if there is any evidence to support the finding of the trial judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981, 4024.]

2. APPEAL AND ERROR ⇐1004(1) — SCOPE OF REVIEW—GROUNDS—EXCESSIVE DAMAGES.

Excessive damages can only be reduced, and a verdict set aside because against the weight of the evidence, on rule to show cause in the court in which the trial was had; even the Legislature is powerless to confer upon the court of errors and appeals the right to set aside verdicts because against the weight of evidence, or to reduce them because excessive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3944.]

Appeal from Supreme Court.

Action by Benjamin F. Loveland against McKeever Bros., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

James Mercer Davis, of Camden, for appellant. Griffin & Griffin, of Jersey City, for appellee.

PER CURIAM. The defendant is the owner of Crab Island, situate in Little Egg Harbor Bay, Ocean county, N. J., on which it has a plant for the rendering of menhaden fish, caught in the Atlantic Ocean. In the conduct of this business, the defendant employed the plaintiff, at a salary of \$200 per month, from the 22d day of July, 1911, until the 24th day of July, 1915. From July 24, 1915, until March 31, 1916, the plaintiff drew wages at the rate of \$50 per month. Plaintiff's salary not having been paid, suit was entered against the defendant for the entire amount accruing to the plaintiff from the date of his employment until his discharge on the date last mentioned, and, also, the plaintiff sued for certain moneys which he had expended on behalf of the defendant, at its request, claiming in all a balance of \$7,015.84. The defendant filed an answer and counterclaim. The answer set up that the plaintiff agreed to devote his exclusive services to the care of defendant's plant; that in violation of his agreement he neglected or refused to perform those services for long periods of time, and, instead, devoted himself to private enterprises of his own, and that defendant had paid plaintiff, pursuant to the contract, various sums aggregating \$7,600. By way of counterclaim the defendant alleged that the plaintiff wrongfully engaged in private business of his own and obtained the services of certain employes of the defendant to assist him in it, and charged their compensation to the defendant's payroll; that plaintiff, at various times, used a boat belonging to defendant in his private business, and damaged the defendant thereby; that plaintiff so negligently and carelessly performed his duties as superintendent of defendant's plant that defendant sustained damage. The total amount demanded in the counterclaim was \$7,700. The case was tried in the Burlington county circuit court without a jury. The trial judge filed the following memorandum:

"Carrow, J. I find that the plaintiff properly performed his contract, and is entitled to recover his unpaid compensation, less \$90 for the use of the 'Green Garvey' and \$24 for the use of defendant's men. The amount which I find is due from defendants to plaintiff is \$2,395.82."

From the judgment entered upon this finding the defendant has appealed to this court. The grounds of appeal are as follows: (1) Because the court refused to grant defendant's motion for a nonsuit upon the evidence for the plaintiff given at the trial; (2) because the court refused to give judgment for defendant, although it should have done so on the evidence given at the trial; (3) because the amount of the judgment was excessive; (4) because the finding of the

court was against the clear weight of the evidence.

[1] The first two grounds of appeal are unavailing to the appellant if there be any evidence to support the finding of the trial judge. It has been repeatedly held that this court will not review the findings of fact in a court below beyond ascertaining that there was evidence to support such findings. See *Larned v. MacCarthy*, 85 N. J. Law, 589, 90 Atl. 272; also *Eberling v. Mutillod*, Court of Errors and Appeals, March term, 1917, No. 137. An examination of the testimony returned with the record shows that there was evidence entitling the plaintiff to recover at the close of his case, and that the case was in the same posture when both sides rested. Therefore the trial judge was justified in denying the motion to nonsuit, and also in finding for the plaintiff.

[2] The third and fourth grounds of appeal are equally valueless to the appellant. Excessive damages can only be deduced, and a verdict set aside because against the weight of the evidence, on rule to show cause in the court in which the trial was had. Even the Legislature is powerless to confer upon this court the right to set aside verdicts because against the weight of evidence, or to reduce them because excessive. *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. Law, 647, 44 Atl. 762.

The judgment under review must be affirmed, with costs.

(90 N. J. Law, 692)

MAYOR AND ALDERMEN OF JERSEY CITY v. HUBER, Collector.
(No. 116.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. MUNICIPAL CORPORATIONS \S 972(2)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

4 Comp. St. 1910, p. 5084, § 4a, relating to the taxation of lands of counties and taxing districts situated in other counties or taxing districts, declares that such lands shall be subject to taxation without regard to any buildings or other improvements, while a subsequent section declares that the lands of the respective counties, cities, and other agencies of the state used for the purpose of water supply shall be subject to taxation by the respective districts in which such lands shall be situated, at their true value without regard to any buildings. *Held*, that an assessment upon a pipe line belonging to a municipality other than the one making the assessment must be made on the value of the land alone, and not on the value of the improvements.

2. MUNICIPAL CORPORATIONS \S 974(2)—TAXATION—ASSESSMENT—DELAY IN TAXING.

Delay of municipal authorities in questioning an assessment made by a second municipality upon a pipe line belonging to the first will not prevent a subsequent attack on such assessment, the doctrine of laches applicable to individuals not being appropriate.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2085.]

3. MUNICIPAL CORPORATIONS \S 972(2)—PUBLIC IMPROVEMENTS—WHAT CONSTITUTE.

A municipality constructed an aqueduct, not as a business venture, but to care for the present and future needs of its population, and for that reason made it larger than required at the present. *Held*, that though the municipality disposed of the excess water, yet, as the aqueduct was not constructed as a business venture, it was entitled to the exemption contained in 4 Comp. St. 1910, p. 5084, § 4a, and so could be assessed only on the value of the land, and not the improvements.

Appeal from Supreme Court.

Certiorari by the Mayor and Aldermen of Jersey City against Lewis P. Huber, Collector, etc., to vacate an assessment for taxes. From a judgment vacating assessments, defendant appeals. Affirmed.

The following is the opinion of the Supreme Court:

PER CURIAM. [1] The assessment by the borough of Secaucus upon the pipe line is illegal. The statute (C. S. 5084, 4a) authorizes the taxation of real estate without regard to any buildings or other improvements on such lands. This was meant to exclude from the valuation the value added by the improvements. The statute authorizes the levying of a tax upon the land only of another municipality. 4 C. S. 5085.

[2] It is argued that the laches of the officials of Jersey City in failing to attack these assessments must result in a denial of the city's claim upon that ground. But the rule is otherwise in the public interest, and the doctrine is settled that the laches of an official, charged with the performance of a public duty, cannot operate to bar the municipality he serves from asserting its legal rights. *Jersey City v. North Jersey St. Ry. Co.*, 43 N. J. Law, 392, 61 Atl. 95.

The result is that the assessments for taxes for the years in question must be vacated.

Harlan Besson, of Hoboken, for appellant.
John Milton, of Jersey City, for respondent.

PER CURIAM. The judgment should be affirmed, for the reasons stated by the Supreme Court in its per curiam opinion.

[3] It is argued here that the land and pipe line are not exclusively used for water to be supplied and used in Jersey City, but that part of the water obtained through it is sold to corporations and individuals outside of the taxing district, and therefore the exemption falls. To this we do not agree. The aqueduct was not constructed as a business venture, but to take care of the present and future needs of the city and its inhabitants. The pipe was made larger than was immediately necessary in order to provide for growth of the city. The sale of water not at present needed is merely incidental, and the fact of such present sale does not negative the use of the land for the purpose of public water supply and of the accompanying exemption, so long as said land is reasonably needed for the present or reasonably anticipated future supply of Jersey City for purely public purposes. In *Newark v. Clinton*, 49 N. J. Law, 370, 8 Atl. 296, there was a separation between the tract used for public purposes and the rest of the land, which is not the condition here.

(90 N. J. Law, 203)

BOUQUET v. HACKENSACK WATER CO.
(No. 21.)(Court of Errors and Appeals of New Jersey.
June 18, 1917.)*(Syllabus by the Court.)***1. NUISANCE §72—PUBLIC NUISANCE—ACTION BY INDIVIDUAL.**

In order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct, and substantial injury (citing 19 E. R. C. 263).

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169.]

2. NUISANCE §72—INJURY TO RIPARIAN OWNER—SPECIAL INJURY.

A riparian owner on a navigable stream suffers no peculiar injury as such because the stream has been made less pleasant for boating, fishing, and bathing. The injury to him is the same as that to any other member of the public, and for the reason that his right qua riparian owner is that of access, and not a special right to use the stream in any different manner than others may use it.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169.]

3. APPEAL AND ERROR §1033(8)—NOMINAL DAMAGES—REVERSAL.

A judgment for appellant for nominal damages, although erroneous, will not be reversed if he was not entitled to any damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4060.]

White and Taylor, JJ., dissenting.

Appeal from Supreme Court.

Action by Maxime Bouquet against the Hackensack Water Company. Judgment for plaintiff for nominal damages, and he appeals. Affirmed.

Arthur T. Dear, of Jersey City, for appellant. Edwin F. Smith, of Jersey City, for appellee.

PARKER, J. Appellant, plaintiff below, claims to be legally aggrieved by the action of the trial judge in directing a verdict in his favor for nominal damages of six cents.

His case, as finally submitted, was that he owned land on the easterly side of the Hackensack river, a navigable stream, on which land was a dwelling house occupied by him and used for the keeping of summer boarders; and that prior to the summer of 1914 he had many boarders and did a profitable business, but in that year and thereafter the water in the river in front of his place was fouled by the act of the defendant, so that it was not so pleasant as it had been to look at or so available for fishing, boating, and swimming, and that in consequence the boarders, who had been attracted by the view and the boating, fishing, and swimming, were caused to remain away, whereby plaintiff suffered material loss. There was some claim of an odor from the water, but this was disregarded at the trial and is not now urged. The view taken by the trial court was that on the assumption that plaintiff's title

extended to high-water mark in the river, the rights, if they existed, of swimming in the river, boating on it, and looking at the view, were not special rights of plaintiff qua riparian owner, or of his guests claiming under his license, but were rights of a purely public character, and that in their infringement plaintiff suffered simply as a member of the public and could not claim special damage in a private action.

[1, 2] Our examination of the case satisfies us that plaintiff was in no way legally injured by this ruling. It is not claimed that he was entitled to recover in this suit as a member of the public, for the deprivation of benefits because his guests found the river no longer pleasant for boating, fishing, or swimming. The claim must rest, if at all, on the injury resulting to plaintiff as an abutting owner. But the right of an owner of the ripa of navigable water is that of access; and if that be unlawfully interfered with he may maintain a special action. *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. Law, 532, 553, 3 Am. Rep. 269. Apart from this, he has no peculiar right to the use of the water or of the shore. 34 N. J. Law, 542, 543, 3 Am. Rep. 269; *Whitmore v. Brown*, 102 Me. 47, 65 Atl. 516, 521, 9 L. R. A. (N. S.) 868. Plaintiff, as owner of land on or near the river, may have more occasion to make use of the public rights of boating and (if there be such rights) of fishing and bathing, but those rights remain public and not private.

The rule, as we understand it, is this: That in order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct, and substantial injury. 19 E. R. C. 263. The same rule in different phraseology will be found in the *Mehrhoff Case*, supra, 51 N. J. Law, 56, at page 57, 16 Atl. 12. It may be conceded that plaintiff's injury was substantial; there is more doubt whether it was direct, but that may also be conceded for the sake of argument; it was not, however, particular, as we have already seen. The result is that the trial judge would have been justified in awarding a nonsuit or in directing a verdict for the defendant. All this has been predicated on the assumption that plaintiff exhibited a title running down to high-water mark. The case does not, in our judgment, show that he gave proof of any such title. His deed, offered in evidence, called for certain lots on a designated map (which map was not put in evidence), and the only mention of the river was contained in a clause in the deed reading as follows:

"Together with all right, title and interest of the party of the first part in and to the land lying between high-water mark of the Hackensack river and the middle of Riverside avenue, as shown on said map, lying directly opposite or in front of such of the property above de-

scribed as has a frontage on said Riverside avenue."

There was no proof of what that right, title, and interest was, or that there was any at all. It affirmatively appeared that there was a strip several feet wide between Riverside avenue and the river. If plaintiff did not own this strip, his right even to access to the river was no better than that of an owner of land a long distance away, or one not an owner at all. But as plaintiff might peradventure have shown some title as a riparian owner, we have preferred to treat the case as if such were the fact.

[3] Inasmuch as plaintiff was not harmed by the direction in his favor of a nominal verdict, the judgment will be affirmed. *Sypherd v. Myers*, 80 N. J. Law, 321, 79 Atl. 340; *Butterhof v. Butterhof*, 84 N. J. Law, 288, 86 Atl. 394.

WHITE and TAYLOR, JJ., dissenting.

(90 N. J. Law, 636)

MORE et al. v. RICHARDS. SAME v. MILNER. SAME v. SILVER.

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS \S 567—INSOLVENCY—SET-OFF AND COUNTERCLAIM—UNLIQUIDATED DEMAND—STATUTE.

The defendants agreed in writing to produce from their respective farms tomatoes, of a given quality, by a certain time, and deliver same to the vendee, and before the period of delivery mentioned in the contract the vendee was declared insolvent, and receivers were appointed therefor.

In a suit by the receivers to collect a claim against the defendants for fertilizer, which claims were certain in amounts and admittedly correct, the defendants set up by way of set-off their unliquidated demands against the insolvent company, for failure to receive the tomatoes, held, that being unliquidated the demands were not capable of set-off under the corporation act, which accords the right of set-off only to claims arising out of mutual dealings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2287.]

2. CORPORATIONS \S 567—INSOLVENCY—SET-OFF AND COUNTERCLAIM—SALES—DEFAULT OF BUYER—TENDER.

The defendants had not perfected their right to sue because of failure to deliver or a tender of delivery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2287.]

3. CORPORATIONS \S 567—INSOLVENCY—SET-OFF—CLAIMS—PREFERENCE.

The recognition of unliquidated claims not entitled to any legal preference against the receivers would accord to such claims a preference in the distribution of the assets of the insolvent company, contrary to the provisions and spirit of the insolvent act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2287.]

Black, White, and Heppenheimer, JJ., dissenting.

Appeal from Circuit Court, Cumberland County.

Suits by Richard M. More and others, receivers for B. S. Ayars & Sons Company, against Charles G. Richards, Simon Milner, and Charles Silver, wherein defendants interposed a plea of set-off. Judgment for plaintiffs, and defendants appeal. Affirmed.

Alvord & Tuso, of Vineland, for appellants. James S. Ware, William A. Logue, and Walter H. Bacon, all of Bridgeton, for appellees.

MINTURN, J. The respective defendants in these three suits are sued by the receivers of the B. S. Ayars & Sons Company, upon contracts, similar in form and substance, entered into between that company during its active existence with each of the defendants. The company sold the defendants quantities of fertilizer for their respective farms, and in turn entered into the agreements in question, whereby the defendants respectively contracted "to plant and thoroughly cultivate" and to deliver to the company specified acreages of tomatoes, of a specified quality, during the season of 1913, and to receive from the company therefor \$8.25 per net ton.

The fertilizers were delivered, but the tomatoes were not because the company before their fruition had become insolvent, and had gone into the hands of the present plaintiffs, as receivers. The receivers brought suits to recover for the agreed price of the fertilizers, regarding which no question was made. The defendants interposed pleas of set-off, whereby they alleged that they were damaged by the failure of the company to execute its contract, by accepting delivery of the tomatoes, to an amount greater than the agreed price of the fertilizers, which damage they claim should present a legal set-off to the plaintiffs' claim.

No question is made that the tomatoes were raised, and that in every essential, but the fact of delivery, the defendants complied with their contract. Upon this assumption a jury was dispensed with at the circuit, and by consent of counsel the legal questions arising upon the facts were submitted to the court. It was conceded that the tomatoes matured from day to day after August 1, 1913, and that the receivers were appointed July 21, 1913, and that on July 28, 1913, a restraining order was made by the Court of Chancery, enjoining the company from transacting business, except through its receivers. It was also in evidence that the receivers did not operate the company's canning factory. Upon these facts the court found for the plaintiffs, from which determination these appeals are taken.

It is argued that the Ayars Company, in its sale of fertilizers, was the agent of another company, known as the Tygest Company. The trial court, however, found it unnecessary to interpolate this fact into the issue,

but disposed of the questions upon the concrete inquiry, whether under the facts stated an action will lie against the receivers.

[1] It is apparent that when the receivers were appointed, these contracts had not matured, and therefore no delivery had been made, and that no tender of the tomatoes was thereafter made. The case therefore is within the narrow compass of an unliquidated demand, which the defendants seek to offset against a distinct independent and liquidated demand, which the plaintiffs as receivers are called upon virtute officii to collect for the purpose of administering the affairs of an insolvent corporation, whose liability for the claim in question at the time of adjudicated insolvency was not fixed.

The manifest effect of a judgment against the receivers, under the circumstances, is to single out these defendants among the creditors, and concede to them a preference upon claims in no wise distinguishable from the great body of unpreferred claims, and accord them a preferential status, conspicuously opposed to the letter and spirit of the law which liquidates such claims upon a basis of equality, in the distribution of assets. *C. S. p. 1652, § 86; Lehigh v. Stevens, 63 N. J. Eq. 107, 51 Atl. 446; Doane v. Millville Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625.*

[2] It is equally obvious, upon well-settled principles, that in order to acquire a legal status for the purpose of maintaining their suit against the receivers, and of putting them in the category of vendees, or the legal representatives of vendees, who have repudiated their contracts, the defendants should have tendered performance or delivery of the subject-matter of the contracts, after the period provided in the contracts had arrived. *Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; People v. Globe Mutual Ins. Co., 91 N. Y. 179.* It is to be observed that the corporation act (section 66) provides that in cases of mutual dealings between the corporation and its creditor, just set-offs may be allowed "according to law and equity."

The situation here disclosed presents no appearance of mutual dealings, upon which the receivers might have exercised their judgment in dealing with the claims upon the basis of mutual set-offs, as contemplated by the statute; and in this connection it is also to be observed that the claims in question were not presented to the receivers upon oath, for administration as required by section 76 of the corporation act (2 Comp. St. 1910, p. 1648), which requires every claim against an insolvent corporation to be presented to the receiver, in writing, under oath.

[3] Quite obviously, therefore, the effort is to obtain by judgments against the receivers a legal status which will accord to the defendants a preference in the distribution

of corporate assets, superior to the status accorded by law to the ordinary claimant. The case is not like *Rosenbaum v. Credit System Co.*, 61 N. J. Law, 543, 40 Atl. 591, where no injunctive order restrained the defendant from transacting business, and permitted the plaintiff to continue his services under the receivership, thereby conceding to him a legal status which is not presented by the record before us.

The result of these considerations is that the judgment of the trial court must be affirmed.

BLACK, WHITE, and HEPPELHEIMER, JJ., dissent.

(90 N. J. Law, 390)

STATE v. HOP.

(Supreme Court of New Jersey. June 22, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 1105(1) — WRIT OF ERROR—CERTIFICATION OF RECORD—REVIEW.

In order that a defendant may have the benefit of section 136 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1863), the trial judge must, in addition to the formal and ordinary return to a writ of error, certify that the proceedings transmitted by him to the court of review comprise the entire record of the proceedings had upon trial; and where the defendant neglects to obtain such a certificate, the review is limited to alleged errors arising on the face of the record itself, or upon bills of exceptions duly taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2887.]

2. CRIMINAL LAW § 968(8), 1044—ARREST OF JUDGMENT—MOTION—EVIDENCE.

A lack of sufficient evidence to make out the case charged in the indictment is not a ground for arresting judgment. In order to raise such a question, there should have been a request to direct an acquittal, or to charge in conformity with the contention.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2437, 2872, 2874, 2875.]

Error to Court of Quarter Sessions, Hudson County.

Sam Hop was convicted of sodomy, and he brings error. Affirmed.

Argued February term, 1917, before TRENCHARD and BLACK, JJ.

Charles E. S. Simpson, of Jersey City, for plaintiff in error. Robert S. Hudspeth, Prosecutor of the Pleas, of Jersey City, for the State.

TRENCHARD, J. The defendant below was convicted in the Hudson quarter sessions court on an indictment for sodomy.

[1] The return to the writ of error is only the formal and ordinary return. There is no certificate by the trial judge that the proceedings transmitted by him to this court comprise the entire record of the proceedings had upon the trial, such as is required to obtain a review under section 136 of the Criminal Procedure Act (O. S. p. 1863). Our review is therefore limited to alleged errors

arising on the face of the record itself, or upon bills of exceptions duly taken. *State v. Webber*, 77 N. J. Law, 580, 72 Atl. 74.

There is no bill of exceptions, and the only assignment of error is:

"Because the court denied the motion made on behalf of the defendant before judgment was announced for an arrest of judgment."

[2] We are of the opinion that such motion was properly denied. The sole contention made in support of the motion is that there was not sufficient evidence to support the conviction. But a lack of sufficient evidence is not a ground for arresting judgment. In order to properly raise such a question, there should have been a request to direct an acquittal or to charge in conformity with the contention. *Powe v. State*, 48 N. J. Law, 34, 2 Atl. 662; *State v. Kelly*, 84 N. J. Law, 1, 87 Atl. 128. No such request was made. However, in order to see that no injustice has been done, we have looked into the question argued, and find no merit in it.

The judgment of the court below will be affirmed.

(90 N. J. Law, 641)

PETER BREIDT BREWING CO. v. WEBER. (No. 57.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

LANDLORD AND TENANT ~~§~~115(1)—MONTH TO MONTH TENANCY—CONSTRUCTION OF LEASE.

Under a lease of a saloon at rental of \$100 per month, the letting is one from month to month, and the fact that the tenant annually applies and pays for a license in compliance with lease does not change the terms of the letting to one from year to year.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 391.]

White and Taylor, JJ., dissenting.

Appeal from Supreme Court.

Action by the Peter Breidt Brewing Company against Fred Weber. From judgment for plaintiff, defendant appeals. Reversed, and venire de novo awarded.

William R. Wilson, of Elizabeth, for appellant. John J. Stamler, of Elizabeth, for appellee.

KALISCH, J. The fundamental question presented here is whether the trial judge was warranted, under the facts and circumstances of this case, in deciding as a matter of law that an agreement of letting between the parties was one from year to year and required a three months' notice to terminate.

The agreement between the parties, which is in writing, was entered into by them on the 10th day of June, 1910. By that instrument it appears that the brewing company agreed to let the premises therein mentioned "to the appellant at a monthly rent of one hundred dollars, payable in advance," and that the appellant agreed "to pay a monthly rental for the premises of one hundred dollars (\$100.00) per month, payable in

advance." The premises were let to the appellant for the saloon business. The brewing company by the terms of this agreement obligated itself to put in a new front and to make such repairs and innovations on the interior as would make the premises suitable for the saloon business. The appellant obligated himself to apply for a license or transfer of the existing license to the excise board to conduct the business of retail liquor dealer on the premises. On the trial of the cause it appeared that on the 26th day of July, 1910, the appellant procured the license from the board of excise, and that he renewed the same annually, the last renewal being from July 26, 1915, to July 25, 1916.

It further appeared that the appellant paid an annual license fee of \$500, and that the brewing company spent a considerable sum of money in putting the premises in condition for the conduct of the saloon business. On the 1st day of November, 1915, the appellant vacated the premises, having prior thereto given 30 days' notice to his landlord of his intention to vacate on the day mentioned as is required by law to be given to terminate a tenancy from month to month.

The error complained of by appellant is presented by exceptions taken to that part of the court's charge in which he defines the nature and extent of the term agreed on by the parties.

The court appears to have assumed that, because appellant paid a saloon license fee of \$500 year after year from June, 1910, to July, 1915, that this had the legal effect of fixing the term of the lease from year to year. And it was in this view he charged the jury that the tenancy was not a monthly one, and that the appellant could not relieve himself from the obligations of the lease by giving one month's notice to quit to his landlord.

But this view is clearly untenable. The written agreement entered into by the parties in the present case does not show an annual rental reserved, and this circumstance, according to *Steffens v. Earl*, 40 N. J. Law, 137, 29 Am. Rep. 214, is a distinctive feature of a yearly letting, but, on the contrary, the writing shows that only a monthly rental was reserved, and in these express terms, "and to pay a monthly rental for the store or first floor and the basement underneath same, of one hundred (\$100) dollars per month, payable in advance." Concerning such a situation Judge Reed, in the case cited, 40 N. J. Law, on page 137, 29 Am. Rep. 214, said:

"But where there is no such letting [yearly], and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or a weekly one, just as the payment is monthly or weekly."

The letting in the present case was manifestly a monthly one, and was subject to be legally terminated by either party giving

one month's notice. The fact that the tenant made a yearly application for a license to conduct his business did not have the legal effect to change the terms of the letting. The rights and obligations of the parties must be determined by the terms of the contract of letting. This was apparently not done.

The judgment will be reversed, and a venire de novo awarded.

WHITE and TAYLOR, JJ., dissent.

(90 N. J. Law, 579)

SECURITY TRUST CO. v. EDWARDS,
Comptroller. (No. 97.)

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

TAXATION — 898 — SUCCESSION TAX — REMAINDER—SUSPENSION.

Under section 3 of the Succession Tax Act of 1909 (Comp. St. 1910, p. 5301), where there are contingent or executory interests dependent upon a power of appointment, the appraisal and taxation thereof is suspended until the exercise of the power.

Appeal from Supreme Court.

Certiorari by the Security Trust Company, executor, etc., against Edward I. Edwards, Comptroller, etc. From a judgment of the Supreme Court affirming on certiorari a succession tax on life interests in personalty and also a tax on interests in remainder, subject to a testamentary power of appointment, the prosecutor appeals. Affirmed in part and reversed in part.

Ralph E. Lum, of Newark, for appellant. Theodore Backes, Asst. Atty. Gen., for appellee.

PARKER, J. So far as concerns the tax upon the life interests, all questions raised herein were determined by the Supreme Court in the case of Maxwell v. Edwards, 99 Atl. 138, the judgment in which case has been affirmed by this court at the present term. On this branch of the case the judgment affirming the tax will be here affirmed.

With respect to the interests in remainder, the respondent's counsel concedes, quite properly, that there should be a reversal. The will of Howard S. Collins, the testator, made identical provision for each of his two daughters by bequeathing the residuary estate to a trustee, upon trust to pay the net income of one-half thereof to each daughter for life—"and on her death to pay over, transfer and convey said part of said residue, with any income not paid to her, to the person, persons, corporation or corporations that she may have designated and appointed by her last will to take the same, or, in default of a valid exercise of her by will of the power of appointment herein conferred, to those persons who under the statutes of distribution of the state of Connecticut in force at the time of her death would be entitled to succeed to her intestate estate in the proportions therein specified."

The residue was appraised at \$66,905.34 and the value of the life interests bequeathed in trust, at \$38,178.38, which latter amount, or the balance thereof after deducting the statutory exemptions, was made the basis of calculation for a tax of 1 per cent. as property transferred to children. Section 1, par. 4, of act of 1909 (C. S. p. 5301), as amended by P. L. 1914, pp. 267, 269. The remainder of the residuary estate, or \$28,726.96, was made the basis of a 5 per cent. tax presently imposed as subject to the general rate prescribed in the same paragraph. So far as relates to this remainder, the comptroller seems to have disregarded the provisions of section 3, which deals with estates in expectancy of a contingent or defeasible character, and the particular life estates supporting them. Where there is a power of appointment, the statute provides that:

"The appraisal and taxation of the interest or interests in remainder to be disposed of by the donee of power shall be suspended until the exercise of the power of appointment, and [they] shall then be taxed, if taxable, at the clear market value of such property, which value of such property shall be determined as of the date of the death of the creator of the power."

It seems quite plain that in obeying this mandate, the tax on the interests in remainder will normally await the termination of the particular estate; and counsel urge, as a ground of invalidity of such tax, that it becomes impossible for the executor or trustee to transfer shares in New Jersey corporations until that time, without submitting to the requirement of section 12 for payment of full 5 per cent. tax, which was upheld in *Senff v. Edwards*, 85 N. J. Law, 67, 88 Atl. 1026, or depositing a 5 per cent. tax with the comptroller and taking out a waiver, as provided in chapter 58 of the Laws of 1914. These provisions appear to be aimed particularly at the transfer of the legal estate in stock to a purchaser, or the like, rather than at the particular succession of a legatee in remainder. There is also the provision contained in the last paragraph of section 3, permitting the compounding on equitable terms of a tax not presently payable, which is evidently the "compromise" mentioned in *Senff v. Edwards*, supra. The statutory scheme is not obscure. If the executor wishes to sell the stock, without waiting for the specific assessment based on interests created by the will, it can be done by paying the 5 per cent. tax under section 12, or depositing it under the act of 1914, page 97, subject to refund of excess when later ascertained; or by paying the tax on the particular interests as presently due, and compromising that against the remainders upon an equitable ascertainment of its present worth, according to section 3. We are unable to see that this scheme gives rise to any unjust or unconstitutional discriminations. It may be said that the point is not before us except as contained in the reasons for setting

aside a five per cent. tax on remainders presently payable. As a condition of permitting sale of securities, such tax has the support of *Senff v. Edwards* in the Supreme Court. As a pure tax, irrespective of such sale, it is not warranted by the statute, and should be set aside. To this extent the judgment of the Supreme Court is reversed.

(90 N. J. Law, 553)

SECURITY TRUST CO. v. EDWARDS,
State Comptroller.

(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

(Syllabus by the Court.)

TAXATION \Leftrightarrow 837(2)—**TRANSFER TAX**—**STOCK**
—**STATUTES.**

The interest of a nonresident deceased pledgor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the act of 1909 (P. L. p. 325; 4 Comp. St. 1910, p. 5301) as amended in 1914 (P. L. p. 267).

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1682.]

Appeal from Supreme Court.

Certiorari by the Security Trust Company, executor of Leonard Morse, deceased, against Edward L. Edwards, State Comptroller. From a judgment of the Supreme Court (89 N. J. Law, 396, 99 Atl. 133), setting aside an inheritance tax, the Comptroller appeals. Reversed, with direction for the entry of an order below affirming the assessment tax.

John W. Wescott, Atty. Gen., and John R. Hardin, of Newark, for appellant. Lum, Tamblin & Colyer and Ralph E. Lum, all of Newark, and Joseph F. McCloy, of New York City, for appellee.

TRENCHARD, J. This is an appeal by the state comptroller, defendant in certiorari, from a judgment of the Supreme Court setting aside an inheritance tax levied under the act of 1909 (P. L. p. 325; Comp. Stats. p. 5301), as amended in 1914 (P. L. p. 267). The prosecutor below, Security Trust Company, a Connecticut corporation, is the executor of the will of Leonard Morse, who died resident in Hartford, Conn., on April 2, 1915. Morse left no real estate whatever, either within or without New Jersey. His gross estate amounted to \$64,523.85, and by the will went entirely to collaterals or those unrelated to the testator. The estate consisted largely of certain securities, viz. corporate stock and four bonds appraised in the aggregate at \$63,285.50. All of these securities had been pledged by Morse in his lifetime, accompanied by a power of attorney in blank, to the Phoenix National Bank of Hartford, Conn., to secure his promissory note of \$37,500, upon which there was due \$5.21 of interest, together with all of the principal amount, at the time of his death. It does not appear that this note had been called prior to the death of Morse, or that the pledgee had caused any

of the securities to be transferred to it, or that any demand had been made upon him prior to death for the payment of the note. Among the securities so pledged were New Jersey stocks appraised in the aggregate at \$28,249. The comptroller appraised the New Jersey stocks at the figures above mentioned, and the decedent's interest in the New Jersey stocks at the sum of \$11,507. This amount was obtained by prorating the amount of the loan together with such portion of the general deductions as the other assets were insufficient to meet, over all of the stocks pledged. The value of the equity in the New Jersey stocks was arrived at by applying to the equity in all of the stocks the fraction represented by the value of the New Jersey stocks over the value of all the securities pledged. Treating the gross estate for the purpose of taxation as the value of the equity in all of the stocks, plus the value of the other assets, the comptroller arrived at the proportion demanded by the method of computation prescribed for nonresident estates in section 12 of the act (namely, the ratio of the New Jersey property to the total property wherever situated), which proportion was found to be 42.6 per cent. The tax was then calculated in the manner prescribed in that section and found to be \$527.55. The comptroller refused to consent to the transfer of the New Jersey stocks to the executor of the decedent, unless such tax upon the decedent's equity therein was paid, and accordingly it was paid. The amount of the tax, i. e., the method of computation, is not challenged, and with that we are not concerned.

The only question presented by the record, and indeed the only question argued, is that decided by the Supreme Court, namely: Is the interest of a nonresident deceased pledgor of stock of a New Jersey corporation in such stock subject to the transfer tax imposed by P. L. 1909, p. 325, as amended by P. L. 1914, p. 267? We are of the opinion that that question must be answered in the affirmative. The view of the Supreme Court was that Morse had ceased to be the owner before his death; hence there was no succession. The court does indeed refer to his "interest" in the stock, but the tenor of the opinion appears to be that there is no taxable succession if the decedent owned anything less than the entire legal and beneficial interest in the stock. Such a view ignores the language of the statute (P. L. 1909, p. 325, as amended by P. L. 1914, p. 267) taxing—

"* * * the transfer of any property * * * or of any interest therein or income therefrom, in trust or otherwise. * * * When the transfer is by will * * * of shares of stock of corporations of this state, * * * and the decedent was a nonresident of the state at the time of his death. * * *" Section 1.

"26. The words 'estate' and 'property' wherever used in this act * * * shall be construed to mean the interest of the testator * * *

passing or transferred to the (successors). * * * The word 'transfer' as used in this act, shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future," etc. Section 26.

The only authority cited by the court below is that of Surrogate Fowler of New York county in *Re Ames*, 141 N. Y. Supp. 793 (1913). But that decision is in conflict with the doctrines of the highest court of New York, as we shall show.

We think that a nonresident pledgor's interest in New Jersey stocks is a property interest which has a situs here for the purpose of succession taxation. As between the pledgor and pledgee, the pledgor is still the general owner. The pledgee has a special property only and upon payment of the debt this is extinguished. That rule has been frequently stated and applied without challenge by English judges. In the early case of *Mores v. Conham, Owen*, 123, 74 English Reprint, 948 (1610), the court recognized that the right of the pledgee was but a special interest. In *Coggs v. Bernard, Ltd.* Raym. 909, 1 Smith's Leading Cases, *199 (1702), Chief Justice Holt stated the same principle. The learned annotator at page *228 says:

"A pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglected to use the general property of the thing pawned, continues in the pawnor, who has a right at any time to redeem it."

Another leading case is *Donald v. Suckling*, L. R. 1 Q. B. 585, 35 L. J. Q. B. 232. Another famous case is *Sewell v. Burdick*, 10 App. Cas. 74, 54 L. J. Q. B. 156 (1884) where Lord Fitzgerald says that:

The pledgees "acquired a special property in the goods, with a right to take actual possession should it be necessary to do so for their protection or for the realization of their security. They acquired no more, and, subject thereto, the general property remained in the pledgor."

A very recent opinion by the Privy Council in a prize case is *The Odessa*, [1916] 1 A. C. 145, affirming (1915) p. 52. Prior to the outbreak of the European war German owners of the cargo had, by assignment of the bills of lading, pledged the cargo to British bankers for advances made prior to the outbreak of the war. After the war began and while the vessel was on the high seas the cargo was seized and condemned as a prize. The contest was between the British pledgees and the crown. Lord Mersey, speaking for the court says:

"All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned."

Our own decisions are uniformly to the same effect. In *Donnell v. Wyckoff*, 49 N. J. Law, 48, 7 Atl. 672 (Supreme Court, 1886), wherein the subject-matter of the pledge was corporate stock, Justice Depue said (49 N. J. Law, page 49, 7 Atl. page 672):

"Upon a pledge of property as security for a debt, the pledgee has only a special property. The general property is in the pledgor, subject to the rights of the pledgee."

In *Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (Chancellor Green, 1860), the conflicting rights of a pledgee of stock and the attaching creditors of the pledgor were dealt with. It would appear from the opinion that the court entertained no doubt that the interest of a nonresident pledgor in stock of a New Jersey corporation pledged to a nonresident was subject to attachment, under the New Jersey statute, and the court, on page 26, says that the rights of the creditors were unquestioned except so far as they conflict with the rights of the pledgee. And speaking of the effect of a pledge, says:

"The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be."

In *Meisel v. Merchants' National Bank*, 85 N. J. Law, 253, 88 Atl. 1067 (Court of Errors, 1913), it was said, in effect, that the pledgor has the right to bring a possessory action against the pledgee to recover the stock itself, providing only he makes and keeps good a tender of the debt.

In *McCrea v. Yule*, 68 N. J. Law, 465, 53 Atl. 210, the Supreme Court, in 1902, in a case of an assignment of a chose in action as collateral security, said (68 N. J. Law, page 467, 53 Atl. page 211):

"A pledgee of personal property, assigned as collateral security, has the right to collect the interest, dividends, and income accruing on the collateral assigned, accounting to the pledgor upon the redemption of the pledge. In making such collections the pledgee is a trustee of the pledgor to see to the proper application of the funds collected or to refund the same to the pledgor if the debt be otherwise paid."

In *Mechanics' B. & L. Ass'n v. Conover*, 14 N. J. Eq. 219 (reversed on other grounds, *Herbert v. Mechanics' B. & L. Ass'n*, 17 N. J. Eq. 497, 90 Am. Dec. 601), the court said that when shares of stock are pledged, they "remain the property of the shareholder for every purpose excepting that of defeating the lien" of the pledgee.

In the United States Supreme Court, drawing the familiar distinction between a chattel mortgage and a pledge, Mr. Justice Pitney says, in *Dale v. Pattison*, 234 U. S. 399, 405, 34 Sup. Ct. 785, 788 (58 L. Ed. 1370, 52 L. R. A. [N. S.] 754):

"On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage."

The law of Connecticut appears to be to the same effect. In *Robertson v. Wilcox*, 36 Conn. 426 (1870), the highest court of that state, 36 Conn. at page 430, said:

"A pledge of property does not carry with it the title to the thing pledged. The title remains as before. All that passes to the pledgee is the right of possession, coupled with a special interest in the property, in order to protect the right."

It is this intangible proprietary interest of the pledgor in the corporate property that the pledgor's executor succeeds to.

Now the doctrine is too well established to need discussion that the stock of a New Jersey corporation has a situs in this state and is subject to succession taxation here. *Dixon v. Russell*, 79 N. J. Law, 490, 76 Atl. 982 (Court of Errors); *Carr v. Edwards*, 84 N. J. Law, 667, 87 Atl. 132; *Hopper v. Edwards*, 88 N. J. Law, 471, 96 Atl. 667.

The matter is nowhere more fully and ably discussed than in the opinion of Mr. Justice Garrison in the Supreme Court in *Neilson v. Russell*, 76 N. J. Law, 27, 69 Atl. 476 (1908), reversed on another point, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673 (1908). The following is quoted therefrom, not for the purpose of supporting this elementary proposition, but as illuminating the precise question under review in the present case (76 N. J. Law, page 35, 69 Atl. page 479):

"In this country, where the general doctrine of the state courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession taxes by the state that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial."

The case of *Amparo Mining Company v. Fidelity Trust Co.*, 75 N. J. Eq. 555, 73 Atl. 249 (Court of Errors, 1909), affirming opinion of Vice Chancellor Stevenson in 74 N. J. Eq. 197, 71 Atl. 605, is also instructive. There the jurisdiction of the courts of the state of incorporation over the enforcement of property interests in stock as against non-residents was upheld.

It being firmly established that the stock is subject to succession taxation by the state, it necessarily follows that not only is the entire legal interest in the stock subject to taxation by the state, but as well every undivided or fractional interest in any such given share of stock, and as well any proprietary interest in such share of stock, though it be an interest of a quality different in character from a mere fractional or other legal interest less than the whole. The interest of a pledgor of a share of stock being such a proprietary interest in the share of stock itself, and the stock being taxable, it follows that the pledgor's interest is taxable, whether it be called an equity of redemption or by some other name.

We need not dwell on the distinctions which exist in respect to situs for the purpose of property taxes, on the one hand, and succession taxes, on the other. The argument of respondent is not forwarded by calling the pledgor's right an equity of redemption, or chose in action, or an intangible. The stock itself is a chose, and intangible. While an intangible right has really no locality, it must, in the nature of things, have ascribed to it a situs for legal purposes. The situs is based on the power of the sovereign, and

if the sovereign has power to deal with it effectively as a property right, it may tax it as having an ascribed situs within its jurisdiction.

The *Amparo Mining Company Case*, supra, at once suggests such power. We note especially the attitude of the court towards the rights of bona fide holders. If any one class of such holders was more prominently in the mind of the court than another, it was probably that of pledgees. But the court did not turn aside from rendering judgment because of the possibility that a nonresident owner had pledged his stock to a nonresident, which, if respondent's argument be sound, would at once have ousted the court of jurisdiction.

It can hardly be doubted that the pledgor could resort to our courts to enforce a conflicting property right in respect to his stock, and that because he could obtain effective relief nowhere but in the domicile of the corporation. To be more concrete, suppose that Morse, a resident of Connecticut, had pledged New Jersey stock to residents of Massachusetts and New York jointly, and that the latter wrongfully delivered the same to a resident of Oregon, and that the stock had no market value. See *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371. Where could he obtain relief except in New Jersey? *Gregory v. N. Y., L. E. & W. R. R. Co.*, 40 N. J. Eq. 38. Who would doubt that such a suit would be quasi in rem?

The New York courts recognize that the pledgor has a residuary interest. In *Warner v. Fourth National Bank*, 115 N. Y. 251, 22 N. E. 172, the interest of a nonresident pledgor of notes held in pledge by a resident was held to be subject to attachment in New York state. Judge Gray says:

"The title to property may remain in the pledgor, but the pledgee has a lien, or special property, in the pledge, which entitled him to its possession against the world."

And, further:

"The pledgor's residuary interest in the pledge constitutes a claim or demand upon the pledgee, which is property, and hence may become the subject of attachment."

And again:

"We think the attachment in question here operated to secure to the (attaching creditor) the lien upon the pledged property, to the extent of the interest of the (pledgor), and that interest was the right to the pledged property, or so much of it or of its proceeds from any collection as remained after the satisfaction of the pledgee's claim for advances."

See, also, opinion of the same judge in *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, where it is said:

"The pledgee obtains a special property in the thing pledged, while the pledgor remains general owner."

The most distinguished New York judge of all times, Chancellor Kent, expressly held in *Cortelyou v. Lansing*, 2 Caines Cases, 200, 2 N. Y. Common-Law Reports 802 (1805), that the legal property in a pledge does not

pass as in the case of a mortgage with defeasance; that the general ownership remained with the pledgor, and only a special property passed to the pledgee, and, further, that the pledgor's interest passed to his administrators.

If the stock has a situs here, where else can be the situs of the residuum? If the interest of the pledgee is less than absolute and unqualified ownership, how can the residuary interest of the pledgor have a situs other than that of the subject of the pledge? The stock never ceases to have a situs in this state, whoever may be the owner. *Nelson v. Russell*, supra. If the transfer of full ownership does not change the situs of the property, how can the transfer of a limited right take out of the jurisdiction or affect the situs of what of the rights of ownership remain after such partial transfer? The tax is in rem; the res is the succession to the proprietary right that a stockholder has in a corporation of this state. Unless the whole of the proprietary right be transferred, the remainder must be taxable here as property of the pledgor having a situs here, to which his executor succeeds. Of course the stock has a situs here; and the general property in the thing pledged must continue, notwithstanding the pledge, to have a legal situs here for the purpose of the taxation of the succession to such general property.

The power to tax being established, we have no difficulty in finding in the statute the intention to do so. It is clear that every proprietary interest of whatever nature in those species of property subject to tax is included. The fourth subdivision of section 1 imposes tax "upon the clear market value" of the property, which impliedly recognizes that the property taxed may be incumbered. Sections 2 and 3 tax future and contingent estates of every character. Section 12 forbids the transfer, by a corporation, without the comptroller's waiver, of shares of stock of, "or other interests in," the corporation. The last paragraph of section 12 (the ratio provision) necessarily contemplates that every kind of property interest be brought into hotchpot, and puts the nonresident on the same footing as the resident. Section 26 says that the word "transfer" shall be taken to include the passing of "any interest" in property, present or future. Such words as "property" and "interest" are ordinarily used in a revenue act in a popular sense, and should be broadly construed. *Smelting Co. v. Comm. of Inland Revenue* (1896) 2 Q. B. 179, 85 L. J. Q. B. 513 (affirmed 1897) 1 Q. B. 175, 66 L. J. Q. B. 137). In the *Matter of Whiting*, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640. The pledgor's "equity" certainly is property in a popular sense. It has value; it may be sold; it may be incumbered; it may be made the basis of extending credit. See, also, as to the extensive application of the language of the

act, *Hopper v. Edwards*, 88 N. J. Law, 471, 96 Atl. 667.

Some stress is laid below by the respondent on the rights of the pledgee, and their supposed infringement by the comptroller, but they are not here involved. No pretense is made by the state that its lien on the stock is other than inferior to that of the pledgee. The latter is not before the court, and there appears in the case nothing of interference with his rights. Certain practical difficulties in the collection of such a tax as this may be compassed within the imagination, but the present case is free therefrom.

It is enough for the decision of this case that the comptroller's consent to transfer was requested by the executor of the decedent's will; that he refused unless payment of the tax was forthcoming; that the tax was paid, the waivers issued, and the stock transferred. The only question before the court is, Had the Legislature the power to authorize the assessment and did it do it?

In the opinion of the Supreme Court (but whether it was the basis of the decision we cannot tell) mention is made of the possibility that the "equity of redemption" be rendered valueless by a resort to the security after the pledgor's death. This possibility would, with equal force, support the proposition that no tax should be levied on an equity in real estate, since that might be foreclosed. This might be due to the owner's neglect to pay the incumbrance, or for other reasons. Likewise a house might be destroyed by wind or flood; a chattel burnt or lost; the assets of the estate might be embezzled; a debt become uncollectable by incompetent management; a security valueless by fluctuations in the market or the receipt of "news from abroad." The tax is on the succession, which occurs at death; and is then due and payable. Section 1. If the subject-matter of the succession be of value at that time, and the universal or particular successors choose to accept the succession, the state may then levy, as of the situation then existing, a premium upon the privilege so to succeed. What becomes of the thing after the state has admitted the successors to the succession is not of its concern. And so hold the authorities. See *Tilford v. Dickinson*, 79 N. J. Law, 302, 305, 75 Atl. 574 (reversed on another point, 81 N. J. Law, 576, 79 Atl. 1119); *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. (N. S.) 329, 14 Ann. Cas. 859; *In re Penfold's Estate*, 216 N. Y. 172, 110 N. E. 490.

The argument of respondent that due prudence and caution requires that assessment be withheld pending realization on the pledge is self-destructive. It will not do to say that the state should take into computation the loss or shrinkage, if any, which has taken place in the meantime. It would not be argued that if there be an increase in value, a tax should be laid on this. Of course the state is not bound to stay the

exercise of the taxing power at the pleasure of the pledgee, and chance the collection of a tax on his judgment and honesty, and on the variability of the market's demand for the thing to be sold.

In the case at bar it appears that certain of the New Jersey stocks were sold by the pledgee shortly after Morse's death, at a price in excess of the appraisal. Certainly this did not render valueless the "equity" in these stocks. It was a realization of their value. While the proceeds were applied in reduction of the principal of the debt, this increased correspondingly the "equity" in the other stocks. It is as if the proceeds of the Bethlehem Steel preferred which was sold were paid to the respondent, and by it applied to the payment of the testator's legal obligation. The validity of the tax, therefore, is not affected by any of the foregoing matters.

Upon the whole, our conclusion is that the interest of a nonresident deceased pledgor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the act of 1909 (P. L. p. 325; C. S. p. 5301) as amended in 1914 (P. L. p. 267).

The judgment below will be reversed, with costs, with direction for the entry of an order below affirming the assessment and tax.

(87 N. J. Eq. 476)

STANFORD v. STANFORD et al.
(No. 36/102.)

(Court of Chancery of New Jersey. June 6, 1917.)

1. COURTS — 24 — JURISDICTION — CONFERRING BY CONSENT.

Jurisdiction of the subject-matter of a suit in equity cannot be conferred by consent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78.]

2. COURTS — 19 — JURISDICTION — PARTIES NONRESIDENT.

A court of chancery has jurisdiction of a bill for an injunction to restrain the taking of a note into another state and its use in a suit at law in such other state on such note on the ground of fraud and for its cancellation, though both parties are nonresidents of the state; the note being impounded in this state in the hands of a Supreme Court Commissioner.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47-52.]

3. EQUITY — 39(1) — JURISDICTION — RETENTION.

Where a court of equity acquires jurisdiction of an action to enjoin the taking of a note to another state for use as evidence in another state suit on the note impounded in this state in the hands of a Supreme Court Commissioner on the ground of fraud, it will retain jurisdiction and determine the case on the merits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114.]

4. BILLS AND NOTES — 525 — EQUITY — FRAUD — SUFFICIENCY OF EVIDENCE.

Where the circumstances surrounding a note are suspicious, as where the due date was changed, interlineations were made long after the making of the note, and the payee slept on her rights for 25 years till indorsers were dead, the claim should not be sustained except on clear-

est proof of most satisfactory and unimpeachable character.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839.]

5. BILLS AND NOTES — 498 — BURDEN OF PROOF.

In an action to restrain taking into another state a note impounded in this state in the hands of a Supreme Court Commissioner and its use as evidence in a suit in such other state against the indorser of the note, the defendant must show by clear and convincing proof either a legal protest and notice thereof or that it was waived by the indorser, since burden is on plaintiff to prove these facts in an action at law and equity follows the law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1688-1694.]

6. BILLS AND NOTES — 130 — DAYS OF GRACE.

A note due two years from August 1, 1893, was entitled under Laws N. Y. c. 607, to days of grace.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 297-309.]

7. ALTERATION OF INSTRUMENTS — 5(2) — INTERLINEATIONS.

Where it appears that words "service of notice and protest is hereby waived," were interlined after execution of note, it is void as against the prior indorser who did not assent to such alteration, as it is a material alteration within meaning of Negotiable Instruments Law (3 Comp. St. 1910, p. 3749, § 124).

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 21-27.]

Bill by Helen K. Stanford against Annie F. Cunningham Stanford to restrain taking of note to another state and its use as evidence in a suit thereon in that state and for cancellation of such note impounded in this state in the hands of a Supreme Court Commissioner. Decree for complainant.

Cortlandt & Wayne Parker, of Newark, for complainant. I. Faerber Goldenhorn, of Jersey City, and George W. Carr, of New York City, for defendants.

LEWIS, V. C. The bill in this case was filed for cancellation of a note for \$6,500, impounded in this state in the hands of a Supreme Court Commissioner, and to enjoin its being taken to New York and used in a suit brought thereon by Mrs. Cunningham Stanford against Mrs. Helen K. Stanford, as residuary legatee of her husband, Philip W. Stanford. March 1, 1913, a rule to show cause with temporary stay was granted. On further hearing upon affidavits by both parties, injunction was granted October 6, 1913, but with provisions so as to permit the New York suit to go on to verdict upon Mrs. Cunningham Stanford giving a bond for \$1,000 that she will not proceed in the cause, after verdict, without permission of the Court of Chancery, and that the commissioner might continue to hold the note subject to be produced at the trial of the New York suit. An appeal thereupon was taken to the Court of Errors and Appeals against so much of the order as permits the suit in New York to pro-

ceed, and permits the note to be taken to New York for use in the suit there.

[1] Before the hearing of the appeal counsel on both sides got together and voluntarily assented to the adjudication of the merits in this tribunal, and the cause has been tried before me. It was not an attempt by consent to confer jurisdiction upon the court, for it is well settled that jurisdiction of the subject-matter of a suit in equity cannot be conferred by consent. *Hudson County v. Central R. R. of N. J.*, 68 N. J. Eq. 500, 59 Atl. 303, and other cases. The situation is somewhat similar to that presented by the case of *Varrick v. Hitt*, 66 N. J. Eq. 442, 57 Atl. 406.

The facts, briefly stated, are: That a note for \$6,500 is alleged to have been given by Colonel Asa P. Stanford, a brother of Leland Stanford, the founder of a great university of that name. The Colonel is alleged to have obtained the signatures of his son Philip and his daughter Mary as indorsers on the note. The note, with its indorsements, reads as follows:

"\$6500 New York, Aug. 1, 1893.
 "Two years after date I promise to pay to the order of Mrs. A. F. Cunningham, six thousand five hundred dollars (\$6500) at Laidlaw & Co., 14 Wall street. Value received.

"Due. ———. No. ———. "A. P. Stanford."

Indorsed:

"Service and notice of protest is hereby waived. Mary E. Stanford.
 "Philip Stanford."

The complainant alleges that the note is false and fraudulent and tainted with fraud and forgery, in that the signature of Philip Stanford was not genuine, but was forged; also that the note has been changed from a one-year note to two years; also that the words "Service and notice of protest is hereby waived" were placed there many years after the indorsements on the back of the note were made, and that a conspiracy existed between Colonel Asa P. Stanford and the lady who afterwards became his wife, the now defendant, to mulct the estate of Philip.

Philip was educated at Harvard, and at the time he indorsed the note he was living at Spokane, Wash., afterwards removing to California, and then to Montclair, Essex county, N. J., where he died on June 1, 1898, having executed his last will and testament wherein he bequeathed everything to his wife and appointed her sole executrix. By the last will and testament of Leland Stanford he left \$100,000 to each of his nephews and nieces, and also the same amount to his brother Colonel Asa P. Stanford. The complainant had the will of her husband duly probated, and thereupon Colonel Stanford engaged counsel and took an appeal to the orphans' court of Essex county, which was decided against him. An appeal was then taken to the Prerogative Court, which was discontinued. Colonel Stanford and the defendant in this suit were both traders in stocks. He died

practically penniless. His son Philip seems to have been fond of him, and all seems to have gone along pleasantly until the death of Philip. The fact that Philip did not provide for his aged father's support by his will, but, on the contrary, left everything to the complainant, Philip's wife, seems to have aroused the indignation of the old gentleman who was at that time about 76 years of age. Colonel Stanford and the defendant were friends for a great many years. In 1902 he married the defendant, and died in 1903.

The note was made in New York and indorsed in the states of Connecticut and Washington. The note was delivered and is payable in New York. The maker, when the note was made and continuously till his death, resided in New York. So far as Colonel Stanford, the maker of the note, is concerned, the note is barred by the statute of limitations. As to Philip, however, the statute of limitations of New York did not apply, as he was out of that state. In the month of November, 1900, an action was commenced in the Supreme Court of this state by the present defendant against the present complainant as executrix on the above note, which note was impounded by order of the court in the hands of a Supreme Court Commissioner who died, and it was afterwards placed in the hands of another commissioner by order of the court, and it has been held by him ever since. A judgment of non pros. was entered in that action. A second suit was then brought in the same court between the same parties as to the same subject-matter, except that the complainant was sued as devisee of her husband, which action the plaintiff discontinued on the 30th of December, 1901.

Some time in December, 1911, the present defendant commenced suit against the present complainant in the New York Supreme Court for the county of New York upon the same note, alleging that the present complainant was the sole legatee of Philip W. Stanford, and sole executrix, and received his property and assets, and that no will either of Asa P. Stanford or Philip W. Stanford had been proved in New York. Afterwards, the present complainant pleaded to that suit, and notice was given to her by the present defendant that an application would be made to the Honorable Francis Swayze, Justice of the Supreme Court of this state, for an order that said note should be turned over and delivered by Charles D. Thompson, the Supreme Court Commissioner who held it under the order of the court. Thereupon the present suit was brought in this court for an injunction to stay the suit at law and for the cancellation of the note; and it is now submitted to the court under stipulations and order whereby this court is to try the whole case, in order to avoid the trial of the case in New York.

[2] In the brief of the defendants' counsel he argues that the Court of Chancery of New

Jersey has no jurisdiction, because both parties are nonresidents. There is no basis for such a contention, it being the settled law that where both parties are nonresidents it will not prevent them from bringing suit or being sued in cases of this character.

[3] It is also the settled law that courts of equity have jurisdiction over all questions where fraud is involved, but, as a matter of practice, where there is a complete and adequate remedy at law courts of equity will usually not assume jurisdiction; but where the court has already assumed jurisdiction, as in a mere matter of discovery, it will continue on and deal equity between the parties on the whole case. In regard to the comity existing between the states, I think that is entirely settled by the stipulation of counsel.

[4] To my mind, this is an unconscionable claim and should not be sustained except upon the clearest proof of the most satisfactory and unimpeachable character. It is well settled that a court of equity will not lend its aid to enforce an unconscionable claim. *Erie R. R. v. Delaware R. R. Co.*, 21 N. J. Eq. 283; *Suffern v. Butler*, 19 N. J. Eq. 202, and other cases. All the circumstances surrounding it are suspicious. The changing of the date of the note from one to two years, which is apparent on the face of it, and the fact that unless such change had been made the first suit that was brought against the complainant as executrix, at the time the note was impounded, would have been barred by the statute of limitations; the very obvious insertion of the words "Service and notice of protest is hereby waived" above the indorsements of Mary and Philip on the note, which I am satisfied were made many years after the making of the note, such insertion being made with the privity and consent of the defendant; the sleeping on the rights for nearly a quarter of a century; the commencement of two suits in New Jersey and allowing them to be dismissed for lack of prosecution, and nothing further being done until the commencement of the third suit in New York, where they sought to take advantage of a technical situation under the statute of limitations because of the absence from the state of the defendant; the death of Philip and Mary, who are unable to testify; and the very apparent attempt to mulct the estate of Philip—are all circumstances against the equities of the holder of the alleged note.

[5] I think that the defendant has not sustained the burden which the law places upon her—that she has failed to show a legal protest and notice thereof; or if that was unnecessary under the waiver, then she has failed to show that the waiver was part of the contract of the indorsers; and in the absence of clear and convincing proof on either or both of those questions she could not recover in an action in a court of law,

and as equity should follow the law, in this respect she cannot recover here.

[6] The protest of the note shows that words were interlined in different ink, and the protest was made on the due day without days of grace, while it should have been protested on the last day of grace. Days of grace were abolished by the laws of New York in 1894, chapter 607, taking effect January 1, 1895, as to all notes made after the approval of the act of May 9, 1894. Consequently, if this note were for two years from August 1, 1896, it was entitled to days of grace.

[7] According to the Negotiable Instruments Law (3 Comp. St. 1910, p. 3749, § 124):

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

The prayer of the complainant's bill for the relief sought will be granted in accordance with these views.

JENKINSON et al. v. PARMLY, City Comptroller, et al.

(Supreme Court of New Jersey. April 5, 1917.)

MUNICIPAL CORPORATIONS—§512(3)—PUBLIC IMPROVEMENTS—ASSESSMENTS—JUDGMENT OF COMMISSIONERS.

Whether lands assessed for benefits resulting from extension of street, and situated 3,200 feet from place of extension, were specially benefited, and to what extent, is a question of fact which must be determined by judgment of commissioners, and that judgment will not be disturbed, unless the improvement could not, in the opinion of reasonable men, be justly regarded as a special benefit to the owners of land in the area fixed by the commissioners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1187.]

Certiorari to Circuit Court, Essex County.

Certiorari by Richard C. Jenkinson and others against Tyler Parmly, Comptroller of the City of Newark, and others, to review an assessment. Affirmed.

Argued November term, 1916, before SWAYZE, MINTURN, and KALISCH, JJ.

Coult & Smith and Stein, Stein & Hannon, all of Newark, for prosecutors. Harry Kalisch, City Atty., of Newark, for respondents.

PER CURIAM. Property owners were assessed for benefits resulting from the extension of Branford place to Highstreet, public streets in the city of Newark. Upon the coming in of the report of the commissioners, written objections were filed by landowners to assessments against their lands contained in the report. The report was confirmed.

The chief objection made against the con-

firmation of the report was that the lands assessed derived no special benefit beyond that of the general public. There were numerous other objections which involved matters requiring careful consideration, all of which have been thoroughly and ably discussed and disposed of in an elaborate opinion by Judge Adams, sitting in the Essex circuit, in confirming the assessments, which opinion expresses the views of this court.

The main contention of counsel for the prosecutors to support their allegation of illegality of the assessments under review is that the commissioners arbitrarily fixed an area of benefits in that the report of the commissioners shows that the lands of the objectors were without the zone in which it could be fairly said that the lands assessed are specially benefited. Whether or not the lands assessed were so benefited and to what extent depended upon the judgment of the commissioners. This inquiry involved in its determination a mixed question of law and fact. The general legal principle to be extracted from *Newark v. Hatt*, 79 N. J. Law, 548, 77 Atl. 47, 30 L. R. A. (N. S.) 637, is that only lands which are specially affected by the opening or closing of a street are to be considered. But whether lands are more or less affected or specially benefited must always remain a question of fact the solution of which rests with the commissioners. It is the judgment of the commissioners which must determine, under all the circumstances of the case, whether the lands are specially benefited or not.

We think the reasoning in *Hart et al. v. City of Omaha et al.*, 74 Neb. 836, 105 N. W. 546, is peculiarly applicable to the matter before us. In that case the court says:

"It is charged that the assessment is unjust and oppressive. The charge appears to be based solely on the fact that the appellant's property, being about three-quarters of a mile from the boulevard, cannot be specially benefited thereby; but whether property is thus benefited is a question of fact, which must depend on the facts and circumstances in each case. On such questions the distance of the property from the boulevard would undoubtedly have an important bearing. But this court is now asked to say, as a matter of law, that because the property is three-quarters of a mile from the boulevard it received no special benefit therefrom, and inferentially that the assessment thereof for the purpose stated amounts to fraud, gross injustice, or mistake. This the court, acting within its constitutional bounds, is unable to do. We do not mean to be understood to say that the distance might not be so great in a given case as to enable the court to say as a matter of law that the property was not specially benefited. That question stands open. What we do hold is that this court cannot say, in view of all the facts and circumstances, that because the property is three-quarters of a mile from the boulevard, it derives no special benefit from such thoroughfare."

And so in the present case we cannot say, in view of all the facts and circumstances, that because some of the lands assessed are 3,200 feet from the Branford place extension

into High street, that such lands do not derive any special benefit.

We cannot say as a matter of law that a proper area of assessment would be upon the blocks of land between the opened street and the next parallel streets. Nor can we fix as a matter of law the area of assessments by metes and bounds, by declaring where such area shall begin and where it shall end. In other words, we cannot substitute our judgment for that of the commissioners, unless it clearly appears that the judgment of the commissioners was without any basis whatever. As was pointedly remarked by Dixon, J., in *Jelliff v. Newark*, 48 N. J. Law, on page 109, 2 Atl. on page 632:

"The area of special benefit is so largely a matter of opinion that the judgment of the commissioners * * * must stand, unless very convincing evidence be adduced against it."

We are not prepared to say from the undisputed facts alone namely, the widening and extension of Branford place to High street, thus linking High street and intersecting streets with Broad street, in the very center of the city, might not, in the opinion of reasonable men, be justly regarded as a special benefit to the owners of land in the area fixed by the commissioners.

For the reasons given, the judgment of the Essex circuit court, confirming the assessments under review, will be affirmed, with costs.

FIEDLER et al. v. PARMLY, City Comptroller, et al.

(Supreme Court of New Jersey. April 5, 1917.)

Certiorari to Circuit Court, Essex County.

Certiorari by William H. Fiedler and others against Tyler Parmly, Comptroller of the City of Newark and others, to review an assessment. Affirmed.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Coult & Smith and Stein, Stein & Hannoeh, all of Newark, for prosecutors. Harry Kalisch, City Atty., of Newark, for defendants.

PER CURIAM. The same questions which were presented in *Jenkinson et al. v. Parmly*, 101 Atl. 390, decided this term, are raised in the present case. For the reasons given by Judge Adams in his opinion confirming the assessments in the Essex circuit court, and the views expressed in the opinion filed, in *Jenkinson v. Parmly*, supra, the judgment of the Essex circuit court, confirming the assessments under review, will be affirmed, with costs.

(90 N. J. Law, 263) NEW YORK TELEPHONE CO. v. MAYOR AND COMMON COUNCIL OF CITY OF NEWARK.

(Supreme Court of New Jersey. June 6, 1917.)

MUNICIPAL CORPORATIONS §422 — PUBLIC IMPROVEMENTS — ASSESSMENT — TELEPHONE EXCHANGE.

A telephone exchange, not being in a legal sense permanently devoted to a public use, may

be assessed for local improvements on the basis of the enhancement of its market value.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1028.]

Certiorari by the New York Telephone Company against the Mayor and Common Council of the City of Newark, to review an assessment. Affirmed.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Edward A. & William T. Day, of Newark (Charles T. Russell, of New York City, on the brief), for prosecutor. Harry Kalisch, of Newark, for the City.

SWAYZE, J. This assessment is for the same improvement involved in *Jenkinson v. Parmly*, Comptroller, and *Fiedler v. Parmly*, Comptroller. All the points but one are disposed of by the opinions in those cases. The additional point made in this case is that the assessment must be limited to the benefit conferred on the telephone company for its use of the property, and cannot be measured by the increase in the market value of the land; and, inasmuch as the property is said to be permanently devoted to a public use of such a character that the present owner is not benefited by improved means of access, it is argued that the assessment should be nominal, or should at most be less than it would be if the property were ordinary business property. To sustain this position the prosecutor relies on *State, Morris & Essex R. R. v. Jersey City*, 36 N. J. Law, 56; *Cemetery Co. v. Newark*, 50 N. J. Law, 66, 11 Atl. 147; *Erie R. R. Co. v. Paterson*, 72 N. J. Law, 83, 59 Atl. 1031. The last two cases do not help the prosecutor. In the *Cemetery Company Case* the portion of the land to which the Cemetery Company had title was held liable to assessment. In the *Erie R. R. Co. Case*, it was held that there might be an assessment for benefits to the use of the property, although there might be no assessment under the circumstances of that case for enhancement of market value. In the *Morris & Essex R. R. Case*, it was indeed held that the enhancement of the present market value was not the proper basis of assessment, but that result was justified by the facts peculiar to the case. The subject has been recently reviewed by the Court of Errors and Appeals, and the rule and the reasons on which it rests have been admirably stated by Mr. Justice Garrison. *New York Bay R. R. Co. v. Newark*, 82 N. J. Law, 591, 83 Atl. 962. The reason of the rule, in *Morris & Essex Railroad Co. v. Jersey City*, he says, is "that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose, and hence, as such a violation

will not be presumed, such land has, in legal contemplation, no market value to be enhanced." The distinction between such a case and the present is that here there is nothing that in a legal sense implies the permanent devotion of the telephone company's property to a public use. It may be that in fact it is always likely to remain the best site in Newark for a telephone exchange, and that the company is never likely to move; it may be that the investment is so large that the loss due to a removal would be prohibitive; it may be that it is fitted up for the special business of the company. All these considerations would probably be applicable to any large business, to a bank, an insurance company or office building, a hotel, a factory, or a department store. But there is nothing to show that the title to the property is likely to be affected by an abandonment of the present use, nor is the property so changed in character that it cannot readily be adapted to other business purposes. Such a change is not unknown in the case of the telephone company in Newark. We see nothing to distinguish the case from that of land used for the other kinds of business buildings just mentioned.

The assessment is affirmed, with costs.

(90 N. J. Law, 636)

O. J. GUDE CO., NEW YORK, v. NEWARK SIGN CO. et al. (No. 100.)

(Court of Errors and Appeals of New Jersey. May 24, 1917.)

1. CONSPIRACY §19—EVIDENCE—PREVIOUS SUIT AGAINST DEFENDANTS.

In an action by a sign advertising company against other such companies for maliciously conspiring to mutilate and injure plaintiff's signs, evidence that three of the defendants more than seven years before the acts complained of had been sued by another plaintiff for like acts was improperly received, since it confused the issues and prejudiced defendants.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 25, 26.]

2. CONSPIRACY §19—EVIDENCE—IMMATERIALITY.

Testimony that the prior suit was settled, introduced to substantiate the charges in the previous suit, was improperly admitted.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 25, 26.]

3. TRIAL §252(3)—INSTRUCTION—INSTRUCTION TO CONSIDER EVIDENCE IMPROPERLY ADMITTED.

The trial judge improperly charged that the jury should consider the earlier suit and its settlement as showing that some of the defendants had knowledge that similar charges had previously been made.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 598.]

Black, White, Heppenheimer, Williams, and Gardner, JJ., dissenting.

Appeal from Supreme Court.

Action by the O. J. Gude Company, New York, a corporation, against the Newark Sign Company, a corporation, and others. There

was verdict for plaintiff, from which a rule to show cause was allowed, with reservation of exceptions. The rule was discharged, and defendants appeal. Reversed, and venire de novo awarded.

Kallsch & Kallsch, of Newark, for appellants. Lum, Tamblin & Colyer, of Newark, for appellee.

PER CURIAM. This was an action in the Supreme Court. The complaint alleges that the plaintiff has been and is in the sign advertising business in general, that the defendant corporations were engaged in the same business, and were and are its competitors and rivals throughout the city of Newark and the surrounding territory; that Kelly and Kavney were officers, directors, and employees of each of the defendant companies, and were actively engaged in the conduct, management, and promotion of the business of each, and of their rivalry and competition with the plaintiff; that they, with Pratt and Cullen, maliciously intending to harass, annoy, and embarrass the plaintiff in the carrying on of its business, damaged and destroyed its signs and property, and caused dissatisfaction among its customers; and to injure and drive it out of business, etc., maliciously conspired, combined, and agreed to damage and destroy its signs and property, and to cause dissatisfaction among its customers, and in pursuance of this design the defendants chopped down, sawed off, burned, and otherwise mutilated and injured the signs of the plaintiff, to its damage. At the trial in the Essex circuit the jury rendered a verdict in favor of the plaintiff against the defendants (except Cullen, as to whom the plaintiff took a nonsuit). From that verdict a rule to show cause was allowed, with reservation of exceptions. The rule was discharged, and the case is here on appeal on the reserved exceptions.

There were many grounds of appeal relied on by the appellants, but for the purpose of disposing of the matter before us only those grounds need be considered which have reference to certain transactions and a certain controversy between the New Jersey Sign Advertising Company (which is not a party to this suit) and three of the defendants in this suit, namely Samuel Pratt, Newark Sign Company, and Newark Bill Poster Company, evidence of which transactions and controversy the court received in evidence and referred to in his charge to the jury, over the objection of the defendants.

[1] In offering this evidence, the plaintiff sought to show that the above-mentioned three defendants, in an earlier suit brought against them by the New Jersey Sign Advertising Company in January, 1913, were charged with the commission of acts similar

to those charged against them in the present suit; the complaint in the earlier suit having alleged that the acts were committed in pursuance of an unlawful conspiracy, combination, and agreement entered into by the three defendants above mentioned, and that the acts were committed since January 20, 1907. The record of that suit was offered and received in evidence. This was error.

The record in the suit just mentioned throws no light upon the present controversy. It was a suit based upon an alleged conspiracy entered into in 1907, which was more than seven years before the acts complained of in the suit at bar. The plaintiff in that suit was the New Jersey Sign Advertising Company, and the plaintiff in the case at bar is O. J. Gude Company. The plaintiffs were not the same in each case. It further appears, upon an examination of the record in the former case, that the answer filed by the defendants denied the charges in the complaint, and that the suit was never tried, but was discontinued. It cannot be said that, because the New Jersey Sign Advertising Company, three years before the present suit was commenced, accused three of the present defendants of conspiring in 1907 to injure it, especially without any verdict in the case to establish the truth of the accusations, that those accusations in that suit afford any light in determining whether like accusations in the present suit are true. It was highly improper to place before the jury the record of the other case. It confused the issues in this case and prejudiced the defendants. It also affected the question of punitive damages. The defendants could not be required to meet the issues in the former suit.

[2] An effort was made to substantiate the charges in the previous suit by the admission of testimony showing that that suit was settled. This was error. As the admission of evidence of the bringing of that suit was error, testimony to the effect that it was settled was equally erroneous.

[3] The trial judge, in dealing with the matter in his charge, said that the jury should consider the earlier suit and the settlement of it as showing that some of the defendants had knowledge that similar charges had been previously made. This too was error, for, as neither the bringing nor settlement of that suit was competent evidence for the plaintiff, it follows that the jury could not lawfully give consideration to that evidence in the pending suit.

The judgment under review will be reversed, to the end that a venire de novo may be awarded.

BLACK, WHITE, HEPPELHEIMER, WILLIAMS, and GARDNER, JJ., dissent.

(90 N. J. Law, 370)

SCHWARZROCK v. BOARD OF EDUCATION OF BAYONNE.

(Supreme Court of New Jersey. July 9, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 63(2) — REMOVAL OF OFFICER — JURISDICTION OF STATE BOARD AND OFFICER.

A controversy as to whether a local board of education had rightfully removed a person from a position existing under the school law is one of which the commissioner of education and the state board of education has jurisdiction under School Law (4 Comp. St. 1910, p. 4727) § 10, in a proceeding which can only result in affirming or reversing the removal, though it involves for determination thereof findings as to his guilt or innocence of the charge of attempted bribery.

2. SCHOOLS AND SCHOOL DISTRICTS \S 47 — REMOVAL OF OFFICER — RIGHTFULNESS — HEARING BY COMMISSIONER OF EDUCATION.

The hearing by the Commissioner of Education of the controversy of rightfulness of removal by a local board of education of a person from a position under the school law is a new one, and he is not limited to a mere review of the evidence taken before the local board, School Law, § 10, providing that the facts involved shall be made known to the commissioner by sworn written statements, accompanied by certified copies of documents.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 93-99.]

3. SCHOOLS AND SCHOOL DISTRICTS \S 63(2) — DISMISSAL OF OFFICER — SUFFICIENCY OF EVIDENCE.

Dismissal of an officer under the school law by a local board of education on testimony of one who has been convicted of perjury, in the face of the officer's denial, is not justified.

4. SCHOOLS AND SCHOOL DISTRICTS \S 47 — REMOVAL OF OFFICER — SETTING ASIDE BY STATE BOARD — EFFECT.

Action of the state board of education in setting aside the removal by a local board of education of an officer under the school law has the effect of a judgment.

[Ed. Note.—For other cases, see Schools and Districts, Cent. Dig. §§ 93-99.]

5. MANDAMUS \S 102(2) — PAYMENT OF SALARY.

One whose removal from an office under the school law by a local board of education has been set aside by the state board is entitled to mandamus, commanding the drawing and paying of a salary warrant, on a showing of having been ready and willing to perform his duty, and refusal of the local board to allow him to do so, and refusal to pay him, and possession of moneys applicable to the payment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 218, 219, 221.]

6. MANDAMUS \S 163 — DEMURRER TO ALTERNATIVE WRIT.

Averments of alternative writ of mandamus are admitted by demurrer thereto.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 341-343.]

Proceeding by Gustav G. Schwarzrock against the Board of Education of Bayonne. Heard on certiorari of decision of State Board of Education and on demurrer to alternative mandamus. Decision sustained, and writ granted.

Argued before Justice SWAYZE, sitting alone pursuant to the statute.

Mark Townsend, Jr., of Jersey City, for Schwarzrock. Daniel J. Murray, of Bayonne, for Board of Education.

SWAYZE, J. The certiorari at the suit of the board of education brings up the decision of the state board affirming the commissioner of education and reversing the action of the local board removing Schwarzrock from the position of supervisor of buildings and repairs.

[1] I agree with the state board that the controversy was one of which the commissioner of education and the state board had jurisdiction under section 10 of the school law. That controversy was whether the local board had rightfully removed Schwarzrock from a position existing under the school law. The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempted bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purposes of the criminal law. Whether in such a case the board should act before action is taken by the criminal courts is a matter resting in the discretion of the board.

[2, 3] 2. It necessarily results from the provision that the facts involved in any controversy or dispute shall be made known to the commissioner by written statements, verified by oath and accompanied by certified copies of documents, that the hearing before him should be a new hearing, and that he is not limited to a mere review of evidence taken before the local board. An examination of the evidence in this case makes it clear that the commissioner and the state board reached a correct result. It would be intolerable to permit a public official of good repute to be dismissed from office on the testimony of one who had been convicted of perjury, in the face of the officer's denial.

[4-6] 3. The action of the state board setting aside the removal of Schwarzrock has the effect of a judgment, and a mandamus will issue in a proper case. *Thompson v. Board of Education*, 57 N. J. Law, 323, 31 Atl. 168. The alternative writ in the present case avers that Schwarzrock was appointed supervisor for three years at a salary of \$1,800; that after his wrongful dismissal he was always ready and willing to perform his duties until July 1, 1916 (the expiration of his term), and that the local board refused to allow him to do so; that they refused to pay him the sum due as salary, \$3,000; that there are funds in the hands of the commissioner of finance and the custodian of the school funds applicable to the payment of said sum of \$3,000. These averments are admitted by the demurrer. Perhaps the defendant meant to challenge the averments by the reasons, but it is a mis-

take to say, as in reasons three and four, that the writ does not show that the amount claimed is in possession of respondents, and that it does not show that the respondents are in possession of moneys applicable to the payment required by the writ. The writ does show these facts. If the defendants meant to traverse the averments they should not have demurred. I cannot distinguish the present case from *Thompson v. Board of Education*. The writ should go. While it prays relief in the alternative, that was proper in view of the relator's uncertainty whether there were funds in hand to meet his claim. In view of the admission of that fact, I see no reason why the peremptory mandamus should not command the drawing of a salary warrant upon the custodian and the payment by the custodian, or other proper officer.

The relator is entitled to costs.

(87 N. J. Eq. 438)

BAIZ et al. v. CORO & L. V. R. & IMPROVEMENT CO. (No. 25/810.)

(Court of Chancery of New Jersey. May 11, 1917.)

1. CORPORATIONS §478—MORTGAGES—VALIDITY—AFTER-ACQUIRED PROPERTY.

In 1892 the government of Venezuela granted a concession for the construction of the Coro & La Vela Railroad, and in 1895 the grantee's administrator assigned the concession to another individual, who reassigned it to a New Jersey corporation known as the Coro & La Vela Railroad & Improvement Company. The original concession authorized a transfer thereof to a national or foreign corporation. Later in 1895 the corporation executed a mortgage to secure its bonds covering all the tangible property, and including the concession contract and including "all property that might thereafter be acquired for use in connection with the mortgagor's business, together with all the reversion, remainders, income, tolls, revenues, rents, issues, and profits arising out of or from the operation of the railroad or any part thereof, and privileges, benefits, and appurtenances now or hereafter belonging or in any wise appertaining thereto." In 1896 Venezuela by statute permitted the granting of subsidies to railroads, prohibiting their transfer to foreign governments, and providing that transfers between private individuals, syndicates, or companies must be previously approved by the national executive. In 1897 a concession on such terms was granted to the Coro & La Vela Railroad & Improvement Company. Through the mixed commission of the United States and Venezuela the railroad's claim for a concession was allowed in part, and the government of Venezuela required to pay the amount allowed to the government of the United States for the benefit of the railroad. The government of Venezuela then seized the railroad and operated it for a period of years. In 1900 the Governor of New Jersey declared the railroad charter void for nonpayment of taxes, and later a receiver was appointed. In 1907 Venezuela filed a petition in bankruptcy against the railroad, which was adjudicated a bankrupt, the decree finding that the mortgage was invalid, but that the bonds, the greater part of which were held by the Venezuelan government, were valid, and the railroad's assets were sold under bankruptcy proceedings. *Held*, that the mortgage of 1895, purporting to cover the concession

of 1892, if ever valid as to the original concession, was not an equitable mortgage on the after-acquired subsidy, represented by an award of the mixed commission.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1871.]

2. RAILROADS §166—EQUITABLE MORTGAGES—CONSTRUCTION.

A somewhat strict construction is required of railroad mortgages when ascertaining their effect as equitable mortgages on after-acquired property.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 516-518.]

3. RAILROADS §177—MORTGAGES—VALIDITY—AFTER-ACQUIRED PROPERTY.

A railroad mortgage to secure its bonds covering "all the tangible property," and including the concession contract and including "all property that might thereafter be acquired for use in connection with the mortgagor's business, together with all the reversion, remainders, income, tolls, revenues, rents, issues, and profits arising out of or from the operation of the railroad or any part thereof, and privileges, benefits, and appurtenances now or hereafter belonging or in any wise appertaining thereto," if it creates any right at all as to an after-acquired subsidy, creates a right which can be asserted only after some form of seizure of the subsidy.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 391, 594-599.]

4. JUDGMENT §822(3)—VALIDITY—AFTER-ACQUIRED PROPERTY.

As the legal situs of the right to receive the subsidy was in Venezuela, the decree of Venezuela that the mortgage was invalid foreclosed its right to assert in the courts of New Jersey the validity of the mortgage, so as to embrace the subsidy, although the subsidy actually came into the possession of the receiver in New Jersey.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1500.]

5. CORPORATIONS §482(1)—VALIDITY—AFTER-ACQUIRED PROPERTY—HOTCHPOT.

In such case *held*, that Venezuela was obliged in equity to put in hotchpot dividends received on her claim through the Venezuela bankrupt proceedings.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1877-1879.]

Receivership proceedings by Emily M. Baiz and others against the Coro & La Vela Railroad & Improvement Company. From an adjudication of the receiver of the insolvent corporation in respect to the allowance of their claims, certain creditors appeal, and Frank S. Bright, as counsel for the receiver, applies for an allowance of counsel fees. Appeal of the Republic of Venezuela not sustained. On appeal of the Baiz estate, affirmed. Claim of Bright allowed.

Thomas L. Raymond, of Newark, and Francis P. Pace, of New York City, for Republic of Venezuela. M. T. Rosenberg, of Jersey City, and Edgar J. Nathan and Michael H. Cardozo, Jr., both of New York City, for the executors of Baiz. Charles D. Thompson, of Jersey City, for Bright. Charles L. Carrick, of Jersey City, pro se.

STEVENSON, V. C. There are in this proceeding three separate matters which have been to a large extent heard together. It will

be the function of this memorandum to set forth, as briefly as possible, the conclusions which I have reached, and state the principal reasons for such conclusions.

1. The first case to be considered is presented by the appeal of the United States of Venezuela from the action of the receiver in disallowing its claim to a preferred charge amounting to \$114,700, and interest to a large amount thereon, under a mortgage alleged to cover the entire fund in the receiver's hands. I am not certain whether the receiver rejected this claim in toto, or allowed it as a general claim, but rejected it as a preferred claim under the mortgage referred to. However that may be, the evidence satisfies my mind that the appellant holds 139 mortgage coupon bonds of the Coro & La Vela Railroad & Improvement Company of \$1,000 each, and that these bonds constitute valid obligations of this corporation, and that through bankruptcy proceedings in Venezuela \$25,300 of this bonded indebtedness was paid, leaving the balance (\$114,700) with a large amount of interest due and unpaid and entitled to payment out of the fund in the receiver's hands, either preferentially or concurrently with the general claims which have been proved.

The only question to be considered in relation to this claim of Venezuela is whether it stands as an incumbrance upon the fund in the receiver's hands. My conclusion is that it does not, and the reasons for this conclusion require some statement of the facts.

(1) On December 12, 1892, the original concession contract for the construction of the Coro & La Vela Railroad in Venezuela was granted by the government of Venezuela to "Manases Capriles and to his partners, associates, or successors." This concession or contract does not appear to have been approved as required by law until March 26, 1895. By assignment dated July 8, 1895, from the administrator and next of kin of Manases Capriles, who was then deceased, and his original "associates," this concession was transferred to Abram W. Naar. Jacob Balz, of New York City, appears to have been the promoter or the principal original promoter of this Venezuela railroad enterprise, and for the purpose of its proper exploitation a corporation was created under the laws of New Jersey entitled the Coro & La Vela Railroad & Improvement Company, among the objects of which was the construction and operation of this railroad. On August 12, 1895, a month after Naar had acquired the concession from the Capriles syndicate, he assigned it to this New Jersey corporation, the Coro & La Vela Railroad & Improvement Company. By the tenth article of this original concession it was provided that:

"The grantee, his associates or his successors, will have the right to transfer or convey this concession to another party, or to a national or foreign corporation, with the same rights, conditions, and obligations that are established, com-

plying with the formalities of the law, and giving due notice to the government."

There are grounds for arguing as will hereinafter appear that this express provision contemplated the assignment of the concession to a national or foreign corporation or other party capable of carrying out, and intending to carry out, the work of constructing the railroad for the promotion of which the concession was made. The evidence bearing upon this question is in an unsatisfactory condition. I think, however, that we may assume, for present purposes only, that this original concession expressly provided that it might be assigned by way of mortgage to secure money to a foreign corporation not expressly authorized to construct railways in foreign countries, and not intending to engage in such work.

On August 20, 1895, the Coro & La Vela Railroad & Improvement Company executed in the usual form a mortgage to the Farmers' Loan & Trust Company of New York City as trustee, to secure an issue of 150,000 bonds of \$1,000 each. The 139 bonds above mentioned held by the appellant upon which its claim is based are a part of this issue. The mortgage covered all the tangible property of the corporation, and also expressly included the concession contract, and used terms which will be mentioned hereafter to extend its scope as an equitable mortgage to after-acquired property of a certain description.

On May 18, 1896, while the railroad, as I understand the situation, was in process of construction, there was a law or decree passed by the government of Venezuela permitting the granting of subsidies under certain conditions to its concessionaires engaged in the construction of railroads at given rates "for every section of ten kilometers finished." This new law in article 16 provided as follows:

"The concessions cannot be transferred either totally or partly to foreign governments. Transfers between private individuals, syndicates or companies must be previously approved by the national executive in order to be valid."

This new law of Venezuela was approved May 27, 1896.

On May 18, 1897, the government of Venezuela, pursuant to the provisions of the last-mentioned statute or decree, entertained the application of an agent of the Coro & La Vela Railroad & Improvement Company for the "addition of an article" to the concession contract of 1892 "for the construction of a railroad between the port of La Vela and the city of Coro, granting a subvention from the national treasury of twenty thousand bolivars for each kilometer of road," and thereupon granted such subvention, payment thereof to be made "at the completion of each ten kilometers." This supplementary concession of 1897 recites that the railroad was then in process of construction. There can be no doubt that this subvention was made to the Coro & La Vela Railroad &

Improvement Company, which was then engaged in completing the railroad.

On February 18, 1898, the amount of the subsidy which was due from the government of Venezuela to the Coro & La Vela Railroad & Improvement Company was ascertained, according to law, by the proper officers of the Venezuelan government and "liquidated" at the sum of 270,000 bolivars. No part of this money was paid except in pursuance of the award hereinafter mentioned.

The history of this railroad enterprise in Venezuela for some years after the liquidation of the subsidy in 1898 is very slightly touched upon in the evidence. It is a matter of history that Venezuela became involved in difficulties with foreign governments, and that her custom houses were seized and that, largely through the intervention of the United States, an adjustment of the financial claims held by citizens of the United States and other countries against Venezuela was effected through a "mixed commission" created by the United States of America and the Republic of Venezuela. The claim of the Coro & La Vela Railroad against Venezuela for the ascertained amount of the subvention had been diligently pressed on behalf of the railroad company by the direction of Mr. Jacob Baiz, who seems to have stood behind the whole enterprise as its chief promoter and chief creditor. Mr. Bright, whose claim to compensation will hereinafter be considered, kept urging this claim through the diplomatic agencies at Washington, under the direction of Mr. Baiz until his death in 1899, and after that under the direction or in the name of his personal representatives or the railroad company itself.

The railroad company at some time, before or after the death of Mr. Jacob Baiz—probably some time after—became insolvent or for some other reason incapable of continuing its business, and the status of its property in Venezuela is only vaguely indicated by the evidence in this case. It is alleged that the government of Venezuela took possession of all the railroad property and proceeded to operate the railroad. It may be surmised that whoever held and operated this railroad made no profit thereby.

On May 2, 1900, the Governor of New Jersey by proclamation declared the charter of the Coro & La Vela Railroad & Improvement Company void on account of the non-payment of taxes due the state for the year 1897. Previous to the making of this proclamation the corporation had been enjoined by the Court of Chancery of New Jersey from the transaction of any further business on account of the nonpayment of said taxes. Whether the directors of the corporation at the time of its dissolution by proclamation made any effort to obtain or administer the assets of the corporation does not appear, but the inference seems to be warranted that these directors took no steps in that direction.

In May, 1903, there being a prospect that the "mixed commission" might make an award in favor of the claim which Mr. Bright had been urging, the present suit was brought in this court by Emily M. Baiz and others, executors of Jacob Baiz, deceased, against the Coro & La Vela Railroad & Improvement Company and its directors praying that a receiver be appointed of all the assets of the corporation, and that the directors be enjoined from transferring or in any way interfering with the same, and thereupon such injunction was granted and Mr. William G. E. See, now deceased, was appointed receiver.

Upon the appointment of Mr. See as receiver Mr. Bright in May, 1903, presented to the proper United States officials at Washington a memorial from the receiver setting forth that the Coro & La Vela Railroad & Improvement Company had completed the railroad from La Vela to the city of Coro, in accordance with its contract, and that the amount of the subvention had been liquidated by the Venezuelan officers at 270,000 bolivars, and that no part of this money had been paid. The memorialist prayed that the claim be presented by the agent of the United States to the "mixed commission" according to the protocol, etc., and that the agent of the United States be directed to insist upon payment.

In June, 1903, the "mixed commission" rendered its judgment awarding the sum of \$61,104.70 in United States gold coin "in favor of said claimant," who is referred to as the Coro & La Vela Railroad & Improvement Company, and directed that the said sum should be paid by the government of Venezuela to the government of the United States of America in accordance with the provisions of the convention under which the award was made. No money was received by the United States on this claim for a number of years, owing mainly, I understand, to the preference which was given to the payment of certain other claims of great magnitude. The entire amount has now been collected from the United States government by a series of receivers, and the present receiver has in hand the sum of \$51,000 for distribution pro rata among six or eight parties who have presented their claims under oath to one or another of these receivers, or for distribution pro rata among the holders of the mortgage bonds. It will be seen that, if the mortgage is held to be a valid incumbrance upon this money, the United States of Venezuela will take about fourteen-fifteenths of the fund. If, however, the mortgage is not an incumbrance upon this money, then, as I have found the bonds to be valid obligations of the insolvent corporation, the United States of Venezuela will take a smaller, but still very large, share of the fund, the amount of which will depend upon the aggregate amount of other claims which are allowed. It may be noted in passing that it appears from a state-

ment of the claims presented to the receiver that, if the appeal of Venezuela from the allowance by the receiver of the claim of the estate of Jacob Balz, amounting to over \$75,000, should be finally sustained, the result would be that Venezuela would not be greatly interested in securing the establishment of the mortgage as a lien on the fund. If, however, the Balz claim is finally allowed, the dividend of Venezuela will be reduced from about fourteenth-fifteenths to about two-thirds; the other claims allowed besides these two large ones being for comparatively small sums.

I have referred to the obscurity in which the evidence leaves the status of the railroad, which seems to have been to a large extent completed by 1898, during the eight or ten years which followed. The sole purpose of the present suit in this court seems to have been to procure the appointment of a receiver through whom the claim for the 270,000 bolivars could be presented to the "mixed commission," and by whom any money awarded on account of that claim could be received. The first receiver, Mr. See, appears to have made no effort to discover any assets in Venezuela. In whose possession these assets were in 1903, and thereafter until 1908, we are not definitely informed, although, as I have said, it is alleged that the railroad property in Venezuela had been seized by the government of Venezuela.

Continuing the history of this South American railroad enterprise, it appears that, however the railroad may have been then held or operated, in December, 1907, the Republic of Venezuela filed a petition in bankruptcy in one of her courts against the Coro & La Vela Railroad & Improvement Company, and thereupon promptly the court made an adjudication of bankruptcy against the company. The judgment of the court found, in accordance with the allegations of the petition filed on behalf of the Republic of Venezuela, that Venezuela was a creditor of the bankrupt as the holder of 140 of the said issue of mortgage bonds, and further found, in accordance with the allegations and prayer of the petition, that the mortgage was invalid under the laws of Venezuela as to all property situate in that country. The bankruptcy proceedings seem to have corresponded with similar proceedings in rem under bankrupt laws of other nations, but include a judgment invalidating the mortgage, although the inference is that the mortgagee, the Farmers' Loan & Trust Company of New York, was not notified of the destructive claim which was made against its mortgage, and in no way appeared or was represented in the proceeding. The important fact, however, to be noted is that Venezuela procured this decree adjudicating in her court that she was a creditor as the holder of these mortgage bonds; that the mortgage which secured these bonds and which covered practically all

the property of the mortgagor, and all of which was situated in Venezuela, was, under the laws of Venezuela, invalid as to such property. The administration of the assets of the bankrupt then proceeded in a manner corresponding with such proceedings in our own courts. The decree of bankruptcy directed that creditors residing in Venezuela should present their claims within 15 days, "plus the traveling time," and that creditors residing out of Venezuela be notified of the adjudication of bankruptcy, and that such creditors should prove their claims within certain periods prescribed according to the location of the creditors. Whether the estate of Jacob Balz was treated as resident in Venezuela, or whether it was treated as resident in New York, and therefore entitled to five months' notice, does not appear. It does appear that the claim of the Balz estate was not proved in this bankruptcy proceeding.

On October 26, 1908, the Venezuelan bankrupt court made an order for the sale of the railway, telephone line, real estate, buildings, machinery, rolling stock, etc., of the bankrupt, and in describing the property sold expressly enumerated the "stock of tools, implements, and other personal property for the use and service of the railroad enterprise situate at its stations at Coro and La Vela and in the workshop." It is plain that the liability of Venezuela under the award of the "mixed commission" made five years before this bankrupt sale was not included in the assets of the bankrupt which were inventoried and sold. This liability had been merged in an award in the nature of a judgment requiring Venezuela to pay an amount of money to the United States of America on account of the claim of the Coro & La Vela Railroad & Improvement Company, and the bankrupt court of Venezuela made no attempt to collect or sell the award. The decree for the sale of the assets of the company recognized the claim of Venezuela, as the holder of 140 of the mortgage bonds, to an amount with interest then ascertained to be over 1,000,000 bolivars. The aggregate amount of the claims of 18 other creditors was found by the decree to be nearly 70,000 bolivars. Venezuela therefore was found entitled to about fourteen-fifteenths of the entire proceeds of the bankrupt estate. The decree further adjudicates, a sale having been held and the assets apparently having been bought in on behalf of Venezuela, that the United States of Venezuela was the owner of the assets "for the price of 139,094 bolivars, the said property to form part of the private dominion of the United States of Venezuela." It may be noted that this final decree of October 26, 1908, adjudicates again that the mortgage of the Farmers' Loan & Trust Company "was not known to the Venezuelan law, could not produce the consequence of creating in favor of the holders of said bonds any liens or special rights over the properties situated in

Venezuela as are those that are being sold in this proceeding," and that the purchaser would take free from all incumbrances.

It may be also noted in passing, as one of the curious and interesting features of these Venezuela bankrupt proceedings in 1907, that it does not appear that the Coro & La Vela Railroad & Improvement Company had been doing any business in Venezuela or elsewhere for at least four years. In 1900 this New Jersey corporation was enjoined by the Court of Chancery of New Jersey from prosecuting any business on account of the non-payment of taxes, and was dissolved by proclamation according to law, and subsequently in 1903 its entire property, so far as the state of New Jersey could control the same, was placed in the hands of a receiver subject of course to valid liens.

(2) Proceeding now to the examination of the question whether the mortgage of the Farmers' Loan & Trust Company ever was a valid incumbrance upon the original concession contract, there seem to be strong grounds for answering this question adversely to Venezuela. The mortgagor was located in Venezuela. Apart from raising money and purchasing material, there is no evidence that it ever transacted the business of constructing or operating a railroad anywhere else. It was created for the purpose of constructing and operating for 40 years this railroad in Venezuela. This New Jersey company not only established itself in business in Venezuela, but accepted a concession contract under Venezuelan law, and that contract expressly permitted its transfer to another party "with the same rights, conditions, and obligations that are established, complying with the formalities of the law and giving due notice to the government." Whether the "formalities of the law" were complied with and notice was given to the government when this assignment by way of mortgage was made to the Farmers' Loan & Trust Company are matters upon which the evidence gives little, if any, information. The express provision for an assignment of the concession under conditions seems to imply the exclusion of assignments without those conditions. Moreover, the purpose of the article permitting an assignment seems to have been to permit an assignee to come in and construct and operate the railroad under the terms of the concession. We are certainly far away from such an assignment when we are presented with this mortgage made to secure money and given to a trust company located in the city of New York, which could hardly be expected to stand ready to go down to Venezuela, construct this railroad and then operate it for 40 years.

In view, however, of the unsettled questions of fact relating to this branch of our inquiry and the unsettled questions of Venezuelan law pertaining to it, I have concluded to pass this fundamental and possibly fatal

objection to the establishment of this mortgage as an incumbrance upon the right of the Coro & La Vela Railroad & Improvement Company to receive this award of money now in the hands of the receiver, which award was based upon a recognition and enforcement of this right.

(3) But we are not dealing with the original concession of May 12, 1892. For present purposes, we may assume the mortgage to have been a valid incumbrance upon all the rights of the Coro & La Vela Railroad & Improvement Company under that concession. We are dealing with the subsidy granted by what is in effect a supplemental concession in 1897, nearly two years after the mortgage was made to the Farmers' Loan & Trust Company to secure this issue of \$150,000 of bonds, and one year after a new law had been passed by the government of Venezuela permitting such subsidies to be granted. When the mortgage was made not only was there no subsidy provided for, but there was no law under which any such subsidy could be granted. It might be argued that the mortgage of the original concession of 1892, especially in view of the words contained in the mortgage with respect to after-acquired property, would operate as an equitable mortgage upon supplementary articles which might be added from time to time by agreement between the contracting parties, Venezuela and the mortgagor. Unfortunately for this argument, when we examine the law of Venezuela passed in 1896 permitting subsidies to be provided for in concession contracts like this, we find the above-quoted express provision constituting article 16 of the statute:

"The concessions cannot be transferred either totally or partly to foreign governments. Transfers between private individuals, syndicates, or companies must be previously approved by the national executive in order to be valid."

There is no pretense that the alleged equitable or anticipatory transfer made in 1895 to the Farmers' Loan & Trust Company of New York was ever "previously approved" or at any time approved by the national executive of Venezuela, as is expressly required by the law of 1896 under which the subsidy was granted to the Coro & La Vela Railroad & Improvement Company. If it is worth while to infer or surmise as to the reasons of this limitation upon transfers, in view of the plain language of the law, it may be noted that the manifest object of Venezuela in providing by law for these subsidies to railroad companies was to secure the construction of railroads. Great evils can, I think, be pointed out resulting in the prevention of the construction of a subsidized railroad if the concession and the right to receive a subsidy under it could be mortgaged to a foreign trust company. In view, however, of what seems to be the plain prohibition of the law above set forth, any further discussion of the purpose and object of the

law in order to aid in its interpretation seems to be unnecessary.

In considering the question of the assignability of the original concession of 1892, and the supplementary concession of 1897, it must be borne in mind that, while the original concession was assigned to Abram W. Naar, and it does not appear that such assignment was permissible, or in fact was valid under the laws of Venezuela, or, if valid, was made in accordance with the express terms of the concession itself, the subsequent assignment by Naar to the Coro & La Vela Railroad & Improvement Company was recognized in the most solemn manner by Venezuela, and the subsidy was made directly to that company. It is the transfer of rights under the concession, to a trust company in a foreign state by means of an instrument operating as an equitable mortgage to secure loans of money with which we must deal, and to which we must apply these provisions of the Venezuelan contracts and Venezuelan laws.

[1] In my judgment this mortgage of 1895 purporting to cover the concession of 1892, if valid as to that original concession, could not possibly operate as an equitable mortgage upon the after-acquired subsidy under the law of 1896, when that law expressly prohibits such a mortgage.

[2] (4) If we assume that the Coro & La Vela Railroad & Improvement Company in 1895 could make a valid mortgage of this possible right to a subsidy, which possibly might arise in the future under a new law which Venezuela might possibly enact, and a supplementary concession which Venezuela might grant, my examination of the terms of the mortgage itself leads me to the conclusion that it could not and did not at any time operate as an equitable assignment or mortgage of the right of the mortgagor to receive this subsidy, which right could not have been lawfully created when the mortgage was made, and in fact did not come into existence until two years afterwards. The rule is well settled which compels a somewhat strict construction of these railroad mortgages when ascertaining their effect as equitable mortgages upon after-acquired property. The limits of this memorandum, if it is to have any, will not permit a discussion of the phraseology of this mortgage, which must be reviewed for a minute investigation of its interpretation and application to the subvention. The mortgage undertakes expressly to convey the grant and concession of 1892 and all property that might thereafter be acquired by the mortgagor "for use in connection with its business as a railroad corporation." The authorities, I think, lead to the limitation of this description of after-acquired property to what may be so acquired in connection with the operation, not the construction, of the railroad. The habendum which counsel for Venezuela thinks favors his view of the case defines the tenure of the mortgagees as including the said prop-

erty and the premises, real and personal, rights, etc., "hereby granted, assigned and conveyed, or intended so to be, with all and singular the reversion, remainders, income, tolls, revenues, rents, issues, and profits arising out of or from the operation of said railroad, or any part thereof, and privileges, benefits, and appurtenances now or hereafter belonging or in any wise appertaining thereto." In my opinion the habendum clause, the function of which it is to define the tenure of the grantee, indicates that the mortgage did not contemplate the acquisition of a subsidy or subvention under a law which might thereafter be enacted, but only moneys which might be acquired from the construction of the railroad. 3 Cook on Corp. (4th Ed.) §§ 856, 857; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; *New Orleans Pacific Railroad Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66; *Smith v. McCullough*, 104 U. S. 25, 26 L. Ed. 637; *Emerson v. European & North American Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39.

(5) If we assume that the mortgage contains language which should be construed as creating under certain conditions an equitable incumbrance upon this after-acquired right to the subvention, I think that the authorities will not permit the establishment of such an equity in favor of the mortgage under the circumstances proved in this case. In the first place, it should be noted that no attempt has been made to argue that the mortgagee could have taken possession of this sum of 270,000 bolivars if upon the liquidation of the subvention at that sum the money had been paid by Venezuela. The most that has been argued, and as I think can possibly with any show of reason be argued, is that upon the mortgage coming due or default in its covenants being made the equity of the mortgagee in respect of this money would arise. That the mortgagor before the mortgage fell due could collect the 270,000 bolivars and expend them in any legitimate way cannot be doubted.

The mortgage, following the usual form, provides that until default, etc., the mortgagor should be entitled "to remain in the full possession, use, and enjoyment and control" of all the property mortgaged or intended to be mortgaged, and also should be entitled "to manage the same and to receive and use the income," etc., and "all moneys payable and receivable or derivable therefrom." The mortgage further provides that in case of default for six months to pay, etc., the mortgagee might take possession of the mortgaged property and conduct "the business operations" of the mortgagor and exercise its franchises and collect the revenues, etc., and after deducting the expenses apply the residue of the money to the payment of the amount due on the bonds. The mortgage also provided that in case of default, etc., the entire mortgage debt might be declared to be due, and thereupon the

mortgagee might sell the mortgaged property at public auction in the manner prescribed. Provision was also made in the mortgage for the appointment of a receiver upon the commencement of any judicial proceedings to enforce the rights of the mortgagee and the bondholders.

[3] I think under the provisions of this mortgage, the most important of which are above set forth, the right of the mortgagee and the bondholders to have this instrument of mortgage enforced as an equitable mortgage upon this subsidy, the right to which did not exist when the mortgage was made, does not appear to have been contemplated as liable to come into existence by the parties to the mortgage, and in fact came into existence two years afterwards—a right pertaining to the construction of the railroad, and not to its future operation—can only be asserted after some form of seizure of the subsidy or the property with which it was connected, or the institution of some proceeding to enforce the mortgage. While the mortgagee was standing aside and making no effort in any way whatever to enforce its mortgage even upon the tangible property of the mortgagor, and was leaving the mortgagor, so far as it (the mortgagee) was concerned, in full possession and control of all its property, including this subvention, the mortgagor had full power as against it (the mortgagee) to make or suffer any lawful transfer of this subvention, this right to receive the subsidy. *Gilman v. Ill. & Miss. Telegraph Co.*, 91 U. S. 603, 23 L. Ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144; *Freedman's Savings & Trust Co. v. Shepherd*, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163; *Zartman v. First Nat. Bk.*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; *Smith v. Eastern Ry. Co.*, 124 Mass. 154.

In this situation of affairs in 1900 the corporation was enjoined from prosecuting any business, and in 1903 all its assets, so far as the state of New Jersey controlled such assets, were vested in a receiver appointed by a New Jersey court. Moreover, this receiver forthwith proceeded to assert his right as the successor of the Coro & La Vela Railroad & Improvement Company to the only assets which he seems to have noticed, viz. the right, under the subvention from Venezuela and the ascertainment of the amount thereof by the proper Venezuelan officers, to recover through the "mixed commission" the amount of the subvention, viz. 270,000 bolivars. The receiver asserted his own right, not the right of the mortgagee, whom he disregarded, and the mortgagee and the bondholders stood by and allowed him to recover and receive the moneys.

Who in 1903 were the holders of this issue of bonds we are not informed. Venezuela appeared in 1907 as the owner of fourteen-fifteenths of them. Whether or not some time during a period of eight or ten years which preceded the bankruptcy pro-

ceedings in Venezuela in 1907 the valuable assets of the railroad were seized by Venezuela or some other party, we are obliged to infer that the mortgagee and the bondholders did not make the slightest effort to assert any rights under the mortgage in any way whatever. The entire effort to enforce the subvention and collect the amount thereof through the "mixed commission" was made by the New Jersey receiver without the slightest aid from the mortgagee or the bondholders. This successful operation of the receiver to recover money alleged to have been mortgaged for more than the amount thereof seems to have been the plainest possible assertion of a right in the receiver in derogation of any alleged right or claim of the mortgagee. Except in certain cases, a receiver of a dissolved or insolvent corporation administers only the equity of mortgaged properties. It would be a strange result, it seems to me, if this so-called equitable mortgagee could be allowed to stand by, assert no right in any way to this subvention, and then when the receiver primarily representing the general creditors had effected a recovery of the amount of the subvention, a sum amounting to over \$60,000, come into a court of equity and have its mortgage established as an equitable mortgage upon the \$60,000 under the terms of the mortgage relating to after-acquired property.

(6) The Republic of Venezuela through its representative and attorney, as we have seen, instituted the proceedings in bankruptcy against the Coro & La Vela Railroad & Improvement Company in 1907, ignoring the fact that long before the corporate existence of the alleged bankrupt had been terminated under the laws of New Jersey, under which the bankrupt corporation was created, and also ignoring the fact that the New Jersey Court of Chancery had placed this New Jersey corporation under an injunction restraining it from doing any business, and undertaking under the statute of New Jersey to place all the assets of said corporation, wherever situate, in the possession of a receiver then appointed. In the petition which the Republic of Venezuela filed in these bankrupt proceedings, she asserted that the mortgage to the Farmers' Loan & Trust Company was invalid as to property situate in Venezuela, and procured an adjudication to that effect. Reasons may be surmised why Venezuela in 1907 and 1908, being the holder of 139 or 140 of these bonds, preferred to have the mortgage declared void, and the Farmers' Loan & Trust Company excluded from consideration, provided the bonds themselves were adjudged valid obligations representing a valid debt, but in regard to this matter the evidence is unsatisfactory.

[4] The point to be brought out is that Venezuela in 1897 and 1898, in the most solemn manner in her own court, asserted the invalidity of this mortgage as a mortgage of property situate in Venezuela, and pro-

cured in that court an adjudication to that effect, and subsequently received as a general creditor holding 140 of the mortgage bonds the great bulk of the proceeds of the assets of the bankrupt administered in the Venezuela court, which assets were described in and were attempted to be covered by the mortgage; and now, having secured this result, Venezuela comes forward in the Court of Chancery of New Jersey and seeks to establish the validity in New Jersey of this same mortgage, and have this court enforce the mortgage as an equitable mortgage covering the proceeds of this subvention as after-acquired property. Of course, there is no inconsistency in the claim of Venezuela that this mortgage was inoperative upon property in Venezuela under Venezuelan law, but was valid and operative in respect of property situate in New Jersey under New Jersey law. The inconsistency, however, is made manifest when we consider the legal situs of the right of the Coro & La Vela Railroad & Improvement Company to receive this subvention of 270,000 bolivars under the supplemental concession made by Venezuela, in pursuance of its law enacted in 1896, a year after the mortgage was made. The Coro & La Vela Railroad & Improvement Company was transacting its business as a railroad corporation wholly in the state of Venezuela. The Venezuelan decree of bankruptcy declared that the corporation had its de facto domicile in that country, and as such was amenable to legal proceedings, including bankrupt proceedings in the Venezuelan courts. Is it not plain that this right under the supplemental concession of 1897 to a subsidy from the state of Venezuela had its situs as property in that state, where all money due under its terms was payable? The right to receive this money arose under a contract which was made between parties domiciled in Venezuela, and which was to be wholly performed in Venezuela.

It seems to me that it only makes confusion of thought to consider the situs of this money in the hands of the New Jersey receiver. This money was never mortgaged. This money represents an asset of the insolvent corporation which at all times had its situs in Venezuela. The government of the United States through a treaty with Venezuela procured an award from arbitrators sitting in Europe for the payment of a sum of money to the United States in satisfaction of the original claim of the Coro & La Vela Railroad & Improvement Company, which was established and "liquidated" at 270,000 bolivars in 1898 by the officials of Venezuela acting in that state. The mortgage either covered the after-acquired right to a subsidy or it did not. If the mortgage became equitably extended so as to cover this right to a subsidy, it must have covered that right when such right had its situs as property exclusively in Venezuela. If when the amount due under the subvention was liquidated

the obligation of Venezuela to pay that amount created an indebtedness, it still remains that the mortgagor "acquired" this indebtedness as property while domiciled in Venezuela; such indebtedness being payable in Venezuelan money in the state of Venezuela and by the sovereign state itself, which was and is located permanently within its territory. Notwithstanding the rules which in some respects are conflicting in regard to the legal situs of debts for various purposes, in my judgment this indebtedness of Venezuela to the Coro & La Vela Railroad & Improvement Company should be considered for the purposes of this mortgage, as having its situs in Venezuela. Venezuela, however, procured an adjudication in her court that the mortgage was void in Venezuela as to all property situate in that state. Such adjudication necessarily includes the proposition that the mortgage was void as to this indebtedness under the subvention, or, to state the matter otherwise, that under the laws of Venezuela this mortgage could not be allowed any force or effect whatever in its relation either to the subvention or the liquidated indebtedness under the subvention, both of which the Coro & La Vela Railroad & Improvement Company "acquired" long after the mortgage was made.

The fact that this money has come into the possession of the New Jersey receiver while giving the New Jersey court full jurisdiction over it does not affect its relation to the mortgage as an equitable mortgage of after-acquired property. The receiver might be a resident of another state, or even of Venezuela. Such a thing is legally possible.

The inconsistency of the claim of Venezuela in this court consists, I think, in the fact that, having procured in her own court a decree that this mortgage was absolutely void as to all property covered by it which was situate in Venezuela, she now endeavors to get a decree from this court precisely to the contrary. It is true counsel for Venezuela has made no argument and presented no theory in regard to the situs of the asset of this insolvent corporation represented by the fund in the receiver's hands. His argument seems, however, to assume that this fund represents property acquired by the mortgagor after the mortgage was given, situate in the state of New Jersey, or, at any rate, not situate in Venezuela.

It has not been argued that there has been any change of the situs of the original after-acquired subvention. Until this New Jersey corporation was dissolved by proclamation and its assets were vested in a receiver, and it was enjoined from acquiring property by the decree of this court, there certainly was no transfer from Venezuela to New Jersey or any other state of the situs of the subvention under the supplemental concession of 1897, or of the indebtedness of 270,000

bolivars which was ascertained to be due under the subvention in 1898. When under a treaty between the United States and Venezuela the "mixed commission" awarded the payment of the 270,000 bolivars with interest thereon in satisfaction of all claims under the subvention, such payment was directed to be made to the United States government, and the United States government then turned over the money to the New Jersey receiver. The Coro & La Vela Railroad & Improvement Company never "acquired" this money when it was paid to the United States government or when it was transferred to the New Jersey receiver. Years before the first payment by Venezuela on account of the award was made to the United States Government the Coro & La Vela Railroad & Improvement Company had been dissolved by proclamation, and had been rendered incapable of acquiring any property, and a receiver in New Jersey of all its assets had been appointed. The fact that in the award the Coro & La Vela Railroad & Improvement Company is mentioned as the claimant is a matter of no consequence. If at that time the right to this money was an asset within the jurisdiction of New Jersey, such asset was vested in the receiver, and it was the receiver that appeared as the actor in the memorial addressed to the "mixed commission" presenting the claim held originally by the Coro & La Vela Railroad & Improvement Company.

It is evident, I think, that Venezuela, in order to sustain her claim to a preferential payment on account of this mortgage, must necessarily take the position that the mortgage equitably covered this indebtedness of 270,000 bolivars, the situs of which was in Venezuela, when the right to receive it was "acquired" by the Coro & La Vela Railroad & Improvement Company, notwithstanding that Venezuela succeeded in procuring a decree in her own court that the mortgage as to all property situate in Venezuela was invalid.

[5] (7) I state the conclusion without argument and with a mere citation of a few authorities to sustain it that in this case the claimant (Venezuela) is obliged in equity to put in hotchpot the dividend which she received on her claim through the bankruptcy proceedings in Venezuela. The other creditors whose claims have been presented to the receivers in this case, and have been sustained, are entitled to stand on a level with the Republic of Venezuela. Wharton on Conflict of Laws, § 798; Phillips v. Hunter, 2 H. Black, 402; Banco de Portugal v. Waddell, L. R. 5 App. Cases, 161; In re Bonnaffe, 23 N. Y. 169.

This rule of equity and equality, which ap-

plies to the case of a creditor who has already received a dividend in foreign bankruptcy proceedings, is in somewhat clumsy language declared and enacted in the present United States bankrupt act (section 65 d).

2. The appeal of the Republic of Venezuela from the adjudication of the receiver allowing the claim of the Baiz estate is not sustained. I do not recall that there is any question as to the amount of that claim. If there is such question the matter can be determined upon settlement of the decree. The proof establishes the claim as something over \$70,000.

It is unnecessary to consider the status of the five bonds alleged to be held by the Baiz estate as collateral to its claim, because of the conclusion which I have reached that the bonds are not equitable liens on the fund, but only represent a general indebtedness. These five bonds therefore do not increase the claim of the Baiz estate amounting to over \$70,000, nor do they give to the Baiz estate any greater right or equity than that which the estate holds as an established general creditor.

3. The claim of Mr. Bright has received so much attention from court and counsel that an extensive discussion of it seems quite unnecessary. This claim was the subject of an oral opinion rendered upon its first presentation some time ago. My conclusion in regard to this claim has virtually been announced, and the grounds therefor have been indicated.

I may say briefly that this whole recovery from the Venezuelan government through the "mixed commission" is the product of the industry, skill, and zeal of this Washington lawyer, Mr. Bright, who originally took hold of the matter upon a somewhat indefinite, but contingent, retainer under an arrangement with Mr. Baiz in his lifetime, acting for the Coro & La Vela Railroad & Improvement Company. To ignore Mr. Bright's substantial claim and to turn over to these creditors the asset which he recovered under the circumstances proved would, in my judgment, be a flagrant violation of the plainest principles of equity and justice. If Mr. Bright had not succeeded he would have lost the fruits of all his protracted labors. My conclusion is that, in addition to the sum of \$6,000 which heretofore was allowed to him, he is justly entitled to the reduced sum which his counsel asked for on his behalf, viz. \$9,000.

If there are any matters overlooked in this somewhat complex mass of litigations disposed of by this memorandum, they may be brought to my attention upon settlement of the decree which will be upon notice.

(90 N. J. Law, 386)

HOFF v. PUBLIC SERVICE RY. CO.

(Supreme Court of New Jersey. June 22, 1917.)

*(Syllabus by the Court.)***1. CARRIERS §284(1)—CARRIAGE OF PASSENGERS—PROTECTION.**

A carrier owes to its passenger the duty of protecting him from the violence and insults of other passengers so far as this can be done by the exercise of a high degree of care, and it will be held responsible for its servant's negligence in this particular when by the exercise of proper care the act of violence might have been foreseen and prevented.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127.]

2. CARRIERS §284(1)—CARRIAGE OF PASSENGERS—PROTECTION.

The failure of the servant of a carrier to prevent the commission of an assault upon a passenger by another passenger, to be a negligent failure or omission, must be a failure or omission to do something which could have been done by the servant; and therefore there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it sufficiently long in advance of its infliction to have prevented it with the force at his command.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127.]

3. TRIAL §178—MOTION FOR DIRECTED VERDICT.

In passing upon a motion for the direction of a verdict, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the party against whom the motion is made, and to give to him the benefit of all legitimate inferences which are to be drawn in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403.]

4. CARRIERS §318(1)—CARRIAGE OF PASSENGERS—PROTECTION—NEGLIGENCE.

The fact that a passenger was intoxicated to the knowledge of the carrier's conductor, the fact that he had repeatedly insulted a woman passenger in the presence and hearing of the conductor, and immediately after the last insulting remark arose from his seat and struck her twice, all without any word of admonition or protest by the conductor or attempt upon his part to prevent the assault, although he was throughout within arm's reach of the drunken man, are circumstances from which the jury could properly infer that with proper care upon the part of the conductor the act of violence might have been foreseen and prevented.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

Appeal from Circuit Court, Hudson County.

Action by Helen Hoff against the Public Service Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued February Term, 1917, before TRENCHARD and BLACK, JJ.

Lefferts S. Hoffman and Leonard J. Tynan, both of Newark, and George H. Blake, of Jersey City, for appellant. Alexander Simpson, of Jersey City, for respondent.

TRENCHARD, J. This suit was brought by the plaintiff, a passenger on a trolley car of the defendant company, to recover for injuries sustained by her by reason of the failure to protect her as a passenger. The plaintiff had a verdict of the jury, and the defendant appeals.

The defendant complains of the refusal of the trial judge to direct a verdict in its favor, and the determination of the propriety of that action will dispose of every question raised and argued.

We are of the opinion that the refusal to direct a verdict was right. At the time when the motion was made, it was open to the jury to infer from the evidence, if they saw fit, the following matters of fact: The plaintiff, a young woman, boarded a closed pay-as-you-enter car of the defendant company on March 20, 1915, at First street, in Bayonne. It was late at night, and there were some men on the car who had been to a prize fight and who had been drinking. As she walked into the car, one of the men said, "Look who is here!" or "Look who is coming!" The plaintiff was agitated, and walked into the car without paying her fare, and afterwards got up and paid her fare. As she passed the man the second time he again spoke to her, saying, "Hello Chicken!" and addressed other insulting remarks to her as she was paying her fare. When the car reached Sixteenth street (where she wished to alight) as she passed the drunken man he said, "Hey, Chicken, take us along." The plaintiff resented this remark and turned and said to him, "You insulted me since I got on this car; if you insult me again I will smack your face." The man then arose from his seat and struck her twice, once in the breast and once in the face, severely injuring her. These insulting remarks made by the drunken man to and concerning the plaintiff were all in the presence of the conductor of the car (who stood within two feet of the man), and were heard by him, but he uttered not a word of admonition or protest and made no effort to protect the plaintiff from such insults, nor from the assault, although he knew that the man was intoxicated.

[1] Now the rule is that a carrier owes to its passenger the duty of protecting him or her from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and it will be held responsible for its servant's negligence in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. *Exton v. Central R. Co.*, 62 N. J. Law, 7, 42 Atl. 486, 56 L. R. A. 508; *Id.*, 63 N. J. Law, 356, 46 Atl. 1099, 58 L. R. A. 508.

It is unquestionably the right of a carrier to control a person who is behaving in an improper manner on its conveyance, or to eject a person who refuses to desist from ob-

jectionable and indecent conduct, or whose condition is such as to render his presence on the conveyance offensive or dangerous to the reasonable comfort or safety of other passengers. And, having this power of control or ejection, it is only reasonable to hold the carrier liable in case its negligent failure to exercise it results in injury to a passenger. The gist of the action for such injuries is the negligence of the carrier or its officers in charge of the conveyance.

[2] The negligent omission of the servant of a carrier to prevent the commission of a tort upon a passenger by fellow passengers being, as we have stated, the basis of the carrier's liability to a passenger injured by such tort, it follows, of course, that the failure to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or omission to do something which could have been done by the servant; and therefore there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command.

The defendant argues that the evidence conclusively shows: (1) That the man who committed the assault upon the plaintiff was not drunk; and (2) that its conductor had no reason to anticipate the assault, and hence that a verdict should have been directed in its favor. But this contention is not well founded in fact.

[3, 4] In passing upon the motion for a direction of a verdict for the defendant, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the plaintiff, and to give her the benefit of all legitimate inferences which are to be drawn in her favor. So considered, it was open to the jury to find both that the passenger who assaulted the plaintiff was drunk, and that the conductor had reason to anticipate the assault sufficiently long in advance to have prevented it. Of course, the mere fact that a passenger may have drunk to excess will not, in every case, justify his expulsion from the car. It is rather the degree of intoxication, and its effect upon the man, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right or imposes the duty of expulsion. In the present case the mere fact that the drunken man was not ejected is not a controlling circumstance. But the fact that the man was intoxicated to the knowledge of the conductor, the fact that he had repeatedly grossly insulted the plaintiff in the presence and hearing of the conductor, and immediately after the last insulting remark, arose from his seat and struck the plaintiff twice, all without

any word of admonition or protest by the conductor or attempt upon his part to prevent the assault, although he was throughout within arm's reach of the drunken man, are circumstances from which the jury could properly infer that with proper care upon the part of the conductor the act of violence might have been foreseen and prevented.

The judgment below will be affirmed, with costs.

(90 N. J. Law, 427)

**FAIRVIEW DEVELOPMENT CO. v. FAY.
FAIRVIEW HEIGHTS CEMETERY CO. v.
SAME.**

(Supreme Court of New Jersey. June 6, 1917.)

1. TAXATION — 208 — EXEMPTIONS — STATUTE — CONSTRUCTION.

Exemptions from general tax burdens of the state are not favored by the law, and will not be construed to exist unless the statute invoked to support them expresses the legislative intention in clear and unmistakable terms.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 343.]

2. TAXATION — 245 — EXEMPTIONS — STATUTE — CONSTRUCTION.

Under Rural Cemetery Act (P. L. 1851, p. 254) § 4, as amended by Laws 1883, p. 123 (1 Comp. St. 1910, p. 373), expressly providing that any portion of the property of a cemetery association not actually set apart and used for burial purposes shall be subject to taxation until it has been so set apart and used for actual purposes of burial, etc., portions of the property owned by a cemetery association and by a corporation holding such land in trust for a cemetery association remaining practically in its natural state and having no actual use or reasonable contemplated use for cemetery purposes, was subject to taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 415.]

Two writs of certiorari by the Fairview Development Company and the Fairview Heights Cemetery Company against Thomas Fay, collector, removing assessments and taxes by the borough of Fairview. Taxes affirmed.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

Weller & Lichtenstein, of Hoboken, for prosecutors. Edwards & Smith, of Jersey City, for defendant.

MINTURN, J. Two cases involving a claim of exemption from taxation are presented by these writs. In the first instance the borough of Fairview, in Bergen county, levied a tax on the assessed value of the property of the Fairview Heights Cemetery Company, comprising about 50 acres, for the year 1913. The prosecutor is organized under the cemetery act (C. S. p. 370), and owns and manages a cemetery comprising about 65 acres, 50 acres of which are not in use for cemetery purposes. The undeveloped section remains practically in its natural state. It was assessed and is taxed by the borough, from which assessment the prosecutor ap-

pealed to the county board, which board sustained the assessment and tax. The insistence of the prosecutor is that the entire tract in use and out of use is exempt from taxation.

[1] The cemetery acts have frequently been before this court, in various aspects of litigation, and from the views expressed as the result of those adjudications, the following principles may be gleaned. The fundamental rule pervading all exemptions from the general tax burdens of the state is that they are not favored by the law, and will not be construed to exist unless the statute invoked to support them expresses the legislative intention in clear and unmistakable terms. *Mausoleum Builders v. State Board*, etc., 88 N. J. Law, 592, 96 Atl. 494; *Cooper Hospital v. Camden*, 70 N. J. Law, 478, 57 Atl. 260; *Rosedale Cemetery Co. v. Linden*, 73 N. J. Law, 421, 63 Atl. 904.

[2] In enacting legislation of this general character whose main and fundamental purpose is the protection under proper management of the bodies of the dead, it is not reasonable to assume that the power conceded by the Legislature to cemetery associations, for that purpose, is so comprehensive in scope as to enable them to purchase tracts of territory, and to hold them unimproved and undeveloped for any purpose, out of the taxable assets of township, county, and state assessments. If such a construction of this legislation were to be admitted, there would appear to be no limit to the bounds of the ownership of the corporation, within the terms prescribed in the act, except the financial carrying capacity of the corporation itself, and the following case involving a claim for exemption upon this ground will enable one to perceive how even that protective limitation may be evaded in actual practice.

The mere organization of a company, under the cemetery acts, and the purchase of land thereafter, without expenditure to improve or develop it, but the mere passive holding of the land, as it were by a species of mortmain, is not enough to bring the claim for exemption within the language and spirit of this legislation. Ownership and use seem to be the legislative tests upon which an exemption from taxation of this character may legally be based. Section 4 of the rural cemetery act in 1883 was amended by a proviso reading that any portion of the property of any such company "not actually set apart and used for burial purposes, shall be subject to taxation," etc. L. 1883, p. 123. The amendment of 1889 made no change in this feature of the legislation. P. L. 1889, p. 418. These various enactments are in pari materia, and must be considered together as presenting a cohesive and consistent legislative scheme declaratory of a state policy of setting aside, by a separate species of tenure, through corporate agencies, sections of land, free from taxation, when such lands are actually in use, or within reasonable contem-

plation of being used for the purpose declared in the statute. *Mt. Pleasant Cemetery v. Newark* (Err. & App.) 98 Atl. 448; *Rosedale Cemetery v. Linden*, supra; *Mausoleum Builders v. State Board* (Err. & App.) 100 Atl. 236. The locus in quo in this controversy presents no indicia of actual use or of reasonably contemplated use, within the statutory purview, which will enable us to bring it within such a classification, and the tax in question should therefore be affirmed.

The second writ removes an assessment and tax, upon 26 acres of undeveloped land, situated on the Bergen turnpike and owned by the Fairview Development Company, a corporation not organized under the cemetery acts, but organized for business purposes under the general corporation act. It obtained title to the locus in quo in 1910, by a conveyance from the Fairview Cemetery Company, for \$1 and other valuable considerations; and thereafter an agreement was executed between the parties to the deed setting out the true consideration of the conveyance (\$300,000), and a covenant was entered into with the cemetery company that the latter company might sell burial plots from the land conveyed, upon certain prescribed terms, as to price and conditions. In effect the instrument constitutes a holding agreement, by which the title to the locus in quo is vested in the development company, subject to certain uses, the covenant being in all formal essentials not unlike the common-law covenant to stand seised to uses (4 Kent's Com. p. 492); the purpose apparently being to vest in the development company, in trust, such lands as the cemetery company could not legally hold by reason of the limitation contained in the cemetery acts.

The land in question is part of 40 acres lying west of the Bergen turnpike, and eleven acres of meadow land lying on the east side thereof. Nothing has been done to improve or develop this acreage for cemetery uses; and it lies in its natural state, impressed with a cemetery use only, so far as the trust expressed in the agreement may impose that character of user upon it. The situation thus presented in principle is not unlike that presented in the case of *Mt. Pleasant Cemetery v. Newark* (Err. & App.) 98 Atl. 448, and the recent case of *Mausoleum Builders, etc., v. State Board* (Err. & App.) 100 Atl. 236.

We do not deem it necessary to determine the power of a company, formed under the general corporation act, for general business purposes, to exercise the power and claim the privileges expressly conferred by exceptional legislation upon a distinctive species of corporation, created for the purpose of performing a quasi public function, and existing specially for the purpose therein prescribed, and for no other; nor do we deem it necessary to determine the further inquiry mooted in the briefs of counsel, whether in such a situation the lands in question can be prop-

erly considered as being held for cemetery uses, within the meaning and purview of the cemetery legislation.

It must suffice to declare as we have done in the previous instance, and for the reasons there advanced, that the locus in quo was not at the time of the imposition of this tax devoted to and in use for cemetery purposes, and for that reason this tax also must be affirmed.

(88 N. J. Eq. 210)

DE LUKACSEVICS v. DE LUKACSEVICS
(No. 40/759.)

(Court of Chancery of New Jersey. June 29, 1917.)

DIVORCE ⇨206—**WRIT OF SEQUESTRATION**—**ALIMONY**—**CLAIMS OF CREDITORS**.

The execution of writ of sequestration in a wife's divorce suit places in custodia legis the property of defendant husband sequestered to satisfy or compel the satisfaction of the wife's claims for alimony, and no rights can be acquired in the property except subject to the operation of the writ, the lien under which extends to alimony due at the time of issuance and alimony subsequently accruing.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 741.]

Suit for divorce between Adelaide L. De Lukacsevics and Charles De Lukacsevics, wherein judgment creditors of defendant husband and the holder of his note applied to obtain payment of their respective debts from a fund in the possession of an officer of the court under a writ of sequestration. Applications denied.

Edward A. Levy, of Passaic, and Frederick A. Haisley, of Newark, for creditors. Frederick S. Taggart, of Westfield, for petitioner.

LANE, V. C. These are applications on behalf of certain judgment creditors of the defendant, Charles De Lukacsevics, and also on behalf of the holder of a note made by defendant, upon which note is indorsed a statement that certain automobiles hereinafter mentioned are held as collateral, to obtain payment of their respective debts from a fund in the possession of an officer of this court under a writ of sequestration. Pending this suit the court made an order for temporary alimony. The defendant had appeared. The order was not complied with. The defendant left the state. Thereupon the court, under the provisions of the twenty-sixth section of the divorce act of 1907 (2 Comp. St. 1910, p. 2038), issued its writ of sequestration under which the sheriff took in his possession two automobiles and certain other personal property of the defendant and entered upon real estate of the defendant and sequestered the rents and profits. Thereafter a receiver was appointed who superseded the sheriff, and who now has in his possession one of the automobiles and a fund of some \$200, the balance of the proceeds of sale of the other automobile, the remainder of the money hav-

ing been used to pay alimony to the petitioner up to the 14th of April, 1917.

The real estate is said to be worth in excess of \$10,000, but in its present condition is unrentable, and it will be necessary to expend in the neighborhood of between \$400 and \$500 for taxes and repairs. All of the judgments were obtained after the writ of sequestration had been issued and executed. Under the cases of Wood v. Price, 79 N. J. Eq. 1, 81 Atl. 1003, affirmed 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210, and Close v. Close, 28 N. J. Eq. 472, it seems to me that there is no doubt but that the execution of a writ of sequestration in cases of this nature places in custodia legis the property of the defendant sequestered to satisfy or compel the satisfaction of the claims of the wife for alimony, and that no rights can be acquired in the property except subject to the operation of the writ. The lien under the writ extends not only to alimony due at the time of the issuance of the writ, but alimony which may subsequently accrue. I think that the property sequestered is no more than reasonably necessary, in view of the circumstances, to retain for the purpose of satisfying or compelling satisfaction of the claims of the petitioner. This results in the application of the creditors being denied. So far as the owner of the note is concerned, he took no chattel mortgage or other instrument which might be recorded evidencing his lien, nor did he take actual or constructive possession of the chattels, so that the lien under the writ is superior to his rights, if any he has.

(90 N. J. Law. 438)

E. I. DU PONT DE NEMOURS POWDER CO. v. SPOCIDIO.

(Supreme Court of New Jersey. June 28, 1917.)

1. **MASTER AND SERVANT** ⇨411—**WORKMEN'S COMPENSATION ACT**—**INJURIES**—**FINDINGS OF FACT**.

On certiorari by the employer to review judgment for an injured servant seeking compensation under the Workmen's Compensation Act (P. L. 1913, p. 302), petitioner's injuries, their nature and extent, held sufficiently to appear from the trial judge's findings of fact.

2. **MASTER AND SERVANT** ⇨412—**WORKMEN'S COMPENSATION ACT**—**AGREEMENT FOR COMPENSATION**—**QUESTION OF LAW AND FACT**.

Whether there was an agreement between an employer and its injured employé to make compensation under the Workmen's Compensation Act without resort to the court of common pleas by petition was a mixed question of law and fact.

3. **MASTER AND SERVANT** ⇨419—**WORKMEN'S COMPENSATION ACT**—**AGREEMENT FOR COMPENSATION**—**REVIEW**.

In view of the Workmen's Compensation Act, § 5, providing that no agreement between the parties for a lesser sum than that which may be determined by the judge of the court of common pleas to be due shall operate as a bar to the determination of a controversy upon its merits, or to the award of a larger sum, where it shall be determined by the judge that the amount agreed upon is less than the injured

employés or his dependents are entitled to receive, where an employer and its injured employé within a year of the accident agreed as to the compensation to be paid the employé, the latter was not barred from filing a petition at any time to have the agreement reviewed by the court upon its merits; the clause of the statute prescribing the one-year limitation period in which a petition must be filed or an agreement made for compensation not being applicable to the situation.

Certiorari to Court of Common Pleas, Salem County.

Proceedings for compensation under the Workmen's Compensation Act by James Spocidio, opposed by the E. I. Du Pont De Nemours Powder Company, the employer. On certiorari by the employer to review the judgment. Judgment affirmed.

Argued November Term, 1916, before SWAYZE, MINTURN, and KALISCH, JJ.

J. Forman Sinnickson, of Salem, for prosecutor. Bergen & Richman, of Camden, for respondent.

KALISCH, J. The question to be determined upon this review is whether the respondent, the petitioner in the court below, filed his petition for compensation under the Workmen's Compensation Act within the time required by law.

The petitioner was in the employ of the prosecutor. On the 25th day of January, 1915, the petitioner, while engaged in transporting cans of cotton from one part of the respondent's plant to another, fell and broke his left arm in three places and suffered a permanent injury.

On the 3d of March, 1916, the petitioner filed his petition for compensation. On the 24th of March, 1916, the petitioner by leave of the court filed an amended petition. In this latter petition he sets forth that after the accident mentioned he and the prosecutor, agreed upon the amount of compensation due to the petitioner for his injuries; that petitioner was informed that he would receive one-half of his wages until he was able to return to work, and after the expiration of 15 days from the date of the accident the prosecutor paid the petitioner \$5.28 per week, being 50 per cent. of his weekly wages, and which sum it paid him weekly until the 5th day of April, 1915, when he was told by the prosecutor's physician to return to work, but that the petitioner was not physically able to return to work at the time, not being entirely cured of his injuries and suffering from a permanent disability as a result of his injuries.

The petition further sets forth that the prosecutor paid petitioner's medical expenses, including an operation performed on petitioner's arm; that the petitioner is not entirely cured of his injuries and is suffering from a permanent disability of his left arm; that he has not been fully compensated under the statute for his injuries received from the accident; that the agreement as to the

compensation made between him and the prosecutor had not been approved of by the judge of the court in which the petition is filed, or a judge of any other court of common pleas, in any county of this state; and that a dispute has arisen between the prosecutor and petitioner as to the compensation due the latter.

The fact that the petitioner's injuries were due to an accident arising out of and in the course of his employment is not disputed by the prosecutor.

The trial judge found that as a result of the accident the petitioner broke his left arm in three places, and that as a result thereof the petitioner suffered a temporary injury to his arm extending from the time he was injured (January 25, 1915) until the 5th day of July 1915, and that there is a permanent injury to the whole arm of 10 per cent.; that after the petitioner was injured he was first taken to the office of Dr. Lummlis, and was there treated and subsequently to the Cooper Hospital in Camden; that the petitioner was told to go to the plant of the prosecutor and he would be paid one-half of his wages; that petitioner went to the prosecutor's plant and received the sum of \$5.28 per week from the prosecutor until the 7th day of April, 1915, a total of \$42.24; that the petitioner was then given a note by Dr. Lummlis advising him to go to the plant for work, the doctor stating that he would be able to do light, but no heavy, work; that the petitioner returned to the plant and did work from the 13th day of April, 1915, until the 13th day of May, 1915, when he was discharged from the plant, and has not been at work there since.

From these facts the trial judge further finds that there was an agreement and money actually paid to the petitioner under the agreement to the amount as above stated from the time of the petitioner's injury. The trial judge further made the following findings: That the prosecutor is entitled to a credit on the amount awarded of \$5.28 a week for a period of eight weeks, or a total credit of \$42.24; that the prosecutor is not entitled to a credit of \$43.25 paid for medical expenses after the first two weeks, nor what was paid to the petitioner for the time he worked from April 16, 1915, to May 13, 1915, since there was no proof of any agreement that it should be payment under the act; that the petitioner is entitled to compensation at the rate of \$6.12 per week for 21 weeks from the 8th day of February, 1915 (being 2 weeks after the accident happened), for the temporary injury to his arm, and that subsequent thereto the petitioner is entitled to the sum of \$6.12 per week for a period of 20 weeks for the permanent injury to his arm.

The prosecutor seeks a reversal of the judgment on two grounds: (1) That the proceeding is barred by the statute of limitations; (2) that "the court of common pleas did not find and determine the facts from

which the legality of the award by said court can be determined."

[1] Taking up for consideration the second point made by the prosecutor first, we think that by the facts above set forth it sufficiently appears what the injuries to the petitioner were, their nature and extent.

As to the position taken by the prosecutor that the proceeding of the petitioner is barred by the statute which provides that in case of personal injuries or death all claims for compensation on account thereof shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under the act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided by the act (P. L. 1913, p. 314) because the petition in the present case was filed after a year had elapsed from the time of the accident, we find to be untenable.

It is plain that the statute provides three methods which may be pursued within the year for the purpose of fixing compensation to be paid to an injured employé: (1) By a petition filed by the injured workman; (2) by a petition filed by the employer of the injured workman; (3) by an agreement between employer and employé.

In the present case there was testimony which afforded a reasonable basis for the finding of the trial judge that there was an agreement for compensation to be paid petitioner between the prosecutor and petitioner, under the statute; for there was testimony to the effect that the prosecutor, after the lapse of two weeks from the time of the accident, agreed to and did pay to the petitioner periodically one-half of the petitioner's weekly wages for some time until the prosecutor requested the petitioner to go to work, which the petitioner did, but was soon afterward discharged. It also appears that the prosecutor paid the medical expenses, amounting to \$43, incurred as a result of the petitioner's injuries.

[2] Whether there was an agreement between the parties to make compensation, under the statute, without resorting to the court of common pleas, by petition, was a mixed question of law and fact, and we think there was evidence justifying the finding of the trial judge that there was such an agreement.

It is clear from the plain reading of the statute that, where the parties agree as to the compensation to be made, the Legislature contemplated that such agreement should be wholly regulated and controlled by the provisions of the statute both as to the duration of time and the amount of compensation to be periodically paid.

Paragraph 20 of the Workmen's Compensation Act (P. L. 1913, p. 309) expressly provides, *inter alia*, that no agreement between the parties for a lesser sum than that which

may be determined by the judge of the court of common pleas to be due shall operate as a bar to the determination of a controversy upon its merits, or to the award of a larger sum, where it shall be determined by the judge that the amount agreed upon is less than the injured employé or his dependents are properly entitled to receive.

[3] In the present case it appears that the petitioner was earning \$12.24 per week at the time of the accident, and therefore the petitioner was entitled to receive \$6.12 per week instead of the periodic weekly payment of \$5.28, as agreed upon between the parties. It further appears that under the statute the petitioner was entitled to compensation for temporary injuries for the period of 21 weeks, and for permanent injuries for 20 weeks, and that all the prosecutor paid to the petitioner under the agreement were periodical payments of \$5.28 for 8 weeks. Thus it becomes manifest, in view of the excerpt from paragraph 20, above quoted, that the petitioner was not barred from filing a petition in order to have the agreement made between the parties reviewed by the court, upon its merits at any time.

As it appears in the present case that there was an agreement made between the prosecutor and the petitioner as to the compensation to be paid by the former to the latter, the one-year limitation clause in which a petition must be filed or an agreement made for compensation is obviously not applicable to the situation presented here. And this is also equally true as to the nonapplicability of the clause of paragraph 21 of the act of 1913, which provides that an agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative, on the ground that the incapacity of the injured has subsequently increased or diminished, because the petition under consideration is not filed on either ground. But if we turn to paragraph 18 of the act, we find that provision is made by it for filing a petition in case of a dispute or failure to agree upon a claim for compensation between employer and employé, etc., and that either party may submit the claim, both as to questions of fact, etc. Paragraph 20 points out in general terms what the petition shall set forth in case of a dispute.

We cannot be led to believe that it was the purpose of the Legislature to put agreements entered into within the year between employer and employé as to the compensation to be paid upon a less secure footing than an award made upon a petition filed within the year. One of the objects of the act is to secure to the parties an inexpensive method of procedure. Of course, an agreement between employer and employé involves no expense whatever and saves to the employer the expense of a hearing, etc. If in the

present case either party had filed a petition within the year, and the court had made an award of compensation, there could not be the slightest doubt under the express language of the statute that either party would have the right in case a dispute arose regarding the compensation, etc., to file a petition after the expiration of the year. The statute has put the agreement between employer and employé on the same plane as an award made by the court upon petition, after a hearing, etc. And this course was manifestly necessary in order to prevent one of the prime objects of the act from being frustrated.

For it is obvious that, if the argument made by counsel for the prosecutor should prevail, then in a case where an employé is entitled to compensation for a period extending beyond 52 weeks, and enters into an agreement with his employer, as he may under the statute, then if at the end of the year, after the last payment due for the year has been paid, the employer should choose to discontinue any further payments, the employé would be remediless under the statute. We cannot give our sanction to such a construction without violating the plain language and spirit of the act and extinguishing one of its vital features.

The judgment will be affirmed, with costs.

(88 N. J. Eq. 41)

WIEBKE v. DE WYNGAERT. (No. 41/159.)
(Court of Chancery of New Jersey. July 5, 1917.)

1. MORTGAGES ~~559~~(9) — FORECLOSURE BY ACTION—CONCLUSIVENESS OF JUDGMENT.

A mortgagor's purchaser who was defendant in foreclosure suit was concluded by the decree therein in a suit to recover deficiency, and cannot question amount decreed to have been due, but could show that he was not liable for the deficiency.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1607, 1608.]

2. MORTGAGES ~~561~~—SUIT FOR DEFICIENCY — SUFFICIENCY OF ANSWER—FRAUD.

In suit for deficiency after foreclosure, the mortgagor's purchaser should have set forth in his answer the fraudulent representations in taking the mortgaged property, which he relied on, showing what the representations were, who made them, and by what authority.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1609-1621.]

3. FRAUD ~~10~~ — MISREPRESENTATIONS BY AGENT—SALE OF MORTGAGED PROPERTY.

If the only representation was the opinion or unauthorized statement of a corporation's agent as to legal effect of writing which defendant signed in purchasing mortgaged property from the corporation, this was not a fraudulent representation by the company.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 11.]

4. MORTGAGES ~~561~~—SUIT FOR DEFICIENCY — NECESSITY OF PLEADING SEPARATE RELEASES.

In a suit for deficiency after mortgage foreclosure, the mortgagor's purchaser should have

stated in his answer that he relied on two separate releases given at separate times.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1609-1621.]

5. MORTGAGES ~~561~~—SUIT FOR DEFICIENCY — DIVIDING ANSWER INTO SEPARATE DEFENSES.

In a suit for deficiency after mortgage foreclosure, dividing of the answer into separate defenses like separate pleas at law is not warranted by Chancery Act of 1915 (Act March 30, 1915 [P. L. p. 194]) § 49, providing that when several causes of action are stated in the bill, the answer must refer each defense to the cause of action to which it is pleaded.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1609-1621.]

Suit by Friedrich Wiebke against Joseph E. De Wyngaert for deficiency after mortgage foreclosure. Application to strike out parts of answer. Objectionable paragraphs stricken out, and defendant given 10 days in which to file further answer.

Hugo Woerner, of Newark, for the motion.
George E. Clymer, of Newark, opposed.

STEVENS, V. C. [1] This is an application to strike out parts of an answer. The situation is this: The King-Marsac Company mortgaged to complainant, and then sold the mortgaged premises to defendant, who is alleged to have assumed payment of the mortgage. Complainant foreclosed. The decree adjudged \$2,030 to be due on the mortgage debt. There was a sale on execution from which \$500 was realized. Complainant now sues for the deficiency. His right so to sue was adjudged on the application to strike out the bill. The defendant, who as owner was defendant in the former suit, is concluded by the decree therein, as far as the decree extends. He cannot question the amount decreed to have been due, but he is not concluded from showing that he is not liable for the deficiency.

In view of the former adjudications the so-called first defense is stricken out, and also paragraphs 1, 2 and 10 of the second defense.

Paragraph 3 is ambiguous. The denial may relate to the fact of acceptance or to the written indorsement.

[2, 3] It is an elementary rule of pleading that if defendant answers he must answer fully. This rule has not been observed in the so-called fourth defense. The fraudulent representations relied on should have been set forth if they were other than the statement that the officers and agents of the corporation represented to the defendant that he would not be liable on his assumption unless he was the owner of the premises at the date of the maturity of the mortgage. The answer should have stated what the representations were, who made them, and by what authority. If the only misrepresentation was the opinion or unauthorized statement of some agent of the company as to the legal effect of the writing which de-

defendant signed, that was not a fraudulent representation made by the company.

[4] Paragraph 1 of the third defense and the fifth defense are to some extent repetitions. The second is broader than the first. If defendant relies upon two separate releases given at different times, he should have so stated. Paragraph 1 should be stricken out, and the so-called fifth defense may be amplified to correspond to the fact.

[5] I know of no authority for dividing the answer into separate defenses like separate pleas at law, as defendant has done in this case. It can only lead to repetition and prolixity, and is not warranted by section 49 of the Chancery Act of 1915.

The objectionable paragraphs will be stricken out, and the defendant given 10 days in which to file a further answer.

(88 N. J. Eq. 204)

FISHER v. T. W. GRIFFITH REALTY CO.
et al. (No. 41/282.)

(Court of Chancery of New Jersey. June 23, 1917.)

**INJUNCTION ~~C~~128—RESTRAINING BREACH OF
PROPERTY OWNER'S RESTRICTIVE AGREEMENT
—SUFFICIENCY OF EVIDENCE.**

In a suit to prevent erection of an apartment house in violation of a restrictive building agreement entered into by property owners, evidence held insufficient to warrant relief, the character of the locality having greatly changed since the execution of the agreement, so as to render it apparent that buildings of the class contemplated thereby would not be built upon the land, and several buildings having already been erected thereon contrary to the intent of the agreement, making enforcement inequitable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278.]

Bill by Jacob W. Fisher against the T. W. Griffith Realty Company, and another. Decree dismissing bill.

Edgar H. Pinneo, of Newark, for complainant. Saul Cohn, of Newark, for defendants.

LANE, V. C. The bill is filed by the owner of a piece of property on the westerly side of Lincoln avenue in the city of Newark between Elwood and Delavan avenues to prevent the erection of an apartment house upon the southwest corner of Elwood and Delavan avenue, a point distant from complainant's house, exclusive of the width of Delavan avenue, of 103⁸/₁₀ feet. The right of complainant is based upon an agreement entered into on or about the 1st of February, 1894, between the then owners of the property extending from a point 100 feet south of Elwood avenue on the westerly side of Lincoln avenue to a point 200 feet south of Delavan avenue and extending for a depth of 200 feet, restricting such property to use only for the erection of private residences. The agreement referred to was without consideration other than mutual promises. For

the purposes of these conclusions I have determined to adopt the construction put upon the agreement by Vice Chancellor Howell in a memorandum handed down by him upon the application for preliminary injunction, which construction is to the effect that the agreement as entered into would prevent the erection of the structure proposed by the defendants. The complainant acquired his title by deed from Mary Ella Eagles, dated March 27, 1909. Mrs. Eagles and her husband, who owned the property in 1894, were parties to the agreement providing for the restrictions. The street next westerly to Lincoln avenue is Summer avenue. Originally the restricted property, or most of it, had been owned by what is now the Phillips estate. The Phillips homestead is on the plot, a portion of which is now sought to be used for apartment house purposes. The estate also owned property on the easterly side of Summer avenue, and at or about the date the agreement was entered into between the property owners on the westerly side of Lincoln avenue a similar agreement was entered into by the property owners on the easterly side of Summer avenue, among whom was Mrs. Eagles, the predecessor in title of the complainant. At the time the respective agreements were entered into the property in the immediate neighborhood was developed in substantially the same manner. From Chester avenue, the street next to Delavan southerly, to Elwood avenue, on the westerly side of Lincoln avenue, there were either private residences or vacant lots. The buildings were substantial, and by that I mean structures costing in the neighborhood of from \$10,000 to \$15,000, and requiring the outlay of considerable money each year to properly maintain. The remaining property in the block bounded by Elwood, Summer, Delavan, and Lincoln was undeveloped. On the easterly side of Lincoln avenue from Chester to Elwood there were a number of private dwellings which had been built for some time. These dwellings, while not as substantial as those on the westerly side, yet housed persons who had been in the neighborhood for years, and offered no obstacle to the consummation of the plan which I think those who entered into the restrictive agreement had in mind. Nowhere on the restricted area or in the neighborhood were there two-family houses or apartments. The neighborhood was not only strictly residential in the sense that almost all who lived therein owned their own houses, but residential in the sense that the houses erected might be termed "residences" in contradistinction to "dwellings." Considerable of the land on the easterly side of Lincoln avenue was undeveloped.

There is no doubt in my mind but that the purpose of the parties to the agreement of 1894 was to keep the neighborhood strictly

residential, a neighborhood in which a person who could afford to invest anywhere from \$10,000 to \$15,000 in a residence, and who could afford to keep up such a residence, would be glad to live. Whether that hope and anticipation would be achieved or not depended, of course, upon whether the undeveloped property and the property unrestricted in the immediate neighborhood should be developed upon a corresponding scale. The restricted area now under consideration comprised only a comparatively short distance on one side of a street. It is apparent, of course, that if the other side of the street facing the restricted area should be developed in a manner not consistent with the plan of those entering into the agreement, the purpose of the agreement would fail. So also if the property on the side streets, Delavan and Elwood, or on the street in the rear, Summer, should be developed in a manner not consistent with the plan, this would mean its failure.

That the parties, at the time, realized that it was necessary for the success of the plan that the easterly side of Summer avenue should be restricted I think is indicated by the fact that similar restrictions were entered into by the owners on that street. To these restrictions, as I have above stated, Mrs. Eagles, the predecessor in title of the complainant, was a party. I might say that originally the Phillips estate owned the entire block bounded by Summer, Delavan, Lincoln, and Elwood avenues, approximately one-half of the block bounded by Summer, Chester, Woodside, and Elwood avenues, Woodside being the street next westerly to Summer, approximately one-half the block bounded by Mt. Prospect, Elwood, Woodside, and Chester avenues, Mt. Prospect being the street next westerly to Woodside, and also a large portion of the block bounded by Lincoln, Delavan, Summer, and Chester avenues; it also owned six lots north of Elwood opposite the block between Woodside and Summer. Conceding that the restrictions under discussion would prevent the erection of the proposed structure of the defendants, the question is whether or not the neighborhood has so changed as to make it inequitable for this court to enforce the provisions of the agreement. I think it has.

Facing complainant's house there have been erected on the northeast corner of Delavan and Lincoln avenues 2 two-family houses. The remainder of the easterly side of the street is built up in approximately 21 one-family houses. These houses, however, are not comparable in any respect with those built upon the westerly side of the street. While they are private dwellings, each of them covers practically an entire lot, this with few exceptions, and they are of much cheaper construction than those which apparently were contemplated by the parties to the agreement. The street next easterly to Lincoln avenue is Washington, and between

Delavan and Elwood it has developed into a business section with some two-family houses and dwellings. Some of the dwellings on the easterly side of Lincoln avenue, between Delavan and Elwood, are houses which have been removed from the westerly side of Washington. The easterly side of Summer avenue, which is the westerly boundary of the block in which complainant's house is situate, is built up substantially in two-family houses. There are 10 two-family houses and 9 single houses, excluding the dwelling on the southeasterly corner of Summer avenue and Elwood, and the dwellings are of the class that I have described as having been built on the easterly side of Lincoln avenue. On the easterly side of Summer avenue, extending from the southeasterly corner of Summer and Delavan, and on the property formerly of the Phillips estate, there have been erected a row of houses, 8 of which are two-family and 1 of which is three-family. On the easterly side of Lincoln avenue south of Delavan there are a number of private dwellings of the character that I have described as having been erected on the easterly side of Lincoln between Delavan and Elwood, and there are also 2 two-family houses between Delavan and Chester. An apartment house has been built on one of the corners of Summer avenue and Delavan, I think on the southwest corner. Two apartment houses have been built on the northerly side of Delavan avenue between Summer and Lincoln, and these abut in the rear upon complainant's property.

On the restricted territory it is conceded that there has been built on the southerly side of Delavan avenue, opposite the apartment houses last referred to, at least 1 two-family house. I find from the testimony that all 3 two-family houses on the southerly side of Delavan avenue are within the restricted territory. These two-family houses, while around the corner from the complainant, are but a comparatively short distance from him. On the westerly side of Lincoln avenue, two doors from the complainant, there have been erected 5 houses which in the testimony have been called duplex or double, in contradistinction to two-family. Each house has one roof, one set of outside walls, a partition in the middle, so that it may be used for two families. Whether they may be called technically private dwellings or not, I think unquestionably their erection was a violation of the spirit of the restrictive agreement. They are not in accordance in any wise with the plan of the parties to that agreement, but are rather in harmony with the present development of the territory in the immediate vicinity.

A survey of the territory in the vicinity indicates clearly that it has grown into principally a place for two-family and apartment houses and small dwellings. On the northeasterly corner of Washington avenue and Delavan a block away from complainant's

house, is a 23-family apartment house; about a quarter way down the block, on the easterly side of Washington avenue, between Delavan and Chester, approximately two blocks from complainant's house, is a large apartment house. The testimony taken before me demonstrates that the property within the restricted area is no longer salable for residential purposes. Two witnesses, one of whom was Alfred S. Skinner, Esq., who owned the property on the northwesterly corner of Lincoln avenue and Delavan, and was a party to the agreement, testified that when they came to dispose of their houses they could do so only at great sacrifice. They and several other witnesses testified generally to the change in the neighborhood, attributing it to the construction of the car barns, the influx of small salaried employes, the noisome smells which came sometimes from the Passaic river, and the establishment of the Mt. Prospect and Forest Hill section of the city of Newark. It is to be observed that Mt. Prospect avenue is the next street westerly to the vicinity under consideration, but it lies on a ridge, and there is no access to it from the vicinity in question short of, I think, half a mile, except by stairs, so that there is a clear line of demarcation between the Mt. Prospect section and this vicinity. No evidence worthy of serious consideration was produced which would indicate that the restricted property was at the present time salable for residential purposes. The effect of the development has been such as to completely surround this small restricted territory on one side of a street by a class of houses not at all in harmony with those contemplated by the restrictive agreement. I cannot see that the erection of the building in question will irreparably or in any wise injure the complainant, in view of the character of the neighborhood. The apartment house to be erected is of the latest type; the rent will be approximately \$10 a room, which means that there will be a class of people inhabit it who can afford to pay from \$40 to \$60 a month and upwards; the general character of the neighborhood will not be changed. The apartments are not so numerous as that there will be an excess of noise and confusion. Taking the territory as a whole, I think that the apartment will be a betterment rather than a detriment. It must not be overlooked that neither the complainant nor his predecessor in title protested against the erection of the two-family houses on the southerly side of Delavan avenue within the restricted territory, and contrary to the restrictive agreement, nor against the erection of what have been called the double houses on the westerly side of Lincoln avenue within the restricted territory, and I think within the restrictive agreement as construed by Vice Chancellor Howell, nor that there are at the present time two apartment houses on

the northerly side of Delavan avenue, which, while not within the restricted territory about complainant's house, nor that complainant's predecessor in the title, although a party to the Summer avenue agreement, acquiesced in its violation. The ultimate fate of all of this territory is that it will be built up with two-family and apartment houses. It is only a question of time. My recollection is that the complainant, or, if not the complainant, one of the witnesses who owned one of the residences, testified that a man would be foolish to buy into the territory for residential purposes in the sense contemplated by the restrictive agreement.

My conclusion is that it would be inequitable for this court to at this time enforce the restrictive agreement, and that the case is within that of *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11.

I will advise a decree dismissing the bill, but, under the circumstances, the dismissal will be without costs. This case is determined, of course, solely upon the facts now before the court, and I express no opinion as to whether, if an attempt were made to erect in this neighborhood a tenement house or a factory, or if an attempt were made to violate the restrictive agreement in any other manner, this court would or would not intervene.

(90 N. J. Law, 448)

DEPARTMENT OF HEALTH OF NEW JERSEY v. MONHEIT.

(Supreme Court of New Jersey. June 19, 1917.)

(Syllabus by the Court.)

COURTS \S 176½ — SMALL CAUSE COURTS — REVIEW — PENALTIES UNDER FOOD LAWS — JURISDICTION.

In an action to recover a penalty for violating the provisions of the pure food law (Act April 20, 1915 [P. L. p. 665] § 1), commenced in the small cause court, the court of common pleas of the county, in which the action is brought, has jurisdiction to hear the case on appeal.

Certiorari to Court of Common Pleas, Cumberland County.

Proceeding by the Department of Health of the State of New Jersey against Hirsch Monheit. There was a judgment for plaintiff, and defendant brings certiorari. Affirmed.

Argued June Term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Josiah Stryker, of Trenton, and John W. Wescott, Atty. Gen., for respondent. Alvord & Tusso, of Vineland, for prosecutor.

BLACK, J. The question to be decided in this case is the jurisdiction of the common pleas court, to hear a case on appeal, in a suit brought in the small cause court, before a justice of the peace, to recover a penalty for a violation of the pure food statute. The defendant was charged with the viola-

tion of section 1 of the supplement (P. L. 1915, p. 665) to the pure food act (Revision, P. L. 1907, p. 485). He was found not guilty by a jury in the small cause court. The department of health appealed from the decision to the court of common pleas in the county of Cumberland. That court found the defendant guilty and imposed a penalty of \$50, hence a writ of certiorari was allowed, which draws in question the jurisdiction of the court of common pleas. The grounds of attack are that the suit should have been commenced before the justice of the peace, sitting as a magistrate, and that, by the original pure food act (P. L. 1901, p. 194, § 16), parties aggrieved may appeal to the circuit court of the county, wherein said action is had. Manifestly, this view of the prosecutor is untenable, as is clearly demonstrated by the following provisions in the statute law of the state. Thus the revised pure food act, above cited (P. L. 1907, p. 485, § 40; 2 Comp. Stat. of N. J. p. 2574, § 40), provides:

"Any and all penalties prescribed by any of the provisions of this act shall be recovered in an action of debt. * * * The pleadings shall conform, in all respects, to the practice prevailing in the court in which any such action shall be instituted."

And in the supplement above cited (P. L. 1915, p. 665, § 5), the statute under which the action in this case was brought, it is provided:

"Such penalties may be sued for and recovered by the same boards and officials, and in the same manner as provided for the recovery of penalties in the act to which this act is a supplement."

The act speaks of a court; the only court which a justice of the peace is empowered to hold is the small cause court; by the small cause court act (P. L. 1903, p. 251, § 80), as amended in 1904 (P. L. 1904, p. 72, § 80) it is further provided that from any judgment which may be obtained in those courts, except such as may be given by confession, an appeal is given to the court of common pleas of the county.

The case of *Harman v. Board of Pharmacy*, 67 N. J. Law, 117, 50 Atl. 662, however, is decisive of this case; there the prosecutor was convicted of violating the pharmacy act; the suit was to recover a penalty under the act, as in this case; the same point was there made, that the suit should have been commenced before a justice of the peace sitting as a magistrate, and not in the small cause court; that case held the action was properly commenced in the small cause court.

We therefore conclude that the judgment of the court of common pleas had jurisdiction to hear the case on appeal. The judgment of that court was regular. The rules applying to summary convictions have no application; it is not necessary that the evidence in the court be set out or the proce-

dures conform to the rules governing summary convictions.

The judgment of the common pleas court of Cumberland county is affirmed, with costs.

(30 N. J. Law, 520)

MAYOR AND ALDERMEN OF JERSEY CITY v. THORPE.

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §260(2) — REVIEW—WRIT OF ERROR.

Writs of error do not run directly to this court from the order of a Justice of the Supreme Court reviewing the summary convictions of criminal courts in municipalities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 568-571.]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §1030(2)—APPEAL—ARGUMENT OF CONSTITUTIONAL QUESTIONS.

An appellant has no right to argue in an appellate court constitutional questions based on a stipulation entered into for the purpose of such appeal, which raise for the first time questions not raised in the court below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2620.]

Appeal from Supreme Court.

Herbert A. Thorpe was convicted in the First Criminal Court of Jersey City of violating an ordinance against littering the streets with refuse matter, and from a judgment of the Supreme Court affirming the conviction, the defendant appeals. Dismissed.

Frank W. Hellenday, of Jersey City, for appellant. John Bentley, of Jersey City, for appellee.

GARRISON, J. The appellant was convicted by the First criminal court of Jersey City of a violation of the provisions of section 4 of an ordinance entitled, "An ordinance concerning the littering of the streets with refuse matter," in that the said appellant did distribute hand circulars upon Summit avenue in said city.

Having been thus convicted, the appellant made application to the Justices holding the circuit of the Supreme Court in Hudson county for the purpose of having his said conviction set aside, if found to be illegal, as provided by the act establishing criminal courts in municipalities in counties of the first class.

The said Justice having heard said appeal, "under the statute in such case made and provided" ordered that the conviction of the said appellant be affirmed. This order the appellant seeks to bring before this court by an appeal.

[1] It is too plain for argument that such an appeal is without legal foundation, not only for the reason that an appeal has not been substituted for a writ of error in the review of the judgments of courts of criminal

jurisdiction, but for the more substantial reason that a writ of error does not run directly to this court from the orders or judgments of a legislative agency such as the Justice of the Supreme Court is under the provisions of the statute under which the proceedings below were had.

Certiorari is the proper remedy; the constitutionality of the statutory review by a legislative agency is sustainable solely upon the ground that orders or judgments so made may be supervised by the Supreme Court upon certiorari. *Newark v. Kazinski*, 86 N. J. Law, page 59, 90 Atl. 1016.

The present appeal, therefore, brings nothing before this court, and must consequently be dismissed.

[2] It may be well to point out to counsel for the appellant that he has no right to argue in an appellate court constitutional questions based upon a stipulation entered into for the purpose of such appeal, and raising for the first time in the appellate tribunal questions that were not raised in the court below. N. J. Digest, sec. 91, et seq.; *State v. Shupe*, 88 N. J. Law, page 610, 97 Atl. 271.

(90 N. J. Law, 349)

ELLIS v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. June 28, 1917.)

(*Syllabus by the Court.*)

1. EXECUTORS AND ADMINISTRATORS ⇨456(3) —COSTS—MOTION TO NON PROS.

In an action brought by an administrator under the "Death Act" (2 Comp. St. 1910, p. 1907) a motion to non pros., if granted, is without costs against the plaintiff.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1951-1954, 1957, 1958.]

2. CASE FOLLOWED.

The case of *Kinney, Adm'r, v. C. R. R. Co.*, 34 N. J. Law, 273, followed.

Action by Alfred H. Ellis, administrator, against the Pennsylvania Railroad Company. Motion to non pros. Rule entered without costs to plaintiff.

Argued February term, 1917, before GARRISON, PARKER, and BERGEN, JJ.

John A. Hartpence, of Trenton, for the motion. Warren Dixon, of Jersey City, opposed.

GARRISON, J. This is a motion for non pros., and for the allowance of costs in favor of defendant against the plaintiff, who is an administrator suing under the "Death Act." The court granted the non pros., but reserved the question of costs, with leave to defendant to submit a memorandum in support of the application therefor against the administrator, which has now been handed to the court.

In his memorandum counsel frankly admits that in the case of *Kinney v. C. R. R. Co.*, 34 N. J. Law, 273 (1870), this court de-

cided that a defendant could not recover costs against an administrator in an action brought under the "Death Act." He also admits that for nearly 50 years this rule has been applied in this court. He then argues with much force that the rule is wrong for the reason that the administrator does not sue in the right of his intestate, but in the right of statutory beneficiaries. We express no opinion as to whether the original decision of this question was correct or not, for the reason that it is the judicial habit of this court under the circumstances now before us to follow its own previous decision, leaving it to the Court of Errors and Appeals to review the legal merits of such decision.

The rule of non pros. may be entered without costs.

(90 N. J. Law, 350).

MALONE v. ERIE R. CO.

(Supreme Court of New Jersey. June 28, 1917.)

(*Syllabus by the Court.*)

DISMISSAL AND NONSUIT ⇨7(1)—RIGHT TO TAKE NONSUIT.

When a judge is trying a case with a jury, his opinion as to the sufficiency of the plaintiff's proofs, whether communicated to counsel or not, does not deprive the plaintiff of his right to submit to a voluntary nonsuit at any time before the jury has retired to consider its verdict or the judge has commenced to address the jury for the purpose of directing a verdict.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 15, 18, 19, 22.]

Appeal from District Court.

Action by James O. Malone against the Erie Railroad Company. There was a judgment for defendant, and plaintiff appeals. Reversed, and venire de novo awarded.

Argued February term, 1917, before GARRISON, PARKER, and BERGEN, JJ.

Thomas J. Brogan, of Jersey City, for appellant. Collins & Corbin, of Jersey City, for appellee.

GARRISON, J. This was an action for damages for the negligent transportation of skins whereby they heated and were in part spoiled.

A motion to direct a verdict was made, during the argument of which the court several times gave expression to a view of the case favorable to the granting of the motion, and when these expressions had reached a point that satisfied counsel for the plaintiff that in the view of the court his evidence was not sufficient to make a case for the jury, he said to the court that he would take a nonsuit. This right the court denied him, and after an exception had been taken to this ruling the court addressed the jury and directed them to render a verdict for the defendant.

We think that it was error to deny the plaintiff's motion to submit to a voluntary

nonsuit made before the jury had retired to consider its verdict and at a time when it had not been directed what verdict to render.

Section 160, Practice Act (3 Comp. St. 1910, p. 4103), takes away this right only "after the jury have gone from the bar to consider their verdict." This applies to district courts. *Greenfield v. Cary*, 70 N. J. Law, 613, 57 Atl. 269; *Ciesmelewski v. Domalewski*, No. 432, November term, 1916, 100 Atl. 179.

In this latter case there was no jury and the judgment pronounced by the court was in effect after the consideration of its verdict.

Wolf Company v. Fulton Realty Co., 83 N. J. Law, 344, 84 Atl. 1041, was also a case tried without a jury and the judge had begun to announce his decision, which, of course, assumed that the jury element in the court had considered its verdict.

Mr. Justice Swayze in this case said that the situation was closely analagous to one where the trial judge has directed the jury to render a verdict for the defendant, but the verdict has not in fact been rendered, in which situation the plaintiff has no right to submit to a nonsuit, citing *Dobkin v. Dittmers*, 76 N. J. Law, 235, 69 Atl. 1013.

The theory of this line of cases is that, when the jury has been directed as to its verdict no consideration by the jury is contemplated; hence the offer to submit to a nonsuit comes too late. The essential feature of these decisions is the legal effect of a binding instruction delivered by the court to the jury. The attempt in the present case is to give to the opinion expressed by the judge to counsel during the argument of the defendant's motion for a direction the same effect that the cases cited give to a judicial direction to the jury to render a verdict for the defendant.

The confusion of these two totally different things loses sight of the fact that at common law where compulsory nonsuits were unknown voluntary nonsuits were based upon the communication to counsel of the judge's opinion adverse to the plaintiff. So far, therefore, from such a communication preventing the plaintiff's submission to a voluntary nonsuit, it normally led to it.

In the early case of *Runyon v. Central Railroad Company*, 25 N. J. Law, 556, while our practice as to nonsuits was still in the making, this court said:

"The counsel did, indeed, resist the motion slow, and the question whether the plaintiff

had made a case which entitled him to recover was fully argued; but after the court had given the opinion that the plaintiff ought to suffer a nonsuit, he did not insist upon his right to have the matter submitted to the jury. In such case the party is considered as technically suffering a voluntary nonsuit."

There is nothing in our judicial rule as to compulsory nonsuits that alters the common-law right to submit to a voluntary nonsuit. If that right has been abridged it is by our statute which preserves the right until the jury has retired to consider its verdict or some judicial action has been taken, the legal effect of which is to control the action of the jury.

It results, therefore, that when a judge is trying a case with a jury, his opinion as to the sufficiency of the plaintiff's proofs, whether communicated to counsel or not, does not deprive the plaintiff of the right to submit to a voluntary nonsuit at any time before the jury has retired to consider its verdict or the court has addressed the jury for the purpose of directing its verdict.

It may well be that, when the judge has commenced to address the jury for the purpose of directing a verdict for the defendant, he cannot be interrupted by counsel for the plaintiff. That question does not arise in this case, where the court had not commenced to address the jury, but had expressed his opinion in a running colloquy with counsel.

Having reached the conclusion that there was legal error in the denial of the plaintiff's right to take a voluntary nonsuit, there must be a reversal of the judgment of the district court and the award of a *venire de novo*.

(90 N. J. Law, 669)

DUFFY v. MAYOR AND ALDERMEN OF CITY OF PATERSON et al. (No. 147.)

(Court of Errors and Appeals of New Jersey. June 18, 1917.)

Appeal from Supreme Court.

Proceeding by William J. Duffy against the Mayor and Aldermen of the City of Paterson and others. From a judgment for defendants, the prosecutor appeals. Affirmed.

Ward & McGinnis, of Paterson, for appellant. Edward F. Merrey, of Paterson, for appellees.

PER CURIAM. The judgment under review will be affirmed, for the reasons given in the per curiam in *Wilhelmina Koetwegen v. Mayor and Aldermen of the City of Paterson et al.*, 101 Atl. 253, No. 149, of the present term of this court.

(90 N. J. Law, 898)

CAHILL v. TOWN OF WEST HOBOKEN.

McCARTHY v. SAME.

(Supreme Court of New Jersey. July 9, 1917.)

*(Syllabus by the Court.)*MUNICIPAL CORPORATIONS §126—OFFICES—
ABOLITION—REMOVAL OF INCUMBENT.

While a municipal office may be abolished by the municipality for economical or beneficial reasons, and the incumbent deprived of his office, although protected by a tenure of office statute, that end cannot be accomplished by a removal from office contrary to the terms of such a statute, when such action leaves the office in existence, and only brings about the creation of a vacancy to which another may be appointed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 298-300.]

Certiorari by Thomas A. Cahill and by Patrick McCarthy against the Town of West Hoboken to review two resolutions of the common council of the defendant Town. Writs allowed and resolutions set aside.

Argued February term, 1917, before GARRISON, PARKER, and BERGEN, JJ.

John J. Fallon, of Hoboken, for prosecutors. Frederick K. Hopkins, of Hoboken, for defendant.

BERGEN, J. In each of the foregoing cases a rule was allowed requiring the defendant to show cause why a writ of certiorari should not be allowed to review a resolution adopted by the common council of the defendant on the 1st day of January, 1917, rescinding a previous resolution of the council appointing the two prosecutors to the positions of patrolmen, and abolishing the positions which they held. On the argument, the cases being argued together, it was agreed by counsel that, if the court determined to allow the writs, it should decide the merits of the controversy as if on final hearing without further argument.

It was stipulated that the defendant is incorporated under "An act providing for the formation, establishment and government of towns," approved March 7, 1895 (P. L. p. 218), and has since been governed by the provisions of that act; that the defendant on April 12, 1916, adopted an ordinance establishing a police department, which provided that the police force of the town should consist of one policeman (to be called patrolman) for every 700 inhabitants of the town; that the two prosecutors were appointed in December, 1916, to fill vacancies, one caused by death, and the other by retirement; that the appointments took effect immediately, and the two prosecutors qualified and entered upon the performance of their duties as patrolmen and served as such until January 6, 1917; that on January 1, 1917, the defendant adopted a resolution rescinding the resolution appointing the two prosecutors and purporting to abolish the office of patrolman held by the

prosecutors; that no charges were preferred against either for incapacity, misconduct, nonresidence, disobedience of just rules and regulations, or otherwise, nor was either given a hearing on any charge or charges; that the preamble of the rescinding resolution recited that the police force was sufficient without the appointment of the prosecutors, and that such appointments were unwarranted and imposed an unnecessary and unjust burden on the taxpayers; and that the purpose of the resolution was the promoting of the efficiency of the department and economy in the administration of the town's affairs.

The power of the defendant to provide for the establishment of a police force is to be found in section 50 of an act entitled "An act providing for the formation, establishment and government of towns" (P. L. 1895, p. 239; C. S. 5532, § 375), which declares that the council shall have power by ordinance to establish and provide for the appointment, removal, duties, and compensation of a police force—

"provided, that such police force (excluding officers) shall not exceed more than one policeman to every eight hundred inhabitants: And provided further, that no policeman or police officer shall be removed except for neglect of duty, misbehavior, incompetency or inability to serve."

There is nothing in this record which tends to show that the police department of the town of West Hoboken was not lawfully established under the statute above referred to.

It authorizes the establishment of a police force not to exceed one to every 800 inhabitants, and to that extent the number of patrolmen is fixed by law, and appointments beyond that number would be unlawful. The fact that the present ordinance fixed the number at one to every 700 inhabitants does not destroy the ordinance establishing a police force and leave the municipality without such force; for, if the number of patrolmen is not properly fixed by the ordinance, the statute fixes it, and within that limit all appointments would be legal, and in this case the appointments including the prosecutors do not exceed that limit. We are of opinion that the police force was lawfully established.

If the police department was lawfully established, then the statute entitled "An act respecting municipal police departments lawfully established in this state and regulating the tenure and terms of office of officers and men employed in said departments" (P. L. 1915, p. 688) applies. That statute (section 1) provides that in municipal police departments lawfully established in this state the officers and men employed therein shall hold their offices and continue in their employment—

"during good behavior, efficiency and residence in the municipality wherein they are respectively employed; and no person shall be removed from office or employment in any such police

department or from the police force of any such municipality for political reasons or for any other cause than incapacity, misconduct, nonresidence or disobedience of just rules and regulations established or which may be established for the police force in such department."

Section 3 of the same act enacts that no person, whether officer or employé in any police department, shall be removed from office except for a cause provided in the first section of the act—

"and then only after written charge or charges of the cause or causes of complaint shall have been preferred against such officer or employé, signed by the person or persons making such charge or charges and filed in the office of the municipal officer, officers or board, having charge of the department in which the complaint arises, and after the charge or charges shall have been publicly examined into by the proper board or authority upon reasonable notice to the person charged, it being the intent of this act to give every person against whom a charge or charges for any cause may be preferred under this act, a fair trial upon said charge or charges and every reasonable opportunity to make his defense, if any he has or chooses to make."

This act prevents the removal of any patrolman from a police department for political reasons, or for any other cause except incapacity, misconduct, nonresidence, or disobedience of rules, and then only after a public hearing upon written charges, and it is not pretended in this case that any charges were preferred or any hearing allowed.

It is urged that when the purpose of the removal of a patrolman is alleged to be in the interest of economy he may be removed arbitrarily by resolution and without a hearing accorded to him. We do not agree to this proposition, for the office cannot be abolished by resolution; it is created either by statute or ordinance, and must be abolished in a like solemn manner. If it be granted that the municipality has the power to reduce the number of patrolmen, it must be done by ordinance fixing the number at less than the statutory ratio.

The statute declares, among other things, that the council shall have power to provide by ordinance for the removal of the police force, and there is nothing in this record which shows any such ordinance; all that appears is that the prosecutors, lawfully appointed, are removed from their offices without the hearing which the statute gives them, leaving the offices in existence to be filled with partisans of the majority of the council. If this can be done, then there is nothing to prevent other removals in like manner until the entire force is discharged and their places filled by new appointments, all by resolution of the council. Under such conditions the allegation of economy as an excuse for a removal of an incumbent without a hearing affords an easy means to avoid the statute.

Mr. Justice Scudder, speaking for the Court of Errors and Appeals in *Newark v. Lyons*, 53 N. J. Law, 632, 23 Atl. 274, said

statutes of this class are intended "for the protection of incumbents while the offices continue," and that the power to declare all offices vacant cannot be exercised "for the purpose of appointing another to the vacated office unless it be for good cause shown against the incumbent, for this would be a removal within the prohibition of the statute." In that case it was held that a power existed to abolish useless and antiquated offices and that "the tenure of the office is qualified by the continuance of the office." In *Sutherland v. Jersey City*, 61 N. J. Law, 436, 39 Atl. 710, *Paddock v. Hudson Tax Board*, 82 N. J. Law, 360, 83 Atl. 185, *Van Horn v. Freeholders of Mercer*, 83 N. J. Law, 239, 83 Atl. 894, and *Boylan v. Newark*, 58 N. J. Law, 133, 32 Atl. 78, the office was abolished. The rule seems to be settled in this state that, while a municipal office may be abolished by the municipality for economical or beneficial reasons, and the incumbent deprived of his office, although protected by a tenure of office statute, that end cannot be accomplished by a removal from office contrary to the terms of such a statute when such action leaves the office in existence and only brings about the creation of a vacancy to which another may be appointed. The resolution under review does nothing more than create a vacancy which the council may at any time fill, and is not supported by the cases cited by the defendant holding that an office may be abolished in the public interest even where the incumbent is protected by a tenure of office act.

Whether, under any circumstances, in view of the act of 1915 (P. L. p. 688), a police officer can be removed without written charges, and a hearing accorded as provided in that act, it is not necessary to decide in this case, for here the office remains in existence, and the result is the removal of the prosecutors from office without charges, or the hearing to which they are entitled, and without an effective abolition of the offices which they held.

The writs will be allowed and the resolution under review will be set aside.

(30 N. J. Law, 414)

MARTIN et al. v. WOODBRIDGE TP., MIDDLESEX COUNTY, et al.

(Supreme Court of New Jersey. June 19, 1917.)

(Syllabus by the Court.)

1. TAXATION — 665 — TAX SALE — ARREARS.

Where lands have been sold by the proper officer to make taxes in arrears levied against land, under the provisions of section 53 of the act of 1903 (4 Comp. St. 1910, p. 5134), it is lawful to add to the taxes in arrears for the current year, to make which a sale has been ordered, all arrears of taxes for which the land has been sold and purchased by the taxing district to the extent necessary to pay the cost of redemption, whether the taxes accrued prior to

that date when the act of 1903 went into effect or thereafter.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1349.]

2. TAXATION \Leftrightarrow 667—COLLECTION—MISTAKE—COSTS.

The fact that the township clerk in furnishing the collector with a statement of all taxes in arrears erroneously included an installment of a sewer assessment not yet due will not vitiate the sale when it appears that the collector before making the sale corrected the error by deducting the installment and did not include it in the amount for which the sale was made, nor will the fact that the clerk included in the amount certain costs not properly chargeable make the sale illegal if in fact the sum for which the land was sold was not more, excluding the fees, than the true amount due.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1350.]

3. TAXATION \Leftrightarrow 662—TAX SALE—ADVERTISE—MENT.

Proof by the collector making the sale that he posted advertisements thereof in five of the most public places of the taxing district is not overcome by the fact that two of the places were sometimes closed during business hours.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1342.]

4. TAXATION \Leftrightarrow 658(3) — TAX SALE — NOTICE OF SALE.

It is not necessary that the notice of sale for unpaid taxes put up by the collector shall contain a statement that the land will be sold in fee if no one should bid for a shorter term. The statute makes it the duty of the officer to make the sale in fee if no one shall bid for a shorter term, and it is not necessary to advertise the terms of the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1335.]

Certiorari by Albert Martin and Ephraim Cutter, executor of the will of Samuel Dally, deceased, against the Township of Woodbridge, in the County of Middlesex, and the Valley Company to set aside a tax sale. Sale confirmed.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Charles C. Hommann, of Perth Amboy, for prosecutors. J. H. T. Martin, of Newark, for defendants.

BERGEN, J. On the 31st day of July, 1916, the collector of the township of Woodbridge, in the county of Middlesex, sold at public auction a parcel of real estate for unpaid taxes to the defendant Valley Company in fee for the sum of \$2,077.13, and thereupon issued to the purchaser a certificate of the sale as authorized by statute. The prosecutors were allowed a writ of certiorari to review the proceedings upon which the tax certificate is based, and also for an order setting aside the sale and certificate. The material facts, which are not in dispute, are as follows: The land was assessed in the name of the owner, Charles S. Demarest, for the years 1894 to 1911, inclusive, and in the name of the estate of Samuel Dally for the years 1912 to 1915, inclusive; that in 1895 the land was sold for taxes assessed for the year 1894, and were

also sold in 1898, 1900, and 1908 for the taxes of the next preceding year, the township of each case being the purchaser, the sales in 1895, 1898, and 1900 being for the period of 30 years, and those of 1904 and 1908 being in fee. After the foregoing sales the township continued to levy the taxes against the land in the name of the owner, and no taxes being paid after the sale of 1908, nor the land redeemed from the effect of the prior sales, the township committee, March 15, 1916, adopted a resolution directing the collector to sell the land to raise the taxes levied for the year 1914 and for all other taxes in arrears.

The township clerk certified to the collector the amount of unpaid taxes for the years 1894 to 1915, inclusive, and also an unpaid sewer assessment. When the collector came to make the sale, it was found that of the sewer assessment \$33 was not then due, and the collector deducted that sum from the amount certified, and added to the balance thus ascertained the expenses and costs of the sale, making a total of unpaid taxes, interest, sewer assessment and expenses of \$2,077.13, for which the land was sold and purchased by the Valley Company.

The sale was made by virtue of section 53 of the tax act of 1903 (C. S. 5134), which provides that, where land has been sold and purchased by a taxing district, the subsequent taxes shall be levied as if no sale had been made, and shall remain a paramount lien on the land, and that no further sale shall be made unless directed by the governing body of the municipality assessing the taxes, in which case the clerk of the taxing district shall certify to the collector the amount required to be paid to redeem the land from the previous sales, and that the collector shall sell the land for the amount thereof to be added to the tax for the current year. In the present case the sale was made for taxes levied in the year 1915, and to it was added all unpaid taxes; the result being to raise a sufficient sum to pay all taxes in arrears, and also to redeem the land from the prior sales to the taxing district.

[1] The first reason which the prosecutor argues why this tax sale should be set aside is that the certificate of the township clerk of the amount to be added to the current taxes included the tax for the years between 1894 and 1903, the date of the act which permitted the adding of anterior unpaid taxes to those of the current year for which the sale was to be made, it being urged that the act of 1903 had no application to taxes accrued previous to that date, because, although section 53 of the act of 1903 declares that:

"Where a parcel of land has been purchased and is held by the taxing district under a tax sale not redeemed, all subsequent taxes * * * shall be and remain a paramount lien on the land and be added to the purchase money and shall be paid before the land can be redeemed from the sale"

—It is provided by section 66, C. S. 5141:

"This act shall take effect on the twentieth day of December 1903, and its provisions shall extend to proceedings on and after that date, relating to taxes assessed in the year 1903, but not to proceedings relating to taxes assessed in prior years."

Section 66 appears to be a legislative declaration that the act of 1903 shall not apply to proceedings relating to taxes theretofore assessed, and that the collection of prior unpaid taxes cannot be enforced in the method provided by section 53, which relates to cases where at a prior tax sale the taxing district became the purchaser. By the statute of 1902 (P. L. 447) all unpaid taxes assessed after the 1st day of January, 1898, were made a first lien for and during the period of five years next after the date on which they become delinquent, and by section 2 of the same act taxes thereafter assessed were made a paramount lien for five years, but this act was repealed in 1903 (P. L. 446) with the proviso that the repealer should not affect the proceedings or remedies relating to taxes assessed prior to 1903. The effect of this repealer was to restore the status existing prior to its adoption, the limitation of five years being removed, and the proceedings and remedies relating to taxes assessed prior to December 20, 1903, restored.

By the statute of 1879 (P. L. 298; C. S. 5188) it was enacted that, where real estate theretofore or thereafter sold for nonpayment of taxes, assessments, or water rents was purchased by the taxing district, or by any person in its behalf, subject to the right of redemption, the taxes, assessments, and water rents should continue to be assessed upon the land for subsequent taxes, but that it should not be necessary to sell the land for nonpayment, and that such taxes and assessments should remain a first lien upon the lands to be paid before it could be redeemed, but this does not provide for a sale for unpaid taxes for which a sale had been made, so the situation is that, as to taxes assessed prior to 1903 and for which the land assessed had been sold and purchased by the taxing district, the right of redemption, and not of resale, existed, and the only question now presented is whether in making a sale under section 53 of the tax act the cost of redemption may be added to the amount of the current taxes for which a sale is to be made. We do not perceive any difference between selling to make a current tax subject to a right of redemption from a prior sale and a sale to make current taxes which shall include the amount necessary to pay the redemption fee. The sale made under the act of 1903 is in fee unless the bidder will take it for a shorter term, and the purchase of a fee subject to the cost of redemption would require the payment of the latter cost; for it cannot be assumed that the Legislature ever intended by implication what it has not expressly declared, viz. that a sale of land for unpaid taxes for a current year under

the act of 1903 would deprive the taxing district of its right to claim and be paid the taxes in arrears for which it had purchased the land and was holding subject to the owner's right of redemption. We are therefore of opinion that, when a sale of land is made under the act of 1903, the taxing district may add to the current tax for which a sale is about to be made the amount required to be paid to redeem the land from the effect of all prior sales at which a taxing district became the purchaser. In matters of taxation all doubtful questions must be resolved in favor of the right of the state to enforce the payment of taxes levied to sustain the government.

The next point is that, as some of these taxes are more than 20 years in arrears, there is a presumption that the tax has been paid. In support of this we are referred to *In re Commissioners of Trenton*, 17 N. J. Law J. p. 23, in which it is reported that Mr. Justice Abbett said that as to taxes:

"A presumption of payment arises after a lapse of 20 years if there is no evidence to repel it, and to show that the debt is still unsatisfied."

Without conceding that such a presumption arises against the state, it is a sufficient answer in this case to say that such a presumption, if it exists, is rebutted by the admitted fact that none of the taxes now in dispute have ever been paid. But, aside from this, all of these taxes beyond the 20-year limit have been enforced by a sale and purchase by the taxing district for the period of 30 years, which has not yet expired, and therefore it is still the owner subject to the owner's right of redemption if that right has not yet expired.

[2] The next reason argued is that the certificate of the clerk included an installment of a sewer assessment amounting to \$33 not yet payable, and that this amount, although deducted by the collector before the sale, was included in the certificate of the clerk. It is not denied that this amount was not included in the sum for which the sale was made, and the mere fact that there was a mistake in the amount claimed in the certificate of the clerk which was corrected before the sale and it made for the true amount will not vitiate the sale; for the owner was in no way injured because he could have redeemed before the sale by paying the correct amount for which the sale was made.

Another reason urged is that the certificate of the clerk included certain items of cost which were greater than that allowed by law; that is, that 40 cents was charged in each case as a fee in excess of the legal amount. This does not make the sale illegal when it appears, as it does here, that the amount for which the property was sold, owing to other slight miscalculations, was not more than was due the township, excluding these alleged illegal fees, there being nothing to show that the owner offered to redeem for any sum due less these fees,

or that he made any objection thereto prior to the sale, or that he is now willing to redeem by paying the amount due.

The next reason urged is that the lands could not be advertised for sale to make the taxes of 1915 until after July 1, 1916, prior to which time the land could not be sold for unpaid taxes for the year 1915. This claim is not sound, for there is nothing in the statute which prevents the advertising of the land for sale prior to the 1st day of July in each year; all that the statute forbids is a sale prior to that date, and in this case a sale was not made until after that date.

[3] The next reason urged is that the advertisements of the sale were not put up in five of the most public places of the taxing district. It is not urged that the places were not public in the general sense of that word, but that two of the places were sometimes closed during business hours. The affidavit of the collector sets out that they were set up "in five or more of the public places of said township" as follows, one on a pole on the north side of Green street, "in front of the premises described in said notice," one in the post office, one in the printing office, one in a real estate office, one in a grocery store, and one in the public room of a hotel, giving the name of each. We think this is sufficient proof, and must be taken as true, unless it is rebutted in a more substantial manner than appears in this case. They are all in a fair sense public places, and should be taken as such under this proof in the absence of anything which conclusively shows that they were not such public places as satisfies the law. What is a public place would depend upon the state of mind of any one objecting to a public sale by any officer which required the posting of such notices.

[4] The next reason urged is that the notice of sale did not state that the land would be sold in fee if no one would bid for a shorter term. Such a statement in the advertisement of the sale is not necessary, for the law fixes the duty of the officer, which is to sell in fee unless some bidder at the sale is willing to pay the arrears in consideration of an estate less than a fee, and the report expressly states that no person bid for a shorter term than a fee, nor was it necessary, as next urged, that the return of the collector should state that it was required to sell the whole of the land, for that sufficiently appears when, as he did, he reports he sold the entire tract to make the arrears.

The next and last reason urged is that the affidavit of mailing does not state that a copy of the advertisement was mailed to the owner of the land. The land belonged to the estate of Samuel Dally, deceased, of whose will Ephraim Cutter was the executor, and his affidavit shows that he mailed to Cutter as the executor of the estate of Samuel Dally, deceased, assessed as owner, a copy of the

notice, which was inclosed in an envelope, with the postage prepaid, addressed to the said Ephraim Cutter. This is sufficient.

There not appearing in this record any sufficient reason why the certificate of sale should be set aside, the proceedings and sale will be confirmed, with costs.

(88 N. J. Eq. 288)

In re MCGAW. (No. 3766.)

(Prerogative Court of New Jersey. July 7, 1917.)

EXECUTORS AND ADMINISTRATORS ~~§~~314(3)—ORPHANS' COURT—DECREEING DISTRIBUTION—TESTATE ESTATES.

The orphans' court, under the power and direction in 3 Comp. St. 1910, p. 3877, § 173, to adjust, order, and make just distribution "in accordance with the directions and provisions of the last will," cannot decree distribution to an assignee of a legatee.

[Ed. Note.—For other cases, see Executors and Administrators. Cent. Dig. §§ 1279, 1280, 1297.]

Appeal from Orphans' Court, Atlantic County.

In the matter of the appeal of Abble V. McGaw from a decree of orphans' court. Affirmed.

John G. Horner, of Camden, for appellant. Thompson & Smathers, of Atlantic City, for respondent.

LEAMING, Vice Ordinary. This is an appeal from a decree of distribution made by the orphans' court of Atlantic county. The decree was made under authority conferred by 3 Comp. Stat. p. 3877, § 173. Orphans' Court Act (P. L. 1898, p. 781).

This statute, originally passed in 1872 (P. L. 1872, p. 47), by its terms confers upon the orphans' court the power to make decrees of distribution in cases of testacy.

The decree in question directs the money in the hands of the executor to be paid to the residuary legatee named in the will. That disposition of the money is admittedly in accordance with the provisions of the will. But appellant herein was at that time the equitable owner of the money by reason of a written assignment thereof theretofore made to him by the residuary legatee. Appellant accordingly sought in the orphans' court a decree of distribution which should give recognition to the assignment and direct the money paid to him. The judge of the orphans' court adopted the view that the statute only authorized a decree in conformity to the provisions of the will and refused to recognize the assignment for that reason.

The only question raised on this appeal is therefore whether the orphans' court, after the allowance of the final accounts of an executor, may, upon application of a party in interest for a decree of distribution, adjudge that funds payable to a certain legatee by the terms of the will shall be paid to a person to

whom the legatee has theretofore assigned his rights in the legacy.

Prior to the act of 1872 above cited the orphans' court was empowered to make decrees of distribution in cases of intestacy only. That power was conferred by the act of March 2, 1795 (Pat. L. p. 153), and has continued to this time with but slight changes in the language of the original act. Comp. Stat. p. 3874, § 168. In Sayre's Adm'r v. Sayre, 16 N. J. Eq. 505, it was determined that under that section the decree must be made in favor of the next of kin irrespective of the existence of any assignments that might have been theretofore made by such distributee. At page 509 of the reported opinion in the case it is said:

"It is no part of the office of the decree to settle whether the share has been paid in whole or in part; or whether the legal or equitable interest in the fund may have been assigned. The law settles with great precision to whom the shares of the estate shall be allotted in making the distribution."

That view does not appear to have been since questioned, and has been given apparent sanction by our Court of Errors and Appeals in *Adams v. Adams*, 46 N. J. Eq. 298, 19 Atl. 14.

The statutory authority of the orphans' court over decrees of distribution in cases of testacy cannot be easily regarded as essentially different from that enjoyed in cases of intestacy so far as the office of the decree is concerned. By its terms the statute directs the court to "adjust, order and make just distribution in accordance with the directions and provisions of the last will and testament in each case, of what shall remain after all debts and expenses shall have been allowed and deducted." This statute thus confers upon the court a power and duty not otherwise enjoyed, and is specific in its directions. A difference in the necessity of a decree of distribution in cases of intestacy and those of testacy may be suggested, in that the former is necessary before a suit can be maintained for a distributive share whereas a legatee may sue for a legacy without such decree; but that circumstance in no way serves to enlarge or define the powers conferred by the section here under consideration. Treated as a strictly statutory power of the court, it seems clear that, in the exercise of that power, the court must confine the operation of the decree so made to the directions of the will in accordance with which the decree is directed to be made. To adjudicate the rights of persons claiming under legatees in a proceeding under the section here in question would in its effect convert the proceeding into a suit for legacies in apparent disregard of the procedure defined for suits of that nature in that court. See 3 Comp. Stat. p. 3883, § 192.

Doubts suggested as to the constitutionality of the section are here passed over. Those doubts are suggested in *Adams v. Adams*, 46

N. J. Eq. 298, at page 302, 19 Atl. 14; *Lippincott's Case*, 68 N. J. Eq. 578, 59 Atl. 884; *Polley's Case*, 70 N. J. Eq. 659, at page 663, 62 Atl. 553.

I will advise an order affirming the decree of the orphans' court.

(90 N. J. Law, 411)

KELLY v. BOARD OF CHOSEN FREEHOLDERS OF ESSEX COUNTY et al.

(Supreme Court of New Jersey. June 19, 1917.)

(*Syllabus by the Court.*)

MUNICIPAL CORPORATIONS —241—CONTRACT —REJECTION OF LOWEST BID.

A municipality cannot lawfully reject the bid of the lowest bidder, where the law requires the awarding of a contract to the lowest responsible bidder, upon the ground that he is not responsible without giving him a hearing, and a finding that he is not responsible, rested upon proper facts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 673.]

Certiorari by James F. Kelly to review the rejection of a bid by the Board of Chosen Freeholders of the County of Essex and others. Order to be entered setting aside resolution awarding the contract, and contract rested upon it.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Ralph E. Lum, of Newark, for prosecutor.
Harold A. Miller, of Newark, for defendants.

BERGEN, J. The defendant, the board of chosen freeholders of the county of Essex, advertised for bids for the plumbing and gas fitting work necessary for a greenhouse and a gardener's cottage connected with a county hospital.

The prosecutor was the lowest bidder by \$1, but the contract was awarded to the next highest bidder, and it is to review this award that the writ of certiorari was allowed in this case. The difference in the bids is small, but the principal involved is applicable to all bids and cannot be evaded, because, in this instance, the amount is small for the controlling legal rule must be applied in all cases without regard to sum involved. The minutes of the meeting of the board at which the bids were opened and considered show that after the bids were opened the architect reported that the bid of James F. Kelly was the lowest, and that thereupon it was:

"Moved that on account of the unsatisfactory work done in the past by this firm for the county, that the bid be rejected. Seconded and carried"

—and that then the contract was awarded to the next highest bidder. The testimony taken in support of this action justifies the inference that a firm with whom the prosecutor was at one time connected had not satisfied the board with regard to work which it had done for it, but so far as the testi-

mony goes it affords no ground for any inference that prosecutor was responsible for the ground of complaint; but assuming that his bid was rejected upon the ground that the board did not consider him a responsible bidder, the action was taken without giving him a hearing or making a finding that he was not a responsible bidder. The board has no right to arbitrarily reject a bid on that ground. The bidder has a right to be heard and to a determination of the question, which must have the support of proper facts, in order that the rejected bidder may have an opportunity to review the action taken and the sufficiency of the proof upon which it is rested. In *Faist v. Hoboken*, 72 N. J. Law, 361, 60 Atl. 1120, this court said:

"If there be an allegation that a bidder is not responsible, he has a right to be heard upon that question, and there must be a distinct finding against him, upon the proper facts to justify it."

And in *Harrington v. Jersey City*, 78 N. J. Law, 610, 75 Atl. 943, Mr. Justice Swayze said:

"If the provisions had been that the contract should be awarded to the lowest responsible bidder, it would have been necessary, before deciding adversely to the prosecutors on that question, to give them a hearing."

This holding was approved by the Court of Errors and Appeals on appeal of the same case. 78 N. J. Law, 614, 75 Atl. 943. The law has thus been settled in this state that before the lowest bid can be rejected, where the statute requires that a contract shall be awarded to the lowest responsible bidder, upon the ground that such bidder is not responsible, without giving him a hearing, and a distinct finding against him that he is not a responsible bidder upon facts which warrant such a conclusion. No such hearing was afforded the prosecutor in this case, nor was there any determination that he was not a responsible bidder, based upon proper facts, and therefore the resolution awarding the contract and the contract made in pursuance of the award will be set aside. The defendant relies in justification of its conduct on *McGovern v. Board of Works*, 57 N. J. Law, 580, 31 Atl. 613, but that case involved an entirely different statute requiring the awarding of the contract to the lowest bidder giving satisfactory proof of his ability to furnish the materials and perform the work properly, and to offer security for the faithful performance of the contract, which is quite different from the present act requiring the award to be made to the lowest responsible bidder, a distinction pointed out by Mr. Justice Garrison in speaking for the Court of Errors and Appeals in the *Harrington Case*. And in the *McGovern Case* Mr. Justice Lippincott said that if the charter of the city of Trenton provided that contracts "should be awarded to the lowest bidder, the action of the governing board in this matter * * *

would be set aside as an unauthorized exercise of power," and when we have added only that the lowest bidder shall be responsible, our courts have held that the question of responsibility is one of fact to be decided only after the bidder has been heard. In addition to this the rejected bidder was, in the case last cited, accorded a hearing with the assistance of counsel.

It is to be regretted that the municipality may be put to additional expense in re-advertising and awarding another contract, but we can find no way to avoid it. The responsibility for it rests with the public board which disregarded a settled rule for law, by action, which, if approved, would nullify the statute and permit its willful avoidance by the arbitrary action of municipal bodies, for if permitted where the difference is \$1, the same principle would apply to a like unauthorized action if the difference was thousands, and permit favoritism in the awarding of all contracts.

The prosecutor may enter an order setting aside the resolution awarding the contract, and the contract rested upon it.

(88 N. J. Eq. 74)

BOEHM v. BOEHM. (No. 42/486.)

(Court of Chancery of New Jersey. June 28, 1917.)

1. HUSBAND AND WIFE ⇐4—DUTY TO SUPPORT.

The duty of a husband to support his wife is not dependent upon contract, but flows from the matrimonial status.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 9, 10.]

2. HUSBAND AND WIFE ⇐279(1)—DUTY TO SUPPORT—SETTLEMENT—VALIDITY.

Where the wife had been awarded separate maintenance which she had been unable to collect, and she made a settlement with the husband for \$750, which purported to be a release of all accrued and future liability, but which the wife testified she did not understand, and there had accrued under the original decree an amount due of \$5,000, the payment of \$750 must be wholly disregarded, and was no bar to the wife's right to an allowance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1054, 1056, 1059.]

Bill by Kate Myers Boehm against Eugene Boehm. Decree for complainant.

Thompson & Smathers, of Atlantic City, for complainant. Garrison & Voorhees, of Atlantic City, for defendant.

LEAMING, V. C. Complainant's bill has been filed pursuant to the provisions of the twenty-sixth section of our divorce act (2 Comp. St. 1910, p. 2038), and prays for an order to compel complainant's husband to provide for her and her minor daughter suitable support and maintenance.

The defense which has been made by defendant is based upon the claim that a decree which was heretofore entered in this court

in a similar suit requiring defendant to pay to complainant \$10 per week for her support has been satisfied and discharged by a settlement made by the parties, in which settlement defendant paid to complainant an agreed gross amount in full satisfaction of all past and future claims of complainant upon defendant for her support.

The evidence discloses that on November 22, 1904, a decree of this court was entered in behalf of complainant against defendant, as complainant's husband, requiring defendant to pay to complainant for her support and maintenance \$10 per week thereafter until further order of the court. That decree was made under and pursuant to the provisions of the section of the divorce act then in force, the provisions of which were similar in terms to the section under which relief is now sought. Great difficulty appears to have been experienced by complainant in the enforcement of that decree until May 25, 1907, when the settlement already referred to was made. On that date complainant and defendant executed a formal written agreement by the terms of which they agreed to live separate and apart during the remainder of their lives, and complainant agreed to accept \$750 in full satisfaction of all claims past and future upon her part against her husband for support. The agreement was directly between the parties, without the intervention of a trustee; the money was paid and the agreement signed and acknowledged by both parties before an acknowledging officer and recorded, and the decree was then discharged of record by complainant's then solicitor.

Complainant now testifies that when she signed the agreement it was her understanding that it was only in satisfaction of back alimony then due under the decree, and that she did not know that the agreement exempted defendant from the payment of future alimony or in any way conferred upon him the right to live separate and apart from her. Opposed to that testimony is the solicitor who then represented complainant and who took the acknowledgment. He has testified that the full purport of the agreement was explained to complainant by him when he took her acknowledgment, and that she fully understood it.

It is difficult to determine at this time with entire certainty whether complainant adequately understood the terms and effect of that agreement at the time she signed it. She is a woman without education and with an intensely dense perception. It is possible that a careful and painstaking explanation to her of the contents of the agreement and its purpose and effect could have adequately apprised her of the exact nature and force of her engagement; but it is reasonably clear that less than that could not have accomplished that purpose. The settlement was

negotiated by the solicitors, and the written agreement was prepared by them for their clients. Alimony to a considerable amount was admittedly then overdue, and from complainant's viewpoint even more was overdue than the amount that at this time appears to have been then overdue, as complainant had not received certain money which had been paid by defendant to her former solicitor. Great difficulty had been encountered by complainant in the various efforts which had been made to enforce payments under the court decree, and complainant had appropriately become greatly discouraged in her litigation. These discouragements had led her to employ a new solicitor to represent her, and the attendant circumstances were such as to render it entirely natural and reasonable that complainant would have wholly relied upon the advice of the solicitor then representing her in signing the agreement without real effort on her part to comprehend the exact nature of the agreement further than to ascertain that money was to be paid to her. Her assumption that the money to be paid to her was "back alimony" is far from unreasonable under all the circumstances unless great care was exercised at the time to satisfy her to the contrary. The same may be said with equal or greater force as to the provisions of the agreement which were designed to release defendant from future liability, including the provisions for the parties to live apart. Unless those provisions were at that time explained to complainant with more care than is ordinarily observed by an acknowledging officer, it is not reasonable to assume that they were adequately comprehended by complainant in their force and effect. The nature of the settlement and complainant's limited mentality and the other circumstances leading to and surrounding the settlement peculiarly demanded that complainant should receive not only accurate information touching the amount then due to her for back alimony, but also sound counsel touching the effect of the instrument on her future rights, and also that such information should be imparted to her in a manner suitable to her limited powers of comprehension.

But, in the view which I entertain of the present situation, I think it unnecessary to here determine whether the written agreement of May 25, 1907, was executed by complainant without an adequate understanding of its terms or effect, or whether, as claimed by the solicitor of complainant, agreements of that nature are so far contrary to the policy of our laws as to render them void: for I am unable to reach the conclusion that the transaction is in any aspect operative as a bar to complainant's right to exact from defendant support for herself and her daughter at this time.

[1] The duty of a husband to support his wife is not a duty dependent upon con-

tract; that duty flows from the matrimonial status. The law casts upon the court of chancery the duty of enforcing that matrimonial obligation of a husband in certain circumstances. The language of our statute under which the present bill is filed is that:

"In case a husband, without any justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall be lawful for the Court of Chancery to decree and order such suitable support and maintenance, to be paid and provided by the said husband for the wife and her children, or any of them, by that marriage, or to be made out of his property, and for such time as the nature of the case and circumstances of the parties render suitable and proper in the opinion of the court, and to compel the defendant to give reasonable security for such maintenance and allowance, and from time to time to make such further orders touching the same as shall be just and equitable."

In the former suit brought by this complainant this court accordingly adjudged that defendant had without justifiable cause abandoned complainant and refused to support her, and the decree then entered required defendant to pay to her \$10 per week until further order of the court for her support. In that situation, and with payments under the decree in default to a large amount, it is claimed by defendant that complainant voluntarily accepted \$750 as a gross amount in full discharge of all past and future obligations of defendant for her support, and thus absolved defendant from all future duties of that nature. If a husband can thus absolve himself from the duty of support for all time, it is obvious that this court is rendered powerless to perform the duty imposed by the act above quoted, for that act clearly contemplates the enforcement of periodical payments for the support of the wife, based upon her needs as they may from time to time exist and upon the husband's ability to pay, and that such payments shall be modified in amount from time to time according to circumstances arising from changing conditions. The language of the act as above quoted is essentially similar to that of the preceding section for the recovery of alimony in a suit for divorce, and that section has been held to contemplate only periodical payments, and not to justify an order for payment of an amount in gross. *Calame v. Calame*, 25 N. J. Eq. 548; *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641. In the latter case it is said:

"Her right to support and maintenance continues so long as it is just that she shall retain it. It is coextensive with the husband's position and ability. His ability and the justice of her enjoyment of her right are subject to change of circumstances which the court cannot anticipate, and hence complete justice requires that the court's power to act shall be kept open so long as it may be needed to direct just variation." *Id.*, affirmed, 55 N. J. Eq. 591, 39 Atl. 1114.

It thus appears that, if a payment to a wife of a sum in gross can be agreed upon by a husband and wife in final discharge of a husband's future obligation of support,

the parties are not only enabled to discharge by stipulation the performance of an existing and permanent matrimonial duty of the husband in a manner which the court could not authorize with the parties before it, but in a manner that obviously defeats or tends to defeat the primary purpose of the statute to protect the wife from future want.

[2] But, while the right of spouses to contract touching the discharge of this matrimonial duty of the husband cannot be regarded as unrestricted, I think it unnecessary to here determine that all such agreements are void or should be wholly disregarded. A settlement upon a wife of a fixed and certain income for her life would accomplish the purposes of the act in so far as the income should be found adequate, and the payment of a gross amount might in some circumstances be treated as relieving a husband from his obligation of support to whatever extent should be found just under the circumstances. But where, as here at this time, the wife comes before the court in a destitute condition, and the husband claims as a bar to his liability a settlement for \$750 of a decree under which there would at this time have been paid over \$5,000 had the decree been complied with, I think it clear that the payment so made by him by way of settlement of future liability must be wholly disregarded. Aside from any question of public policy which may be involved, the money which was paid in settlement of future liability was in amount obviously too unreasonable and unjust to afford a bar at this time in a case of this nature.

Nor am I able to give any force to the provisions of the settlement agreement providing that defendant may live separate and apart from his wife. At the time that agreement was signed he was a deserter of his wife, and so adjudged by the court decree then existing. His continued absence from her has not been in the slightest degree occasioned or influenced by any consent upon his wife's part to that effect. No proffer on his part has been made at the hearing or at any other time to live with his wife or to support her at his home or elsewhere. His sole defense is that the settlement agreement has absolved him from the duty of support.

Complainant's long delay since the settlement in seeking the aid of this court has in no way arisen from any understanding on her part that she had by any agreement or settlement discharged her husband from liability for future alimony or had in any way agreed that he should be privileged to live separate from her. At all times since the \$750 was paid her conduct has been consistent with her belief that the payment which was made was of back alimony. Since that time she has been persistently going from attorney to attorney without success seeking one who would enforce her claim. Finally an appeal to the chancellor secured

for her a solicitor, and this suit is the result.

The former suit and decree was for complainant's support, and did not include the support of complainant's daughter. The settlement agreement did not by its terms exonerate defendant from liability for the support of the daughter. This suit seeks a decree compelling defendant to contribute to the support of both complainant and their daughter, who resides with complainant. The evidence discloses that defendant's pecuniary resources are at the present time considerably less than when the former decree was entered. He is, however, in my judgment, well able to pay \$5 per week. That amount is an appropriate amount for him to pay for the support of the daughter alone, but I do not feel justified in ordering payment of more than that amount in view of defendant's present pecuniary condition.

I will accordingly advise a decree requiring defendant to pay \$5 per week for the support of complainant and his daughter, and also an aggregate counsel fee for complainant's counsel of \$50.

RICCIO v. RICCIO. (No. 40/750.)

(Court of Chancery of New Jersey. June 29, 1917.)

PARTITION \S 12(1)—TENANCY BY ENTIRETY—SALE.

If a sale of premises held by husband and wife as tenants by the entirety be decreed in a suit for partition, it must not be an absolute sale, but must be limited to the right of possession during the joint lives of both parties, that the right of survivorship may not be affected in any way.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 39.]

Action between Josie Riccio and Gaetano Riccio. Decree for complainant.

Eugene Dotto and Philip J. Schotland, both of Newark, for complainant. Riker & Riker and Richard Hartshorne, all of Newark, for defendant.

FOSTER, V. C. This is an action for the partition by absolute sale of certain real estate in the city of Newark owned by the parties who are husband and wife. On the hearing it was established that the parties were married on October 27, 1898, that they have three children, and that as a result of quarrels they separated about May 1, 1915.

Complainant before her marriage worked as a button hole maker, and continued to do some of this work after her marriage, from time to time, and claims to have paid part of the purchase money of the property from her work. Defendant is a tailor and claims to have paid all of the purchase price, over the amount of the money borrowed on mortgage, from his savings. About May 20, 1902, the

parties purchased the premises in question for \$2,500. Of this sum \$2,200 was obtained on mortgage from a building and loan association, and complainant claims that she and defendant each contributed \$200 to make up the balance of the purchase money and to pay for searches and other expenses connected with the passing of title. Defendant denies that complainant contributed any money for these purposes and claims that he furnished all the money required to complete the purchase above the amount obtained on the mortgage and to carry the property. The deed for the property conveys it to the parties as "Gaetano Riccio and Josie Riccio, his wife."

Complainant claims that a mistake was made in the deed in thus designating herself and her husband, the defendant, as tenants by the entirety, and that it violated the agreement she had made with her husband regarding the form in which they should take title, which was, that they each should contribute one-half of the purchase price and an equal share for the maintenance of the property, and that they should be equal partners in the ownership of the property, and that they were to be tenants in common in the ownership of the property. Defendant denies this and claims there was a mistake made in the form of the deed; that when he purchased the property he was unfamiliar with real estate transactions; that in examining the deed under which his grantors held, he noticed it was made to "Justus Schneider and Philippina Schneider, his wife," and he directed or consented to having his deed made out in the same way, assuming that was the legal way it should be done; that he has paid the purchase price for the property and the expenses of its maintenance; and that he intended that the only interest complainant, as his wife, should have in the property was such as the laws of the state gave her.

The impression made upon me at the hearing was that the claim of a mistake in the deed was an afterthought on the part of both parties which had arisen because of the serious differences between them. These differences it seems cannot be reconciled, as complainant claims defendant assaulted and stabbed her, and defendant claims complainant since her separation from him has been living in adultery with another Italian.

Counsel for complainant apparently take somewhat the same views of the facts that I have because they contend that if it is not established that a mistake was made in the deed as claimed, and if it be found that the parties are tenants by the entirety, nevertheless there should and can be a partition of the property under the facts and on the authority of *Schulz v. Ziegler*, 80 N. J. Eq. 199, 83 Atl. 968, 42 L. R. A. (N. S.) 98.

My consideration of the opinion of Vice

Chancellor (now Chancellor) Walker in this case and of the opinion of Mr. Justice Parker in speaking for the Court of Errors and Appeals in affirming the Vice Chancellor's determination shows that it does not entirely sustain complainant's contention or sanction the relief to the extent asked for in her bill. Justice Parker, speaking for the court, said:

"We hold, therefore, that by virtue of an estate by entirety, as modified by the married woman's act, the seisin of husband and wife during the joint lives is essentially a tenancy in common, terminated on the death of either, with remainder in fee to the survivor; and that the right of the husband may be transferred by him to a third party who thereby becomes tenant in common for the joint lives in the husband's place; and that partition may be had between such purchaser and the wife of this tenancy in common, but without affecting in any way the common-law right of survivorship."

It will be observed from this statement of the law, that if a sale of the premises be decreed it must not be an absolute sale, but must be limited to the right of possession during the joint lives of complainant and defendant, in order that the right of survivorship may not be affected in any way.

The prayer of the bill in asking for an absolute sale of the premises and the payment to complainant of one-half of the amount realized therefrom over the amount of the present incumbrances thereon, as her share of the property is too broad, but a sale of the right of possession during the joint lives of the parties will be advised, and an accounting may be taken of the income received from and the expenses incurred in carrying the property. Counsel will be heard if desired on the period to be covered in the accounting.

(90 N. J. Law, 35)

BOROUGH OF HADDON HEIGHTS v. HUNT.

(Supreme Court of New Jersey. April 25, 1917.)

LICENSES § 7(1) — PEDDLING — OCCUPATION TAX — POLICE POWER.

An ordinance making it unlawful for one to peddle in a certain borough without a license anything except products of his own raising or articles of his own manufacture, but exempting all persons having a regular place of business or residence within the borough and paying taxes therein, unless they are selling goods of persons not residents and taxpayers in the borough, is invalid; the ground of exemption being arbitrary.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7, 19.]

Samuel P. Hunt was convicted, and brings certiorari. Conviction set aside, with costs.

The following is the ordinance in question:

Section 1. It shall be unlawful for any person to hawk or peddle or expose for sale house to house in the borough of Haddon Heights any goods, wares or merchandise of any description, excepting products of his or her own raising, or articles of his or her own manufacture, or to drive, push or pull any peddler's cart or wag-

on within said borough for that purpose without a license for that purpose first had and obtained. All persons who shall go from house to house and sell on orders or by sample any goods, wares or merchandise to be afterwards delivered, shall be considered as hawkers and peddlers within the meaning of this ordinance, and shall be subject to the conditions and penalties herein provided: Provided, however, that no person or persons having a regular place of business or residence within the limits of the said borough of Haddon Heights, and paying taxes thereon, shall be subject to any of the said conditions or penalties, unless he, she or they are selling the goods of persons who are not residents and taxpayers of said borough.

Argued before GARRISON, J., sitting alone pursuant to the statute.

Cyrus D. Marter, of Camden, for prosecutor. Jess & Rogers, of Camden, for defendant.

GARRISON, J. The ordinance is infirm, whether the occupation tax be a police or a revenue measure, for the reason that there is no rational connection between the occupation that is taxed and the conditions that exempt from such tax.

Residence in the borough is admittedly not enough, and having a regular place of business is on the same footing, in the absence of a requirement that the business conduct at such place shall bear some relation to the wares so peddled.

To exempt a peddler of produce because he had a music store or a photograph gallery would be arbitrary in the extreme. Whether or not such suggested requirement would meet this defect is not up for decision.

The payment of real estate taxes on a residence or place of business affords no basis for exemption from an occupation tax; the two imposts are entirely unrelated. A non-resident might own and pay taxes on all the real estate in the borough and still be required to pay this occupation tax.

The grounds of exemption being thus arbitrary and illusory, the ordinance falls to support the conviction, which is set aside, with costs.

(90 N. J. Law, 342)

STATE v. NONES. (No. 5.)

(Court of Errors and Appeals of New Jersey. March 5, 1917.)

Error to Supreme Court.

Charles A. Nones was convicted of crime, and brings error to the Supreme Court to review a judgment affirming his conviction. Affirmed.

For opinion of the Supreme Court, see 88 N. J. Law, 460, 97 Atl. 66.

Borden D. Whiting, of Newark, for plaintiff in error. Jacob L. Newman, of Newark, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Justice Swayze in the Supreme Court. 88 N. J. Law, 460, 97 Atl. 66.

(40 R. I. 477)

STONE v. NORRIS. (No. 388.)

(Supreme Court of Rhode Island. July 5, 1917.)

1. TAXATION — 329 — ASSESSMENT — SUFFICIENCY.

Gen. Laws 1909, c. 58, § 6, requiring taxpayers to describe their personality, etc., is directory merely, since, if such accounts are not filed, the assessors may fix its value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 549, 550.]

2. ELECTIONS — 83 — QUALIFICATIONS OF VOTERS—PAYMENT OF TAXES.

Under Const. art. 2, § 2, providing that only persons who have paid a tax assessed against their property can vote for city councilmen, etc., persons paying personal property taxes are qualified electors, although the assessments did not describe their personality, since Gen. Laws 1909, c. 58, does not require the assessors to describe personality upon the taxpayer's failure to do so.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81.]

Petition in equity in the nature of quo warranto, under Gen. Laws 1909, c. 328, by Charles H. Stone against Walter W. Norris. Petition denied and dismissed.

Edward M. Sullivan, Francis E. Sullivan, and John J. Sullivan, all of Providence, for petitioner. Frank H. Wildes, of Providence, for respondent.

BAKER, J. Charles H. Stone, of the city of Cranston, in this state, by this his petition in equity in the nature of quo warranto, filed under the provisions of chapter 328 of the General Laws, brings in question the title of the respondent, Walter W. Norris, to the office of third councilman of the Fourth ward of said city for the term of two years, commencing the first Monday in January, 1917. The petition alleges that said respondent and himself were opposing candidates for the office of third councilman from said fourth ward at the election held November 7, 1916; that on the following day the city council of said city in accordance with law counted the ballots cast in said election for said office, and declared the result of such election to be that the respondent had been elected over the petitioner by a plurality of 114 votes; that thereafter the said Walter W. Norris on the first Monday of January, 1917, was duly sworn and engaged as incumbent of said office of councilman, and now holds the same. The petition further alleges that the names of a number of persons participating in said election, not qualified so to do and sufficient to determine the result of said election, "were placed upon the tax rolls of said city by the assessors of taxes of said city without any description of the several properties of said persons respectively possessed or claimed to be possessed" by them. By the bill of particulars subsequently furnished by the petitioner the names of 124 persons assessed as aforesaid are given as participating in the election of third councilman for said Fourth

ward on November 7th last. The petition also alleges that:

"Said pretended assessment is in violation of section 2 of article 2 of the Constitution of the state of Rhode Island"

—which provides that:

"No person shall at any time be allowed to vote in the election of the city council of any city, or upon any proposition to impose a tax or for the expenditure of money in any town or city, unless he shall within the year next preceding have paid a tax assessed upon his property therein, valued at least at one hundred and thirty-four dollars."

It appears by evidence or admissions that these 124 persons were assessed in 1916 by the tax assessors of Cranston for either "personal estate" or "personal property" in varying amounts from \$195 to \$8,000, the most of them for tangible personal property only, a few for intangible personal property only, and one for both kinds, and that all of them duly paid the taxes assessed against them. The petitioner's claim is that the words "tax assessed," in section 2 of article 2 of the state Constitution, means a tax *legally* assessed, and that as the tax rolls of Cranston "did not contain any description, or even mention, of the personal property for the payment of a tax upon which any such person claimed the right to vote," the assessment as to all of them was illegal, and as a consequence they were not legally entitled to vote; that as the number of such voters exceed the plurality declared to have been received by the respondent, and inasmuch as it is not possible to determine and prove who was chosen councilman by the admittedly legally qualified voters at said election, he prays this court to declare said election to be null and void and to order a new election for said office of third councilman. The respondent has moved the dismissal of the petition on various grounds which we do not deem it necessary to now set out.

The petitioner does not question in any way the acts of the board of canvassers, or of the acts of the tax assessors other than the one already stated, or the qualifications of the 124 as voters, except as they may be affected by the alleged illegality of the assessment. There are, therefore, but two questions to be considered: First, were the assessments illegal for lack of description of the personal property? and, if illegal, were these 124 persons, after having severally paid a tax assessed upon their property in Cranston, valued in the assessment in excess of \$134 in each instance, disqualified as voters at such election?

If we consider the second question first, assuming for the time being that the assessments were illegal, it is by no means clear that these persons were disqualified as voters. The requirement of property ownership as a qualification for voting, once so common, has been almost entirely abandoned. If there be precedents on the point, they must be

sought in the early decisions, and we find some authority on this question. Article 3 of the Amendments to the Constitution of Massachusetts provided that:

"Every male citizen of twenty-one years of age and upwards (excepting paupers and persons under guardianship) who shall have resided within the commonwealth one year * * * and who shall have paid * * * any state or county tax, which shall, within two years next preceding such election" (for general state offices) "have been assessed upon him, in any town or district of this commonwealth, * * * shall have a right to vote in such election; * * * and no other person shall be entitled to vote in such election."

The House of Representatives submitted a question to the Supreme Judicial Court as to the right to vote under said article 3 of a person upon whom a poll tax had been assessed "after the annual assessment of taxes." The opinion of the court in reply appears in 18 Pick. (Mass.) 575. On page 578 the court said:

"We beg leave not to be understood as intending to suggest that to qualify one to vote, within the provisions of the Constitution, it must appear that the tax which he has paid is in all respects a legal tax, or that it is competent to go behind the actual payment of a tax, to inquire whether there has or has not been any irregularity or illegality in the levying or assessment of the taxes. This is a point which the person claiming the right to vote is not bound to inquire into, and in most cases cannot know. It is sufficient that he has paid a tax de facto levied and assessed upon him."

Later in *Humphrey v. Kingman*, 5 Metc. (Mass.) 162, 166, where the qualification of a voter was in question, the court said:

"It is not the mere payment of money that qualifies a man to become a voter, but the money paid must be for the discharge of a tax actually assessed upon him, whether legally or illegally."

[1, 2] But were the assessments against these 124 persons illegal because the personal property was not described? The petitioner has cited authorities and decisions in other jurisdictions holding that such an assessment is invalid. But the statutes of different states differ much in their requirements in respect to the levy and assessment of taxes, and it is only where such statutes are substantially like our own that decisions in other jurisdictions have persuasiveness as authorities. The requirements of our own statutes, as applied to the admitted facts, are to determine the legality or illegality of these assessments. Chapter 58 of the General Laws prescribes the method of assessing taxes. Section 4 imposes the duty upon the assessors of assessing and apportioning "any tax on the inhabitants of the town and the ratable property therein" as ordered by the town. Section 6 relates to the giving of notice of the time and place of making the assessment, providing that:

Such notice "shall require every person and body corporate liable to taxation to bring in to the assessors a true and exact account of all his ratable estate, describing and specifying the value of every parcel of his real and personal estate, at such times as they may prescribe."

Section 7 is as follows:

"Every person bringing in any such account shall make oath before some one of the assessors that the account by him exhibited contains to the best of his knowledge and belief a true and full account and valuation of all his ratable estate; and whoever neglects or refuses to bring in such account, if overtaxed, shall have no remedy therefor."

Section 8, as amended by section 43 of chapter 769 of the Public Laws of 1912 is as follows:

"The assessors shall make a list containing the true, full and fair cash value of all the ratable estate in the town, placing land, buildings and other improvements, tangible personal property, and intangible personal property, in separate columns, and distinguishing those who give in an account from those who do not, and shall apportion the tax accordingly."

Section 4 of chapter 57 of the General Laws provides that:

"Taxes on real estate shall be assessed to the owners, and separate tracts or parcels shall be separately described and valued as far as practicable."

Chapter 57 has numerous provisions as to the place in which and the persons to whom personal property of different kinds shall be taxed, but there is no statutory provision similar to the one relating to real estate requiring a separate description and valuation of personal property.

It is true that as to certain corporations, which under the statutes are exempt from taxation for personal property, except certain kinds thereof as named in the statute, this court, from the necessities of the case, in order to avoid double taxation, has held that the assessment roll should show that such corporation had been assessed only for such kind of personal property as it was taxable for under the statute. *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233, 2 Atl. 766; *Rumford Chemical Works v. Ray*, 19 R. I. 302, 33 Atl. 443; *Newport Reading Room and Higbee*, Petitioners, 21 R. I. 440, 44 Atl. 511. Such cases are special in character and application. The provision of our statute requiring "every person and body corporate liable to taxation to bring in a true and exact account of his ratable estate, describing and specifying the value of every parcel of his real and personal estate," is merely directory, as when there is default in bringing in such account the assessors are clothed with no authority to summon in such delinquents and compel disclosure, as is the case in some states. In such case it is the right and duty of the assessors to proceed to ascertain the nature and extent of such persons' taxable property from the sources of information at their command and to place a valuation upon it according to their best judgment. 37 Cyc. 995. They have the means of obtaining definite information as to the ownership of real estate by examining the land records, and of ascertaining its approximate value in the market, and accordingly the requirements of section 4, chapter 57, supra, as to separate descriptions and valua-

tions of separate tracts or parcels of real estate are practicable and reasonable. But it is a practical impossibility for assessors to correctly ascertain the extent, character, and particulars of an individual's ownership of personal property when he brings in no account thereof; and to require them to particularly describe such personal estate in the assessment roll, without first clothing them with power to ascertain of what it consists, would be unreasonable and futile. Our statute does not require it. Chapter 58 offers the inducement to bring in a sworn account of taxable property by providing for such persons as do so a remedy for over-taxation. At the same time it provides as a penalty or disadvantage for the one refusing or neglecting to bring in an account in that he is without remedy if overtaxed. *Coventry Co. v. Assessors of Taxes*, 16 R. I. 240, 14 Atl. 877; *Tripp v. Torrey*, 17 R. I. 359, 22 Atl. 278. There is remedy for such person for illegal taxation only, as when he has no ratable or taxable estate. *Hall v. Bain*, 18 R. I. 413, 28 Atl. 371, is a case of illegal taxation, although in that case the plaintiff had brought in an account. See, also, *Newport Reading Room and Higbee*, supra.

In the case of a person having taxable personal estate and rendering no account to the assessors, it could be of no possible advantage to him to specify and describe on the assessment roll the property on which he is assessed, as he is without remedy in any event. The law as to assessment of taxes in Massachusetts in its main features is similar to our own, although it requires specification on the assessment roll of certain kinds of personal estate. In *Noyes v. Hale*, 137 Mass. 266, on page 270, the court said:

"If a person who is liable to be taxed in a town for personal property does not bring in a list of such property to the assessors, as provided by law, it is their duty to ascertain, as nearly as possible, the particulars thereof, and to 'make an estimate thereof at its just value, according to their best information and belief.' Gen. Sts. c. 11, § 27; Pub. Sts. c. 11, § 41. If they are unable to ascertain the particular kinds or items of such taxable personal property, an estimate of it may be made as 'personal property,' without any enumeration of particulars. This practice, we believe, prevails widely; and indeed it appears to be necessary, in view of the manner in which much taxable personal property is now commonly held, of the ease and frequency with which it is transferred, and of the practical impossibility of ascertaining correctly the particulars of an individual's investments and property without as well as within the state on any given day. Such appears to have been the method which was sanctioned in *Bates v. Boston*, 5 Cush. 93, and a similar method in respect to real estate was approved in *Tobey v. Wareham*, 2 Allen, 594. The requirement of Pub. St. c. 11, § 43, that the assessors shall specify the amount of each of several classes of taxable personal property, namely, money at interest and other debts due, money on hand including deposits, public stocks, and securities, and stocks in corporations without the state, did not exist until 1879. It was adopted chiefly for statistical purposes; it of course extends only to so

much of the enumerated classes as the assessors may be able to ascertain; it does not include all taxable kinds of personal property; and a compliance with it is not essential to the validity of a tax. See *Sprague v. Bailey*, 19 Pick. 436, 441; *Lincoln v. Worcester*, 8 Cush. 55, 63. The existence of that requirement by no means precludes assessors from assessing a tax upon 'personal property,' when they are unable to ascertain the items of which such personal property is composed."

See, also, *Lamson Consolidated, etc., Co. v. Boston*, 170 Mass. 354, 49 N. E. 630.

We are of the opinion, therefore, that the taxes assessed against the 124 persons named were not illegally assessed because the personal property, tangible or intangible, for which they respectively were assessed, was not described on the assessment roll.

One of the grounds of the motion to dismiss is that the petition should have been brought in the name of the Attorney General, as the petitioner is not a claimant of the office of councilman, and in his brief the defendant cites *Ney v. Whitley*, 26 R. I. 464, 59 Atl. 400, on that point. Without deciding the point, we have thought it proper to consider the questions presented by the petition and to express our opinion thereon, as from its allegations it seems apparent that the same question could be raised as to several other persons in Cranston declared to have been elected to other offices in that city in the election held November 7th last.

The petition is denied and dismissed.

(40 R. I. 519)

RHODE ISLAND HOSPITAL TRUST CO.
et al. v. PECK et al. (No. 389.)

(Supreme Court of Rhode Island. July 6, 1917.)

1. PERPETUITIES ⇐4(21)—TRUSTS—VALIDITY.

Under a trust, a provision for the payment of fixed sums each year for an indefinite period to such persons as shall from time to time answer a certain description violates the rule against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 42.]

2. PERPETUITIES ⇐4(17)—TRUSTS—ANNUAL PAYMENTS—VALIDITY.

A trust to pay a certain sum from the income and corpus at a stipulated rate per year until exhaustion of the corpus and during the lifetime of the trustor's wife, or that after the wife's death the residue of payments not due and payable to her should be paid to the same persons who would inherit real estate had testator then died intestate, was valid as to all provisions for the wife.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 34.]

3. PERPETUITIES ⇐4(21)—TRUSTS—ANNUAL PAYMENTS—VALIDITY.

The provisions for disposition of the estate after the wife's death were void, since the entire class might not be ascertainable within the period allowed by the rule against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 42.]

4. TRUSTS ⇐275—INCOME—DISPOSITION.

Where testator created a trust in favor of his wife and his heirs, providing for payment

of a stipulated sum annually from the income or the corpus as required, and the income was sufficient to provide a surplus over the stipulated payment, the income should be permitted to accrue to provide for the possibility that the income might eventually become insufficient to pay the stipulated sums.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 393.]

Certified from Superior Court, Providence and Bristol Counties.

Suit by the Rhode Island Hospital Trust Company and another, against Louise L. Peck and others. Case certified on questions. Questions answered.

Argued before PARKHURST, C. J., and SWEETLAND, VINCENT, BAKER, and STEARNS, JJ.

Gardner, Pirce & Thornley and James O. Collins, all of Providence, for complainants. William R. Tillinghast, Everette S. Chaffee, and Frederick A. Jones, all of Providence, for respondents.

STEARNS, J. This is a suit in equity praying for the construction of the will of Walter A. Peck, who died in 1901, brought by Rhode Island Hospital Trust Company and Union Trust Company, trustees severally named in said will, against Louise L. Peck, widow of said Walter A. Peck and executrix of the will, the three children and ten grandchildren of said Walter A. Peck, who are the only descendants of said testator. The cause, being ready for final hearing, was certified to this court in accordance with chapter 289, § 35, Gen. Laws of R. I.

By his will the testator gave to each of the complainants the sum of \$200,000 to be held in trust upon identical trusts. The only directions given to the trustees in regard to the distribution of the income arising from the trust estates, the termination of the trusts, on the final disposition of the corpus of the trust estates are as follows:

"The trustee for the time being shall from time to time as often as once in each six months during the continuance of this trust pay out from the then trust funds and property (including accumulations of income as well as the then corpus of the estate) at the rate of seven thousand dollars (\$7,000) per year until the principal or corpus of said trust estate and property as well as all accumulations of income have been exhausted.

"During the lifetime of my wife if she survives me, she is to receive the same fractional share of each of said payments as would be payable to her upon an equal division of said payments between herself and my children living or represented by living issue at the time of such payments respectively. For example, if my family consists of its present members, one-fourth ($\frac{1}{4}$) to her, but if at my death or at any time during the term of her life either of my children should die leaving no issue surviving or the issue of any deceased child should all die, the fractional share of my wife is to be increased, from and after such occurrence to make her payments equal to that of each of my children then living. And if my wife survives me, and at my death or at any time during her life neither of my children nor any issue of theirs is surviving, the whole of said payments shall be made to

her as they respectively become due and payable during the term of her life.

"At all times during the continuance of these trusts the child, children or descendants living at the time, of any child of mine that has previously deceased are to receive (per stirpes) the share of income that would have been payable to such child of mine under this will if such child was then living, and I expressly include in all the provisions of this will any child or children of mine hereafter born whether in my lifetime or not as well as my children now living. From and after my decease if I survive my wife, the whole of said payments as they become payable shall be paid to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate and in the same proportions that they would inherit such real estate from me.

"And from and after the decease of my wife if she survives me, the residue of said payments not due and payable to her as aforesaid shall be paid to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate, and in the same proportions that they would inherit such real estate from me."

The trustees have paid out of each trust estate the sum of \$7,000 each year, one-fourth thereof to Louise L. Peck, the widow, and one-fourth thereof to each of the testator's children. Such annual payments have not exhausted the income received by the complainants, respectively, from the trust funds, and each of the complainants now holds a considerable sum of money representing accumulations of income which are not at the present time required to make the annual payments.

The questions submitted may be stated as follows: I. What disposition shall be made of the accumulated income now in the hands of the complainant trustees? II. What disposition shall be made of the further income and the corpus of the estate: (A) During the lifetime of Louise L. Peck? (B) After the death of said Louise L. Peck? The answers to these questions are dependent upon the intention of the testator as expressed in his will except so far as his intention so expressed may be found to be contrary to the rule against perpetuities. The method to be followed in the application of this rule is stated as follows in Gray in section 629 (3d Ed.):

"The Rule against Perpetuities: The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied."

[1] What was the testator's intention as expressed in his will? The trust provision is unusual. The trustee is directed to "pay out from the then trust funds and property (including accumulations of income as well as the then corpus of the estate) at the rate of seven thousand dollars (\$7,000) per year until the principal or corpus of said trust estate and property as well as all accumula-

vions of income have been exhausted." This is the only indication in the will of any attempt to fix definitely the termination of the trust. There is no direction for the payment or transfer of the corpus of the estate as distinguished from the income.

The intention of the testator that the trust should continue during the life of his wife is clear; that it should not terminate at the time of her death or at his death, if he should survive his wife—is also apparent from the clauses supra. If he survives his wife, the gift is of "the whole of said payments," and if his wife survives him, the gift after her death is of "the residue of said payments not due and payable to her." But in the clause providing for his surviving his wife these "payments" are further defined by the addition, "as they become payable." In each case the gift over is "to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate."

It seems to be clear that the testator intended that the payments of \$7,000 per year from each trust should continue after the death of the survivor of himself and his wife, and that they should be made to those persons who would be entitled to inherit real estate from him at the several times when the payments are made. The intent at this time is not to make an absolute gift of the principal or the income, but only of the payments as they become payable to persons who answer the description given at the time of each payment. The law is well settled that a provision, as in this case, for the payments of fixed sums each year for an indefinite period to such persons as shall from time to time answer a certain description is in violation of the rule against perpetuities. *Williams v. Herrick*, 19 R. I. 197, 32 Atl. 913. The effect on prior limitations of an attempt to create interests which are too remote is stated by Gray, cited above, in section 247 as follows:

"If future interests created by any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument."

See, also, *Goffe v. Goffe*, 87 R. I. 542, 94 Atl. 2, Ann. Cas. 1916B, 240.

[2] At what time then do the interests in these trust payments become too remote? It is clear that the testator's intention that the payments should continue during the life of the wife can be carried out, and that the trust up to the time of the decease of the wife is valid. We also are of the opinion that the children during the life of their mother are entitled to share equally in the payments, and, in the event of the death of any child in the lifetime of the mother, the children or descendants of such deceased child will take the share of the payments that would have been payable to the parent; if any of the testator's children should die,

leaving no issue surviving, in this period, to wit, during the life of the wife, the payments to the wife and surviving children would be increased and divided equally as provided for in the will; and in the event of the death of all of testator's children without issue surviving, during the life of the wife, the wife would then take the total of all the payments.

[3] Coming now to the time of the death of the wife, said Louise L. Peck, we find a gift of the residue of said payments as they become due for the benefit of a class composed of the persons who answer the description of his heirs at law, which is to continue indefinitely as long as any of his children or their descendants are living. There is no distinct and separate gift to the testator's children as such. Inasmuch as this gift is to a class which includes persons who might not be ascertained until after a life in being and 21 years afterward, it is void under the rule that a gift to a class is void unless the whole class must be ascertainable within the period allowed by the rule. In *re Bence*, 3 Ch. Div. L. R. 242 (1891); In *re Hancock*, 1 Ch. Div. L. R. 482 (1901); *Siedler v. Syms*, 56 N. J. Eq. 275, 38 Atl. 424. In the cases cited supra, the courts recognize and affirm the well-established rule quoted with approval by the court in the *Syms Case*, supra, 56 N. J. Eq. at page 279, at page 426 of 38 Atl.:

"When * * * a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a court can so mold it as to say that it is divisible into two classes, the one embracing the lawful and the other the unlawful objects of his bounty."

Applying this rule to the case before us, it is plain that the testator's children take nothing under this clause, and that the entire limitation after the decease of the wife is void. The trust is valid during the life of the wife, and as the bequest to the heirs is void, the property held in trust by the trustees will pass under the residuary clause of the will quoted above into the residue, and will then belong to the estate of Mrs. Peck. In Gray, supra, in the footnote at bottom of page 230, after citing authorities, the author says:

"There is no question that personal property included in a void bequest goes to the residuary legatee."

See, also, *Woodward v. Congdon*, 34 R. I. 316, 83 Atl. 433, Ann. Cas. 1914C, 809.

[4] In regard to the surplus income we are of the opinion that this should be retained in the trust funds until the termination of the trust at the death of Louise L. Peck. There are no instructions to the trustees to accumulate. The intention of the testator is to make sure that the trustees shall have \$7,000 a year to distribute, and the reference to accumulations and the inclusion thereof in the trust fund are incidental to the main purpose of the testator as above mentioned. At the time when the will was made the

income from trust funds was considerably less than it is to-day. The trustees were given broad powers in the management of the trusts and the change of investments. The testator undoubtedly had in mind the possibility of loss from the use of these powers by the trustees, in which event he evidently meant that the corpus of the trust and accumulations of income, if any, should be used by the trustees for the payments. It is true that the accumulations of income are now considerable, but it is not at all certain that the time may not come during the life of the trust when these accumulations, or part of them, may be required to continue the payments.

The testator's intention in this respect seems to us to be clear that his wife should have no more than her proportionate part of the \$7,000 annually during her life, and that nothing except the \$7,000 a year should be taken out of this fund, including the accumulations until her death.

Having answered the questions submitted to us, the parties may present a form of decree in accordance with this opinion for approval by this court and entry by the superior court.

(6 Boyce, 570)

STATE ex rel. LINIHAN v. UNITED BROKERAGE CO. et al.

(Superior Court of Delaware. New Castle.
June 27, 1917.)

1. CORPORATIONS ⇨181(1) — RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

A stockholder has the right to inspect the books of the corporation at a proper time for proper purposes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 674, 676, 677.]

2. MANDAMUS ⇨129 — RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

On a stockholder's petition for mandamus for inspection of books of the corporation, if it appears from the corporation's return that he desires the inspection for improper purpose, the court in its discretion will not order the inspection.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264.]

3. MANDAMUS ⇨164(4) — RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

Where the return to a stockholder's mandamus petition to compel the corporation to allow him to inspect his books unequivocally alleged that he desired the inspection for the purpose of bringing annoying and harassing suits against the corporation without just cause, his petition should be denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 355.]

4. MANDAMUS ⇨164(4) — RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

If it is sufficiently averred in the return that the purpose of relator in seeking an inspection of the corporate books is an improper one, for the purposes of the proceeding, the answer must be accepted as true, and the relator referred to what other remedy he may have at common law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 355.]

Petition for mandamus by the State of Delaware, on relation of John E. Linihan, against United Brokerage Company and others, to compel the production of books. Non sunt as to Carnes and McGehee. Service on the remaining two defendants. Motion to dismiss petition and discharge rule as to James M. Satterfield, the resident agent, on the ground that he was neither a necessary or proper defendant. Granted. On return of the rule, the alternative writ was on motion issued against the United Brokerage Company. Motion to quash return to the alternative writ. Overruled. Peremptory writ denied.

Argued before RICE and HEISEL, JJ.

Marvel, Marvel, Wolcott & Layton, of Wilmington, for plaintiff. Andrew C. Gray, of Wilmington, for United Brokerage Co. Robert H. Richards, of Wilmington, for Samuel T. Carnes, and James M. Satterfield, of Dover, in pro. per.

RICE, J. (delivering the opinion of the court). The state of Delaware upon relation of John E. Linihan, filed a petition in this court, praying for a writ of peremptory mandamus, directed to United Brokerage Company, Samuel D. Carnes, J. P. McGehee and James M. Satterfield.

Upon the issuance and return of the rule to show cause why the prayer of the petitioner should not be granted, an alternative writ of mandamus was issued on the twenty-fourth day of March, A. D. 1917. The petition was incorporated in the alternative writ. On the seventh day of May following, the defendant filed a return to the alternative writ of mandamus. In this return the defendant admits the allegations appearing in the first, second and third paragraphs of the petition, to wit: That the petitioner is a resident of the city of Chicago and state of Illinois; that the United Brokerage Company is a corporation organized and existing under the laws of the state of Delaware, and Samuel D. Carnes is the president, and J. P. McGehee is the secretary and treasurer of said corporation, and James M. Satterfield is the resident agent of said corporation; that the company has an authorized capital stock of eleven million dollars, of which one million dollars is preferred and ten million dollars is common stock, and that the relator is the owner of twenty-five hundred and fifty shares of said common stock.

In answer to the fourth paragraph of the petition, the defendant admits that no dividend has been declared on the common stock of the company.

To the fifth paragraph of the petition, the defendant admits that until June 14, 1916, it maintained an office at number 220 West Forty-Second street, New York City, at which office the books and records of the company were kept, but denies that Barron G. Collier

owns the majority of its stock or is its controlling stockholder, and avers that the said Collier is the largest individual stockholder.

The defendant denies the averment in the sixth paragraph of said petition that in the month of November, 1916, the relator determined, if possible, to dispose of his stock in the defendant company.

The defendant also admits that its stock is not listed on any exchange and is not currently dealt in at any place of public sale and exchange of stock.

In reply to the seventh paragraph of the petition, the defendant makes certain admissions not necessary here to set forth.

The defendant admits the averments in the eighth paragraph of the petition that certain letters were sent by the relator and for the relator to the defendant requesting an inspection of certain books of the corporation.

To the ninth paragraph of the petition, the defendant admits that it is a holding company, and that its properties consist of the capital stock of other corporations, and bonds of United Cereal Mills, Ltd., but denies that it owns any of the capital stock of the said United Cereal Mills, Ltd.

The defendant admits the averment in the tenth paragraph of the petition, that the said United Cereal Mills, Ltd., did commence an action in foreign attachment in the Superior Court of the state of Delaware, in and for New Castle county, against the relator, John E. Linihan, and attached the shares of stock of the said relator in said United Brokerage Company, the defendant herein, and admits that the bail demanded in said writ was the sum of fifty thousand dollars, but denies that the bringing and commencement of said action was brought by procuration of this defendant or its officers.

The seventeenth paragraph of defendant's return is in the following language:

Further answering said petition, the defendant avers that the demands of the relator for the privilege of inspecting the books and records of this defendant, and of making copies thereof, and the institution of this suit, were not in good faith, nor for any legitimate or lawful purpose, but were made and instituted for the sole purpose and object of harassing the defendant and the said Barron G. Collier, the defendant's principal stockholder, with the view of compelling it or him to acquire the said shares of stock owned by the relator in the defendant, and as a counter attack to induce the said United Cereal Mills, Ltd., to abandon or compromise just and valid claims which it has against the relator, growing out of his mismanagement of the said United Cereal Mills, Limited, while he was in charge thereof, as will be hereinafter more fully detailed.

The defendant avers that for several years prior to the twenty-fifth day of October, A. D. 1916, the relator was an officer and director of the said United Cereal Mills, Limited, a

partnership association under the laws of the state of Michigan, and during said period, from time to time, held the offices of general manager, treasurer, vice chairman and vice president, and at some portions of said period held all of said offices at the same time, and during said period had practical and exclusive control, management and direction, with slight exceptions, of all of the business and affairs of said association. During said period, the said relator had full right and power to employ and discharge all agents and employes of said association, to make all legitimate contracts in its name and behalf, and to disburse its funds in the operation and conduct of its business.

During all of said period of employment of the said relator by the said partnership association, the said association was almost entirely owned by either this defendant or by the said "United Brokerage Company of New York," a corporation all of whose stock is and always has been owned by this defendant.

For some time prior to October 25, 1916, the United Brokerage Company of New York, owning as aforesaid almost all of the capital stock of said United Cereal Mills, Limited, was dissatisfied with the management of the affairs of the said United Cereal Mills, Limited, by the relator, and, although repeated requests were made for the same, by the said United Brokerage Company of New York, no accurate or definite information regarding the business and affairs of said partnership association could be obtained by the said United Brokerage Company of New York from either the relator or his subordinate officials and employes. Consequently, about the month of April, 1916, it was decided by the said United Brokerage Company of New York to have a report made by a qualified expert accountant on the condition of the said partnership association and its business; but the relator, being then the managing officer of said partnership association and being in actual possession and control of all its books and records, positively refused to allow such accountant to have access to said books and records for the purpose of making an investigation of the affairs and business of said association. The relator, well knowing that such an investigation would disclose mismanagement by him of the affairs of said association and misappropriation of its funds by him, persistently refused either to give any information to the said United Brokerage Company of New York, or its representatives, with reference to the business and affairs of said association, and also persistently refused to permit any such information to be obtained by the said United Brokerage Company of New York; and the said relator expressly instructed his subordinates to refuse to every one any access whatsoever to the books and records of the said partnership association and to refuse any information whatsoever relating to its affairs

to the said United Brokerage Company of New York, and also to every other person whatsoever. The said relator, then and there knowing that this defendant, through its ownership of the stock of the United Brokerage Company of New York, was interested in the affairs of the said United Cereal Mills, Limited, and, then and there, planning a counter attack to divert or prevent the attempts of the United Brokerage Company of New York to obtain a disclosure of the true conditions of the business and affairs of said partnership association, seized hold of the fact that he was a stockholder in the defendant company as the basis of such counter attack and forthwith made a demand that the defendant company, or the said Barron G. Collier, who was then known to the relator to be the largest stockholder in the defendant company, should purchase his (the relator's) stock in the defendant company, at a price satisfactory to the relator; and the said relator then and there threatened that unless such purchase should be made he would take legal proceedings, the character of which he did not then disclose, for the purpose of harassing and injuring the defendant. The defendant corporation and the said Collier both refused to purchase said shares of stock and the said relator thereupon began to make demands for the right to inspect the books and records of the defendant and persisted in his refusal to permit any examination to be made of the affairs of the said United Cereal Mills, Limited, by the board of managers of said partnership association, as well as by the owner of practically the entire capital stock thereof; and claimed, as an excuse for such conduct, that all of the board of managers and officers of said partnership association, other than himself, had not been duly elected. By such, and other similar tactics, the said relator, between April, 1916, and October, 1916, endeavored to prevent access to the books and records of said partnership association by all other persons than himself and his appointed subordinates. It having become evident that the relator's efforts to prevent an examination into the affairs of the association were caused by his anxiety to conceal from the other officers and stockholders some mismanagement of the business, a general meeting of the shareholders of said association was held in the month of October, 1916, and a board of managers was elected, of which board the relator was not chosen as a member; but as a matter of fairness to the relator, he was temporarily continued as manager of the plants of the said association until an investigation and report could be made of the condition of the business. Under the Michigan statute (How. Ann. St. 1912, §§ 5425-5441), authorizing the organization of partnership associations, the governing body thereof is called a "board of managers." Almost immediately after the new board of managers was elected, it was discovered by the said board of managers

that the said partnership association had a number of outstanding checks without sufficient funds in bank to pay them when presented, and that other financial transactions had been made by the said relator which reflected seriously upon the honesty of the management of the said association and threatened the financial standing of the association. Thereupon, it was made plain to the relator that the financial assistance which had theretofore been extended to the said association by the defendant company would be withdrawn unless the relator should completely sever his connection with said association and turn over all books, records and papers of the said association unto such persons as might be appointed by the said Board of Managers. The relator, fully appreciating that he would be seriously compromised if said checks went to protest, and the financial transactions above referred to were exposed, therefore agreed to, and did, then and there, sever his connection with the said association and made delivery of all its books and papers, and the attorney for said relator, then and there, for the first time, informed the representatives of the said Board of Managers that the relator had been using the money and funds of said association for speculation in grain and had thereby lost moneys and funds of said association amounting to about the sum of forty thousand dollars.

The examination of the books and affairs of the said association which followed the severance of the relator's connection therewith, disclosed the fact that the said relator for several years prior thereto had been unlawfully and without authority using the funds and money of said association for the purpose of speculating in grain, ostensibly for the company but, in a number of instances, in the names of other parties, and that such conduct on the part of said relator had resulted in a misappropriation and loss of about the sum of \$38,875.50 of the money and funds of said partnership association; and said examination also disclosed the further fact that the said relator, for several years prior to the severance of his relations with said association, had been using the funds of the said association for the purpose of paying his private debts and obligations and thereby had overdrawn his personal salary account with said association, for various amounts from time to time, and that the amount of such overdrafts, at the time of such severance of relations, aggregated the sum of \$6,886.35, the said amount being the moneys of the said United Cereal Mills, Limited, which the said relator had theretofore unlawfully taken and appropriated to his own use, in addition to the above mentioned funds so as aforesaid misappropriated by him for the purpose of speculating in grain; and it is to recover the above mentioned sums of money, so misappropriated as aforesaid by the said relator, that the said suit by foreign attachment has been brought in

the said Superior Court of the state of Delaware.

This defendant further avers that the persistent refusals of the relator to permit the United Brokerage Company of New York, which was and is practically the sole owner of the said United Cereal Mills, Limited, to obtain any information about the conduct of the business of the said United Cereal Mills, Limited, of which, as aforesaid, the said relator was the manager, and the sudden demand of the relator for the right to inspect the books of the defendant, and the threat of the relator to institute legal proceedings against the defendant unless it should purchase his stock in the defendant at a price satisfactory to him, were all inspired solely by the relator's desire to avoid the consequences of his wrongful and illegal acts, hereinabove set forth, as manager of the said United Cereal Mills, Limited. Anticipating that some legal action would be taken against him by the said United Cereal Mills, Limited, the relator, even after the events hereinabove detailed, continued to endeavor to compel either this defendant, or the said Collier, to purchase his shares of stock in this defendant company; and, for the purpose of "holding up" the defendant, or the said Collier, and coercing them to purchase his said shares of stock, or to exert their influence to prevent any legal action being taken against him by the said United Cereal Mills, Limited, the said relator threatened to exercise his right as a stockholder to inspect the books and records of the defendant and threatened to use the information gained from such inspection for the purpose of bringing suits to annoy and harass the defendant and to injure its business and the business of its said subsidiaries, engaged, as aforesaid, in conducting the said street railway advertising business. And this defendant avers that, if permitted access to the books of the defendant, the said relator will use the information gained therefrom as the basis of unjust and unsupportable legal actions in the hope that he may thereby be able to compel this defendant, or the said Collier, to purchase his said shares of stock, or to compel them, indirectly, to influence the United Cereal Mills, Limited, to desist from proceeding against him for the wrongful acts aforesaid.

This defendant further avers that it is the declared purpose and intention of the said relator, in case he obtains from this court the right to inspect and make copies of the books, papers and accounts of the defendant corporation, to use the information thus obtained to injure the street railway advertising business of the said subsidiaries of the said defendant, and also to use such information as the basis of suits against the defendant corporation or the said Collier, or both of them, for the sole purpose of harassing and annoying them to the extent of compelling them, or one or the other of them, to pur-

chase his said shares of stock, as the price of peace.

This defendant further avers that this present suit, itself, has not been brought for any proper purpose, but, on the other hand, that the same has been brought for the improper, evil and vicious purpose of using this court and its process as a means of coercing either the said defendant or the said Collier to purchase the said shares of stock, so as aforesaid owned by the relator, whereas, in fact, neither the said defendant nor the said Collier have any desire to purchase the same. And this defendant further avers that, so far as it is concerned, it will not permit itself to be coerced to purchase the said relator's shares of stock, under any circumstances.

Argument was heard on a motion to quash defendant's return to the alternative writ.

The question for our immediate consideration and determination is whether the averments contained in the seventeenth paragraph of the return show sufficient reason why the relator should not be permitted, under the order of the court, to inspect and make copies of, and extracts from, the books of the company as prayed for in the petition. We believe the questions of law raised have all been determined by the courts of this state.

The right which relator seeks in this suit is the common-law right of the stockholder to inspect the books of the corporation at the proper time and for a lawful and proper purpose. The relator in his petition expressly avers that he does not wish to see the books and papers for mere idle curiosity, nor for speculative purposes, nor for any improper purpose whatever, and sets forth in his petition what under ordinary circumstances would be a proper purpose, and if it were not for the issues raised by the seventeenth paragraph of the defendant's return, we think he would have established his right to inspect certain books of the defendant company.

[1] It is a principle of law recognized in this state, that a stockholder has the right to inspect the books of the corporation at a proper time for proper purposes. *Juivecourt v. Pan-American Co.*, 5 Pen. 395, 61 Atl. 398, 63 Atl. 1118; *Brumley v. Jessup & Moore Paper Co.*, 1 Boyce, 397, 77 Atl. 16; *State v. Jessup & Moore Paper Co.*, 4 Boyce, 248, 83 Atl. 449.

[2] If it appears from an inspection of the defendant's return, that relator's purpose is not as alleged by him, for a proper purpose, but is, as averred by the defendant, for an improper purpose, then the court in its discretion would not make an order for the inspection of defendant's books by the relator, and in this case would not quash return filed by the defendant.

In *State v. Jessup & Moore Paper Co.*, supra, it was said:

"The answer made by the return is threefold in nature. It first charges the relator with actions and motives which, if true, would deprive it of the right to obtain information it seeks * * *"

—and again with reference to the bad faith and improper motive of the relator in the same case, the court said:

"Bad faith and improper motive of the kind alleged, would, if true, deprive the relator of any right to inspect the books of a corporation of which it is a stockholder; but such an allegation of bad faith and improper motive, without something to show how and in what respect it exists, is alone insufficient as a denial of the plaintiff's good faith and proper motive, just as a bald averment of the relator as to its good faith and proper purpose, without something to show the real or probable existence of the one and the other, would be an insufficient averment in the petition upon which to ask for and obtain the inspection of corporate books."

[3] In passing upon the question raised by the return of the defendant, we must not only keep in mind the right sought to be exercised by the relator, but we must also keep before us the rights of the other stockholders to have their interests in the company protected.

There is much in the seventeenth paragraph of defendant's return, which may seem irrelevant and would be irrelevant if it were not that it contained averments of the circumstances leading up to and throwing light upon the nature and character of the relator's demand that one of the principal stockholders purchase his stock in the defendant company, at a price satisfactory to the relator and his threat that unless such purchase should be made, he would take legal proceedings for the purpose of harassing and injuring the defendant, and also his subsequent threat to exercise his right as a stockholder to inspect the books and records of the company, and use the information gained in such inspection, for the purpose of bringing suits to annoy and harass the defendant, and to injure its business and the business of its subsidiaries.

The examination of corporate books by the relator for the purpose declared by him, as averred in the return of seeking information whereby he could bring harassing and vexatious litigation against the company, could if such purpose should be effected but bring injury to the interests of the other stockholders in the company, and would be hostile to their interests and the interests of the company, even though such litigation should be finally determined in favor of the company. Such averments of bad faith and improper purposes on the part of the relator when unequivocal, complete and sufficiently pleaded in detail, can only under our practice in mandamus proceedings, result in a denial of

the plaintiff's prayer to inspect the corporate books.

In *State v. Jessup & Moore Paper Co.*, supra, the court said:

"Under the practice of this court in proceedings in mandamus, the relator by its petition must disclose a state of facts that establishes its legal right to the remedy it seeks, and when an alternative writ issues to enforce that right, the defendant by its return must either show that it has obeyed the command of the writ, or, in the alternative, deny the averments of the petition, upon which the writ was awarded, and show the relator to be without right to the remedy. There must be denials of those averments that are material to establishing the petitioner's right, and in order to avoid obedience to the mandate of the writ, the denials must be unequivocal, complete and sufficient. They must be sufficient, not merely in the estimation of the pleader, but must be so pleaded as to disclose their sufficiency to the court that is called upon to pass upon their sufficiency. When the sufficiency of the denials is thus disclosed, they are accepted as true; when their sufficiency is not disclosed, and the mandate of the writ is not obeyed, the return is insufficient, and to that extent the case stands as if no return were made at all. * * *"

It may be a hardship to the relator in this case not to be allowed to inspect the books of the company, as it may prevent him from securing information as to the value of the stock owned by him, and attached in the proceeding instituted by the United Cereal Mills, Ltd., and may result in preventing him from securing bail in that proceeding. But unfortunately for him, the return avers and sets forth improper threats and demands against the company and at least one of the stockholders in the company, which if carried out, would undoubtedly prove most injurious to the welfare of the company and to the interests of the stockholders.

[4] Under our practice, if it is sufficiently averred in the return that the purpose of relator in seeking an inspection of the corporate books is an improper one, for the purposes of the proceeding, the answer must be accepted as true and the relator referred to what other remedy he may have at common law. We have no practice or procedure in this state, whereby issues raised by the allegation in the petition and the averments in the return may be submitted upon evidence to a jury for their determination.

We are of the opinion that the bad faith and improper purposes on the part of the relator, averred by the defendant in its return, is adequately pleaded and it is effectively shown that the relator should not be permitted to inspect and make copies of, and extracts from, the books of the company, as prayed for in his petition filed, and therefore we are of the opinion that the motion to quash the return should not be granted.

The peremptory writ is denied.

(6 Boyce, 582)

PERKINS v. BRINGHURST.

(Superior Court of Delaware. New Castle.

June 27, 1917.)

DISCOVERY — 97(1) — MOTIONS — PRODUCTION OF PAPERS — REQUISITES.

In making an order under Rev. Code 1915, § 4228, to require the production of papers in evidence the application should show not only that notice had been served upon the adverse party or his counsel of the time when the application would be made to the court, but also that prior demand had been made on the adverse party, or his counsel, for leave to examine the books or writings within a reasonable time (stating the time), and such leave had been refused.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 124-127.]

Action by Clifton A. Perkins against Anna J. Bringhurst. On defendant's motion to require the production of papers. Motion granted.

Argued before RICE and HEISEL, JJ.

Baldwin Springer and Caleb E. Burchenal, both of Wilmington, for plaintiff. Saulsbury, Morris & Rodney, of Wilmington, for defendant.

Action by Clifton A. Perkins against Anna J. Bringhurst, to recover for work and labor performed and materials furnished, money advanced, etc., in and about the erection and repair of certain buildings for defendant. Plaintiff filed a bill of particulars with his declaration, to which defendant refused to plead until a further bill of particulars was filed. Plaintiff filed a more detailed bill of particulars.

Counsel for defendant thereupon served the following notice upon counsel for plaintiff:

"* * * We hereby give you notice that on Thursday, next, June seventh, 1917, at 2:30 o'clock P. M. we shall move the court to order the plaintiff in the above cause to produce the books or writings mentioned in the schedule hereto appended and marked Exhibit 'A,' which said books or writings are in the possession or control of the plaintiff and which contain evidence pertinent to the issue; such production to be made for use during the pendency of said cause under such terms and at such times as the court may direct."

And also filed the following motion:

"The defendant in the above stated cause by Saulsbury, Morris & Rodney, her attorneys, having given to the plaintiff in said cause due notice of this application, as appears by the copy of said notice hereto attached, doth now move the court for an order requiring the plaintiff to produce during the pendency of said cause, under such terms and at such times as the court may direct, the certain books or writings mentioned in the schedule hereto appended and marked Exhibit 'A,' which said books or writings are now in the possession or control of the said plaintiff and contain evidence pertinent to the issue in said cause."

Argument was heard.

HEISEL, J. (delivering the opinion of the court). This is an application by defendant for the production by plaintiff, of certain writings in his possession for examination by

defendant during the pending of the action, as provided by section 4228, Rev. Code 1915.

In making such order as we think necessary and proper in this matter, we take occasion to say, that in applications to the court under the section of the Code mentioned, we think the better practice to be, and hereafter will require the application to show, not only, that notice had been served upon the adverse party or his counsel of the time when the application would be made to the court, but must show also that prior demand had been made on the adverse party, or his counsel, for leave to examine the books or writings in question, within a reasonable time (stating the time) and such leave had been refused.

We think the practice as stated in section 337 of Woolley's Del. Prac. should be followed.

And now, to wit, this twenty-seventh day of June, A. D. 1917, the foregoing petition having been read and considered by the court, it is ordered that the plaintiff produce on the twentieth day of July, 1917, at the office of the Prothonotary of this court, at Wilmington, for the inspection and examination of the defendant, the following bills or writings.

1. The contracts mentioned on page one of the bill of particulars.

2. Bill showing items of charge on page seventeen of the bill of particulars, January 28, 1913, tin roofing for porch—\$126.98.

3. Bills showing items of charge on page forty of the bill of particulars under date of March 28, 1913, of each of the following charges:

Warner's bill.....	\$120 30
Plastering for truck room partitions..	120 00
Tyler's bill for stone lining.....	100 00
Extra heating.....	235 00
Panels and castings.....	156 58
Panels and canvas.....	81 30
Glass.....	73 82
Delaware Hardware Co.'s bill—extra	
hdw.	178 00
Extra painting materials.....	183 26
Wilmington Sash & Door Co.'s bill for	
extra millwork.....	174 79

(6 Boyce, 584)

PALESE v. PALESE.

(Superior Court of Delaware. New Castle.

June 14, 1917.)

DIVORCE — 99 — PLEADING — DEFENSES.

Where the defense in an action for divorce is adultery on the part of the plaintiff, the better practice is to file an answer setting up the adulterous acts relied upon, with the same particularity as would be required in a petition alleging adultery as a ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 316-318.]

Action for divorce on the ground of—extreme cruelty by Mollie A. Palese against Andrew J. Palese. Plaintiff given opportunity to file an answer, setting up defense sought to be raised by evidence.

At the trial, it was sought to introduce testimony to prove adultery on the part of the plaintiff. Objection was made that no answer setting up such a defense had been filed by defendant. It was contended in reply that the practice did not require the filing of such an answer, except in cases where the ground for divorce is adultery.

Argued before RICE and HEISEL, JJ.

Armon D. Chaytor, Jr., of Wilmington, for plaintiff. Frank L. Speakman, of Wilmington, for defendant.

RICE, J. The court is of the opinion that, where the defense in an action for divorce is adultery on the part of the plaintiff, the better practice would be, and should be, to file an answer setting up the adulterous acts relied upon, with the same particularity as would be required in a petition alleging adultery as a ground for divorce. As the practice has been somewhat unsettled up to this time, we will give the defendant in this case reasonable opportunity to file an answer. If that can be done during the noon recess, the plaintiff may then elect whether he will proceed with the hearing or ask for a continuance.

(78 N. H. 418)

BERNARD v. WHITEFIELD TANNING CO.

(Supreme Court of New Hampshire. Coös.

May 1, 1917.)

1. WATERS AND WATER COURSES ¶77—POL- LUTION OF STREAM—SUFFICIENCY OF EVI- DENCE.

In an action for damages to realty and personalty from the pollution of a river by anthrax germs from defendants' tannery; evidence held to justify finding that the germs which killed plaintiff's cows and inoculated his land came from the tannery in the summer, when defendants operated it, rather than before, when it was operated by others.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66.]

2. WATERS AND WATER COURSES ¶77—POL- LUTION—EVIDENCE—MATERIALITY.

Evidence offered by defendants tending to show that government inspection and disinfection of the foreign hides which defendants used exclusively were effectual to destroy anthrax germs, and that defendants, in the management of their business, relied on such inspection and disinfection, was admissible, since it bore directly on the question whether pollution of the stream was due to defendants' want of care, or want of care of defendants' predecessors in the tannery business, who used domestic hides.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66.]

3. NUISANCE ¶2—UNREASONABLE USE OF RE- ALTY—KNOWLEDGE OF USE.

To charge the owner of realty with an unreasonable use of it, it must appear that he had actual knowledge of the use.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 2.]

4. WATERS AND WATER COURSES ¶77—POL- LUTION OF STREAM—ACTION FOR DAMAGES— ISSUE.

In an action for damages to realty and personalty from pollution of a river by anthrax

germs from defendants' tannery, the issue whether turning the tannery's general waste into the stream was a reasonable exercise of defendants' riparian rights should not be submitted, but only the issue of negligence, unless plaintiff proves damages from the exercise of the right which defendants claim as appurtenant to their riparian ownership.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66.]

Transferred from Superior Court, Coös County; Chamberlin, Judge.

Action on the case by James Bernard against the Whitefield Tanning Company. There was verdict for plaintiff, and defendant excepts. Transferred from the superior court. Exception sustained, and new trial granted.

Case, for the recovery of damages to real and personal property occasioned by the pollution of John's river in Dalton, by anthrax germs from the defendants' tannery located on the river at Whitefield. Trial by jury, and verdict for the plaintiff. Exceptions were taken by the defendants to the exclusion of evidence, to the charge of the court, and to the denial of the defendants' motion for a directed verdict. The facts sufficiently appear in the opinion.

Goss & James, of Berlin, and E. M. Bowker, of Whitefield, for plaintiff. Drew, Shurtleff, Morris & Oakes, of Lancaster, for defendant.

PLUMMER, J. The defendants in support of their motion for a directed verdict, contend that the evidence of the plaintiff was not sufficient to warrant the verdict, because it could not be found on the evidence that the anthrax germs which caused the damage to the plaintiff came from the tannery while operated by them. The plaintiff owns and carries on a farm of 100 acres situated on the northeast side of John's river in Dalton about five miles below the defendants' tannery. Thirty acres of the farm is tillage, and the remainder is pasture and brush land. The building in which the tannery is located is owned by the town of Whitefield, and was first occupied and used as a tannery for several years by Bernard & Son, and following them Obendorff & Adler operated a tannery therein from July or August, 1914, to April, 1915. The defendants took possession in May, 1915, and began the operation of the tannery May 15, 1915. There is considerable water used in the various processes of tanning the hides, and all the waste runs into a sewer, which empties into John's river. Great care is taken to save all the trimmings, fleshings, and hair from the hides, that by custom belong to the defendants, but some of the hair is washed into the sewer. There was evidence that the tannery was kept in a clean condition. All the hides tanned by the defendants previous to the bringing of this suit, August 16, 1915,

were foreign hides. The first hides tanned were 500 from South America, which were tanned May 15th, 16th, 17th, and 18th. The next hides were 47 known as Rangoons from India, which were tanned May 23d. On June 10th the defendants received 1,000 China hides for tanning, and from then to the bringing of this action, the tannery, or some part of it, was in continuous operation, tanning these China hides. Anthrax is prevalent in China and many foreign countries. Under government regulations, if hides imported from Argentine are accompanied by a certificate of the American consul, stating that the animals from which the hides were taken were killed in abattoirs under government inspection, they are admitted. But if hides are imported from China, in order to be admitted, they must be accompanied by a certificate sworn to by the American consul, stating that they have been immersed for at least 30 minutes in a 1 to 1,000 solution of bichloride of mercury, which is effective to kill both germs and spores. If such hides arrive here without the proper certificate, a government inspector sees that they receive the required immersion before they can be tanned. It appeared that anthrax germs in the spore form are very difficult to destroy, resisting drying, high temperatures and freezing, and that damp ground and muck holes furnish the best soil to promote the growth of the spores, and when such ground becomes infected it is likely to remain so for many years. There was evidence that the predecessors of the defendants in the tannery tanned domestic, country gathered hides from the West and Southwest, and that anthrax is more or less prevalent in the Southern states in this country, and particularly in the Mississippi Valley.

[1] The defendants urge that, inasmuch as the evidence shows that the hides which they tanned before this suit was brought were all foreign hides admitted under government regulations, it is very improbable that anthrax germs came from the tannery while operated by them, and that it is more probable, considering the ability of the germs to live in the soil, that the germs which did the injury came from the tannery when operated by those that preceded them, who tanned country gathered hides, and therefore that the jury could not find that they caused the pollution of the stream. This contention cannot be sustained. Whatever may be said in support of the defendants' position, it cannot be held as a matter of law that the jury were not justified in finding that the anthrax germs that killed the plaintiff's cows and inoculated his land, came from the tannery in the summer of 1915. Previous to that summer the occupants of the plaintiff's farm had never had any trouble from cattle dying, and cattle did not suffer any ill effects from drinking the river water, when Bernard & Son and Obendorff & Adler were operating

the tannery. Between the 5th and 10th of July, 1915, shortly before 4 of the plaintiff's cows died of anthrax, the water in John's river rose, due to heavy rains, and overflowed the plaintiff's low lands in which his cows were pastured. And during the summer the water in the river had a strong odor and was filthy, and hair and pieces of fleshings were floating on the water. The plaintiff had 5 cows die of anthrax in 1915. Four died in July as above stated, and 1 that died in December got out of the plaintiff's yard, and wandered down onto the low lands and to the river. Some 15 cattle along the course of John's river below the tannery contracted the disease of anthrax in the year 1915. The first creature died of it on June 22d. There was no outbreak of the disease prior to that time. There were no known cases of the disease except on farms along the river below the tannery, and at places where meadow hay cut on the John's river interval was being fed. The evidence disclosed that Amos Brown had cows taken sick with anthrax that were fed with hay that was cut in 1915 on a meadow below the tannery through which the river flows. Washings from this hay upon examination showed anthrax germs. An employé of the defendants testified that the last of August or the first of September, 1915, he had a swelling on his neck starting with a pimple, and that he went to a hospital, and had it cut out, and the physician who did it sent the tissue to the state bacteriologist at Concord, who found that it contained anthrax germs. The evidence above referred to is sufficient to warrant the finding of the jury that the anthrax which destroyed the plaintiff's property came from the defendants' tannery in the summer of 1915.

[2] The evidence offered by the defendants tending to show that government inspection and disinfection of foreign hides was effectual to destroy anthrax germs, and that the defendants in the management of their business relied upon such inspection and disinfection, which was excluded subject to exception, was competent, and should have been admitted. It bore directly upon the question whether the pollution of the stream by anthrax germs was due to the defendants' want of care, which was one issue submitted to the jury. This error destroys the verdict.

[3] The gist of the plaintiff's claim was that the defendants exercised their rights of ownership of the tannery in an unreasonable manner, and thereby caused the plaintiff's injury, or stated more specifically, that it was unreasonable for them to put anthrax germs into the water, which was turned or allowed to run into the river and which poisoned the plaintiff's cattle. The claim was made at the trial: (1) That the defendants had no right to empty the refuse from the tannery into the river; and (2) they could not, in the reasonable exercise of their rights

as owners of the premises, put anthrax germs into the water or allow it to be polluted in that way. But the defendants did not claim the right by virtue of their ownership of the tannery premises to put poisonous germs into the river. The right the defendants did claim was to turn the general refuse of the tannery into the stream, and they admitted their obligation to exercise due care to keep such refuse free from anthrax germs. There was no evidence the defendants knew the refuse carried such germs. In order to charge an owner of real estate with an unreasonable use of it, it must appear he had actual knowledge of its alleged use. The question whether the use of the stream as a sewer for the tannery was a reasonable exercise of the defendants' riparian right was submitted to the jury, but no claim of any damage from such use was made except that occasioned by anthrax. As the defendants did not claim the right to put anthrax into the stream, the injury the plaintiff alleged arose not from the right which the defendants claimed, but from their alleged negligence in the exercise of a right claimed by them. Whether they had the right to turn the refuse of the factory into the stream or not, as the damage complained of did not result from the exercise of that right, it is immaterial whether turning the general waste into the stream was reasonable or not. The submission of that issue to the jury might tend to confuse them and distract their attention from the real issue whether the presence of the anthrax in the stream was due to the defendants' fault.

[4] This issue was submitted as a part of the question of reasonable use, but at another trial the issue of negligence only should be submitted unless the plaintiff proves damage from the exercise of the right which the defendants claim as appurtenant to their riparian ownership. All concurred.

Exception sustained.

New trial granted.

(91 Vt. 500)

BETTERLY v. BRATTLEBORO STREET RY. CO. et al.

(Supreme Court of Vermont. Brattleboro. July 20, 1917.)

1. RAILROADS \S 326(1)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

One driving a sleigh over a railway crossing was bound to exercise ordinary care with reference to general conditions known to, and which must necessarily, exist at such crossing during the sleighing season, and the amount of snow in the traveled part of the street as affecting the slope to the track could be considered in passing upon the question of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1037, 1038.]

2. RAILROADS \S 330(1)—CROSSING ACCIDENT—RIGHT TO ASSUME SAFETY OF CROSSING.

One driving a sleigh over a railroad crossing could assume that the track was kept in a

reasonably safe condition, and could not be charged with negligence in failing to notice a defect, unless it was so obvious that it ought to have been seen by one approaching the crossing with ordinary prudence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1071.]

3. RAILROADS \S 350(15)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence showing that plaintiff drove a sleigh over a railway crossing at the rate of four or five miles an hour, and that he failed to notice the undue prominence of a rail which overturned his sleigh held insufficient to show contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1168.]

4. RAILROADS \S 324(4)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—MANNER OF DRIVING.

The fact that one drove a horse over a railway crossing at a trot, and that the speed was not lowered, would not charge him with negligence if the speed was no greater than ordinary prudence permitted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1025.]

5. TRIAL \S 296(4, 5)—REFUSAL OF REQUEST—CURE BY OTHER INSTRUCTIONS.

Refusal of a request upon the measure of plaintiff's duty in driving over a railway track held not to have been cured by given instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

6. TRIAL \S 62(2)—RECEPTION OF EVIDENCE—REBUTTAL.

Plaintiff had a right to rebut medical evidence showing that he could not have survived a certain dislocation testified to by plaintiff's physician, resulting from a railway crossing accident, by showing that one who had received such a dislocation could not only live, but could be free from paralysis.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149.]

Exceptions from Windham County Court; Frank L. Fish, Judge.

Action by Thomas F. Betterly against the Brattleboro Street Railway Company and another. Judgment for plaintiff, and both parties bring exceptions. Exceptions sustained, judgment reversed, and cause remanded.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Barber & Barber, of Brattleboro, for plaintiff. Clarke C. Fitts, of Brattleboro, and Harold E. Whitney, for defendants.

MUNSON, C. J. The plaintiff was injured by being thrown from his sleigh while crossing the street railway track in Brattleboro. He has recovered a judgment, and both parties present exceptions. The only exceptions argued by the defendants are to the refusal of the court to direct a verdict in their favor, and to its failure to comply with certain requests for instructions. All their exceptions relate to the question of contributory negligence.

The plaintiff testified that there was good

sleighting at this time, not a great deal of snow, a few inches, and that you would naturally go down slightly in passing upon the railway. All that is claimed in the defendants' statement of the case is that the snow made the traveled portion of the highway somewhat higher than the railway crossing. The jury has found by special verdicts that the accident was caused by the sleigh hitting the running rail, and on account of the absence of a proper plank guard along the side of it. There was evidence that the plaintiff had not crossed here before during that winter.

The plaintiff testified that his horse was trotting, jogging along five, six, or seven miles an hour; that he made no difference in the speed on coming to the track; that he took all the care that anybody could; that he did not see any obstacles, did not look ahead to see if there were any, and did not expect any; that he was driving along unconcerned; that he did not have in mind how the track crossed, or what the effect would be in striking the rail on a curve; and that the fact that he was about to cross a track did not occur to him. Mrs. Estey, a witness for the plaintiff, testified that as she was coming from an intersecting street she saw the plaintiff coming down towards the railway crossing; that he was driving along at a very slow pace, not more than four or five miles an hour; and that he was thrown out right in front of her as she waited for him to get by.

[1-3] The defendants insist that the plaintiff's testimony as to the manner in which he approached and came upon the crossing entitled them to a directed verdict. It is evident, however, that the amount of snow in the traveled part of the street, as affecting the slope to the track, is an element to be considered in passing upon the question of contributory negligence. The plaintiff was bound to exercise ordinary care with reference to the general conditions which are known to exist, and must necessarily exist, at such a crossing during the sleighting season. But he had a right to proceed upon the assumption that the track was kept in a reasonably safe condition, and he cannot be charged with negligence in failing to notice the defect, unless it was so obvious that it ought to have been seen by one approaching the crossing with ordinary prudence. We think it cannot be said as matter of law that the plaintiff was guilty of negligence in driving upon the crossing at the rate of four or five miles an hour, or in failing to exercise a closeness of observation that would have informed him of the undue prominence of the rail.

[4] We think the defendants were not entitled to instructions in the terms of the second and fourth requests. One or two suggestions will indicate our view. A man may drive onto a crossing without giving it a thought, and yet drive onto it in a manner

which meets the requirement of the law. If the speed at which the plaintiff came upon the crossing was no greater than ordinary prudence permitted, the fact that the gait of the horse was a trot, and that the speed was not lowered, would not charge him with negligence. The language of the fifth request might easily be thought to refer to the physical situation alone, and so mislead the jury to the plaintiffs' injury. The situation at the crossing as it actually existed was to be considered in connection with the situation which the plaintiff had a right to expect there, and what reasonable prudence required of him in such circumstances.

[5] The third, seventh, and eighth requests, like the others, are based upon different features of the plaintiff's testimony descriptive of his driving. The seventh is taken up specially by defendants' counsel as the best illustration of their claim. It reads:

"If a prudent man would naturally slow up the gait of his horse as he approached the tracks as Betterly did, then it was incumbent upon Betterly to slow up, and his failure to do so precluded his recovery in this action, if the jury found that the gait at which he was going had anything to do with throwing him out of the sleigh."

The defendants claim that the refusal of the court to comply with any of their requests left the charge without any application of the general rule given the jury as the measure of the plaintiff's duty.

The only general definition of negligence was that given in stating the duty of the defendants. The jury was afterwards told, in substance, that if the plaintiff was negligent in any degree in anything that contributed to his injury, he could not recover; that if he was not without fault as he approached the crossing, the defendants were entitled to a verdict. The only statement in the nature of an application of this rule to the facts of the case was made in that part of the charge in which the court submitted certain special inquiries respecting the cause of the accident, and stated the claims of the parties regarding them. It was made with reference to the inquiry whether the accident was caused by the absence of a proper plank guard, and was in these terms:

"The defendants say the crossing was in good order, had all the planks and other things that were necessary and proper for the safety of the public, and that the driving of the plaintiff at the time onto the crossing as he did, the crossing being more or less bare, the result was a natural one, and the fault was the plaintiff's; he should have halted his horse and driven more slowly upon the crossing, because it is known of all men that you can't drive onto a piece of bare ground with rails on it like this without jolting the sleigh somewhat."

The court concluded this presentation by saying:

"There is the whole question, in four propositions, for you to determine."

The seventh request contained a sufficiently complete and accurate statement of the plaintiff's duty to entitle the defendant to a

compliance with it in terms or in substance. It called for a specific application of the law of the subject to the case presented by the evidence. The jury was told that the plaintiff could not recover unless he was free from fault, but was given no particular test as the measure of his conduct. The reference to the case of a careful and prudent man as the standard in cases of this kind was preceded and followed by comments which directed the attention of the jury to the care exercised by the defendants. There was no direct and explanatory presentation of the rule of liability in its relation to the plaintiff. The frame of the charge in other respects was such as to make this omission material. The court submitted inquiries regarding the existence and effect of certain physical conditions which were claimed to have caused the accident, and referred to these as covering the whole question. Later in the charge the jury were told that if they found that any of these causes produced the injury, and that the defendant was negligent in that particular, it would be their duty to assess damages. The accident might have been caused by any one of the claimed defects, and yet the defendants have been absolved from liability by the conduct of the plaintiff. The failure of the court to comply with the defendants' request for a specific application of the law of negligence to the conduct of the plaintiff, left the jury quite liable to be misled by the subsequent incomplete instructions. The duty imposed upon the plaintiff by the law of the subject was not adequately presented to the jury.

[6] The plaintiff's exceptions relate solely to the question of damages. His evidence tended to show that when thrown from the sleigh he struck upon his right shoulder and head, and received injuries which were serious and permanent. The defendants claimed, and their evidence tended to show, that the plaintiff's injuries were not serious and permanent. It was not claimed that the plaintiff suffered from paralysis. Dr. Lynch, the physician who first attended him, testified that he thought he had received a partial dislocation of the atlas and axis. On cross-examination the doctor said that a man who had suffered such a dislocation could live, and that he had read of cases of that kind. The defendants called physicians, who testified that if the plaintiff had received such a dislocation, it would have resulted in his immediate death or paralysis. The plaintiff called Dr. Lynch in the rebuttal, and asked him if in his judgment that was a fact, and the evidence was excluded as not rebutting. The exclusion was error. Dr. Lynch supported his theory of a partial dislocation by saying on cross-examination that one could receive such a dislocation and live. The defense introduced witnesses who testified in effect that the plaintiff could not have

received the dislocation claimed, for if he had it would have resulted in death or paralysis. The plaintiff was entitled to rebut this denial by evidence that one who had received such a dislocation could not only live but be free from paralysis.

The exceptions of both parties are sustained, and the case will go back for a retrial of all questions.

Judgment reversed, and cause remanded.

(91 Vt. 523)

BLOUIN v. GREENE et al.

(Supreme Court of Vermont. Franklin. July 16, 1917.)

1. GARNISHMENT \Leftrightarrow 4—NATURE OF ACTION.

P. S. 1657, providing that contract and account actions may be commenced by trustee process, does not authorize commencing a tort action by such process.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 3.]

2. GARNISHMENT \Leftrightarrow 4—NATURE OF ACTION.

The rule that a tort action cannot be commenced by trustee process is not changed by Practice Act (Acts 1915, No. 90) §§ 3 and 4, authorizing amendment of pleadings in form and substance, and county court rule No. 10, providing that misdescription of the form of action shall not be fatal, since such provisions relate to defects in pleadings, and not in process.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 3.]

Exceptions from City Court of St. Albans; N. N. Post, Judge.

Action by Octave Blouin against W. B. Greene and the Richford Savings Bank & Trust Company, as trustee. Judgment for plaintiff, and the principal defendant excepts. Reversed, and complaint dismissed.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

McFeeters & McFeeters, of Enosburgh Falls, for plaintiff. Fred L. Webster, of Swanton, for defendants.

MUNSON, C. J. The plaintiff has declared in tort for injuries to his automobile. The writ issued as a trustee process, and was served "in the usual way" on both principal defendant and trustee. The defendant pleaded the general issue with notice of matter in set-off. Before trial, and while the jury was being impaneled, the trustee appeared, made disclosure of no funds, and was discharged. It was agreed that the defendant might withdraw the notice given with his plea. After the jury was impaneled and sworn, and before any evidence was introduced, the defendant filed a motion to dismiss the writ, which assigned for causes that the writ was issued and served as a trustee process and was void, and that the court had no jurisdiction of the process or the cause of action. Upon the filing of this motion the plaintiff asked leave to dismiss the action as to the trustee; whereupon the court overruled the

defendant's motion to dismiss the writ, and permitted the plaintiff to dismiss the action as to the trustee, and allowed the defendant an exception to each ruling. A trial by jury was then had, with verdict and judgment for the plaintiff.

If not affected by recent legislation, the law governing this case is well settled. An action of tort cannot be commenced by trustee process; and, if so brought, it cannot be sustained against the principal defendant by discharging the trustee, or striking out the trustee clause. Such a proceeding is without authority, and gives the court no jurisdiction. *Ferris v. Ferris*, 25 Vt. 100; *Hill v. Whitney*, 16 Vt. 461.

The plaintiff contends that the case is governed by No. 90, Acts of 1915, known as the Practice Act. Special attention is called to section 3 of the act, as construed and amplified in county court rule 10. This section provides that:

"No pleading shall fail for want of form, but shall be amended in matters of form at any stage of the proceedings if the fault is pointed out."

The rule referred to contains this provision:

"The misdescription of a form of action in a complaint, or the bringing of an action in the wrong form, shall not vitiate the complaint nor be fatal to the right of action; and the provisions of section 3 of said act shall apply to such fault."

It is provided further in section 4 of the act that:

"Pleadings may be amended in matters of substance at any stage of the proceedings under the direction and in the discretion of the court. * * *"

These provisions seem to sustain the plaintiff's position, unless the question is still to be regarded as jurisdictional.

[1] The right to proceed by trustee process depends solely upon the statute, and P. S. 1657, the section giving the right, does not authorize it in actions of tort. But in cases where the right is given the process is merely an incidental proceeding in a suit brought to enforce collection directly from the debtor. *Divoll v. Nichols*, 70 Vt. 537, 41 Atl. 972. It was urged in the cases above cited that a writ and declaration in trespass, containing the trustee clause, were good in form and substance as against the principal defendant, and could be sustained by discharging the trustee and proceeding against the defendant as upon a common law process. The court conceded that, if the trustee were discharged, and the trustee clause struck from the record, there would still remain a legal process and declaration, in form at least, against the principal defendant, but considered that it was prevented from so treating them by the fact that there was no authority in law for commencing the suit in that manner.

[2] If we adhere to the views expressed in the cases above cited, we cannot sustain the

plaintiff's position without holding that the Practice Act and the rule of court relied upon have disposed of the jurisdictional objection; in other words, it will be necessary to hold that these provisions authorize an amendment that will so change the process as to make valid that which in its inception was void. We do not think such an amendment comes within the purpose of the act. Both the sections relied upon relate to the amendment of defective pleadings, and the defect here is one of process, and not of pleading. We find nothing in the act which contemplates the authorization of a court to amend itself into a jurisdiction which it did not have of the suit as brought. But if the act were held to authorize a rule giving this power, there has been no attempt to exercise the authority. The rule in question provides merely that the bringing of an action in the wrong form shall not vitiate the complaint, but shall be deemed a defect of form and subject to the provisions of section three of the act. It manifestly relates to questions of pleading and not of process. Thus, if a plaintiff's right of action calls for a complaint in contract, and he has declared in tort, the court may permit an amendment to cure the defect; but such an amendment in no way involves the question of jurisdiction.

The process in this case issued with out authority of law, and so was void from the beginning; and the court, being without process, was without jurisdiction. It follows that it was powerless to allow an amendment, and that it should have sustained the motion to dismiss.

Judgment reversed, and complaint dismissed, with costs to defendant.

(116 Me. 283)

CHELLIS v. COLE et al. (two cases).

(Supreme Judicial Court of Maine. July 16, 1917.)

1. FRAUD — ACTIONS — RIGHTS OF PARTIES.

Where defendants represented to plaintiffs that corporation stock was as good as bonds and was a good investment, when in fact the corporation was hopelessly insolvent, and soon went into receivership and bankruptcy, with a payment of only 15 per cent. to creditors, defendants were liable to plaintiffs for the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8.]

2. FRAUD — ACTIONS — RIGHTS OF PARTIES.

Where one defendant desired to sell corporation stock to plaintiffs, and another known to plaintiffs and upon whose opinion they relied stated to them that the stock was valuable, was as good as bonds, and that the investment was a good one, he as well as the seller was liable for the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 35.]

3. FRAUD — ACTIONS — RIGHTS OF PARTIES.

Where the certificates of stock which were the subject of a sale procured by fraud provided

that the stock was subject to redemption at a certain amount per share, which the company at one time interpreted as entitling it to call in the stock, the purchaser could not be put at fault in his action for the fraudulent sale on account of his failure to tender the stock, especially where the company was bankrupt and could not have redeemed the stock in any event.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 30.]

Report from Supreme Judicial Court, York County, at Law.

Two actions, by Daniel S. Chellis and by Lucinda M. Chellis, his wife, against Jerome W. Cole and another. Cases reported. Judgment against both defendants in each action.

Argued before CORNISH, C. J., and BIRD, HALEY, HANSON, and MADIGAN, JJ.

J. Merrill Lord, of Kezar Falls, and Mathews & Stevens, of Berwick, for plaintiffs. Emery & Waterhouse, of Biddeford, for defendants.

MADIGAN, J. Both of these actions are for fraud in the sale of stock of White's Express Company, a New York corporation, doing business in New York City and Brooklyn. By agreement they were reported to the law court upon so much of the evidence as is legally admissible, the law court to render final judgment thereon.

Daniel S. Chellis was about 60 years old, and had lived for many years with his wife, the other plaintiff, on a farm in a small country town in York county. They had on deposit in the Limerick National Bank in said county \$5,000, \$4,000 in his and \$1,000 in her name. The defendant Mills was from New Haven, and a stranger to the plaintiffs, while Cole was a neighbor and was known to them as a successful trader and business man.

On March 21, 1911, the defendants drove into the yard of the plaintiffs' home and Cole introduced Mills to Mr. Chellis and asked him to take the defendants into the house as they wished to have some talk with them, Chellis and his wife. On that and two or three succeeding days on which the visits were repeated several hours were spent in trying to induce the plaintiffs to buy stock in the express company which Mills claimed to represent. A lengthy statement purporting to show the exact state of the company's assets and liabilities was exhibited and explained. Mills vouched for the truth of everything therein contained stating that with an expert he had recently spent some weeks making a complete examination of the affairs and condition of the company. He further represented that its property was fully insured, and its business was so flourishing that the officers were obliged to build additional buildings constantly, and that the company owned all of its real estate and terminals. The plaintiffs were repeatedly assured that everything

about the company was all right, and that the stock was an excellent investment.

[1] Because of the representations and allurements and advice of the defendants Daniel Chellis bought 400 shares of the stock, paying therefor \$4,000, and his wife bought 100 shares, paying therefor \$1,000. Four quarterly dividends at the rate of 7 per cent. per annum were paid, but the evidence clearly shows there was nothing in the condition of the company to warrant any one of these dividends. There is not the least doubt that the company was hopelessly insolvent when the stock was sold to the plaintiffs, and in the latter part of 1911 the company was in the hands of a receiver, and early in 1912 it was in bankruptcy. A dividend of 10 per cent. was paid the creditors with the prospect of a possible further final dividend of 5 per cent. The representations made to the plaintiffs by Mills were untrue in fact, and of his liability therefor there is no question. *Wheelden v. Lowell*, 50 Me. 499; *Goodwin v. Fall*, 102 Me. 353, 66 Atl. 727; *Litchfield v. Hutchinson*, 117 Mass. 195.

[2] The defendants contend that Cole is not liable, because, at the most, his expressions were merely those of opinion. His conduct and statements were the controlling influence whereby the plaintiffs were defrauded. He was known to the plaintiffs to be a shrewd and successful business man, and was supposed by them to be interested in the sale of the stock. On three occasions he drove with the defendant Mills in a buggy a distance of four miles to their home, sat by and participated in Mills' conversation. He repeatedly assured the plaintiffs that the stock was all right; that it was a safe investment; that they would make no mistake in taking their money from the bank and buying this stock; that it was just as good as the bonds, which he exhibited to them. A check for \$1,000 given by Daniel S. Chellis for a portion of this stock, made payable to the order of Chas. E. Mills, agent of White's Express Company, was indorsed by Mills, as agent, to Cole, who evidently received cash for the same at the bank, as the check bears no further indorsement. While it is not necessary for the maintenance of this action to show collusion between Cole and Mills, this, unexplained as it is, is strong presumptive evidence that Cole was personally secretly profiting by the sale of this stock to the defendants. In *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498, we find the following:

"The defendant * * * contends * * * that the evidence showed that the statement was made as matter of opinion, and not as a representation of a fact, and that he was not liable therefor. But he was the third party with no interest, so far as appears, in the trade. And he was bound to act honestly and in good faith, not only in regard to matters of fact, but also in regard to matters of opinion. * * * If he undertook to express an opin-

ion he was bound to give his honest opinion. He had not the same latitude as a seller, for the reason that the buyer in dealing with the seller would naturally be supposed to be on his guard, whereas he would not be on his guard, * * * in dealing with a disinterested third person. * * * Being liable for a false representation as to his opinion, as well as for a false representation in respect to a matter of fact, it is immaterial which the allegations were construed by the presiding judge to be."

Also in *Medbury v. Watson*, 6 Metc. (Mass.) 259, 39 Am. Dec. 726, there is a marked and obvious distinction between the cases in which there is a—

"false affirmation by the vendor to the vendee, where the maxim 'caveat emptor' applies, and * * * those * * * upon the false representations of a third person with regard to the value of the property. * * * In the one the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest it is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations."

See, also, *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390.

In this case the defendant was turning over in part payment of land certain notes of a third party. The defendant represented that the notes were as good as gold, and told the defendant he had lent money to the maker, saying:

"Do you suppose I would lend my money to any one that was not good?"

Held, that the evidence was sufficient to warrant a finding that the false representations were actionable.

The court says that:

"It is true that such a representation may be, and often is, a mere expression of opinion. But we think * * * it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may * * * rely."

In *Safford v. Grout*, 120 Mass. 20, the representation was that the maker of a note was of ample means and ability to pay said note and that the note was good. The court says that these were statements of facts susceptible of knowledge, as distinguished from mere matters of opinion or belief. In the case at bar, made under the circumstances that it was made, the statement of Cole that the stock was a safe investment, that it was as good as his bond, that it was safer than the bank, is seemingly an approval of all representations made by Mills as to the assets and liabilities of the company. These statements were made in conjunction with those made by

Mills. The value of the stock depended upon the amount of stock paid in and upon the available assets and liabilities. A statement that the stock was good and a safe investment was equivalent to an assertion that the express company was solvent. The plaintiffs relied upon him, and not upon Mills, who, unassisted by Cole, never would have defrauded the plaintiffs. Under the decisions above quoted Cole is equally liable in these actions.

[3] But the defendants say that there was an existing contract between the plaintiffs and the White's Express Company, by virtue of which the plaintiffs were entitled to redeem their stock at any time and receive for each share of stock the sum of \$11.50, and as the stock had never been tendered to the White's Express Company, the actions are premature, and not maintainable. This contention is based upon the following clause in the certificates of preferred stock:

"This stock is subject to redemption at \$11.50 per share."

The prospectus of the express company exhibited to the plaintiffs at the time of the sale and on file in the case as plaintiffs' Exhibit No. 27, interprets that clause as follows:

"The company reserves the express right to call in the preferred stock at 115, which is \$11.50 a share with accumulated and accrued dividends, in whole or in part, on or before January 1, 1916."

As this placed the call of the stock at the option of the express company, and not at the option of the plaintiffs, the plaintiffs certainly could not have been at fault. Furthermore, it is clear that the company was bankrupt when the stock was sold, and was in no better condition when it ceased paying the dividends, which must have come from money belonging to the creditors and not to the stockholders. Any attempt to have the stock redeemed by White's Express Company must therefore have been a waste of energy. These actions are not for breach of contract, but are actions of deceit based on false representations in regard to the stock sold to the plaintiffs. The measure of damages is the difference between the actual value of the stock at the time of the purchase and its value if it had been what it was represented to be. The tender of the stock to the Express Company was therefore unnecessary. *Andrews v. Jackson*, 168 Mass. 269, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Morse v. Hutchins*, 102 Mass. 439.

Judgment against both defendants in favor of Daniel S. Chellis for \$4,000, with interest from date of writ.

Judgment against both defendants in favor of Lucinda Chellis for \$1,000, with interest from date of writ.

(116 Me. 295)

GARNSEY v. GARNSEY.

(Supreme Judicial Court of Maine. July 21, 1917.)

1. WILLS \Leftrightarrow 740(3) — CONTRACTS BETWEEN DEVISEES—CONSIDERATION.

That the widow to whom testator gave all his securities for life allowed the sons, the residuary legatees and devisees and remaindermen, to use certain bonds to discharge debts against the real estate, is consideration for their contract to pay her annually the amount of interest on the bonds.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1891.]

2. RELEASE \Leftrightarrow 12(1)—PROMISE—CONSIDERATION.

A mere verbal statement by creditor that he will, or intends to, release, or that he does release, a debtor, being without consideration, is of no binding effect.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 18.]

3. INTEREST \Leftrightarrow 45 — NATURE OF PAYMENTS UNDER CONTRACT.

Under agreement of sons, in consideration of their mother allowing them to use bonds in which she had a life interest, to pay her annually, for life, an amount equal to the interest on the bonds, such payments are not interest, as regards their bearing interest from maturity.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 94.]

Report from Supreme Judicial Court, York County, at Law.

Action by Mary J. Garnsey against Julia A. Garnsey, administratrix, and another. Case reported. Judgment for plaintiff.

Argued before CORNISH, C. J., and BIRD, HALEY, HANSON, and MADIGAN, JJ.

Lucius B. Swett, of Sanford, and Mathews & Stevens, of Berwick, for plaintiff. Allen & Willard, of Sanford, for defendants.

HALEY, J. An action of assumpsit on a contract in writing of the following tenor: "Sanford, Maine, May 2, 1898.

"For value received we jointly, but not severally, promise to pay to our mother, Mary J. Garnsey, annually, during her life, an amount equal to the interest paid by the Kennebec Light & Heat Company on \$3,800 face value five per cent. bond, maturing in the year 1918.

"F. A. Garnsey.
"A. E. Garnsey."

The action is brought by Mary J. Garnsey, the promisee named in the contract, against Almon E. Garnsey, one of the signers, and Julia A. Garnsey, administratrix of the estate of Fred A. Garnsey, the other joint promisor. The case is before this court upon report.

The plaintiff is the widow of Amos Garnsey, whose will was proved and allowed April 5, 1898, in the probate court for York county, and Frederic A. Garnsey and Almon E. Garnsey, two sons of the testator, were appointed as executors, without bonds, as requested in the will. Julia A. Garnsey, the administratrix of Frederic A. Garnsey, is made defendant, and Almon E. Garnsey, one of the executors of Amos, is the other de-

fendant. The will of Amos Garnsey, by item 1 devised and bequeathed to his two sons, they being all his legal heirs—

"all the securities which he owned at the time of his decease, including stocks, bonds, notes and other securities of a similar character, to be held by them, or the survivor of them, in trust for the following purposes:

"1. To pay the income thereon as it accrues, to my wife, Mary Jane Garnsey, in her life for her own use and disposition.

"2. Upon the decease of my said wife to divide the securities between my two sons, or their heirs by right of representation. I give my said trustees power to reinvest any monies, which may come into their hands in payment of the securities, upon consultation with their mother, and with her written consent, to change any investments, which they and she shall deem it for the interest of all concerned. * * *

"II. All the rest and residue of my estate of whatever name or nature or whatever situate, I give, devise and bequeath to my two sons, Frederic A. Garnsey and Almon E. Garnsey, in equal shares, to them, their heirs by right of representation and assigns forever."

The inventory returned shows \$12,700 real estate, personal estate \$41,800, and the bonds of the Kennebec Light & Heat Company mentioned in the agreement were not included in the inventory, but they were a part of the estate of Amos Garnsey, and were converted by the two executors, and the proceeds used to pay indebtedness of the estate. The will expressed the wish that the parties legally interested under the will make a division of the property according to the terms of the will, and prevent or dispense with proceedings in the probate court. The parties interested under the will were the two sons and the widow. There were no other heirs, and it is evident that they attempted to adjust the matters without having the estate fully administered upon. The will was proved and allowed April 5, 1898, and there was no account filed in the probate court until November 21, 1913, some 15 years after the will was proved, and that account was never settled.

[1] It is objected that there was no consideration for the agreement. The consideration is clearly proved. The two executors converted the bonds mentioned in the agreement, and, according to the claim of counsel and the testimony, they used the proceeds to pay debts and claims upon real estate which was devised to them at the death of their mother. The plaintiff, as the widow of Amos Garnsey, had a right to waive the provisions of the will, and to claim her one-third interest in the real estate, which was undoubtedly worth \$4,000, and also entitled to a third of the rights and credits after the debts of the estate were paid. But, instead of doing that, she gave her approval of the will by releasing \$3,800 worth of bonds so the executors might pay the debts of the estate and preserve it for themselves as residuary legatees. By the agreement between the plaintiff and the executors and trustees the plaintiff waived the right to have them

hold \$3,800 worth of bonds, and she be paid the income therefrom during life, and accepted in lieu thereof the personal obligations of the two executors and trustees to pay her the amount she would have received as interest on the bonds, and thereby they were permitted and authorized to convert those bonds into money, which they did, and reduced the indebtedness upon the real estate that was to descend to them at the death of their mother by the provisions of the will of their father. That was a sufficient consideration for the execution by the executors and trustees of the agreement to pay the widow according to the terms of the agreement declared upon.

[2] It is the claim of the defendant Julia A. Garnsey administratrix, that the plaintiff has released her as administratrix of her husband from the contract, even if there was a sufficient consideration when given by the two sons to the mother. She testifies:

That at one time the plaintiff told her she did not want her to pay the obligation, "didn't expect me to pay; she didn't need it, and I needn't worry anything about it; she was going to give it to me. She said she was going to give it to Almon; she was giving it to me; she intended to use us just alike; that on several times the plaintiff stated that she did not expect her to pay it, and didn't want her to."

Upon the other hand, the plaintiff is positive she never told her she did not expect her to pay anything on it and did not want her to, and that she never said any such thing, and that she did expect it.

The circumstances of the case tend to support the testimony of the plaintiff. But, even if she did say that which Julia A. Garnsey claims she said to her, it was not a release of the estate of Fred A. Garnsey from the obligation that he had signed. It was, at most, if the defendant's version is right, a mere verbal promise without consideration and of no binding effect. In order for it to release the estate of Fred A. Garnsey from the contract made and signed by him, it was necessary to be a promise upon a sufficient consideration. There was no consideration moving from any one to Mary A. Garnsey to release the estate of Fred A. Garnsey from his contract. A mere statement by a creditor that he intends to release, or that he does release, a debtor, there being no consideration moving from any one for the promise, the debt is not thereby discharged. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a sufficient consideration, but a naked promise to release without consideration is not a discharge.

It is urged that this suit is prosecuted by the defendant, Almon E. Garnsey, one of the joint promisors, without the consent of his mother. The plaintiff is an old lady and has to rely upon some one. He is her only son, and it does appear that she relies to a cer-

tain extent upon his advice. She signed, of her own free will, the notice to the other defendant that the note must be paid. There is no pretense of any duress or any fraud to induce her to sign that demand. She appears in court and prosecutes the suit. It is true she says she did not know until lately, referring to the time of trial, that a suit had been brought, but she ratified the act of her son if she did not give authority in the beginning, and we have no doubt from the testimony that she authorized the suit to be brought at the time it was brought.

[3] The promise declared upon was the joint promise of Almon E. Garnsey and Fred A. Garnsey, and by a judgment against both defendants either of the defendants can pay and have contribution from the other. The payments agreed to be paid were not interest, but yearly payments. They were payable annually, and each payment bore interest from the day it became due. *Swett v. Hooper*, 62 Me. 54; *Whitcomb v. Harris*, 90 Me. 211, 38 Atl. 138. The mandate must be judgment for plaintiff for \$180 annually for the years declared upon, with interest at 5 per cent. on the payments when they became due to the date of the writ, and interest on the total from the date of the writ to the date of judgment of the May term, 1917, to be cast by the clerk.

Judgment for plaintiff as per rescript.

(118 Me. 375)

MCCARTHY v. INHABITANTS OF TOWN OF LEEDS (two cases).

(Supreme Judicial Court of Maine. June 21, 1917.)

1. BRIDGES \Leftrightarrow 37—UNLICENSED AUTOMOBILE—LIABILITY—"TRAVELER."

Under Pub. Laws 1911, c. 162, § 11 (Rev. St. 1916, c. 26, § 28), providing that no automobile shall be operated by a resident of the state upon any highway unless registered, and in view of Rev. St. 1903, c. 23, § 56, providing that highways, townways, and streets legally established shall be kept in repair so as to be safe for travelers, the administrator of two infant children riding in an automobile with their granduncle, who owned the machine, but in whose name it was not registered, and who were killed through a defective bridge, could not recover from the town; the word "traveler" meaning one lawfully a traveler, and any travel in an unregistered automobile being unlawful.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 96, 103-105, 109.

For other definitions, see *Words and Phrases*, First and Second Series, *Travel*; *Traveler*.]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 755(1)—DEFECTIVE HIGHWAY—INJURIES—LIABILITY.

Independent of statute, there is no liability on the part of municipalities for injuries caused by defective highways.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590.]

Madigan, J., dissenting.

Action by John H. McCarthy, Jr., administrator of two McCarthy children deceased, against the Inhabitants of the Town of

Leeds. Judgment for defendants in each case.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, PHILBROOK, and MADIGAN, JJ.

McGillicuddy & Morey, of Lewiston, for plaintiff. Tascus Atwood and H. W. Oakes, both of Auburn, for defendants.

CORNISH, J. These two actions were brought against the defendant town under R. S. 1903, c. 23, § 76, to recover damages for the loss of life of two children aged seven and nine, respectively, alleged to have been caused by the failure of the defendant to keep a certain bridge over Dead river in said town in proper and reasonable repair.

On the day of the accident, July 22, 1913, one John H. McCarthy was riding in his automobile, and was sitting on the front seat beside the chauffeur. On the rear seat were the two little girls, his grandnieces. When the automobile reached the bridge, one of the forward wheels, according to the declaration in the writs, struck a raised plank, thereby deflecting the machine from its course and turning it against the railing which proved to be weak and unable to withstand the impact. The automobile with its occupants was precipitated into the river. Mr. McCarthy was rescued, but the children were drowned.

The automobile was not registered in the name of the owner, and that fact is the pivotal point in this case.

Suit was brought by Mr. McCarthy in his own behalf against the town to recover damages for injuries to himself and his property, and judgment was rendered for the defendant on the ground that as the automobile was not registered in the owner's name he was prohibited from using it on the highway, and the town owed him no duty to keep the way safe and convenient for him to travel upon. *McCarthy v. Leeds*, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212.

[1] The two suits at bar were subsequently brought by John H. McCarthy, Jr., as administrator of the estates of the two children, the plaintiff claiming that these two passengers have a right of action against the town, even if the owner did not. In our opinion they, as well as the owner, are barred from recovery.

[2] It must be distinctly borne in mind that this is not a common-law action of negligence against an individual or a corporation, but a statutory remedy against a municipality, and the rights of the traveling public and the liability of the municipality are limited by the scope of the statute. Independent of statute there is no liability on the part of municipalities for injuries caused by defective highways. The liability is a creature of the statute (*Haines v. Lewiston*, 84 Me. 18, 24 Atl. 430; *Colby v. Pittsfield*, 113 Me. 507, 95 Atl. 1), and it does not ex-

tend beyond the express provisions (*Peck v. Ellsworth*, 36 Me. 393).

What, then, is the measure of that liability? It is this:

"Highways, town ways and streets, legally established, shall be opened and kept in repair so as to be safe and convenient for travelers with horses, teams and carriages." R. S. 1903, c. 23, § 56.

The word "travelers" is the significant word for our consideration. As was said by this court in *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23:

"To enable the plaintiff to recover, he must have been a 'traveler.' That is not all. He must have been traveling for some purpose or other for which streets are required to be constructed and kept in repair. A person may be a traveler, but not such within the contemplation of the statute which gives compensation for an injury occasioned by a defect in the highway. He may be within or without the protection of the statute, and still be a traveler."

It was accordingly held in that case that one who uses the highway for the express purpose of horse racing is not a traveler to whom the municipality owes the statutory duty of keeping its street in repair. Children using a street as a playground cannot be regarded as travelers. *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281. Nor can a runaway horse. *Richards v. Enfield*, 13 Gray (Mass.) 344; *Higgins v. Boston*, 148 Mass. 484, 20 N. E. 105.

Further, in order to be within the protection of the statute, one must be a lawful traveler. One who is traveling in defiance of a statutory prohibition is unlawfully upon the highway. Take for instance traveling on Sunday, prior to the passage of chapter 129 of the Public Laws of 1895. This court repeatedly decided that when a person received an injury through a defect in the highway while he was traveling on the Lord's Day, except in case of necessity or charity, he could not recover. *Bryant v. Biddeford*, 39 Me. 193; *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56. The Maine rule as to nonrecovery in such cases was also the rule in Massachusetts (*Bosworth v. Swansey*, 10 Metc. [Mass.] 363, 43 Am. Dec. 441; *Jones v. Andover*, 10 Allen [Mass.] 18; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Davis v. Somerville*, 128 Mass. 594, 35 Am. Rep. 399); and in Vermont (*Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111). In this Vermont case the ground on which the rule rests is clearly set forth. New Hampshire held the contrary. *Sewell v. Webster*, 59 N. H. 586.

Precisely the same principle is involved in the case at bar where the intestates were traveling in an unregistered automobile. Such a vehicle is proscribed. Pub. Laws 1911, c. 162, § 11 (R. S. 1916, c. 26, § 28) reads:

"No motor vehicle of any kind shall be operated by a resident of this state, upon any highway, town way, public street, avenue, driveway, park or parkway, unless registered as provided in this chapter," etc.

The Legislature had the power and the right to enact this prohibitive legislation for the protection of its citizens. The registration of a car and the display of its number plate serve to identify the owner in case of injuries caused by negligent conduct in its operation. Here, as in the case of the violation of the Sunday law, it is not a question of causal connection between the violation of the statute and the happening of the accident. The same causes would be at work to produce an accident on Monday or Tuesday as on Sunday. So in the case at bar the mere nonregistration can hardly be regarded as a contributing cause. The railing of the bridge had no more strength to withstand the impact of a registered than of an unregistered car. The true theory is that this unregistered car was expressly forbidden to pass along the highway and over the bridge. The municipality was not obliged to furnish any railing whatever for its protection. This is the ground on which *McCarthy v. Leeds*, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212, was decided, and it is the logical ground on which this class of cases against municipalities rests.

But the learned counsel for the plaintiff urges that even if Mr. McCarthy, Sr., the owner of the car, cannot recover, the ban does not prevail against the children who were merely passengers. He discusses the lack of contributory negligence on their part and what is true, that the doctrine of imputed negligence does not obtain in this state. But neither of these questions is involved here. The question of contributory negligence as related to the nonregistration is beside the mark. It is not a question of age or intelligence or knowledge or intention on the part of the occupants. It is a question of fact. It is a matter purely of statutory prohibition. All the occupants are under the same disability. The very logic of the situation prevents any discrimination between them. The statute does not relieve the town from keeping its streets in repair merely for the owner of an unregistered auto and those who know the situation, and impose that duty upon it as to those passengers who have no such knowledge. Nor does the absence of the doctrine of imputed negligence aid the plaintiff. Our decision is not based on the doctrine of negligence, as we have already stated. It is based upon the statutory "thou shalt not."

To illustrate: It is conceded that the right to use the highways of the state is not absolute, and that the Legislature has the right to limit and control their use whenever, in the exercise of the police power, it is necessary to promote the safety and general welfare of the people. It can prescribe what vehicles shall use the highways and what shall not. It can absolutely close certain streets to certain traffic. *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 848,

L. R. A. 1915E, 264, 127 Am. St. Rep. 513. In the exercise of this power certain streets in the town of Eden were closed to the use of automobiles by chapter 420 of the Private and Special Laws of 1903. At the entrance to these streets, under the provisions of the act, signboards were to be erected bearing these words: "No automobiles allowed on this road." This act was held constitutional. *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 28 L. R. A. (N. S.) 502, 20 Ann. Cas. 512.

In 1909 the prohibition was extended territorially to all the ways and streets in the towns of Eden, Mt. Desert, Tremont, and Southwest Harbor on the island of Mt. Desert. Private and Special Laws 1909, c. 133. This act was also held constitutional. *State v. Phillips*, 107 Me. 249, 78 Atl. 283. Suppose an automobile in defiance of those statutes had been operated in the forbidden district, and one or more of the occupants had been injured through some defect in the highway. Could it with reason be claimed that any liability whatever rested upon the municipality within which the accident happened, or that it made any difference whether the injured party was the owner or the chauffeur or the passenger, and whether such passenger knew of the nonregistration or not? Certainly not. Those towns were freed from all responsibility when the prohibition was placed upon this kind of traffic.

Now instead of prohibiting all automobiles from using certain streets and ways, the Legislature has seen fit to debar all unregistered automobiles owned by residents from using any of the streets and ways throughout the state. Figuratively speaking, signs are erected on every highway, after the pattern of the Eden act, bearing the inscription: "No unregistered automobiles are allowed on this road." Whenever that sign is disregarded the occupants travel at their peril.

The nonliability to passengers as well as to owner has been settled in Massachusetts. In *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445, three suits were brought against the defendant city, one by the owner, and two by female passengers in an unregistered car. On this point the opinion holds:

"If the automobile in which the female plaintiffs were riding was not registered according to the requirements of law, it was unlawfully upon the way; those who were using it were not travelers, but trespassers; and it would follow that they could not maintain this action. * * * Each one of the plaintiffs must fail of recovery in that event. It would not help the individual plaintiffs that they may not have known that the automobile was not duly registered; they did not know that it was, and it was at their own peril, as to the city and as to third persons, that they undertook to use a vehicle the use of which was prohibited by law."

To the same effect is *Dean v. Boston Elevated Railway*, 217 Mass. 495, 105 N. E. 616. Our conclusion therefore is that these ac-

tions cannot be maintained. If the present statute is too drastic the remedy should come by legislative amendment.

Judgment for defendants in each case.

MADIGAN, J. (dissenting). That those innocent of an intentional wrong should be held trespassers on the highways established for the benefit of the public does not seem reasonable. A machine may be operated contrary to the provisions of the statute, but why must all passengers therein be classed as outlaws? Few violations of statutory prohibitions entail such drastic punishment. A sleigh without bells, a carriage without lights, a wagon with narrow tires, if forbidden should be in the same class; but must we hold all in such vehicles trespassers, and therefore without protection from defective highways or the negligence of other travelers? If certain appliances were required by law on trolley cars, would we hold all passengers in an offending trolley as trespassers?

Massachusetts, which is one of the few states holding as Maine does, applies a different rule to the unlicensed chauffeur than to the unregistered car. Can we say a machine in perfect condition unregistered, but driven by a licensed driver, is more dangerous than a registered car driven by a man whose license has been revoked for reckless driving? Under the rule adopted in the majority opinion at our peril we accept a ride with a friend, or enter a public bus. The women and children in the sight-seeing cars in the cities, and public cars running from town to town, may be without remedy in case of injury. License plates are no indication of compliance with the law. They frequently are changed from car to car. Only by making sure that the maker's number agrees with that on the state license is there reasonable assurance of safety. If by change of ownership the license has lost its efficacy within an hour the car and its occupants are beyond the pale of the law. The cruelty of our interpretation is brought home to us in the case of these innocent children. If the accident instead of proving fatal had rendered them cripples for life, they would have been without redress for the criminal negligence of some town official. We say the law says, "Thou shalt not," and therefore travelers are trespassers, though the failure to pay a state license has not the slightest connection with the accident. Is it a necessary sequence, or is it thus because we say it is? Why might not the penalty here, as in other instances of violation of law, stop with fine or imprisonment? Conditions in our state and highways are no different than in states taking the contrary view and, as it seems to me, fairer and juster rule.

(116 Me. 503)

TUTTLE v. CUMBERLAND COUNTY POWER & LIGHT CO.

(Supreme Judicial Court of Maine. July 21, 1917.)

TRIAL ~~6~~143—QUESTIONS FOR JURY.

Where the testimony on vital questions involved is conflicting, and different conclusions may be drawn therefrom, the case is properly submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 348.]

Exceptions and on Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by Mary J. Tuttle against the Cumberland County Power & Light Company. On defendant's exceptions to refusal to direct a verdict for defendant and on general motion for new trial. Exceptions and motion overruled.

Argued before CORNISH, C. J., and SPEAR, KING, HANSON, and MADIGAN, JJ.

Hinckley & Hinckley, of Portland, for plaintiff. Bradley & Linnell, of Portland, and William Lyons, of Westbrook, for defendant.

PER CURIAM. This is an action to recover damages for personal injuries claimed to have been received by the plaintiff while she was a passenger on one of the defendant's electric cars.

At the conclusion of the testimony the defendant's attorney moved the court to direct a verdict for the defendant, which motion was overruled. The jury returned a verdict for the plaintiff for \$400. The case is before the court on the defendant's exception to the refusal of the presiding justice to direct a verdict for the defendant, and upon general motion for a new trial.

The issues in the case are stated in the bill of exceptions as follows:

"The plaintiff claimed that as the car in which she was riding was proceeding along Ocean street, in South Portland, and slowing down to make a stop on Highland avenue which crosses Ocean street diagonally, where she intended to alight from the car, and that at a short distance before said car reached Highland avenue, she arose from her seat and proceeded to the rear platform of the car, and while standing on the step or the rear platform of the car, and at a point on said Ocean street near said Highland avenue, the conductor gave the motorman the signal of two bells, and that the car moved or jumped forward rapidly, and threw her on to the street and severely injured her."

"The defendant claimed that as the car was proceeding along Ocean street at a moderate rate of speed, and when it had reached a point on said street near to a double tenement house, located on the easterly side of said street, and about 120 feet northerly from said avenue, the motorman shut off the power in obedience to a signal that the conductor gave him 400 or 500 feet back from this point, to stop at Highland avenue at a white post, so called, located at the corner of said street and avenue, and

that as the car was slowed down to a speed of 4 or 5 miles an hour the plaintiff arose from her seat, proceeded to the rear platform, and stepped right down on to the step, and then on to the street, at a point at least 85 feet northerly and before said white post and Highland avenue, the stopping place of said car, were reached, and that when she so stepped off from said car, it was running smoothly, 4 or 5 miles an hour, without any jerking or jumping, or any unusual motion whatever, and that no signal of two bells was given by the conductor as claimed by the plaintiff. And the track at this place was very nearly level and in good condition and the car was in perfect running order."

The testimony upon the vital questions involved was conflicting and different conclusions might be drawn from the evidence by different minds. The case was therefore properly submitted to the jury for their finding upon the issues involved. We are of opinion that the testimony warranted the jury in finding that the plaintiff was in the exercise of due care, and that her injury was caused by the negligence of the defendant. The weight of the evidence sustains the claim of the plaintiff that the signal of two bells was given prematurely, and that following the same, and as a direct result thereof, she was thrown from the car and injured. The first claim is abundantly proved by the plaintiff's testimony, the latter claim that she was thrown from the car, is corroborated by witnesses for the defendant. It follows that the exceptions and motion must be overruled.

So ordered.

(116 Me. 289)

MCKINNON v. BANGOR RY. & ELECTRIC CO.

(Supreme Judicial Court of Maine. July 21, 1917.)

1. STREET RAILROADS §100(1)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Evidence that plaintiff, ten year old boy, attempted to cross a street in the middle of the day without looking for approaching trolley cars or noticing ringing of the gong, and ran into fender of a car, establishes his contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 217.]

2. STREET RAILROADS §112(3)—INJURY TO PASSENGER—BURDEN OF PROOF.

A ten year old plaintiff injured while attempting to pass in front of defendant's street car must affirmatively show that his want of due care did not contribute to the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228.]

3. STREET RAILROADS §114(19)—PERSON INJURED—SUFFICIENCY OF EVIDENCE.

Evidence regarding defendant street railway employees' efforts to stop a car by reversing power, sanding tracks, etc., on down grade, slippery tracks between the time plaintiff fell on the fender until collision with a stationary car held not to sustain a verdict for plaintiff upon the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 248.]

Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Action by John McKinnon, by his next friend, against the Bangor Railway & Electric Company. Verdict for plaintiff, and defendant moves for a new trial, and excepts. Motion sustained, and new trial granted.

Argued before CORNISH, C. J., and HALEY, HANSON, and MADIGAN, JJ.

E. P. Murray, of Bangor, and W. R. Pattangall, of Augusta, for plaintiff. Ryder & Simpson, of Bangor, for defendant.

HALEY, J. An action on the case to recover damages for injuries received by the plaintiff, as he alleges, by reason of the negligent operation of the defendant street railroad. The verdict was for the plaintiff, and the case is before this court upon motion and exceptions.

The record discloses that on the morning of February 22, 1915, at about half past 10 o'clock, a car of the defendant company, called an Old Town car, on the track of the defendant at Bangor, came up Exchange street and down State street, in a westerly direction, on the northerly track, towards Hammond or Main street; that when it arrived at a point near what is called the old post office, it had a slight collision with a jigger that had failed to get off the track, although the motorman was constantly ringing the gong. The car stopped and a crowd commenced to gather, while the motorman and conductor were taking the names of the witnesses who saw the collision, at which time a Highland street car of defendant came up Exchange street and turned the corner into State street about 180 feet away. The motorman of the Highland street car saw the car ahead at a standstill as his car headed straight down State street and applied his brakes. State street, from Exchange street where the car stopped, is down grade. The day was warm and the snow was melting and running down along the car rails into State street. The rails were slippery. When the brakes were applied the wheels of the Highland street car ceased turning, but the wheels skidded on the rail by reason of the rail being what the railroad men call "greasy." The car was about 31 feet long and weighed 11 tons. The motorman next reversed his power, but the car wheels got no grip on the rails and the car kept on, the motorman ringing his gong continuously. The conductor came forward and worked the lever on the sand box which threw sand upon one rail of the track. The car would check up a little and then slide ahead again, but failed to stop. The car was a vestibule car, and in the vestibule there was a pall of sand with a small shovel in it. When the Highland street car was within a short distance of the stationary car, the plaintiff, a boy about ten years old, whose attention had been attracted by the car colliding with the jigger, ran from the sidewalk on the southerly side of State

street diagonally across the street, and without seeing the Highland street car or looking to see if any car was coming he ran against the left-hand corner of the Highland street car and was caught up by the projecting car fender and carried on until the Highland street car bumped into the stationary car. The motorman of the Highland street car saw the boy appear at the corner of his car and saw him fall out of sight, whether on the fender, the ground, or under the car the motorman could not tell. The Highland street car was then moving very slowly, probably not more than 4 miles an hour, and there is some testimony showing it was not over 2 miles an hour. The motorman's efforts to stop the car failed, although he was using his brake and reversing the power constantly from the time he came around the corner and the car began to skid, during which time the conductor was working the lever, sanding the rail that the wheels might catch so that the car would go backwards. When the cars came together the impact was not hard enough to break the glass or injure the cars. The plaintiff was caught between the two cars, his head was badly cut, his right hand and forearm crushed, so that his arm had to be amputated a little below the elbow. Neither the conductor of the Highland street car nor the conductor or motorman of the Old Town car knew of the boy's presence until after he was hurt. It also appeared that the defendant had a sand car which was used to sand slippery places upon its tracks upon notice of their existence, but no sand had been put upon the State street tracks by the sand car on the morning in question.

[1, 2] There was also testimony tending to show that water running on the rails would wash the sand off, especially after a car had passed along and pulverized the sand on the rails, and that the condition of the car rails as to slipperiness changed in a few minutes, being dependent upon the street traffic, water, moisture, frost, wind, and atmosphere. There is but little dispute as to the facts; the principal dispute being the distance of the Highland street car from the Old Town car when the plaintiff fell upon the fender of the Highland street car. The undisputed facts that the plaintiff, in the middle of the day, stepped from the sidewalk and attempted to cross a public street upon which the trolley cars were running in plain sight, and without looking where the cars were coming from, or the rate of speed at which they were traveling, or without looking for the car that was coming down the street, or without paying any attention to the ringing of the gong which was being rung all the time, heedlessly ran against the fender of the car and was thrown on the meshes of the car fender, shows beyond question that the plaintiff was not in the exercise of due care, that his want of due care was negligence that contributed to the injuries that he

received, and as the plaintiff was bound to show not only the defendant's negligence, but affirmatively that no want of due care on his part contributed to his injury (*Colomb v. Street Railway*, 100 Me. 418, 61 Atl. 898; *Mullen v. Railway*, 164 Mass. 452, 41 N. E. 664), his contributory negligence and want of due care is a bar to this action, unless, as the plaintiff contends, that rule does not apply to this case.

[3] The plaintiff claims that, admitted he was negligent in running on to the car so that he fell upon the fender, yet the defendant is liable because its servants might, after the motorman saw the plaintiff on the fender, or by the exercise of reasonable care might have seen him, have stopped the car and thereby have avoided the collision.

In actions of this kind it is true that every negligent act upon the part of the plaintiff will not necessarily bar him from the recovery of damages. The rule has been stated many times, "that he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible."

"If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except as it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior conduct." *Iron & Steel Co. v. Worcester & Nashua Railroad Co.*, 62 N. H. 162. Notwithstanding the negligence of the plaintiff in falling upon the fender of the defendant's car, the plaintiff was powerless to help himself; from that time a new relation existed between the parties, and it was the duty of the defendant, if its servants having charge of the car knew of his position, or by the exercise of due care would have known the dangerous position the plaintiff was in, to use the same degree of care which a reasonable, careful, and prudent man ought to use under the same circumstances, and if, with the exercise of reasonable care, they could have prevented the injury, it was their duty to do so, and failure on their part to so act would be negligence which would entitle the plaintiff to recover. *Weltzman v. Nassau Electric R. Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905. In other words, when a plaintiff, by his negligence has placed himself in a dangerous position, the defendant, advised of his situation, is not for that reason legally justified in failing to use reasonable care to avoid injuring him. *McKeon v. Railroad Co.*, 20 App. Div. 601, 47 N. Y. Supp. 374. Where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the

injury could have been avoided by the use of ordinary care at the time by the defendant. *Atwood v. Railway Company*, 91 Me. 399, 40 Atl. 67; *Ward, Adm'r v. Maine Central Railroad Co.*, 96 Me. 136, 51 Atl. 947; *Butler v. Railway*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *Moran v. Smith*, 114 Me. 55, 95 Atl. 272. But that doctrine does not apply to the facts of this case, as they fail to show negligence on the part of the defendant independent of and subsequent to the plaintiff's negligence. At the time the plaintiff fell upon the fender the motorman and conductor were using all means at their command to stop the car. Its speed had been reduced to between 2 and 4 miles an hour, and with the efforts they were making, but for the slippery or greasy condition of the rails caused by the melting snow and slime which ran off from the street onto the tracks, they would have been able to stop the car almost instantly. The condition of the rails was caused by the action of Nature but a few minutes before the accident, and was remedied by the action of Nature as the running water shortly washed the rails clean. The plaintiff claims that the rails should have been sanded, but the evidence shows that the sand would have washed away immediately. The conductor did not see the plaintiff or know of his position upon the fender until after the accident. The motorman testifies positively that he did not; that he was trying to stop the car by putting on the power and reversing that he might make the wheels catch upon the rails and stop the car from skidding; he saw the boy fall close to the car—he could not tell where—and from that time to the time the car ran into the Old Town car both the conductor and motorman were doing their utmost to stop the car with proper appliances furnished for that purpose. There is no evidence of any negligence on the part of the defendant independent of and subsequent to the plaintiff's negligence that caused the plaintiff's injuries.

The case of *Weltzman v. Nassau Electric Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905, cited by the plaintiff, differs from this case in that the plaintiff in that case offered to prove that the car, upon the fender of which the plaintiff's intestate fell, could have been stopped within 20 feet from where the motorman first saw the child approaching dangerously near the track. The court refused to admit the testimony, and therefore a new trial was granted.

In this case there is no evidence that the motorman saw the child until it fell upon the fender, and the evidence shows clearly and conclusively that the efforts of both the conductor and motorman could not stop the car before the collision.

In *Green v. Metropolitan St. Ry. Co.*, 65 App. Div. 54, 72 N. Y. Supp. 524, the plaintiff fell upon the fender of the car, and the car

traveled a distance estimated at nearly 100 feet before it stopped, and the plaintiff was jolted off from the fender and run over, and the testimony proved that the car could have been stopped within 20 or 25 feet. It was held that the defendant was liable, but in that case there was no effort made to stop the car within the distance within which it could have been stopped. In this case the servants of the defendant made proper effort to stop the car.

As the evidence clearly shows that the plaintiff was guilty of negligence in falling upon the fender of the defendants' car, and that his negligence contributed to the injuries he received, and as the defendant was guilty of no independent subsequent negligence after the plaintiff's negligence, but that its servants did all that an ordinary prudent person would or could have done under the circumstances to stop the car, which was a suitable car for the business for which it was being used, it follows that the motion must be sustained. It is unnecessary to consider the exceptions in detail, as they are all practically covered by the statements of the law as applied to the motion for a new trial.

Motion sustained.

New trial granted.

(257 Pa. 221)

JOOS v. COMMONWEALTH.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. JUDGMENT \S 714(2)—RES ADJUDICATA—LIABILITY FOR ADVERTISING.

A judgment of the Supreme Court that under the statutes relator could not recover for publishing the mercantile list of dealers within the cities of Pittsburgh and Allegheny was res adjudicata, and could not be litigated again in another proceeding by the same relator involving the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1243.]

2. TAXATION \S 319(1)—PUBLICATION OF APPRAISEMENTS—AUTHORITY—STATUTE.

Under Act April 22, 1846 (P. L. 486) § 12, requiring notices of mercantile appraisements in the county of Allegheny, except in the cities of Pittsburgh and Allegheny, to be advertised in at least two newspapers, the authority of the mercantile appraisers to order such publication would be implied, and such authority was not taken away by Act April 11, 1862 (P. L. 492), relating to the assessment and collection of mercantile taxes, which is to be construed with other acts relating to the same subject.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 514, 527-529, 532-534.]

3. NEWSPAPERS \S 5(2)—PUBLICATION OF APPRAISEMENTS—EXTENT OF RECOVERY—ENABLING STATUTE.

Where the mercantile appraisers for the county of Allegheny ordered the publication of the mercantile appraisal list in a newspaper and it was held by the Supreme Court that the publisher could not recover for publishing the list within the cities of Pittsburgh and Allegheny, and Act May 3, 1915 (P. L. 241), authorized the publisher's action for whatever

was due him, a judgment for advertising the list of dealers in the county outside of those cities, and refusing a recovery for advertising within those cities, was proper.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 23, 24.]

Appeal from Court of Common Pleas, Dauphin County.

Assumpsit for advertising by John E. Joos, a resident of the city of Pittsburgh, against the Commonwealth. Verdict for plaintiff for \$2,524, with interest from May 9, 1885, and judgment thereon, and both parties appeal. Affirmed.

See, also, 129 Pa. 492, 8 Atl. 159.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

E. K. Trent and J. E. B. Cunningham, both of Pittsburgh, for plaintiff. Horace W. Davis, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth.

BROWN, C. J. [1] By an act of assembly approved May 3, 1915 (P. L. 241), the plaintiff was authorized to bring this action against the commonwealth to recover whatever might be legally due him as owner and publisher of a German newspaper in which there was published, by direction of the mercantile appraiser, the mercantile list of the county of Allegheny for the year 1885. Louis T. Brown was the county's appraiser for that year, and on May 9, 1885, approved plaintiff's bill for \$4,152. After its approval he presented it to the auditor general, who declined to pay it, and he thereupon instituted a proceeding in the court of common pleas of Allegheny county to compel A. E. McCandless, county treasurer, to pay him. A full report of that proceeding is found in *Commonwealth v. McCandless*, 129 Pa. 492, 8 Atl. 159, and, for the purpose of an intelligent understanding of the case now before us, we extract the following facts from it: To the alternative mandamus the county treasurer filed an answer, in which he averred that the paper owned and published by the plaintiff was a Sunday newspaper, and the publication of the mercantile appraiser's list therein was not therefore legal. An issue was directed to determine whether the paper was or was not a Sunday publication. The verdict of the jury was that it was a Saturday newspaper. The court then considered the various acts of assembly relating to the publication of mercantile appraisers' lists, and in an elaborate opinion by the late learned Judge Ewing, it was held that, under the statutes, the mercantile appraiser had no power to authorize the publication of the mercantile list of dealers within the cities of Pittsburgh and Allegheny, and for this, if for no other reason, the commonwealth was not bound to pay the claim of the relator as presented, for there were no means of ascertaining the proportion that would be chargeable for the list of dealers outside of the said cities.

[2] It is first to be observed that the question of the right of the plaintiff to recover for the publication of the list of dealers within the cities of Pittsburgh and Allegheny must be regarded as *res adjudicata*, for it was distinctly passed upon by the court below adversely to him, and its action was affirmed by this court. The right given by the act of 1915 to bring this suit merely permits it to be brought with the right of the commonwealth to have its liability determined by settled rules of law applicable to all litigation. The plaintiff's claim of \$4,152 is made up in this action of two items: (a) \$1,628, for advertising the names of dealers within the cities of Pittsburgh and Allegheny; (b) \$2,524, for advertising the names of dealers in Allegheny county outside of said cities; and the only question is whether he can recover for the second item. Whether he can do so depends upon statutory provisions. The act of April 16, 1845 (P. L. 532), authorized the courts of common pleas of Allegheny and Philadelphia counties to appoint an "appraiser of mercantile taxes" to ascertain and assess all dealers in accordance with the various acts of assembly then in force relating to tax upon vendors of merchandise. By the sixth section of the act the appraiser was directed to furnish each person and firm so assessed a written or printed notice of his classifications, giving at the same time to each dealer notice of the place and time at which appeals might be heard from his classifications. No authority is given in this act to the appraiser to make any publication in the newspapers. By section 12 of the act of April 22, 1846 (P. L. 486), the fifth, sixth, seventh, and eighth sections of the act of 1845 were extended to all the counties of the commonwealth, with the proviso that the appraiser for each county should be appointed by its commissioners, and that the written or printed notice required by the sixth section of the act of 1845, to be furnished by the appraisers to the persons or firms assessed, should extend only to the cities of Pittsburgh and Allegheny, in the county of Allegheny. The notices of assessments made by the appraiser within other portions of the county are required by the act of 1846 to be given by at least four advertisements in at least two newspapers, if there be so many published in the county. While the act is silent as to who is to order the publication, the fair implication is that it was intended to vest the authority to do so in the appraiser, and this authority was exercised by the appraiser in the present case, in pursuance of which the publications were duly made by the plaintiff, and his bill therefor is at an admittedly correct rate. While the court below, in *Commonwealth v. McCandless*, was in doubt as to whether this authority remained in the appraiser, in view of the act of April 11, 1862 (P. L. 492), we are of opinion that, as all acts relating to the assessment and collection of mercantile taxes must be construed

together, the authority of the mercantile appraiser to order the publication, found in the act of 1846, was not taken away by the act of 1862. The act of May 6, 1874 (P. L. 124) relates only to advertisements published by an officer or officers of the commonwealth authorized by law to publish the same, and is not to be regarded as having any application to the present case.

[3] The foregoing views were correctly held by the court below. From its judgment sustaining the second item of plaintiff's claim he and the commonwealth have both appealed. The judgment gives him all he is entitled to under the law, and does not require the commonwealth to pay what it does not owe. It is therefore affirmed.

(257 Pa. 134)

RICHARDS et al. v. SHIPLEY.

(Supreme Court of Pennsylvania. March 12, 1917.)

INJUNCTION §61(2) — CONTRACT IN RESTRAINT OF TRADE—BREACH.

Where the owner of a coal business sold it, including his fixtures, trade-name, etc., and agreed not to engage in that business in the city in which he had conducted his business for two years, or within a radius of two miles from his former place of business for five years, and three years thereafter established a coal business inside the city limits, but outside the two-mile radius, and solicited orders within such radius, he would be enjoined from soliciting or transacting such business within a radius of two miles from his former place of business within five years from the date of the agreement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 121-123.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by J. Ernest Richards and others against Walter C. Shipley. Preliminary injunction continued, and defendant appeals. Affirmed.

Davis, J., filed the following findings of fact and conclusions of law in the court of common pleas:

Findings of Fact.

Upon the bill, answer and proofs the following facts are found:

(1) The plaintiff George B. Newton Coal Company is a Pennsylvania corporation chartered September 4, 1912, under the name of "Heg Coal Company," its corporate name being shortly thereafter changed to George B. Newton Coal Company. It is, and has been since November, 1912, engaged in the retail coal business in the city of Philadelphia.

(2) The plaintiffs J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett are citizens of Pennsylvania and residents of Philadelphia. They were the promoters of the George B. Newton Coal Company, which they organized in the year 1912 for the purpose of purchasing and consolidating a number of retail coal businesses in the city of Philadelphia. Pursuant to said plan, said coal company did, in the fall of 1912, purchase and acquire the plants, properties, assets, trade-names, and good will of a number of retail coal businesses theretofore con-

ducted in said city, among others being the coal business conducted by the defendant, Walter C. Shipley.

(3) The defendant, Walter C. Shipley, is a citizen of Pennsylvania residing in the city of Philadelphia. Prior to November, 1912, he had been engaged for many years in the retail coal business in said city, his principal office and place of business being at the corner of Price street and Main street, in Germantown, Philadelphia. He did a large retail coal business in Germantown and owned a valuable business and good will, his business being conducted under the name of "Walter C. Shipley."

(4) On November 22, 1912, the defendant, Walter C. Shipley, executed a bill of sale, a copy of which is attached to the bill. On the same day the plaintiffs F. Wilson Prichett, Howard F. Hansell, Jr., and J. Ernest Richards executed a bill of sale, a copy of which is attached to the bill of complaint. On the same day the defendant, Walter C. Shipley, and the plaintiffs J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett entered into the trade agreement, a copy of which is attached to the bill of complaint, which agreement was on said date assigned by said Richards, Hansell, and Prichett to the George B. Newton Coal Company by an assignment a copy of which is attached to the bill of complaint. On the same date the George B. Newton Coal Company and the defendant, Walter C. Shipley, entered into the employment contract, a copy of which is attached to the defendant's answer.

(5) Upon the execution of the bills of sale, assignments, and agreements enumerated in the foregoing finding No. 4, and upon the consummation of the transfers contemplated by said documents, the plaintiff George B. Newton Coal Company took over, and has from that time continuously to the present conducted, the business thus acquired by it from said Walter C. Shipley.

(6) Pursuant to his said contract of employment with the George B. Newton Coal Company, the defendant, Walter C. Shipley, entered the employ of that company on November 22, 1912, and continued in its employ until the latter part of the month of December, 1915. During most of said period he was in charge of and manager of that branch or department of the George B. Newton Coal Company's business which had formerly constituted the business of said Shipley.

(7) The agreement dated November 22, 1912, between the defendant, Walter C. Shipley, and the plaintiffs J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, and their assigns (hereinafter referred to in finding No. 4), provided, *inter alia*, as follows:

"Whereas, Walter C. Shipley, by agreement bearing even date herewith, has granted, bargained, and sold unto J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett all of his business, trade-name, trade-mark, good will, machinery, fixtures, furniture, etc., of his coal business, with the exception of cash, accounts, and bills receivable, accounts and bills payable, materials, supplies, and stock on hand as set forth in the said bill of sale;

"And whereas, in consideration of the purchase of his business by the said J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, it is deemed to be to the mutual interest of the parties hereto that the said Walter C. Shipley shall refrain from continuing in the coal business in the city of Philadelphia for a period of two years and within a radius of two miles from Main and Price streets, Germantown, for a period of five years, and that he should indemnify the said J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, and their assigns, from any loss on account of any claims made against the said Walter C.

Shipley, in connection with his business or by reason of any accounts and bills payable now outstanding:

"Therefore, it is mutually agreed by and between the parties hereto as follows:

"(1) Walter C. Shipley agrees that he will not, for a period of two years from date hereof, within the city of Philadelphia, and for a period of five years from the date hereof within the radius of two miles from Main and Price streets, Germantown, be or become directly or indirectly engaged in or connected with any retail coal business or undertaking similar to that heretofore conducted by him under the name of Walter C. Shipley, either individually or as a member of any firm or partnership, or as an officer, director, manager, stockholder, or employé, or in any other capacity, other than in any one of said capacities in the George B. Newton Coal Company or its subsidiary companies. * * *

"This agreement is made with the understanding: * * * II. It shall not be so construed as to prevent Shipley becoming the owner of any real estate, whether the same is used in the coal business or otherwise.

"This agreement and the warranties and covenants shall extend to, inure to the benefit of, and be binding upon the parties hereto, their executors, administrators, and assigns."

(8) In the month of January, 1915, the defendant, Shipley, rented a tract of land at Chestnut Hill and situated about 2 miles and 500 feet from the corner of Main and Price streets, Germantown, and in the summer of 1915 he began to equip and fix the same as a coal-yard. Immediately upon leaving the employ of the Newton Coal Company in December, 1915, said Shipley proceeded to transact a retail coal business at said yard under the name of St. Martins Coal Company, and is still engaged in said business under said name. Immediately upon entering upon said business he began upon an extensive scale to advertise his business, by means of circulars and otherwise, in various places, and among others throughout that portion of Germantown which lies within two miles of the corner of Main and Price streets. He actively solicited orders of coal within said district in various ways, and among others by circulars signed "St. Martins Coal Company, by Walter C. Shipley," and sold and delivered coal in said district.

(9) When the defendant Shipley negotiated the lease of his present yard at Chestnut Hill, it was his belief that said yard should be rented by the plaintiff Newton Coal Company. He was urging upon the Newton Coal Company the advantages that would accrue to it from renting such yard, and acted in the premises on behalf of the Newton Coal Company. It was not until the fall of 1915 that the proposal that the Newton Coal Company should take over said yard was abandoned.

(10) At no time did the defendant, Shipley, inform any of the officers or directors of the Newton Coal Company that he intended, upon entering upon the retail coal business at his present yard, to solicit orders within the district lying within two miles of Main and Price streets, Germantown, or engage directly or indirectly in the retail coal business in said district prior to November 22, 1917, the time limit fixed in said agreement of November 22, 1912. At no time did the George B. Newton Coal Company or any of its officers, directors, or committees authorize, agree, or consent that said Shipley should disregard in any way the trade restrictions contained in his said agreement.

Conclusions of Law.

(1) The agreement of November 22, 1912, between Walter C. Shipley and J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, and which was subsequently assigned

to the George B. Newton Coal Company, whereby said Shipley agreed to refrain for a period of five years from November 22, 1912, within the radius of two miles from Main and Price streets, Germantown, from engaging or becoming interested, directly or indirectly, in the retail coal business or any undertaking similar to that conducted by him under the name of Walter C. Shipley prior to November 22, 1917, is a legal, valid, and enforceable agreement.

(2) Under his said trade agreement with the George B. Newton Coal Company said Walter C. Shipley has no right either under his own name or the name of St. Martins Coal Company, or any other name, to solicit orders for retail coal from, or receive orders for retail coal from, or make deliveries of retail coal to, any persons, firms, or corporations within two miles of Main and Price streets, Germantown.

(3) Neither the George B. Newton Coal Company nor any of its officers, committees, or directors have waived the rights of said company under said trade agreement, by acquiescence or otherwise.

(4) The evidence offered on behalf of the defendant, Shipley, tending to prove an oral agreement entered into between said Shipley and one or more of the promoters of the Newton Coal Company, in derogation of the trade agreement entered into by said Shipley in the written contract of November 22, 1912, was irrelevant and inadmissible.

(5) At no time did Howard F. Hansell, Jr., or any of the promoters of the Newton Coal Company agree or attempt to agree with said Shipley that he would not be required to observe his trade agreement of November 22, 1912.

(6) The plaintiffs are entitled to the relief prayed for in the bill, and the temporary injunction heretofore entered by the court should be continued to cover the period named in said agreement of November 22, 1912, to wit, until November 22, 1917.

Discussion.

The bill in equity filed prays for an injunction to restrain the defendant "from being or becoming, directly or indirectly, engaged in or connected with any retail coal business in the city of Philadelphia for a period of two years from November 22, 1912, either in his own name or under the name of St. Martins Coal Company or any other name or as a member of any firm or partnership, or as an officer, director, manager, stockholder, or employé of any corporation, or in any other capacity," and further "restraining and enjoining said Walter C. Shipley, either in his own name or under the name of St. Martins Coal Company or any other name, from soliciting retail coal business or transacting a retail coal business in any way within a radius of two miles from Main and Price streets, Germantown, Philadelphia, for a period of five years from November 22, 1912."

The plaintiffs and defendant entered into an agreement dated November 22, 1912. This agreement provided, in part: "In consideration of the purchase of his business by the said J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, it is deemed to be to the mutual interest of the parties hereto that the said Walter C. Shipley shall refrain from continuing in the coal business in the city of Philadelphia for a period of two years, and within a radius of two miles from Main and Price streets, Germantown, for a period of five years, and that he should indemnify the said J. Ernest Richards, Howard F. Hansell, Jr., and F. Wilson Prichett, and their assigns, from any loss on account of any claims made against the said Walter C. Shipley, in connection with his business or by reason of any accounts and bills payable now outstanding."

It is admitted that the defendant has established a retail coal business and yard under the

name of the "St. Martins Coal Company." The yard is located at what is designated by the defendant as 7600 Germantown avenue. It appears that this location is a few hundred feet outside of the two-mile radius from Main and Price streets, Germantown, the location indicated in the contract. It is further admitted by the defendant that he has solicited business in the city of Philadelphia within a radius of two miles from Main and Price streets, Germantown. The terms of the agreement are neither vague nor ambiguous, and the meaning of the parties to the agreement is conclusively presumed to have been set forth in its written words. A meeting of the parties preliminary to the execution of the contract was held, and a contract submitted to the defendant was reformed at the suggestion of himself and his counsel. We conclude from the brief of counsel for defendant and his argument at the hearing that his interpretation of this contract is that the defendant may establish a retail coal business beyond the two-mile radius and deliver coal to customers living within the territory included in the radius of two miles from Main and Price streets. We need not here concern ourselves as to the motive or reason actuating the minds of the parties to the agreement as to the limitation of time or territory as therein set forth. As we have already stated, the purpose and requirements of the agreement are perfectly clear, and we cannot read into the agreement any mental reservation or mutual understanding not therein expressed at the time of the execution. The defendant contends that the plaintiff corporation by one of its officers acquiesced in the action of the defendant in securing a coal yard and placing a stock of coal therein at 7600 Germantown avenue. It appears from the correspondence between the defendant and the president of the plaintiff company and from conversation with other officers of the company that the defendant desired to sever his connection with this company as an employé. There is nothing in the agreement requiring the defendant to continue as an employé of the company, and it further appears that the officers of the company desire the defendant to continue in the service of the company as an employé. The defendant further contends that the action of Mr. White, the vice president of the plaintiff company, in advising defendant as to the method of constructing the coal pockets in defendant's yard, amounted to an acquiescence of the company in defendant's action in violating the terms of the agreement. We find as part of the agreement the following: "(2) It shall not be so construed as to prevent Shipley from becoming the owner of any real estate, whether the same is used in the coal business or otherwise."

The defendant cannot be estopped from establishing a coal yard in the city of Philadelphia after the expiration of two years, provided such yard is not within a radius of two miles from Main and Price streets, Germantown. The defendant evidently recognized that provision, as he was careful to go a few hundred feet beyond that radius in constructing his new plant.

We are not convinced that the conduct of the officers of the company acting in their individual capacity amounted to an acquiescence in the abrogation of the contract, nor that the plaintiff corporation is estopped from enforcing the clause prohibiting the defendant from doing business for a period of five years within a radius of two miles from Main and Price streets, Germantown, and the result of their discussions in relation to defendant's right to disregard the agreement was to the effect that defendant could not arbitrarily abrogate the contract. The officers or directors of the plaintiff corporation appear to have been acting as individuals.

In any event, it does not appear that there was any official action taken by the plaintiff company authorizing them to abrogate the contract, and we are of opinion that the officers of the company, acting as individuals, cannot waive the right of the company plaintiff to enforce the terms of the contract. If the agreement is to be abrogated, the corporation, in its official capacity, should authorize such action.

It is not necessary at this time to cite the numerous authorities supporting the right of an injunction for violation of contracts similar to the agreement in this case. In *Monongahela River Coal & Coke Co. v. Jutte*, 210 Pa. 288, 302, 59 Atl. 1088, 1093 (105 Am. St. Rep. 812, 2 Ann. Cas. 951), it was said: "When a contract is presented which in some degree restrains trade, we do not at once decide that it is void as against public policy, but we go further and inquire: Is it limited as to space or time, and is it reasonable in its nature? We are approaching nearer and nearer to the conclusion, although we have not yet reached it, that common honesty is the true public policy."

We are of opinion that it is a breach of the agreement to conduct a business similar to the one transferred within the radius of two miles from Main and Price streets or to do acts in violation of the spirit and intent of the contract. The defendant cannot be restrained from establishing a coal yard, after the term of two years, beyond the territorial limits set forth in the agreement, but the soliciting of business, the selling and delivery of coal to customers within the territorial limits, is carrying on business and a breach of the contract.

The court on final hearing continued the preliminary injunction which it had issued. Defendant appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Alex. Simpson, Jr., and E. Spencer Miller, both of Philadelphia, for appellant. Charles L. McKeehan, of Philadelphia, for appellees.

PER CURIAM. This appeal is dismissed on the facts found and the legal conclusions reached by the learned chancellor below and on his discussion of the questions involved.

Decree affirmed at appellant's costs.

(287 Pa. 152)

LUNG v. SUTTON et al.

(Supreme Court of Pennsylvania. March 12, 1917.)

MASTER AND SERVANT \Leftrightarrow 217(1)—SAFE PLACE TO WORK—KNOWLEDGE OF DANGER.

A servant suing for personal injury from stepping into a hole in the floor of a building in which he was working could not recover where he had noticed a number of similar holes, and had attempted to cover them, but had missed the one into which he fell.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Harry Lung against Charles M. Sutton and Richard W. Stephenson, trading as Sutton & Stephenson, to recover damages for personal injury. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

From the record it appeared that the plaintiff at the time of the accident had been ordered by the defendant firm to put tile upon and around the base of a column in a building which was being altered and repaired; that in the floor there were a number of holes, and that when the plaintiff went to work he noticed the holes, endeavored to cover them, and then went to work. After working three-quarters of an hour he stepped into one of the holes and was seriously hurt. He explained that he had overlooked this hole because it was in the dark. At the close of the plaintiff's case the court entered a compulsory nonsuit, which it subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Charles E. Asnis, David Bortin, Jacob Singer, and Emanuel Furth, all of Philadelphia, for appellant. A. L. Molise and W. W. Smithers, both of Philadelphia, for appellees.

PER CURIAM. The appellant, an employe of the appellees, was injured by stepping into a hole in a floor of a building in which he was working. Having noticed a number of holes in this floor, he proceeded, before starting to work, to cover them with boards procured from another floor, but unfortunately missed, as he frankly admitted in his testimony, the one into which he fell. His failure to cover that hole resulted in his injuries, and for this reason the court below could not have avoided the entry of the nonsuit.

Judgment affirmed.

(257 Pa. 144)

EDMONDS et al. v. CHANDLER.

(Supreme Court of Pennsylvania. March 12, 1917.)

EQUITY — 443—BILL OF REVIEW—JUDGMENT OF SUPREME COURT.

After a decision by the Supreme Court a bill of review will not be entertained in the court from which the appeal was taken, especially where the purpose of the bill is to correct an alleged error as to matters which were a part of the record in the case at the time of the appeal.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1071-1077.]

Appeal from Court of Common Pleas, Dauphin County.

Bill in equity by Franklin Spencer Edmonds and another against Percy M. Chandler, receiver of the Tradesmen's Trust Company, to review a decree distributing the assets of the insolvent trust company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

On final hearing the court, McCarrell, J., in the court of common pleas, filed the following opinion:

The plaintiffs, Franklin Spencer Edmonds and Charles I. Cronin, filed this bill in the above-

entitled case, and as a part of the proceedings taken therein, against Percy M. Chandler, receiver of the Tradesmen's Trust Company, asking for a review of the decree of distribution made to them as creditors of said trust company. The company was dissolved October 11, 1911, and a receiver duly appointed. As his accounts were filed they were referred to auditors, in pursuance of the act of 1909, for audit and distribution. These plaintiffs presented their claim, asserting that they had the right to preference over other creditors, because their claim was secured by an arrangement between the Tradesmen's Trust Company and one John Megraw, who was interested in a building operation in West Philadelphia, and had arranged with the trust company to finance the building operation, and had given as security for the moneys needed for that purpose ground rents and mortgages resting upon the various lots of ground included within the limits of the building operation. The plaintiffs became the purchasers of certain of these mortgages and ground rents. The agreement between Megraw and the trust company provided, in substance, orally, that the funds received from the sale of ground rents and mortgages should be a trust fund in the hands of the trust company to secure the trust company for its advances of money and the protection of the securities which were to be sold by the trust company for the purpose of raising funds to complete the building operation. The building operation had not been completed at the time the trust company was dissolved in October, 1911, and these plaintiffs presented to the auditors appointed to make distribution of the money in the hands of the receiver their claim for the mortgages and ground rents which they had purchased, and requested a preference over the general creditors in the distribution of the funds in the hands of the receiver because of the agreement to treat the proceeds of the ground rents and mortgages as a trust fund. The plaintiffs offered no special testimony for the purpose of showing their right to a preference, but the auditors examined fully into the matter and heard testimony upon the subject at various dates. They decided that no trust fund had been created, that the money received from sale of ground rents and mortgages covering the Megraw operation had been mixed with the general funds of the company, and were a part of the general assets, and therefore refused to allow the plaintiffs a preference, but did allow them their proper percentage from the general fund. Exceptions were taken to the report of the auditors, which exceptions were overruled by this court, and an appeal was taken to the Supreme Court by the plaintiffs, resulting in the affirmance of our decree of distribution. This opinion affirming our decree was delivered July 3, 1915. The present bill for a review was filed October 19, 1915. An answer has been filed by the receiver, and the matter is now before us for decision.

The plaintiffs contend that the testimony of Howard P. Page, quoted in part in their bill, shows a manifest mistake of law and of fact upon the face of the record, and that they are therefore entitled to a review. Their contention is that the testimony of Page shows that a trust fund was in existence covering the proceeds of the ground rents and mortgages connected with the Megraw operation, out of which the plaintiffs were entitled to be paid in preference to other creditors. This testimony was taken April 26, 1912. No request was made to the auditors or to this court, based upon this testimony for a specific finding, that this testimony showed the existence of a trust fund, such as the plaintiff asserted was established for their protection. No exception was taken to the auditors' finding specifically upon that ground, and no application was made either to

the auditors or to this court for permission to file exceptions *nunc pro tunc*. That these plaintiffs knew of the existence of this testimony or by the exercise of reasonable diligence could have known of the same prior to the filing of the auditors' report is reasonably certain. They were present by their counsel at the morning session of the auditors' meeting April 26, 1912. After the matter has been decided by the court of last resort, are they entitled now to maintain a bill of review for the purpose of correcting the alleged mistake? This question has been considered by our appellate courts quite frequently. In *Dennison v. Goehring*, 6 Pa. 402, the plaintiffs had filed a bill, setting out that a trust was created for the benefit of one of the plaintiffs. A final decree was pronounced in favor of the plaintiffs, and the defendant appealed to the Supreme Court. After hearing in the Supreme Court the decree of the court below was affirmed. Afterwards the defendant brought his bill of review in the lower court for alleged error in law appearing in the body of the decree. The lower court dismissed the bill of review, and from this decree of dismissal an appeal was taken. Mr. Justice Bell, page 403, uses the following language: "Thus, the only question presented for determination is, whether a bill of review for errors on the face of the record can be entertained in an inferior tribunal, after the final decree of this court on appeal, affirming the decree appealed from." Numerous decisions upon this subject are then referred to, and at page 405 appears the following: "These decisions are consonant with reason; and the rule they establish is absolutely necessary to prevent the confusion and mischiefs which would flow from practically transposing the relative positions of our courts, superior and inferior, an inconvenience which the occasional correction of mistake in a comparatively few * * * cases would not compensate." To the same effect in *George's App.*, 12 Pa. 260; also *Felty v. Calhoun*, 147 Pa. 27, 23 Atl. 438.

The case of *Ricketts v. Capwell*, 241 Pa. 138, 88 Atl. 319, is in accordance with the other decisions, and holds that after a decision by the Supreme Court a bill of review cannot be entertained in the court from which the appeal was taken. The plaintiffs before the auditors and in this court asserted that they were entitled to a preference. The burden was therefore upon them to show by what authority they had this preference. Assigned Estate of the Solicitor's Loan & Trust Co., 3 Pa. Super. Ct. 244. The auditors had before them the testimony of Mr. Page upon the basis of which the right to this bill of review is based, and they had also other testimony upon the same subject, particularly the testimony of Lewis K. Brooks, former treasurer of the company. He testified distinctly and positively that the moneys received by the Tradesmen's Trust Company were mingled with its own funds and became a part of the general assets. Referring to accounts which the trust company had with certain banks, which accounts were marked "Title Department," Mr. Brooks testified as follows: "Q. Then do I understand that the purpose of having those title department accounts was not to keep trust funds which would go through the title department separate and apart from the general funds of the company? A. No, it was not. That was hoped to arrive at some day, but that was not the intention when those accounts opened, nor were those accounts run for that purpose. Q. Then do I understand that the title department accounts which you have just been speaking of, in those account funds which belonged to other people who had transactions through the title department, were not deposited there for the purpose of keeping those funds intact and separate and apart from the funds of the company? A. No, they were not."

The testimony of Mr. Brooks upon this subject was clear and distinct and positive, and on that the auditors found that the funds received by the trust company from the securities connected with the Megraw operation had been mingled with the general funds of the company, and that no funds had been earmarked as belonging to a trust for the holders of these securities. The testimony of Howard Page, upon whom the plaintiffs now rely, and which was taken long before the appeal to the Supreme Court was taken, does not, in our opinion, show that the testimony of Mr. Brooks is incorrect. It seems to be in entire harmony with it. Mr. Page speaks of the account of the trust company with the Corn Exchange National Bank and with the Fourth Street National Bank. These accounts were both in the name of the Tradesmen's Trust Company, and showed that the banks respectively were indebted to the Tradesmen's Trust Company, Title Department, in the sums appearing in the respective accounts. Neither account, however, shows that the funds referred to therein were designated as a trust fund for the holders of the Megraw securities, or in any way indicated that the accounts showed anything else than the indebtedness of the banks to the trust company. The funds referred to in these accounts were not earmarked, and no one could tell therefrom that they were anything else than a statement of the money due from each bank respectively to the trust company. Mr. Page undertakes to analyze and examine the deposits and ascertain from what source moneys credited therein were derived. He said: "By analyzing the balances I find various points that they would transfer from this special deposit to the general deposit of the company certain sums of money, in the most cases even amounts of \$10,000, \$15,000 or \$25,000, indicating the amounts deposited in this account, and, checking from the last deposit made, I find that eight items, the last deposits which were made aggregating \$13,653.49, which consisted of the proceeds of the sale of six ground rents."

There does not appear from any testimony to have been anything upon the books of the bank to indicate the source from which the money deposited came; and, as already stated, the accounts in these respective banks were not marked as trust funds for the Megraw securities or any other particular securities. The testimony of Mr. Page seems to be consistent with the testimony of Mr. Brooks that these deposits were to the general credit of the trust company, and that the funds were mingled with other funds, so that they were apparently a part of the general assets of the trust company. Mr. Page testified: "I might say that all of the checks drawn upon the title department funds were made payable to the Tradesmen's Trust Company, and redeposited in their general funds." This is in exact harmony with the testimony of Mr. Brooks. At the time of the hearing before the auditors the plaintiffs submitted all the testimony which they desired to offer to sustain their right to a preference. They were fully heard upon this subject by the auditors, by this court, and by the Supreme Court. The auditors had before them all the testimony, both of Mr. Brooks and Mr. Page. Mr. Page was a certified public accountant, employed by the receiver to examine the books of the trust company, and he was called to testify before the auditors as to whether the receiver had charged himself in account with all the money received by him for the trust company. He had never been an officer of the trust company. Mr. Brooks, the treasurer of the company, testified positively that no trust fund had ever been created or set aside, although the company expected to do so in the future. The auditors considered all this testimony and concluded that: "The moneys received by the trust company

were mingled with its own funds and became a part of the general assets. Appellants have failed to identify the funds in such manner as to entitle them to follow and claim it as a trust fund to the exclusion of other creditors." This conclusion has been affirmed by the Supreme Court in opinion of Mr. Justice Frazer in *Comm. v. Tradesmen's Trust Co.* (No. 1), 250 Pa. 372, 376, 95 Atl. 574.

We are not satisfied that this conclusion reached by the Supreme Court works any injustice to the plaintiffs. We are of opinion that they are not now entitled to a bill of review. An appeal to this court for a rehearing on the ground of the alleged after-discovered evidence necessarily must have been refused, for the evidence suggested as after discovered was already on the record, and plaintiff must be conclusively presumed to have known of its existence. Now, after the whole matter has been considered and decided by our court of last resort, we are powerless to grant further relief. There are, perhaps, a thousand creditors of the Tradesmen's Trust Company whose claims are being held up because of the proceedings for the distribution of the funds in the hands of the receiver, and to permit the filing of the bill of review at this late date under the circumstances existing would be without precedent, and would unnecessarily and improperly interfere with the rights of other creditors, who are not made parties to the proposed bill of review.

The court dismissed the bill. Plaintiffs appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING JJ.

John G. Johnson and E. Spencer Miller, both of Philadelphia, for appellants. Paxson Deeter and Samuel M. Clement, Jr., both of Philadelphia, for appellee.

PER CURIAM. The decree in this case is affirmed, at appellants' costs on the opinion of the learned court below dismissing their bill.

(257 Pa. 181)

In re BERBERICH'S ESTATE.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. PLEDGES ¶56(4)—**SALE—NOTICE.**

The pledgee of property before selling it to answer for the default of the pledgor must give notice to the pledgor in order to afford him opportunity to continue the pledge if he desires, and upon continued default the pledgee may sell, but only upon notice of sale so that the pledgor may protect himself and his property by redemption or otherwise.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 157-159, 178, 179.]

2. BROKERS ¶24(2)—**STOCKBROKERS—MARGIN TRANSACTION—SALE OF STOCK.**

Where a stockbroker contracts to carry stock upon margin, an agreement is implied that it shall not be sold to prevent the exhaustion of the margin until additional margin shall have been requested, and a reasonable time afforded for furnishing it, and a sale of the stock without notice to the owner is a breach of the broker's contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19.]

3. ESTOPPEL ¶94(1)—**SALE OF STOCK—ACQUIESCENCE.**

The widow of a customer who had dealt with a stockbroker on margins had no standing in her own right to interfere with the broker's sales of the stock, and as the administratrix of the customer and as against the broker who had illegally converted the stock might stand quiet until the broker demanded the balance due, as the wrongdoer could not compel her election between a ratification of his act or a repudiation of it, and hence was not estopped to complain of the transaction, especially where the broker had not been misled to his injury in reliance upon her action.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 246.]

4. ATTORNEY AND CLIENT ¶77—**AUTHORITY OF ATTORNEY—SALE OF STOCK PLEDGED BY TESTATOR.**

An attorney for an administratrix, without express authority to bind her or the estate, has no implied authority to authorize a broker to sell stocks pledged by the decedent without notice to the administratrix.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 88-90, 132, 136, 148, 149.]

Appeal from Orphans' Court, Philadelphia County.

Kathryn Berberich, administratrix of the estate of Herman Berberich, deceased, appeals from a decree dismissing her exceptions to adjudication of the claim of William Hastie Smith, Jr., & Co. against the estate. Reversed, with a procedendo.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, and FRAZER, JJ.

James J. Breen, of Philadelphia, for appellant. Frederick J. Knaus, of Philadelphia, for appellees.

STEWART, J. For several years prior to July, 1914, William Hastie Smith, Jr., & Co., a firm of stockbrokers in the city of Philadelphia, had carried an account with one Herman Berberich. The firm from time to time purchased stocks and bonds on the latter's order, advancing their own money for that purpose, and charging him with the amount so advanced, plus their regular commission and interest. The bonds and stocks so purchased remained pledged in the hands of the brokers as security for their advancements and charges, together with whatever margin might be deposited by Berberich pursuant to demand made by the firm for additional security against a declining market. Under date of June 30, 1914, the firm rendered a quarterly statement of account to Berberich—the last one rendered—showing an indebtedness due from him of \$56,806.17, for which it held as security enumerated bonds and stocks purchased on his order. On 16th of July following, upon the order of Berberich, the firm purchased for him certain additional stocks increasing his indebtedness to \$58,406.17, subject to a credit of \$440 for certain dividends collected by the firm, which reduced the claim to \$57,966.17. Thus the

account stood when towards the end of July, 1914, the firm called on Berberich for additional margin. This demand he attempted to comply with by mailing to the firm two checks drawn by himself, one for \$1,000, and one for \$2,000, against deposits ample to meet the demand. These checks reached the firm on Saturday July 25th, and were promptly deposited. The day following, Sunday, Berberich met his death in the surf at Wildwood, N. J. On Monday, the two checks passed through the clearing house. The one for \$1,000 was paid. The other was refused by the bank for the reason as written on the back, "Maker deceased." On the 11th of August following letters of administration on the estate of Herman Berberich were granted to his widow, Kathryn Berberich, the accountant and appellant. On the audit of her account as stated by herself William Hastie Smith, Jr., & Co., the above-named firm of brokers, presented its claim as above indicated, reduced by the \$1,000 check which had been paid, and demanded payment out of balance in the hands of the administratrix. The correctness of the account was not disputed; that is to say, there was no contention that it did not correctly exhibit the several stock transactions between Berberich and the firm. The dispute arose out of transactions on the part of the firm after the death of Berberich. On the day following the death of the latter, Monday, July 27th, there occurred a rapid decline in stock values because of the warlike situation abroad. The margin demanded by Berberich not having been met in full because of his sudden death, and being apprehensive of a still further decline in market values, the firm, without notice to any one in interest, proceeded to sell sufficient of the pledged securities of Berberich to furnish it with what it believed a reasonable margin for its own protection. These sales made on the day following Berberich's death, while furnishing sufficient margin to the brokers, resulted in heavy loss to Berberich's estate. The firm, by letter dated the same day addressed to the widow of Berberich, advised her of the fact that they were carrying a large amount of stock for her husband, that he had sent a check for \$2,000 to be placed to his credit which had been refused by the bank on which it was drawn, and added:

"This reduced his credit with us to such an extent, and the stock market was so panicky on account of the war scare that we felt it wise to reduce his holdings, and so sold 1,100 shares as per inclosed notice. It is well that we did so, as the prices of stocks we sold are much lower to-night. As soon as you are able to take these matters up with us, we would be glad to call upon you and explain the situation."

The stocks reported sold were Philadelphia Electric 100 shares, Lake Superior 600 shares, and Electric Storage 100 shares. Two days thereafter values continued to decline, and the firm sold the following additional securities of Berberich, without notice to

any one in interest: Lake Superior 100 shares, Electric Storage 200 shares, and Kansas Southern 100 shares—and carried proceeds to Berberich's credit. During the months of September, October, and November following, further sales were made without notice to the administratrix of the estate, but of which she was subsequently advised by the firm. This left in the hands of the firm \$10,000 in Lake Superior bonds and 775 shares of Lake Superior stock. The total proceeds of sales made amounted to \$42,821.74. This credited on Berberich's account left a balance of indebtedness of \$14,144.43, for which claim was made before the auditor. The facts not being in dispute, on this presentation of them the auditor held: (1) That in making the sales in July the claimants acted within their rights and powers, they sold only sufficient to protect themselves, instead of selling out decedent's entire holdings; the prices obtained were higher than those obtainable during the rest of the year, and had they waited longer greater loss would have been occasioned; (2) the claimants immediately notified the wife of the decedent of the action they had taken, and if it was not her duty as widow to repudiate their action, it certainly was her duty to do so as administratrix after her appointment; (3) that as to sales made after appointment, the administratrix through her counsel waived any necessity of notice by directing claimants to protect themselves as best they could. The auditor accordingly awarded to claimants the full amount of their claim as presented. Exceptions having been filed the case was heard by the court in banc, with the result that the exceptions were dismissed and the report of the auditor confirmed. From this decree we have the present appeal by the administratrix of the estate.

In the opinion filed by the court, while there is no express dissent from the view taken by the auditing judge in what we have above indicated as the latter's first conclusion, namely, that in making the sales in July the claimants acted within their rights, there is, nevertheless, a refusal to rest the case on any such ground accompanied by this qualified admission:

"If the rights of the parties depended simply upon this question, we should probably hold that the stocks were unlawfully converted, and the claimants were liable for the consequent loss."

Inasmuch as we are of opinion that the court should have held unqualifiedly that these sales of stock were in law and fact an illegal conversion of the same, and are unable to agree that the reasons assigned by the court are sufficient in law to relieve the claimants from the legal consequences incurred, a brief reference to some well-established rules and principles will be here in place. Reduced to its simplest terms, the relation to the parties to this transaction was that of pledgor and pledgee. No special contract between the parties touching the mode or manner of conducting the business that

engaged them having been shown, it was necessarily subject to common-law rules and principles, and by these their reciprocal rights and obligations must be determined. Though having certain property rights in the things pledged, the pledgee had no right of disposal except under well-defined conditions; and, except as these conditions have been fully met, any sale of the pledge by the pledgee must be held to be unlawful conversion of the property.

[1] One of these conditions requires that before any sale be made to answer for any default of the pledgor the pledgee shall give notice to the pledgor or some one standing in interest with him, in order that opportunity may be afforded him to continue the pledge if he may desire. Upon continued default the pledgee may sell, but even then only upon notice that sale will be made, so that opportunity be again afforded the pledgor to protect himself and his property, if he can, by redemption or otherwise.

[2] Where, as in the present case, there is a contract to carry stocks upon margin, an agreement, as part of the contract, is implied, that such stocks shall not be sold, in case there is danger of the exhaustion of the margin, until additional margins shall have been applied for and a reasonable time afforded for furnishing the same. A sale of the stock without notice is a breach of the contract on the part of the broker. Doubtless parties may agree that the broker may sell without notice when stocks falling in price show that the margin does not cover the difference between current rates and the price paid, but, in the absence of any such agreement, it would be a breach of good faith and common honesty to allow the pledgor's property to be sacrificed without giving him an opportunity to increase his margin and hold the stock for a favorable change in the market. This is said in *Ritter v. Cushman & Gignoux*, 35 How. Prac. (N. Y.) 284, and multiplied cases from our own books may be found of like effect. We have cited the above case in this connection more particularly because of what follows the extract above given. The learned judge there concludes:

"I know it is said that fluctuations in the stock market are so sudden and unexpected that there is not time to give notice; but these abrupt transitions in the value of stocks are and have been well known for many years, and should be provided for by brokers and those with whom they deal. If no such provision is made, parties must abide by the rules of law."

In *Bispham's Equity Pl.* (8th Ed.) 359, it is said:

"The right to sell upon notice, however, is one in the exercise of which a great deal of care is required; and the pledgee may be held responsible if he does not strictly follow all the requirements of the law by which his rights are fenced."

In *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177, following *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519, and *Sitgreaves v. Farmers' Bank*, 49 Pa. 359, it is expressly declar-

ed that the pledgor cannot appropriate the pledge in satisfaction of the debt intended to be secured at his option, unless in pursuance of a contract to that effect, nor sell it without giving notice to the pledgor of his intention to do so, in order that he may have an opportunity to redeem it if he desire. To the same effect is the late case of *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501, Ann. Cas. 1915B, 941. In the present case it is not pretended that any notice whatever was even attempted to be given. We need not delay to consider whether Berberich was in actual default on July 27th when the sales were made, with respect to the margin that had been demanded of him. It may be conceded that for the few hours, if so much, intervening between the return of the \$2,000 check and the actual sale, he was technically in default. What right did that circumstance give the appellee? None whatever but the right to sell upon notice given. Instead of giving such notice, or attempting to give it, the appellee, with the single purpose of providing itself with additional margin on a rapidly declining market, precipitately threw the pledged certificates upon the market and sold them as it would have sold its own property for which it was answerable to none but itself. The fact that Berberich was lying dead at the time neither justified nor excused such precipitate haste. What matters it that notice to Berberich was made impracticable by his death? Such circumstance, or any other happening that would interfere with the pledgor observing the strict requirements of the law, as said in the case above cited, should be provided against by the brokers and those with whom they deal, and if no such provision be made, parties must abide by the rules of law. A familiar rule is that, when notice is required to be given, if the party to be served cannot be found, a notice delivered at his last known place of residence is sufficient. So it might have been here, and who can say that such notice, had it been given, would not have arrested the sale? However this may be, it was the bounden duty of the appellee to give whatever notice a reasonable regard for the rights of those in interest would have suggested. Failing in this, sales made on the 27th and 29th of July must be held to have been an illegal conversion of the pledged property.

[3, 4] Avoiding in a way this material inquiry, the learned court rests its affirmance of the auditing judge's report on purely equitable considerations: First, that it was the duty of the widow, at least after she had qualified as administratrix, to repudiate the transaction, and not having done so, she cannot now claim that the sales were unlawful and seek to hold the brokers for the highest market value of the stocks thereafter, or the market price at the date of the trial. The opinion proceeds:

"She did nothing at all, and it would be in our opinion very inequitable to allow her to set off

against this claim damages which we calculate would approximate \$8,700."

This is to impose on the widow and administratrix a duty which the law nowhere recognizes. In her own right the widow had no standing to interfere; as the legal representative of the estate of the pledgor she had a perfect right, as against one who had illegally converted the property of the estate, to stand quiet until the latter made demand. The wrongdoer was without standing to compel her to make election between a ratification of his wrongful act or a repudiation of it. It is quite enough to know that no ratification by her is alleged. We are not here dealing with a question arising out of a contract, but one arising out of an illegal transaction.

Another consideration advanced by the court is that:

"The widow's conduct was entirely inconsistent with her present claim; for when shortly after her appointment as administratrix one of the claimant's firm saw her attorney in reference to the account and to a check of the decedent's drawn before his death, but returned from the bank by reason of his death, the attorney said in effect, 'It is up to you to protect yourselves.' Naturally the brokers considered that this remark was virtually a declination to do anything to protect the account and an authority to the brokers to act in the future as they thought best, and we entirely agree with the auditing judge that this was a waiver of the notice of future sales. This was, moreover, at the time when the attorney for the estate should have given the brokers notice that they would be held liable for their failure to give notice of the prior sales. He who will not speak when he should shall not speak when he would. The circumstances were such as to impose on the administratrix or her representative the duty in equity to inform the brokers that they would be held to strict accountability for what they had done."

To the doctrine here asserted we cannot agree. Minds may differ as to what might fairly be understood from the remark of the counsel to the appellees when he was called upon; but, aside from that, it is of no consequence what he said. In his capacity as counsel merely he was without express au-

thority to bind the administratrix, or the estate she represented; neither had he any implied authority arising out of the relation in which he stood. The subject of the conversation had regard to a fixed right in property of the estate, and over that he had no control whatever. Furthermore, it being a fixed right of the estate—the right to notice of a purpose to sell—it could only be waived upon consideration, and none is pretended. The counsel was under no duty to speak out and caution the appellee against further illegal acts on their part in connection with the property of the estate, or disclose to them what his advice to the administratrix would be with respect to the earlier sales. We repeat, here is no room for the operation of equity. Estoppel could not arise. There is not a particle of evidence that appellees were misled to their hurt by relying upon the representations made by either the administratrix or her counsel. What they did with the stocks remaining on their hands from August to November was just what they had already done with the stocks sold in July; they sold without notice and without any waiver of notice, thereby making themselves liable.

"If a transaction is condemned under the force of legal rules, it cannot receive a more favorable consideration in a court of equity on account of any hardship to particular parties." Bispham's Equity Pl. (8th Ed.) p. 59.

The case calls for reversal. With the data before us that would enable us to determine exactly what amount should be deducted from the claimant's demand, in view of what we have said as to the law, we might end the controversy here; but we have not this data, and it is possible that further testimony will have to be taken to do exact justice between the parties. We have sufficiently indicated what we regard to be the law governing the case, and in order that the case may be disposed of in accordance therewith, we direct a return of the record, and reverse with a procedendo.

It is so ordered.

(116 Me. 304)

COOMBS et al. v. FESSENDEN et al.

(Supreme Judicial Court of Maine. July 16, 1917.)

1. DEEDS §194(1)—DELIVERY — PRESUMPTION FROM MANUAL TRANSFER.

There is a presumption that when manual possession of a deed passed from a son, the grantor, to his mother, the grantee, both parties intended to effect an immediate transfer of the title in accordance with the terms of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574, 575, 581-583, 634.]

2. DEEDS §208(1)—DELIVERY—INTENTION — CONTROL OF PRESUMPTION—SUFFICIENCY OF EVIDENCE.

In an action to recover realty, defendants basing title on a warranty deed from a son to his mother, the delivery of which plaintiffs denied, evidence held insufficient to overcome the presumption that, when manual possession of the deed passed from son to mother, both parties intended to transfer title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630.]

3. EVIDENCE §271(18)—DELIVERY OF DEED —SELF-SERVING DECLARATIONS.

In an action to recover realty, defendants claiming under a warranty deed running from a son to his mother, receipts for rent of the demanded premises, given by the son after execution of the deed, and an assignment to secure rent, the mother's name not appearing in any of the papers, and there being no evidence that she ever saw them, or knew the manner in which her son was dealing with the tenants, were inadmissible to overcome the presumption of delivery of the deed arising from its manual transfer; for, though evidence of the grantor's conduct in relation to the property conveyed by his deed is admissible on the question of title, the participation and knowledge of both parties in and of such conduct must clearly appear; otherwise the evidence is self-serving and inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1096.]

4. APPEAL AND ERROR §1064(1)—INSTRUCTIONS—HARMLESS ERROR.

Where no legal evidence was introduced to control the presumption that a deed was delivered to the mother, the grantee, by her son, with intent to vest title in her to the premises described, an instruction that the only question to be considered was, Did the parties mean that title was to pass or not? that there was no question but that it was passed over as far as it went, but was it intended to take effect as a conveyance, was misleading and prejudicial to the interests of one claiming under the grantee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Madeline B. Coombs and others against Cornelia G. Fessenden and others. There was verdict for plaintiffs, and defendants except. Exceptions sustained.

Argued before CORNISH, C. J., and KING, BIRD, HANSON, PHILBROOK, and MADIGAN, JJ.

Oakes, Pulsifer & Ludden, of Auburn, for plaintiffs. Ralph W. Crockett, of Lewiston, for defendants.

MADIGAN, J. In a former trial of this case the defendants recovered a verdict, which was set aside by the law court. 114 Me. 347, 96 Atl. 242. A second trial resulted in favor of the plaintiffs, and the matter is now before us on exceptions. The plaintiffs assert title to the demanded premises as the heirs of William C. Coombs, who received a deed of the same as the result of a partition between the heirs of John Coombs, the father of William. The defendants' title is based on a warranty deed, in common form, dated July 1, 1909, running from William to his mother, Marcia Coombs, the delivery of which the plaintiffs deny, thus raising the issue in dispute.

William died a few hours after the mother, and we lack the benefit of any light they might have shed on the controversy. The attorney who drew the deed says he acted at William's request. A first draft was unsatisfactory to the mother, and a second draft meeting with her approval was executed and acknowledged by William, handed by the attorney to William, who in turn handed it to his mother. After her death the deed was found in a trunk in which the mother kept her papers.

[1, 2] The decision in *Coombs v. Fessenden*, supra, is based on the refusal of instructions that the jury might find the attorney's testimony to be true and still find for the plaintiff on the question of legal delivery of the deed, provided they were satisfied from all the evidence in the case that, although the deed was physically transferred from the grantor to the grantee, nevertheless the parties did not intend that the title and ownership of the property should immediately pass to Mrs. Coombs. A careful examination of the evidence in this case fails to overcome the presumption that when the manual possession of this deed passed from the son to the mother, both parties intended to effect an immediate transfer of the title, in accordance with the terms of the deed.

In the absence of controlling evidence of strong probative force, the circumstances are sufficient to conclusively establish that the deed was delivered with the intention of passing the title to the premises demanded.

"When the grantor gives physical possession and control of the document to the grantee, either actually or constructively, or directly states that he delivers the instrument wherever it may be, and so puts it in the power of the grantee to take it, or does both of these things, and there is no proof of an intent not to transfer the title, a delivery complete in the first instance is made." *Reeves on Real Property*, § 1110.

"Where a deed, with the regular evidence of its execution upon the face of it, is found in the hands of the grantee, the presumption is that it has been duly delivered." *Ward et al. v. Lewis et al.*, 4 Pick. (Mass.) 518.

"The production of a bond by the obligee from his own possession also tended to show that it had been delivered to him." *Valentine v. Wheeler*, 116 Mass. 478.

"If an unrecorded deed of land is found, at the death of the grantee, in his pocket book in his possession," the presumption is that it was "duly delivered to him." *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563.

[3] To overcome this presumption the plaintiffs introduced several receipts for rent of the demanded premises, given by William after the execution of the deed, also an assignment to secure rent. The mother's name nowhere appeared in any of these papers, and there was no evidence that she ever saw them or knew the manner in which William was dealing with the tenants. While evidence of the conduct of the grantor in relation to the property is admissible on question of title, the participation and knowledge of both parties must clearly appear. This evidence lacks the essential mutuality, and is self-serving and consequently inadmissible.

"Receipts, bills of parcels, and other papers, signed by one party to a suit, and offered by an opposing party, are received, like other contracts, as showing the declaration or engagements in writing of the opposing party. But they cannot be received, when offered by the maker of them, unless there be proof, that they have been in the hands or in some way connected with the opposing party; and they are then received as exhibiting his assent, or showing his connection with the transaction." *Boody v. McKenney*, 23 Me. 517.

"The rule of law is well settled that, after a conveyance of real estate, the declaration of the grantor in disparagement of his grant, made in the absence of the grantee, are never admissible in evidence against the grantee." *Chase v. Horton*, 143 Mass. 118, 9 N. E. 31.

"The declaration and acts of a grantor after the completion of a sale have been held admissible for the purpose of defeating the title, which, by a solemn contract, he had passed to, and perfected in, another." *White v. Chadbourne*, 41 Me. 149.

"The declarations of a supposed grantor" are not to be received after his death as "evidence against the party claiming under the deed." *Bartlet v. Delprat*, 4 Mass. 707.

"The rule that the acts and declarations of a grantor, after he has divested himself of the estate, shall not be admitted to impeach the title of the grantee is well settled, and not to be departed from." *Winchester v. Charter*, 97 Mass. 140.

Defendants' exceptions to the admission of this evidence must therefore be sustained.

As a basis for a verdict this question was submitted to the jury:

"Was the deed of William C. Coombs dated July 1, 1909, intended by the parties to it to take effect at that time as a conveyance of the title of the land described in it by the delivery of it to the grantee?"

With this question and as explanatory of the issue the presiding justice in his charge instructed the jury as follows:

"When it appears that there has been a delivery, that is, a manual delivery, from hand to hand, of a deed, there arises a presumption that the title passes; that is, that the parties intended the effect to be just what their acts would indicate. But it is not a conclusive presumption; because deeds are delivered from party to party for various reasons, at various times, without the parties intending at the time to pass the title. They may intend to pass it at some future time, but not then; that is, the deed is passed over without intention on the part of the parties to it that it shall take effect

then as a conveyance of the title. Sometimes a man may make a deed, perhaps, and intend delivery with an intention that it shall take effect when he dies, or on the happening of some condition, or upon the condition of payment, and not to take effect otherwise, and delivery of a deed, passing from hand to hand upon condition, does not convey title. It must be a delivery of the title from one to the other at the time. Now, there being no question raised that this deed was actually passed from William G. Coombs, the sole and only question to be considered is: What was the intent of the parties? Did they mean that the title was to pass then or not?"

And also the following:

"There is no question but it was passed over, as far as that goes, but was it intended to take effect at that time as a conveyance?"

[4] While to the trained legal mind this question and these instructions would present no difficulties, we fear that they were misleading to the jury, and therefore prejudicial to the interests of the defendants; for, as heretofore observed, no admissible evidence was introduced to control the presumption that this deed was transferred to the mother with the intention of thereby vesting in her the title to the demanded premises.

"It is indispensable to the delivery of a deed that it shall pass beyond the control or dominion of the grantor. Otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse, and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of grantor, but he cannot have it before. Neither can the grantor transfer his property after his decease by deed. The statute of wills or of descent then govern all property not disposed of during the lifetime of the owner. To be sure a freehold estate may be conveyed to commence in futuro, when it is so declared in the deed (*Wyman v. Brown*, 50 Me. 139), and the grantor may reserve full power and control over the land thus conveyed during his natural life (*Drown v. Smith*, 52 Me. 141), but not over the deed." *Brown v. Brown*, 66 Me. 316.

"So far as the grantor is concerned, any acts or words, * * * whereby he in his lifetime parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed and pass to the grantee, constitute a delivery of a deed of conveyance; and that nothing less will suffice." *Brown v. Brown*, 66 Me. 316.

A father assigned certain mortgages to his son, with instructions that in case he died to put them on record at once. The son placed them in a safe to which he and his father both had access; the father continuing to collect the interest on the mortgage notes. The court says:

"We are satisfied that the transfer of the property was not to take effect until after the father's death. As this is contrary to the statute of wills, the assignments are to be treated as nullities." *Shurtleff v. Francis*, 118 Mass. 154.

"To make the delivery good and effectual, the power of dominion over the deed must be parted with." *Cook v. Brown*, 34 N. H. 480.

Hubbard v. Greeley, 84 Me. 340, 24 Atl. 790, 17 L. R. A. 511, is both clear and exhaustive:

"The authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that in all cases where such deliveries are made the deeds take effect immediately and according to their terms, divested of all oral conditions. * * *

"The law reasonably provides * * * that the instrument delivered shall be conclusive with respect to its contents and the intention of the parties, and in the same manner, and in view of the same considerations, that the act of delivering the instrument shall be equally conclusive; that the danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, are as great in the one case as in the other; that if a condition could be annexed to the delivery of a deed, when made to the obligee himself, or to his agent or attorney, the very essence of the transaction would be left to depend on the memory and truthfulness of the bystanders; and that there is manifest wisdom in the rule that in such transactions the law will regard, not what is said, but what is done."

"It is easy to see," said the court, in *Miller v. Fletcher*, 27 Grat. (Va.) 403, 21 Am. Rep. 356, "that the most solemn obligations given for the payment of money, are of but little value as securities if they may at a future day be defeated by parol proof of conditions annexed to the delivery of the instrument, and never performed," and that a doctrine of this kind would, perhaps, be still more mischievous, if applied to deeds of real estate; that if such a doctrine should prevail the title of the grantee would be liable to be defeated at any time by evidence of non-performed parol conditions annexed to the delivery of the deed, and in such cases there would be no safeguards against perjury or the mistakes of the "slippery memory," and all titles would be as unstable as sands before the seashore.

Hill v. McNichol, 80 Me. 209, 13 Atl. 883, is an instance where the history of the deed and the conduct of the parties subsequent to the date of its supposed delivery absolutely negative any intention of the parties to deliver the deed and thereby transfer the title. As is said in that case:

"An intention that it shall be a delivery must exist in the minds of both parties."

One Abner Hill was conducting, with his sons, a large business. In 1860 and 1861 he executed a deed of certain property to one of his sons, Monroe Hill, who in 1862 executed a deed of the same premises to his mother, Elizabeth Hill. The latter deed was never seen or heard of until within a few days after Monroe Hill died when it was taken from a drawer in a bureau at the Hill house, where Monroe lived with his parents, and hurriedly sent by special messenger to the registry of deeds. It appears that both Abner and Monroe Hill kept papers and transacted some business in this house. There was no evidence in the case of any previous possession of the deed by Mrs. Hill more than a presumption arising from her possession at the time she sent the same for record in 1867. The evidence in this case of Mrs. Hill's connection with this property, subsequent to transferring the deed from Monroe to her, of conveyances in which she joined subsequent to the date of such deed, which are absolutely inconsistent with any claim of title by her, was so strong that it was considered by the jury and the court as absolutely disproving any intention of the parties to pass any title from Monroe to his mother by the deed, under which she asserted title. The question of intention, which is the essential element of a valid effectual delivery, is a matter of evidence, and in *Hill v. McNichol* the evidence absolutely disproved any such intention.

In this case, however, as already stated, we find no evidence to show that both grantor and grantee did not intend an effectual valid delivery of the deed from the son to the mother. The testimony of the attorney clearly shows it. The deed was found in her papers, and there is no admissible evidence in the case to disprove it. While a deed might pass from the manual possession of the grantor to that of the grantee for some temporary purposes, such as examination or as the basis for survey, or a legal opinion as to the title, there is in such cases no intention of delivery for the purpose of passing title, and neither party could claim a delivery. In this case, however, there is no such evidence, and there is no evidence to rebut the presumption arising from the mother's possession or to disprove the testimony of the attorney who witnesses the execution and delivery of the instrument. As we feel the question submitted and the instructions tended to cloud the real issue in the minds of the jury and to divert their attention from the salient points of the evidence and the law applicable to the case, the defendants' exceptions must be sustained. We do not feel it necessary to discuss the remaining exceptions.

Exceptions sustained.

(116 Me. 299)

FARNHAM v. CLIFFORD.

(Supreme Judicial Court of Maine. July 28, 1917.)

1. MASTER AND SERVANT §330(3)—EVIDENCE OF RELATION—SUFFICIENCY.

In an action for personal injuries alleged to have been sustained by plaintiff in a collision with defendant's automobile, evidence held to warrant finding that defendant's son was employed in his father's business while driving the automobile at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272.]

2. EVIDENCE §265(10) — ADMISSIONS AGAINST INTEREST — FAILURE TO CONTRADICT.

Where, after evidence as to defendant's admission of his liability, he took the stand and did not contradict or explain the testimony, the jury was authorized to find that he knowingly made the admission and that it was true.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1038.]

3. APPEAL AND ERROR §1002—FINDINGS OF JURY—REVIEW.

Where the testimony as to the permanency of the injuries was evenly balanced, it was a question for the jury as to the weight to be given such testimony, and the appellate court will not review their findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Anna R. Farnham against John D. Clifford. There was a verdict for plaintiff, and the case is before this court on a motion for a new trial and upon exceptions. Motion and exceptions overruled.

Argued before SAVAGE, C. J., and OOR-NISH, KING, BIRD, HALEY, and MADIGAN, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. Andrews & Nelson, of Augusta, for defendant.

HALEY, J. An action on the case for personal injuries alleged to have been sustained by the plaintiff June 13, 1914, as a result of a collision of the carriage in which she was riding with the automobile of the defendant. The case was tried at the September term, 1916, in Androscoggin county, and the jury returned a verdict for the plaintiff for the sum of \$3,747.09, and the case is before this court upon a motion for a new trial and upon exceptions.

At the time of the accident the defendant was living in the city of Lewiston. The family consisted of himself and wife, two boys and two girls, the sons being more than 21 years of age and practicing lawyers in the city of Lewiston. The defendant was the owner of an automobile, which he had purchased for the pleasure of himself and family and which the family had permission to take and use whenever they so desired. On the evening of the accident the defendant was not in town, and on that evening one of his

sons, who was living with him as a member of his family, took the car, without any express permission as far as positive testimony goes, and while operating the automobile did it so negligently that it collided with a team in which the plaintiff was riding, about three miles out of Lewiston on the road to New Gloucester. As a result of that collision, the plaintiff was injured, and brings this action against the defendant.

It is the contention of the attorney for the defense that there is no evidence whatever that John D. Clifford, Jr., the son who was driving the automobile at the time of the accident, had ever acted as chauffeur for his father, or had ever driven for any other member of his father's family, and that there is an entire lack of evidence as to whether he was out on business or pleasure the night of the accident. The motion and exceptions practically go to the same proposition, that there is no evidence in the case that the son was employed in his father's business while driving the machine at the time of the accident; that it was for his sole pleasure; that the relation of master and servant did not exist; that such relation cannot be inferred from the ownership of the car; and that, although it may have been the business of the father to furnish an automobile for the use of his family, yet there is no evidence in the case that the son was so using it, or for what purpose he was using it; that it does not appear sufficiently that he was performing the business of his father, or that the relation of master and servant existed. The defendant testified that the son did not own the auto, and never did; that he himself was in absolute control of the machine; that nobody else had the control; that its control never passed from him; that he bought the machine for the pleasure of himself and family; that John D., Jr., the son, had the right to take the machine out on any pleasure ride that he might wish; that he did not have to ask permission; that he bought it for the family's pleasure to take it when they liked, and he could take the machine that night, just as he had always taken it, without asking; and that, aside from the ownership of the machine, John had the right to the use of it just as he pleased.

[1, 2] If the evidence stopped there, it may be that the position of the defendant's counsel would be sustained; but there was in the case evidence that authorized the jury to find that, at the time the defendant's son was using the machine, he was either doing it as the agent or servant of the father, or using it in the defendant's business, for the defendant told the husband of the plaintiff "that his car he had bought for the pleasure of his family and for business; that they had a right to take it whenever they saw fit without asking," and he furthermore told him "so far as the liability extended he was responsible." That was a direct admission of

facts essential to establish his legal liability, and, if the defendant's position is sound, then that admission covered the situation which defendant's counsel urges was necessary to exist for defendant to be charged. After the accident, with full knowledge of the facts, he admitted his liability. Upon the stand he did not deny he so admitted; but leaves it for his counsel to argue, without explanation, why the admission was not true. The admission of the defendant was open to explanation and contradiction. It was subject to rebuttal, explanation, and comment, and the fact that the defendant was a witness in his own behalf, after the testimony had been given as to his admission of his liability, and did not contradict or explain the statement, but allowed it to pass as true and unchallenged, authorized the jury to find that he knowingly made the admission, and that his admission was true. As stated in *Robinson v. Stuart*, 88 Me. on page 62:

"The statement and admissions of Southard, as testified to by the plaintiff, not having been denied or in any way modified, must be taken as true."

The defendant having admitted his liability, and when a witness in his own behalf not having explained or modified his admission, it is useless to discuss the rights of the parties upon the theory that facts existed that the defendant, by his admission, shows did not exist.

[3] The motion also asks that the verdict be set aside because the damages awarded by the jury are excessive. There is no question but that the plaintiff was severely injured by reason of the accident, and that she was taken to a hotel and remained there some three weeks, and that she has been under medical treatment ever since. There is a dispute as to the nature of her injuries and whether she will ever recover or not; but there is no question but that she was injured as claimed, and that she had not recovered at the time of the trial. The plaintiff produces three eminently respectable physicians, including the physician who treated her from the time of the injury to the time of the trial, who have made examinations, and they all give an opinion which, if believed, authorized the jury to find that the woman received injuries from which she will never recover. Upon the other hand, the defense produce three eminently respectable physicians who admit that, at the time of the trial, the plaintiff was suffering from the apparent effects of the injury received at the time of the accident; but they gave it as their opinion that she is not suffering from the same injury that the physicians for the plaintiff give their opinion she is suffering from, and that she will in a short time probably recover from the effects of the injury.

The physical condition of the plaintiff was one of the issues submitted to the jury, and we have no right to say that the testimony

of the three physicians upon one side or the other should be weighed differently than the jury found it. They were authorized to find that the testimony of the physicians for the plaintiff outweighed the testimony of those for the defendant; and if, in their opinion, the testimony of the defendant's physicians outweighed the testimony of the physicians of the plaintiff, they had the right to so find. But, with the testimony so evenly balanced upon the question of the permanency of the injuries, it was a question for the jury as to the weight to be given the testimony, and we have no right, under the circumstances, to disturb their finding and the mandate must be:

Motion and exceptions overruled.

(116 Me. 508)

LEMBO v. DONNELL

(Supreme Judicial Court of Maine. Aug. 1, 1917.)

ABORTION — §16 — CIVIL LIABILITY — EXCESSIVE DAMAGES.

Plaintiff brought an action for damages for an illegal operation performed by defendant upon plaintiff's wife to produce a miscarriage. The wife became infected with blood poisoning as a result of the operation, and became desperately ill, remaining in the hospital seven weeks, during which time ten operations were performed. She had recovered only in part at the time of the trial about six months after she left the hospital. There was evidence from which the jury might have found that plaintiff's actual disbursements and liabilities necessarily incurred amounted to substantially \$600. *Held*, on motion for new trial, that a verdict of \$881.58 could not be regarded as excessive.

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Emilio R. Lembo against Charles K. Donnell. The jury returned a verdict for plaintiff, and the case is now before the law court upon a motion by defendant for a new trial. Motion overruled.

Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, and MADINGAN, JJ.

Newell & Woodside, of Lewiston, for plaintiff. Tascus Atwood, of Auburn, for defendant.

PER CURIAM. Action on the case, wherein it is alleged that the defendant performed an illegal operation on the plaintiff's wife to produce a miscarriage, and thereafter negligently and unskillfully treated her, whereby the plaintiff was put to large expense for nursing, medicine, and medical attendance for her, and was deprived of her companionship and services for a long space of time. Upon trial the jury returned a verdict of \$881.58 for the plaintiff, and the case is now before the law court upon a motion by the defendant for a new trial, based upon the allegations that the verdict is against the weight of the evidence and that the damages awarded are excessive.

We have examined and studied the evidence with care, and we are by no means satisfied that the finding of the jury in the plaintiff's favor was erroneous. Whether they found against the defendant upon both, or only upon one, of the allegations upon which the action is based this court cannot now determine; but that is immaterial, for we think the evidence is abundantly sufficient to justify the jury in finding that both of those allegations were established.

Neither is it made to appear to the court that the damages awarded are excessive. The plaintiff's wife became infected with blood poisoning as a result of the criminal operation on her. The defendant attended her for about four weeks following the operation. Under his treatment she became desperately ill, and as soon as another physician was called she was removed to a hospital, where her case was diagnosed as almost hopeless. She remained in the hospital seven weeks, during which time ten operations were performed to remove pus from different parts of her body. She had recovered only in part at the time of the trial, about six months after she left the hospital. The evidence shows that the plaintiff was put to large expenses for nursing, medicine, and medical and surgical services in an effort to save his wife's life and to restore her to health as much as possible. The jury may well have found from the evidence that his actual disbursements and liabilities necessarily incurred on that account amounted to substantially \$600. In view of that fact, and also that the plaintiff was deprived of the services of his wife for a long space of time, and that he suffered great anxiety and distress of mind on account of her serious illness, an award of \$881.58 damages in his favor cannot be regarded as excessive.

Motion overruled.

Judgment on the verdict.

(116 Me. 504)

SPOFFORD v. BICKFORD.

(Supreme Judicial Court of Maine. Aug. 1, 1917.)

NEW TRIAL ¶71—CONFLICTING EVIDENCE.

There being a mere issue of fact and conflicting evidence, and the jury not manifestly erring in deciding such issue, new trial will not be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145.]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Isaac N. Spofford against Hor-

ace Bickford. Verdict for defendant, and plaintiff moves in the law court for new trial. Motion overruled.

Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, and MADIGAN, JJ.

Newell & Woodside, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

PER CURIAM. Action of replevin for a black horse. The verdict was for the defendant, and the case comes before the law court upon the plaintiff's motion for a new trial.

It is undisputed that the defendant purchased the horse in question of the plaintiff and fully paid for it. Thereafter he told the plaintiff that the horse was too young or too quick, and the parties then made some arrangement whereby the defendant left the black horse with the plaintiff and took from him a sorrel horse. A few days later the defendant returned to the plaintiff the sorrel horse and took the black horse home. The plaintiff's claim at the trial was that the defendant resold the black horse to him in exchange for the sorrel horse. He testified that when the sorrel horse was driven back to his place by the defendant, a few days after the exchange, it was too sick to be driven, and that it was left in his stable for that reason, the defendant borrowing the black horse to drive home with. The sorrel horse did not recover from that sickness, but died in a few days at the plaintiff's stable.

On the other hand, the defendant contended that the arrangement between him and the plaintiff was that he should take the sorrel horse on trial for a few days, and if it satisfied him he was to keep it in place of the black horse; that upon trial the sorrel horse proved wholly unsatisfactory, and he returned it to the plaintiff and took his black horse home.

The issue in the case was one of fact, whether the defendant resold the black horse to the plaintiff in exchange for the sorrel horse. Upon that issue the testimony was conflicting. It will serve no useful purpose to restate it here. If the jury accepted the testimony of the defendant and his witnesses, the verdict was justified. An examination of the evidence does not convince the court that the jury manifestly erred in deciding the issue of fact involved between the parties in the defendant's favor, and accordingly the motion for a new trial must be overruled.

So ordered.

(287 Pa. 126)

MEDOFF v. FISHER et al.

(Supreme Court of Pennsylvania. March 12, 1917.)

1. CONTRACTS ⇨105—BUILDING CONTRACT—ARCHITECT — KNOWLEDGE OF STATUTORY REGULATIONS.

Plaintiff holding himself out as an architect was particularly charged with knowledge of the statutory regulations and restrictions governing the erection and use of buildings.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 477, 478, 480-497.]

2. CONTRACTS ⇨106 — ILLEGALITY — RECOVERY.

An architect, suing for services in the preparation of plans and specifications for a building under a contract with defendants, which building was to contain a motion picture theater and also dwellings, bathhouse in cellar, and stores, in violation of Act June 9, 1911 (P. L. 746), regulating the construction of buildings used for exhibition of moving pictures, was a party to an agreement to do an unlawful act, and could not recover.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 477, 478, 480-497.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Barnet J. Medoff, doing business as Medoff & Son, against Joseph Fisher and others for services rendered by plaintiff as an architect. Verdict for plaintiff for \$2,247, and judgment thereon, and defendants appeal. Reversed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Julius C. Levi, of Philadelphia, for appellants. Bernard Pockrass and Harry A. Mackey, both of Philadelphia, for appellee.

MOSCHZISKER, J. The plaintiff, an architect, sued to recover for professional services; he secured a verdict, upon which judgment was entered; the defendants have appealed.

In his statement of claim, the plaintiff avers that he was employed by defendants "to prepare and draw up plans and specifications and to supervise the operations of a building which the defendants were about to erect"; that "said building was to contain a moving picture theater, Russian and Turkish baths, stores and dwellings"; further, that he had performed the services of his employment as far as he could, but, after securing bids from various contractors, the defendants had refused to proceed with the construction of the building; finally, plaintiff claimed a fixed amount for commissions upon what he alleged to be an agreed basis, less an admitted payment on account.

The defendants relied upon several defenses, only one of which need here be considered. In the course of the trial, when another architect, called as an expert witness by the defendants, was upon the stand, the court would not permit him to explain that the plans in question contravened the

law, hence, could not be used, and therefore were of no monetary value. Counsel for the plaintiff objected to the offer upon the ground that, whether or not the plans were within the law had "nothing to do with the case," since his client "contracted to do what defendants wanted." Although this particular testimony was ruled out, yet all the evidence in the case shows that the various parts of the structure which defendants contemplated erecting were so connected as, within the meaning of the law, to constitute a single building, containing a moving picture theater and several stores and dwellings, the basement under all to be fitted for and occupied as a public bathhouse.

The act of June 9, 1911, P. L. 746, "to regulate the construction, maintenance, and inspection of buildings used for the exhibition of moving pictures, in all cities of the first class," provides, *inter alia*, by section 3, that "no such building hereafter erected * * * with a seating capacity of five hundred or less, and no portion of any such building, shall be occupied or used as a dwelling or tenement house, apartment house, hotel, or department store;" further that "such restriction shall relate and be applicable, not only to the portion containing the auditorium, but also to the entire structure or building used for moving picture exhibitions, or in connection therewith;" by section 4, that "no such building * * * for the exhibition of moving pictures, with a seating capacity of over five hundred, and no portion of any such building, shall be used for any other purpose;" and, by section 8, "any person or persons who shall * * * violate any of the provisions hereof, shall be guilty of a misdemeanor," punishable by fine or imprisonment.

On the element of seating capacity, there is some evidence, though not very definite, that the auditorium in this case was to have "not more than 500 seats"; but, even at that, the building, as planned, would clearly have contravened the plain terms of the statute. Had the structure been erected and put to the uses intended, the owners would have been guilty of a misdemeanor.

[1, 2] This being the case, what is the situation of the plaintiff? The principle that, since one may change his mind before the actual perpetration of a forbidden act, the mere intention to commit a wrong is no offense has no proper application under the circumstances at bar; for even though, after an erection of this building, the defendants might not have put it to any forbidden use, yet that fact does not change the status of the case so far as the plaintiff is concerned. The latter's position, therefore, is simply this: All men are supposed to know the law, and, further, one holding himself out as an architect is particularly charged with knowledge of the statutory regulations and restrictions governing the erection and

use of buildings; therefore we must assume both the plaintiff and defendants knew that the uses to which the latter contemplated putting the proposed structure were forbidden under a criminal penalty by the statutes of Pennsylvania. Thus, it may be seen, we have the plain case of three men, the defendants, intending to do a forbidden thing, employing a fourth, the plaintiff, to assist them in making plans to carry out their unlawful purpose—in other words, a combination which could be indicted as a criminal conspiracy. Of course, no contracts or engagements entered into under such circumstances will be enforced at law.

The plaintiff showed this unlawful combination in making out his case, and, in fact, it would have been impossible for him to avoid doing so; hence the law will leave him just where it finds him, and the court below should have so ruled. As already indicated, the plaintiff's objection to defendants' offer of testimony shedding, or tending to shed, further light upon the issue under consideration was based upon a theory of law which should not have been sustained; but since the case falls without regard to this rejected testimony, it is necessary to pass upon only the seventh assignment of error, which complains of the trial judge's refusal to give binding instructions for the defendants.

The assignment last referred to is sustained, and the judgment is reversed.

(257 Pa. 172)

CITY OF PHILADELPHIA v. CONWAY.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. MUNICIPAL CORPORATIONS §429—OPENING OF STREETS—ASSESSMENT BENEFITS.

Where property lies at the corner of unopened intersecting streets, benefits may be separately assessed for the opening of the street upon which but a small part of the property abuts, if the entire property is benefited by the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1039.]

2. MUNICIPAL CORPORATIONS §429—OPENING OF STREET—ASSESSMENT—ABUTTING OWNER.

An ordinance for the opening of F. street from the north to W. street and for the opening of W. street from F. street to another street provided for the opening of F. street to the south side of W. street, so that property running to the middle of W. street abutted on F. street as opened for half the width of W. street, and was properly assessed for benefits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1039.]

3. TRIAL §252(1)—INSTRUCTIONS—ABSTRACT.

The court properly refused to charge that benefits from a street opening, if allowed, should be restricted to such charges as are peculiar to an abutting owner, and did not include those common to the public; such instruction being abstract and inadequate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612.]

4. MUNICIPAL CORPORATIONS §428—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

A general advance in value in the neighborhood is no ground for assessing benefits if the property does not border on the improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1038, 1043.]

5. MUNICIPAL CORPORATIONS §467—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

Where property adjoins the improvement and becomes subject to assessment for benefits, the rule in estimating damages and benefits is the difference in the market value as a whole before and after the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1110, 1111.]

6. MUNICIPAL CORPORATIONS §554—STREET OPENING—ASSESSMENT OF BENEFITS.

In a proceeding for the determination of benefits from a street opening, where defendant claimed that remote and speculative benefits, or benefits accruing from the increased business the opening of the street might bring to the owner, should not be considered, it was not reversible error to qualify the contention by charging that the jury should be satisfied if the advantage accrues within a reasonably short time or a "relatively immediate" time, as that term did not permit the jury to depart from the general rule by which damages are measured by the difference in market value before and after the improvement.

7. MUNICIPAL CORPORATIONS §553—STREET OPENING—DETERMINATION OF BENEFITS—EVIDENCE.

In such proceeding the admission in evidence of the plan of the property used by the viewers and attached to their report, which did not show the full area of the land, was not reversible error, where the deficiencies in the plan were supplied by admission of counsel for defendant, by a deed of the entire property and further description with the acreage given by defendant himself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1262.]

8. MUNICIPAL CORPORATIONS §553—ASSESSMENT OF BENEFITS—EVIDENCE—REPORT OF VIEWERS.

Where street opening proceedings were begun prior to passage of Act April 2, 1903 (P. L. 124), making viewers' reports prima facie evidence of benefits sustained, the report of viewers was not admissible in evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1262.]

9. APPEAL AND ERROR §1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of the report of viewers was not ground for reversal, where such ground of objection was not relied upon at the trial, and where there was evidence of the fact set out in the report, and where the jury were instructed that the report was not binding upon them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

10. APPEAL AND ERROR §728(3)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error to overruling objections to certain questions are defective, where they fail to set forth the answers to the questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3012.]

Appeal from Court of Common Pleas, Philadelphia County.

Condemnation proceeding by the City of

Philadelphia against William Conway, with appeal from award of jury of view assessing benefits for the opening of certain streets. Judgment for the plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER and FRAZER, JJ.

J. Lee Patton and Alfred D. Wiler, both of Philadelphia, for appellant. Glenn C. Mead and Louis Hutt, Asst. City Sol., and John P. Connelly, City Sol., all of Philadelphia, for appellee.

FRAZER, J. [1,2] In 1896 the city of Philadelphia adopted an ordinance providing, *inter alia*, for the opening of Fifty-Eighth street, from Market street to Walnut street, and also Walnut street from Fifty-Seventh to Sixtieth streets. The ordinance for grading Fifty-Eighth street was passed July 16, 1897; the contract for the work bears date July 28, 1898; and the improvement was completed September 13, 1898. The ordinance for grading Walnut street bears date February 14, 1898; the contract, July 12, 1898; the work was completed September 27, 1898. The improvement of the two streets was carried on simultaneously, and as a whole. Under the practice then existing separate boards of viewers were appointed to assess damages and benefits resulting to abutting property from the opening of the two streets. Defendant's property is located at the southwest corner of Fifty-Eighth and Walnut streets, beginning at the intersection of the center line of those two streets, and extending westerly on the center line of Walnut street, and southerly on the center line of Fifty-Eighth street. The viewers appointed on the Fifty-Eighth street improvement assessed benefits against defendant's property in the sum of \$2,800. This report was confirmed by the court, and an appeal taken by defendant to the court of common pleas. The city filed a statement of claim May 11, 1899, and no further action was taken to have the appeal disposed of until 1913, when the case was put at issue by defendant, and called for trial in 1914. A verdict resulted for plaintiff for the amount awarded by the viewers, plus interest from the date of the original assessment, making a total amount of \$5,824. The court below overruled defendant's motion for a new trial, and for judgment non obstante veredicto, and this appeal followed.

Defendant's main contention is that his property does not abut on the line of the improvement, and consequently is not liable to assessment for benefits; hence he was entitled to have judgment entered in his favor non obstante veredicto. At the time these two streets were opened defendant's property, comprising over nine acres, extended southward from Walnut street, between Fifty-Eighth and Fifty-Ninth streets, to which access was had by an old lane, or country road, called "Marshall Road," and was used

as a brickyard. The opening of Fifty-Eighth street provided an outlet on the north to Market street, a main city thoroughfare, and the extending of Walnut street gave the property a street frontage along its entire length on the northern side. The opening of these two thoroughfares were parts of the same general improvement, and were completed at approximately the same time. At the intersection of Fifty-Eighth street and Walnut street, a small rectangular piece of ground lying within the lines of both streets was required to complete the improvement. Defendant contends the Walnut street frontage included the entire width of Fifty-Eighth street, thus leaving his property without frontage on the latter thoroughfare. There seems, however, to be no reason for holding that the property fronts on one of these streets rather than the other. The ordinance called for the opening of Fifty-Eighth street from Market to Walnut. The strip of land lying between the northern boundary of Walnut street and its southern boundary, and within the line of Fifty-Eighth street, was as much a part of Fifty-Eighth street as of Walnut street. If the phrase "to Walnut street" be construed to indicate the north side of that street, as argued by defendant, then a provision in the same ordinance to open Walnut street from Fifty-Eighth to Sixtieth streets must necessarily be construed to mean from the western line of Fifty-Eighth street to the eastern line of Sixtieth street, and there would remain unopened an ungraded square piece of land lying within the line of both streets at the corner of Fifty-Eighth and Walnut streets, thus leaving the two improvements with dead ends and unconnected. Surely this was not the intention of the municipal authorities. Consequently, under a fair and reasonable construction of the ordinance, "to Walnut street" can have no other meaning than to the south line of that street. In accordance with this conclusion defendant's property abuts on Fifty-Eighth street, for the distance of half the width of Walnut street. Although it is true the abutting portion is but a small part of the tract, yet the advantage acquired is an outlet to a main thoroughfare, and the benefit accrues to the tract as a whole, and not merely to the small portion directly abutting on the street. *Chester v. Eyre*, 181 Pa. 642, 37 Atl. 837. Hence the question of the extent of the benefit of the improvement to the entire property, if any, was properly submitted to the jury. This case is distinguishable from those relied upon by defendant following the general rule that property can be assessed for public improvements but once, and only when it abuts directly on the line of the improvement as was held in *Morewood Avenue*, 159 Pa. 20, 28 Atl. 123, 132, *Fifty-Fourth Street*, 165 Pa. 8, 30 Atl. 503, *In re Orkney Street*, 9 Pa. Super. Ct. 604, and numerous other cases. Here the property not only abutted on the Fifty-Eighth street improvement, but

there had been no previous proceeding in which this particular item of benefit was, or could be, considered.

The fifteenth, sixteenth, and seventeenth assignments of error are to the refusal of the trial judge to affirm points submitted by defendant, requiring an instruction to the jury that his property did not abut on the improvement. These assignments are disposed of in the foregoing part of this opinion, and require no additional consideration.

[3-6] In the eighteenth assignment defendant complains of the refusal of the court to affirm a point to the effect that benefits, if allowed, should be restricted to such advantages as are special and peculiar to defendant, and not include those common to the public. As an abstract principle of law, the point is substantially correct. *Morewood Ave.*, supra; *Park Avenue Sewers*, 169 Pa. 433, 32 Atl. 574; *Beechwood Avenue Sewer* (No. 1) 179 Pa. 490, 36 Atl. 209. It is, however, inadequate as applied to the facts of this case, and, if affirmed would doubtless have served only to confuse the jury. The assessment of benefits for public improvements is but a mode of exercising the taxing power of the commonwealth, and is valid only so long as it provides for a just and equitable assessment, according to benefits conferred. *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Pittsburgh's Petition*, 138 Pa. 401, 21 Atl. 757, 759, 761. For reasons reiterated in a long line of cases we have evolved the rule that such assessments can be justified but once, and when confined to properties directly abutting on the improvement. In the *Morewood Avenue Case*, supra, we said (159 Pa. 37, 28 Atl. 130):

"As we have repeatedly decided, the doctrine of assessment for benefits, to pay for public improvements can only be defended upon the ground that the benefits are local and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case when the property assessed abuts directly upon the line of the improvement. Having their own burthens to bear in this respect, the owners cannot be subjected to the discharge of similar burthens upon other properties, whether situate on the same street or in the same neighborhood."

A general advance in value in the neighborhood is not ground for assessing benefits, if the property does not border on the improvement. But if the property adjoins the improvement it becomes the subject of assessment, and the rule is that in estimating both damages and benefits the criterion is the difference in market value as a whole before and after the changed conditions. Defendant's fourth point involving this rule was affirmed by the trial judge; the sixth point, excluding remote or speculative benefits, was also affirmed, and the subject fully covered in the general charge. Under the circumstances, if the point had been properly drawn, in view of the facts of the case, the refusal to affirm would not justify a reversal. *Miller v. James Smith Woolen Machinery Co.*, 220 Pa. 181, 69

Atl. 598; *Bracken v. Penna. R. R. Co.*, 222 Pa. 410, 71 Atl. 926, 34 L. R. A. (N. S.) 790; *Hufnagle v. Delaware & Hudson Co.*, 227 Pa. 476, 76 Atl. 205, 40 L. R. A. (N. S.) 982, 19 Ann. Cas. 850.

[7] The nineteenth assignment complains of the failure of the trial judge to affirm without qualification the sixth point, which included a statement that remote and speculative benefits should not be taken into consideration, nor should the jury consider benefits accruing from increased business the opening of the highway might bring to the owner of the land. The court in answering this point said:

"In general, that is a correct proposition, namely, that you must not go far out into dreams to find out the advantage. You must be satisfied if the advantage accrues to it within a reasonably short space of time, which we call, by the way, relatively immediate."

The complaint is that the use of the words "relatively immediate" permitted the jury to depart from the general rule by which damages are measured by the difference in market value before and after the improvement. We cannot say the use of these words was intended to permit the jury to depart from the rule laid down in this class of cases, nor that it had such effect. In an improvement of this nature necessarily extending over a period of time, no particular day can be set as the dividing line for the purpose of fixing the values before and after the taking. A reasonable time must necessarily be allowed for the completion of the work, and a proper determination of the various elements of value based upon the changed condition of the locality. *Robbins v. Scranton*, 217 Pa. 577, 66 Atl. 977. The time for determining the changed value was explained by the court in the general charge, and defendant's fourth point, to the effect that the damages or benefits were to be measured by the "difference in the market value immediately before the opening of the street and its market value immediately after the opening of the street," was affirmed without qualification. The answer to the point in connection with the general charge placed the question raised in the point properly before the jury.

[8] In the first assignment of error complaint is made of the admission in evidence of the plan of the property used by the viewers and attached to their report. The plan showed the portion of the property abutting on Walnut and Fifty-Eighth streets and the intersection of these two streets, but did not show the full extent of the area of the land. Whatever deficiency existed in this respect was supplied by the admission of counsel for defendant that there were over nine acres in the tract, and that it extended from the center line of Walnut street, and between the center lines of Fifty-Eighth and Fifty-Ninth streets, southward beyond Spruce street. A deed of the property was subsequently offered in evidence, and a further description, with the acreage, given by defendant himself. The

jurors, therefore, had before them a complete description of the extent of the property and its uses.

[9] Defendant also argues that the trial judge erred in permitting the report of the viewers to be received as evidence. This practice was established by the act of April 2, 1903 (P. L. 124), making viewers' reports prima facie evidence of benefits sustained. The provisions of the act do not, however, apply to proceedings held before its passage. *Carson v. Allegheny*, 213 Pa. 537, 62 Atl. 1070. The report in this case was filed in 1899, and was not properly admissible under the terms of the act. However, no objection was made to its admission on this ground; the objection on the record being that the plan did not show the entire property belonging to defendant. The case was tried on its merits, both court and counsel apparently overlooking the fact that the proceedings had been begun several years previous to trial, and before the passage of the act of 1903. We have frequently refused to consider objections raised for the first time in this court. But should we be disposed to depart from our usual practice, we are not convinced that harm resulted to defendant by reason of the oversight. Expert testimony as to the value of the property, both before and after the improvement, was given on behalf of both parties, and the jury instructed that the report of the viewers was not binding upon them, and that if in their opinion the viewers reached an improper conclusion, they must have no hesitation in so saying.

[10] There are 34 assignments of error in this case. Those not discussed above are defective, and on account of their defects require no comment. They assign the action of the court in overruling defendant's objections to certain questions, without stating the answers. This is a plain violation of our rule of court.

The assignments of error are overruled, and the judgment is affirmed.

(92 Conn. 31)

MILFORD WATER CO. v. KANNIA et al.

(Supreme Court of Errors of Connecticut.
July 6, 1917.)

1. EMINENT DOMAIN § 237(4) — APPRAISAL OF PROPERTY.

The irregularity of the appraisers in eminent domain proceedings visiting the assessor's office and inspecting the tax list in the absence of the parties is not a ground for setting aside the award, where no substantial injustice resulted.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 610.]

2. EMINENT DOMAIN § 231 — APPRAISAL OF PROPERTY.

It is not irregular for appraisers to examine public records which are admissible in evidence and are afterwards admitted.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 585-589.]

3. EMINENT DOMAIN § 134 — APPRAISAL OF PROPERTY — DAMAGES.

In appraising property the owner cannot have included as an item of damages the possi-

ble profits should a water-bottling plant be installed in the absence of evidence as to the adaptability of the land for such purpose, or as to the profitable character of the industry.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 356.]

4. EMINENT DOMAIN § 202(1) — APPRAISAL — SCOPE OF INQUIRY.

It is not improper for a member of the appraising committee to ask whether a cow got mired on the land to be condemned.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 541.]

5. EVIDENCE § 266 — DECLARATIONS.

There is no error in excluding a question asked whether a real estate expert had not in conversation appraised premises at a higher value than his testimony showed, since the fact that a real estate expert employed to establish an asking price has revised his opinion downward is no evidence that the revised valuation is less correct than the original.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1051.]

Appeal from Superior Court, New Haven County; Gardiner Greene, Judge.

Proceedings by the Milford Water Company against Antonio Kannia and others. From a judgment overruling remonstrance to report of appraisers on condemnation proceedings, Kannia and others appeal. No error.

See, also, 100 Atl. 1064.

George E. Beers, of New Haven, for appellants. George D. Watrous, of New Haven, for appellee.

BEACH, J. At the last term a motion to dismiss this appeal was overruled, and it now comes before us on its merits.

The first assignment of error relates to the reception against objection of a tax list containing a valuation for assessment of 48 acres of land, including the premises in question, on the ground that the valuation was not shown to have been made by either of the respondents. But whether the objection is well taken or not is of no consequence, because the appraisers valued the 16 acres taken by the applicant at more than three times the assessed value of the entire 48 acres.

[1] It is also objected that the appraisers visited the assessor's office and inspected the tax list in the absence of the parties; but, as no substantial injustice resulted, the alleged irregularity is not a ground for setting aside the award. *Groton & Ledyard v. Hurlburt*, 22 Conn. 191; *Bristol v. Branford*, 42 Conn. 321; *New Milford Water Co. v. Watson*, 75 Conn. 237, 247, 52 Atl. 947, 53 Atl. 57.

[2] Moreover, it is not irregular for appraisers to examine public records which are admissible in evidence and are afterward admitted.

[3] It is also assigned as error that the appraisers excluded a question, asked of the witness Whitney, as to how many quarts of bottled drinking water would have to be handled per diem in order to make the business a feasible one. The respondents' claim

in this connection was that without making an unreasonable use of the water of Beaver brook, which adjoined their land, and without appreciably diminishing its flow, a bottling business could be conducted on their land for bottling and selling drinking water, and that the value of the land for that use should be taken into account. The appraisers excluded the question on the ground that the respondents had no right, as against lower riparian owners, to use any of the water of the brook except for farm and household purposes. It appears incidentally from the report that there are some springs on the respondents' land; but no question is raised on this appeal as to the right of a landowner to impound and divert spring water at its source, and we express no opinion on that point. The only ground of this branch of the remonstrance is that the committee erred in ruling that the respondents had no right as riparian owners to bottle and sell any part of the water of Beaver brook. We are of opinion that the question objected to was properly excluded. The just compensation to which a landowner is entitled in condemnation proceedings is the value of the land taken (and in a proper case the damage to the balance of his land) considered with reference to the uses for which the land is then adapted. It follows that no evidence of value is admissible with reference to the alleged adaptability of the land for any special commercial business until a foundation is laid by evidence that the land is in fact adapted for that special business at the time of the taking. A mere claim of counsel is not enough. It is useless, for example, to discuss the alleged right of the respondents to sell bottled water from Beaver brook, unless it is first made to appear that there is an available market for it. There is nothing in this record to show either an existing market for Beaver brook water in bottles, or that the water of Beaver brook possesses special qualities which would tend to make it more salable in bottles than ordinary brook water; and ordinary brook water is not so salable. As bearing on the value of the respondents' land, the evidence objected to was too remote and speculative, and on that ground alone the committee did not err in rejecting it. On this state of the record the question whether a riparian owner may bottle and sell brook water, provided he does not thereby appreciably or unreasonably diminish the flow of the stream, appears to us to be a moot question which does not require discussion.

[4] A member of the committee who had heard of the fact that a cow got mired on the land in question very properly asked the respondent Kannia about it, when the latter was on the witness stand. This incident affords no basis at all for a claim of bias or injustice.

[5] There was no error in excluding the question addressed to his own real estate expert by the respondents' counsel asking whether he had not in conversation appraised the premises at a higher valuation than that to which he had just testified. The fact that a real estate expert employed to establish an asking price has revised his opinion downward is no evidence that the revised valuation is less correct than the original.

There is no error. The other Judges concurred.

(52 Conn. 58)

STATE v. CASTELLI et al.

(Supreme Court of Errors of Connecticut.
July 6, 1917.)

1. CRIMINAL LAW § 622(1)—JOINT TRIAL OF DEFENDANTS—DISCRETION OF COURT.

It is within the discretion of the court to grant a separate trial to defendants jointly indicted, and it is not an abuse of discretion to deny separate trials unless it appears that a joint trial will probably result in substantial injustice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210, 2214.]

2. CRIMINAL LAW § 622(2)—JOINT TRIAL OF DEFENDANTS—DISCRETION OF COURT.

It is not necessarily a ground for granting a separate trial to defendants jointly indicted that evidence will be admissible against one which is not admissible against the other, since evidence may be received and its limited application pointed out to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210, 2213, 2216, 2217.]

3. CRIMINAL LAW § 622(2)—JOINT TRIAL OF DEFENDANTS—DISCRETION OF COURT.

Ordinarily the fact that one of the accused has made a confession incriminating the other is a good ground for granting separate trial of defendants jointly indicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210, 2213, 2216, 2217.]

4. CRIMINAL LAW § 622(2)—JOINT TRIAL OF DEFENDANTS—DISCRETION OF COURT.

Where each of two defendants jointly indicted made a full confession of facts which if legally corroborated was sufficient to convict either of them, it is not an abuse of discretion to refuse separate trial, asked on the ground that evidence, consisting of confessions, admissible against one, was not admissible against the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210, 2213, 2216, 2217.]

5. CRIMINAL LAW § 1158(2)—APPEAL—COLLATERAL QUESTIONS.

Generally speaking the decision of a trial court on a preliminary and collateral question of fact will not be reversed unless in a case of clear and manifest error.

6. CRIMINAL LAW § 531(2)—WITNESSES § 241 — PRELIMINARY QUESTIONS — LEADING QUESTIONS.

It was not error to admit a general question addressed to state's witness whether any threats were made or inducements held out to procure confessions, the issue being a preliminary one, tried to the court in the absence of jury with opportunity of cross-examination since

in such case leading questions and questions calling for conclusions of fact are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1214; Witnesses, Cent. Dig. §§ 795, 840.]

7. CRIMINAL LAW \S 673(4)—EVIDENCE—ADMISSIBILITY—CONFESSIONS.

Where two defendants are jointly indicted and tried for murder, the confession of one of them is properly admitted as against him if the jury is instructed not to consider it as evidence against the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1873.]

8. CRIMINAL LAW \S 518(1), 531(1) — EVIDENCE — ADMISSIBILITY — CONFESSIONS — VOLUNTARY CHARACTER.

Before a confession of accused can be admitted, the state must show its voluntary character, and it is not essential that a warning be given that accused could not be compelled to make the confession if the voluntary character is otherwise shown, especially where the accused has been warned at another time prior to making the confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157, 1159, 1212, 1213.]

9. CRIMINAL LAW \S 531(3)—EVIDENCE—ADMISSIBILITY — CONFESSIONS — VOLUNTARY CHARACTER.

Evidence held to show that confession of one of two defendants jointly indicted and tried was voluntarily made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215.]

10. CRIMINAL LAW \S 858(3) — CONDUCT OF TRIAL—TAKING EVIDENCE TO JURY ROOM.

It is not error to allow the jury to take to the jury room confessions of the accused which were admitted as exhibits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2058.]

11. CRIMINAL LAW \S 402(1) — EVIDENCE — LOST DOCUMENTS—ADMISSIBILITY.

Where the assistant state's attorney stated that he had been through every scrap of paper the state had, and could not find papers showing a statement of accused that he would confess, it was not error to permit parol testimony of the alleged transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 887, 1211.]

12. HOMICIDE \S 166(5)—EVIDENCE—ADMISSIBILITY.

In prosecution for wife murder, a summons in suit for nonsupport by deceased against accused is admissible as tending to show accused's reason to believe that his wife had complained to the police.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 325.]

13. CRIMINAL LAW \S 517(1)—EVIDENCE—ADMISSIBILITY—CONFESSIONS.

The confessions of two defendants jointly indicted and tried, being inconsistent with respective pleas of not guilty, when proved are evidence affecting the defendants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146, 1148, 1149.]

14. CRIMINAL LAW \S 823(15) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.

In prosecution for murder, where the court fully instructed on reasonable doubt and the degree of proof required, mere use of the phrase "considerable doubt" was not error, where the jury could not have misunderstood.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158.]

15. CRIMINAL LAW \S 777½ — TRIAL — INSTRUCTIONS.

Where the court carefully instructed that the jury must take the evidence from the witnesses, that his own recollection of the testimony might be incorrect, his omission to state a certain fact testified to was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1807.]

16. CRIMINAL LAW \S 884(2) — TRIAL — INSTRUCTIONS.

The court is not bound to use the phraseology of counsel in preference to its own in stating familiar propositions of law to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1205, 1222-1224.]

17. HOMICIDE \S 107—JUSTIFICATION.

A husband who on his own story suspects that his wife and a friend are going to have illicit relations, follows them to a distant city, conceals himself in a closet, armed with a deadly weapon, waits for the expected provocation to materialize, and then kills his wife, cannot claim justification.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 187.]

18. CRIMINAL LAW \S 510—ACCOMPLICE TESTIMONY—SUFFICIENCY.

One of two defendants jointly indicted and tried cannot be convicted solely on the testimony of the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126.]

19. CRIMINAL LAW \S 508(3)—CONSPIRACY—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder against two defendants jointly on theory of conspiracy, where one of them testified in his own defense, his testimony was admissible so far as it tended to prove or disprove the conspiracy outlined by the confession of the other defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1101, 1104, 1113-1115; Witnesses, Cent. Dig. § 244.]

20. HOMICIDE \S 253(1) — EVIDENCE — SUFFICIENCY.

Evidence held to sustain the conviction of two defendants jointly indicted for a crime of first degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531.]

Wheeler, J., dissenting.

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Joseph Castellì and Francesco Vetere were convicted of murder, and they appeal. No error.

The defendants were convicted in the superior court for New Haven county of murder in the first degree. They were jointly indicted for the murder of Annie, the wife of Castellì, who was found in a bedroom at 260 Crown street, New Haven, on Easter Sunday, April 23, 1916, suffering from severe fractures of the skull, of which she died on the following day. The deceased and both the accused were deaf mutes. On the 26th of April both of the accused were apprehended in New York in connection with an inquiry into the disappearance from New York of Annie Castellì. While the inquiry was in progress the coroner for New Haven

county arrived and the identity of the missing woman with the murdered woman was established. Each one of the accused freely made a full confession to the coroner in which each separately from the other described the killing in substantially the following way: Castellì for reasons given was tired of his wife and desired to get rid of her. He induced Vetere to plan and carry out a pretended elopement for the purpose of bringing Annie to New Haven, where Castellì was to kill her. Pursuant to this conspiracy, Vetere induced Annie to accompany him to New Haven, and took her to a lodging house at 260 Crown street, where they obtained a room, representing themselves as man and wife. They then went out to lunch, and Vetere found an opportunity of leaving Annie and informing Castellì, who had followed them on the same train, of the whereabouts of the room and how to open the front door at 260 Crown street. After lunch Vetere and Annie went back to their room, where Castellì had in the meantime concealed himself in a closet armed with a piece of iron pipe. Vetere kissed Annie, and after some love-making went to the front window. Vetere says that Annie appeared to fall asleep. Castellì then came out of the closet and struck her on the head with the pipe, inflicting the wounds from which she afterwards died. Castellì and Vetere then took Annie's jewelry and money and returned together on the same train to New York. On the way down Vetere, at Castellì's suggestion, wrote a postal card to the effect that Annie had eloped, addressed it to Castellì, and mailed it on reaching New York. This postal card was produced and put in evidence at the trial. That evening they both went together to a social entertainment. Each of the confessions was admitted in evidence against the party who made it, but not as against the other accused. The state also proved the death and identity of Annie Castellì; the fact that she and Vetere were seen together at the boarding house; that Annie was left alone in the restaurant for a time and rejoined by Vetere; that Vetere was seen leaving the boarding house alone with a bag. Annie's jewelry was recovered from the person to whose custody Vetere had committed it.

On the trial each of the defendants went upon the witness stand and admitted all the physical facts recited in their respective confessions, but Vetere claimed that the elopement was a genuine one, and Castellì claimed that he learned of it by seeing Annie and Vetere conversing about it in the sign language, followed them to New Haven without Vetere's knowledge, ascertained by observation where their room was at 260 Crown street, and found his way there without the assistance of Vetere, concealed himself in the closet armed with a piece of iron pipe, and that he became enraged at the behavior

of Annie and Vetere, and killed his wife under the influence of uncontrollable rage.

William A. Bree and John Cunliffe, Jr., both of New Haven, for appellant Castellì. Spotswood D. Bowers, of Bridgeport, and Samuel E. Hoyt, of New Haven, for appellant Vetere. Arnon A. Ailing, State's Atty., and Walter M. Pickett, Asst. State's Atty., both of New Haven, for the State.

BEACH, J. (after stating the facts as above). At the opening of the trial Vetere moved for a separate trial on the ground that it would appear from the coroner's finding and notes that there was evidence in the case admissible against one and not admissible against the other of the accused. Castellì made no motion for a separate trial. Vetere's motion was opposed by the state's attorney on the ground that the crime was committed in carrying out a conspiracy to murder the deceased, and that as to any items of evidence which might be admissible against Castellì only Vetere could be adequately protected by a proper instruction to the jury. The court overruled the motion and directed the accused to be tried together, and this is assigned as error by both of the accused.

[1] The rule as to granting separate trials to persons jointly indicted is stated in *State v. Brauneis*, 84 Conn. 222, 226, 79 Atl. 70, 72, as follows:

"Whether a separate trial shall be allowed to parties jointly indicted is within the discretion of the court. Ordinarily justice is better subserved where the parties are tried together. But cases arise where the defenses of the different parties are antagonistic, or where evidence will be introduced against one which will not be admissible against others. Where from the nature of the case it appears that a joint trial will probably be prejudicial to the rights of one or more of the parties, a separate trial should be granted when properly requested."

The discretion of the court is necessarily exercised before the trial begins, and with reference to the situation as it then appears; and the phrase "prejudicial to the rights of the parties" means something more than that a joint trial will probably be less advantageous to the accused than separate trials. The controlling question is whether it appears that a joint trial will probably result in substantial injustice.

[2] It is not necessarily a ground for granting a separate trial that evidence will be admissible against one of the accused which is not admissible against another. Such evidence is received and its limited application pointed out to the jury in most cases where two or more accused persons are tried together. When the existence of such evidence is relied on as a ground for a motion for separate trials, the character of the evidence and its effect upon the defense intended to be made should be stated so that the court may be in a position to determine the probability of substantial injustice being done to the moving party from a joint trial.

It does not appear from the record that the trial court was so advised in this case, and on that ground alone it is impossible to say that the court abused its discretion in denying Vetere's motion.

[3] Ordinarily the fact that one of the accused has made a confession incriminating the other would be a good ground for granting a separate trial. But the peculiarity of this case was that each of the accused had made a full written confession of facts which, if legally corroborated, was sufficient to convict either one of them of murder in the first degree.

[4] It follows that no material fact incriminating either one of the accused came to the knowledge of the jury because they were tried together which would not also have come to the knowledge of a jury if each had been separately tried and his own confession admitted against him. This being so, the claim that substantial injustice was done by a joint trial relates rather to the corroborative effect which each of these confessions may be supposed to have had upon the other; and if we assume that the trial court did know all the facts before the trial began, the question presented to it was whether it would order separate trials of two self-confessed conspirators, each of whose acts and declarations made or done in pursuance of the conspiracy was admissible against the other, because their respective confessions, being made after the event, were not so admissible. The mere statement of this proposition shows that the question was one fairly within the limits of judicial discretion, and that a denial of Vetere's motion for a separate trial was not an abuse of discretion. In view of the precautions taken in the admission of evidence and again in the charge of the court, we cannot assume that the jury were improperly influenced by any corroborative effect given to evidence not admissible against one of the accused, but admitted as against the other only. It may be observed that our attention has been called to but two cases in this country where the action of a trial court in refusing to grant separate trials to persons jointly indicted has been held to be reversible error. In one of them the right to a separate trial was granted by statute, and in the other the effect of the joint trial was to deprive the accused of the benefit of material testimony, under the common-law rule that persons jointly indicted and tried may not be called as witnesses for or against each other.

[5] Generally speaking, the decision of a trial court upon a preliminary and collateral question of fact will not be reversed unless in a case of clear and manifest error. In *State v. Willis*, 71 Conn. 293, 313, 41 Atl. 820, this rule was applied to, or quoted as applicable to, the determination of the voluntary character of extrajudicial confessions as affecting their admissibility in evidence; and we see no reason why it is not equally appli-

cable to the determination of the probability or improbability of substantial injustice flowing from a joint trial of persons jointly indicted. If it were not so, there would be grave danger of mistrials from causes which were unknown to the trial court at the time when it was required to decide the question. Moreover, joint trials of persons jointly indicted are the rule, and separate trials the exception resting in the discretion of the court. For the reasons indicated we are satisfied that in this case the court did not err in denying Vetere's motion for a separate trial, and that no substantial injustice has been suffered by either of the accused in consequence of their joint trial.

The assignments of error next in logical order are those relating to the admission of the several statements and confessions of the accused. Here again the court had to deal with a preliminary issue, and upon the trial of that issue all of the statements and confessions were abundantly shown by the state to have been given voluntarily and without undue influence of any kind.

[6] Referring first to the assignments of error relating to this branch of the case pursued on the brief for Castelli: There was no error in admitting the general question addressed to the state's witnesses whether any threats were made or inducements held out to procure the confessions. The issue was a preliminary one, tried to the court in the absence of the jury, and opportunity was given for cross-examination. Under these circumstances the court might in its discretion shorten the direct examination of witnesses by admitting leading questions and questions asking for conclusions of fact. Exhibit 81 was an affidavit for the purpose of extradition, and the evidence of the officer Enright is not only that Castelli before signing it read it over carefully and made a correction in it, but on cross-examination that the notary warned Castelli in writing that anything he signed might be used against him. Exhibit 89 is the detailed confession made by Castelli to the coroner of New Haven county, and it is prefaced by a written warning in the form approved by this court in *State v. Coffee*, 56 Conn. 399, 16 Atl. 151, and in *State v. Willis*, 71 Conn. 308, 41 Atl. 820. Exhibit 28 is a paper written by Castelli admitting the killing and addressed to the coroner after Castelli had been taken to the door of the room where Vetere was, and had seen that Vetere was making a statement to the coroner. The witness De Martini testified that Castelli asked for a piece of paper on which to write it. No doubt, Castelli was influenced by what he had just seen and by the statement of De Martini, which was true, that Vetere was telling the whole story; but, as pointed out in *State v. Willis*, supra, it is difficult to conceive of a confession which is not induced by a sense of self-interest. Moreover, this paper added no material fact

to the case made by the state. Castellì made several statements on April 26th, and the state very properly offered all of them in evidence, but, so far as the issue of guilt or innocence is concerned, they were all merged in or superseded by the final confession, Exhibit 39, which was complete in itself.

[7] Exhibits 38 and 30 are statements made by Vetere incriminating Castellì. These were not admitted as against Castellì, and the jury were instructed not to consider them as evidence against him. They were necessarily admissible as against Vetere, and the course which the court took was the only one possible. On their merits the assignments of error relating to these statements of Vetere go back to the denial of the motion for a separate trial which has already been discussed.

[8] In this connection we take up the alleged error of the court in admitting the story of Castellì's rehearsal of the murder scene at 260 Crown street on May 3d. The claim is that Castellì was compelled to reenact the murder, and so compelled to give evidence against himself. This again was a preliminary issue, and the court so treated it ruling that the state must show that the actions of Castellì were voluntary. The state fully sustained the affirmative of that issue, but the objection is made that Castellì was not at that time warned that he could not be compelled to rehearse the murder or that such rehearsal might be used against him. There is, however, no rule of law in this state which requires any such warning. The state must show affirmatively that any confession or performance in the nature of a confession was not procured by duress. The fact that a warning in the usual form has been given is generally accepted as satisfactory evidence that the confession was not procured by duress. But when the voluntary character of the confession is shown either by proof of a warning or by any other satisfactory evidence the law and the Constitution are satisfied. In this instance a warning had been given to Castellì the week before, and he had fully confessed after being warned. A week later he was asked, being deaf and dumb, to go to the scene of the crime and repeat the confession in pantomime, and upon the evidence he did so voluntarily. A second warning under such circumstances would have been superfluous.

Castellì testified when on the witness stand that one of the officers at the police station in New York struck him many times with a piece of hose before his confession was written. This evidence was offered after the state had rested, and, of course, long after the preliminary issue as to the voluntary character of Castellì's confession had been tried and determined in favor of its admissibility. Under these circumstances the court properly instructed the jury that, if they found that the accused were frightened

or forced to make their confessions by the conduct or abuse of the officer having them in charge, they should disregard the statements entirely as of no value.

[9] Referring now to the statements and confessions of Vetere. It is assigned as error that the court ruled that Vetere's confessions were voluntary. In support of these assignments of error it is said that Vetere was allowed to see Castellì in the act of making a statement to the coroner; that the two were kept apart, and not allowed to communicate with each other; that Vetere was not given anything to eat from 7:30 p. m., when he was brought into the police headquarters, until 11 p. m.; that his examination was protracted until 3 a. m.; and that the attempted proof of the voluntary character of his statements failed, because of the generality of the questions asked of the state's witnesses. Most of these matters have already been sufficiently discussed. The length of time occupied in these examinations by the coroner is accounted for in part by the fact that he took the statements of Castellì and Vetere separately, partly by the mode of communication adopted, which was by writing out the questions and then handing the paper to the accused for him to write his answer, and partly by the fact that Vetere was taken out to supper. As to the alleged deprivation of food, it appears that up to the time when Vetere complained that he was hungry he had made no incriminating statement; that he offered to make a statement in writing; that the coroner wrote out the customary warning, and Vetere wrote in reply:

"I want to get food, as I nearly choked to death, and I got awful headache. I am uneasy without food, and if I get food I would be excited to write and tell all the truth."

He was immediately taken out to supper, and wrote nothing in the nature of a confession until after he came back. This being so, it cannot be said that his confession was in any degree extorted by starvation. On the contrary, the coroner was careful that no confession should be made until after Vetere's hunger had been satisfied.

[10] It is also assigned as error that the confessions of the accused were admitted as exhibits and allowed to go to the jury room; the alleged wrong being that undue prominence was thus given to the most damaging portions of the testimony. There was no error in this. Writings made or subscribed by the accused are ordinarily admitted as exhibits. If these writings were harmful, it was not because any rule of procedure was violated, but because the accused had furnished harmful evidence against themselves.

[11] We take up next the assignments of error in the admission of evidence. De Martini testified that he wrote on a piece of paper that Vetere was telling all, and showed it to Castellì, who wrote back on a piece of paper: "Me afraid of chair; tell all." This testimony

was objected to on the grounds that papers themselves must be produced and to prove their loss the assistant state's attorney was allowed to state to the court that he had been through every scrap of paper the state had and could not find them. The testimony was then admitted. There was no error. The evidence of loss was sufficient to support the admission of secondary evidence, especially as the statement itself was of little importance, because followed by a full written confession.

[12] As to the admission of the summons in the suit for nonsupport brought by Annie against Castelli, the objection that it tended to prove a different offense from that with which Castelli was charged was properly overruled. The paper was admissible, being taken from Castelli's person, as tending to show that Castelli had reason to believe that his wife had complained to the police against him in respect of the matter described in the summons. The probation card, also taken from him, and the testimony of Enright explaining it, were admissible on the same ground, and the exemplified copy of the record of the New York court in the nonsupport proceedings was directly admissible to show the relations between Castelli and his wife. Vetere's assignments of error Nos. 8 and 9 are not well founded in the record. The claim is that De Martini was permitted to testify to a conversation carried on in writing, without producing the writings, but the record is that the witness was asked whether any threats or inducements were made to Vetere in writing or otherwise, and that he answered "No."

[13] The court in charging the jury with reference to the statements or confessions made by the accused used the phrase, "They are only admissible as evidence affecting the one who made them;" and this is claimed as error because in *State v. Willis*, supra, we said that such statements were not "testimony," but facts to be proved by testimony. The distinction drawn in *State v. Willis* is quite correct, and that distinction was carefully observed by the trial court not only in other parts of the charge, but also in the language complained of. The declarations of the accused inconsistent with their respective pleas of not guilty were not testimony, but when proved they were "evidence affecting the one who made them" in the same sense that any other relevant fact inconsistent with the claims of an accused is evidence affecting him.

[14] On one occasion the court in its charge used the phrase "considerable doubt" instead of "reasonable doubt," but it could not be supposed by the jury that the court intended to mean anything more or less than that reasonable doubt which it had been at great pains to explain and expound to them at great length.

[15] The claim that the court unfavorably

commented on evidence seems to us without foundation. It is true that the court apparently failed to remember Castelli's claim that he had bought his ticket for New Haven because he had seen Annie and Vetere talking about going to New Haven, but such a slip as that in commenting on the evidence after a long trial is not reversible error. In the first place, it is the duty of the jury, not of the court, to remember the evidence correctly, and, in the second place, the court was very careful to so inform the jury and to tell them that he might be mistaken in his recollection of the evidence, and that they must take the evidence not from him but from the witnesses.

[16] The court did not err in refusing to charge as requested by Castelli upon the subject of reasonable doubt. The charge of the court upon that point was correct and sufficient, and the court is not bound to use the phraseology of counsel in preference to its own in stating familiar propositions of law to the jury.

[17] The court did not err in charging the jury that in order to reduce Castelli's crime from murder to manslaughter the homicide must have taken place under circumstances which would justify a reasonable belief that adultery was being committed. That is the rule expressed in *State v. Yanz*, 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, 92 Am. St. Rep. 205, and *State v. Saxon*, 87 Conn. 15, 86 Atl. 500. It was too favorable to Castelli. A husband who on his own story suspects that adultery is going to be committed, follows his wife and her suspected paramour from New York to New Haven, conceals himself in a closet armed with a deadly weapon, waiting for the expected provocation to materialize, and then kills his wife, cannot claim the benefit of the rule in *State v. Yanz*.

[18, 19] As to Vetere's assignments of error Nos. 39-41, the court correctly charged the jury that Vetere could not be convicted on Castelli's unsupported testimony. This was all that the case called for. Castelli was not a witness for the state. He could not, while jointly indicted, have been compelled to testify. But, since he chose to testify in his own defense, his admissible testimony was relevant, though not that of a full witness, so far as it tended to prove or disprove the existence of the conspiracy outlined in Vetere's confession.

[20] We have disposed of all the assignments of error pursued on the briefs, except those relating to the denials of the motions to set the verdicts aside, on the ground that they were against the evidence. These motions were properly denied. The rule laid down in *State v. Willis*, supra, is that an uncorroborated extrajudicial confession will not support a conviction of murder in the first degree. But these confessions were abundantly corroborated. The identity of the victim and her death from the injuries inflicted by Castelli are established without re-

sorting to the confessions. Castell's testimony at the trial admitting the killing and pleading provocation left only the degree of the crime to be determined by the jury. Was it a willful, deliberate, and premeditated killing, as his confession admitted, or was it the result of a sudden outburst of uncontrollable fury caused by the sight of his wife in Vetere's arms? The jury could give but one answer to that question; for Castell himself testified that he concealed himself in the closet armed with a deadly weapon, to await the return of Vetere and his wife; and upon what little testimony was given on the trial as to the situation of the parties it seems that Vetere was standing by the window at some distance from Annie when she was struck.

Vetere also admitted on the witness stand that he was present at the killing. His testimony amounted to a judicial confession that he was an accessory after the fact, and the only question left for the jury was whether he was an accessory after the fact, in which case he was not guilty of any crime of which he stood indicted, or whether he was a principal under our statute as indicated by his confession to the coroner. All the physical facts were admitted. The determining question was whether the elopement with Annie was a genuine affair of the affections, as Vetere claimed in his testimony, or whether it was a pretense contrived to bring the victim to her place of execution, as Vetere admitted to the coroner.

No reasonable explanation consistent with the theory of a genuine elopement can be given of Vetere's own testimony as to what took place at and after the killing. The crucial scene is hurried over in a few words. He says that he kissed Annie; that she wanted to take a nap in the chair; that he went over to the window seat; that he heard and saw nothing until he looked around and saw Castell standing beside his wife. Annie was then sitting with a drooping head, and Castell, pointing to the door, said "Killed, finished," and then, "Hurry up." Apparently no further communication passed between them until they reached the train. Could there be stronger corroboration of the confession to the coroner than is unconsciously furnished by Vetere's testimony? Not an indication of surprise, sorrow, anger, or desire for retributive justice, but, on the contrary, instant acquiescence, a partition of Annie's jewelry and money, a joint flight from the scene of the crime without stopping to see whether Annie was really dead, and a common attempt to conceal the crime by writing a postal card addressed to Castell intended to account for Annie's disappearance, and by appearing together at a social entertainment that same evening.

The fact that Vetere left Annie alone in the restaurant at the time when, according to his confession, he met Castell and told him of the location of the room, and how to

open the front door, was also proved. Without going further into details, it seems evident that the motions to set aside the verdicts were properly denied.

There is no error in either appeal.

PRENTICE, C. J., and RORABACK and SHUMWAY, JJ., concurred.

WHEELER, J. (dissenting). One ground of error in Vetere's appeal and one in Castell's, in my judgment, entitles each to a new trial. Vetere seasonably moved for a separate trial. The granting of such a motion is ordinarily a matter of discretion. But if the defenses of the accused are antagonistic, or the evidence to be introduced against one is not admissible against the other, separate trials may be ordered. Where a joint trial will probably be prejudicial to one or more of the accused, the motion should be granted. *State v. Brauneis*, 84 Conn. 222, 226, 79 Atl. 70.

I agree with the majority opinion that the mere fact that evidence will be admissible against one accused which will not be admissible against another will not necessarily furnish a ground for granting a separate trial; for the court by limiting its admission and pointing out to the jury at the time of its admission and its charge the precise use to be made of the testimony may make it reasonably certain that the jury did not reach its conclusion by the improper use of this evidence.

So that in a given case the test for the trial court is, Will the joint trial probably result in substantial injustice, that is, will the jury be unable to separate the evidence, and be likely to use the evidence admissible against one accused against another, against whom it is not admissible?

I. I agree with the majority that the ground of the motion for a separate trial should develop the existence and effect of such evidence so that the court will be placed in a position to determine the probability that substantial injustice will be done to the moving party. The majority hold that:

"It does not appear from the record that the trial court was so advised in this case."

I think this conclusion does not accord with the facts of record.

At the beginning of the trial Mr. Hoyt, counsel for Vetere, thus addressed the court:

"Before we proceed to draw the jurors, I should like to make a motion in this case. I should like to make a motion that the accused be tried separately, first, upon the ground that there is evidence in this case, as is apparent from the coroner's finding and notes, which is admissible against one and not admissible against the other, in the nature of statements and other evidence decidedly of a character that is not admissible against both. As I understand the law in *State v. Brauneis* in 84 Conn. 222, 79 Atl. 70, it is, of course, a matter of discretion for the court. Our Supreme Court has said that where it would be prejudicial to the interests of the accused to try them together, then they should be tried separately. Now, I

therefore move that they be tried separately, on behalf of Vetere at least."

Replying, the state's attorney conceded that:

The two accused "did make separate statements in writing * * * and other statements by signs to the authorities in New York during the coroner's inquest."

Mr. Hoyt replied:

"I cannot add anything, your honor, to what I have already said, except this: The state's attorney has suggested that in the event of admissions or conversations of one being admitted which would not be admissible against the other that the caution of the court would take care of it. Now, it does not seem to me that, while your honor in the caution is doing everything you could to prevent it being used against the other man, it certainly does get to the ears of the jury, and it is pretty hard for any human being to dismiss that from their minds, provided, of course, such statements are admissible."

The ruling of the court upon the motion shows that it fully appreciated the ground of the motion, viz. to prevent the state introducing statements and evidence which were admissible against one accused and not against the other.

The state's attorney has argued this point as wholly within the discretion of the court. He has not claimed that the trial court was not apprised of the ground of the motion or the character of the evidence to be offered. Mr. Hoyt expressly called the court's attention to the coroner's finding and notes, and we may assume that the court, learned and experienced judge, and for a long period a distinguished state's attorney, had these before it.

The court then knew that there were different statements in the nature of written confessions and oral statements claimed by the state to have been made by these accused, some of which might be admissible against one accused and not against another and others of which might be admissible against one and not against another, and the court knew that the state intended to offer evidence that Castelli had been taken to the scene of the tragedy and had there reenacted all that was done by him and by Vetere at and about the time of the killing.

I have never known a case where it was more apparent at the inception of the trial that it would probably be difficult, if not impossible, to disassociate the evidence thus offered against one accused from the evidence offered against the other. It was the duty of the court, when this condition appeared, to grant separate trials to these accused.

Upon an examination of the evidence it appears that during the taking of the evidence in at least 21 instances the court instructed the jury that certain evidence admitted was admissible against Castelli, and not against Vetere, and in at least ten instances the court instructed the jury that certain evidence admitted was admissible against Vetere and not against Castelli. And these

were not the only occasions when such instruction would have been pertinent.

The amended finding recites:

"(1) Upon the trial much evidence was admitted against the defendant Joseph Castelli only. This was done against the objection of counsel for the defendant Frank Vetere, made upon the ground that such evidence was prejudicial to the defendant Frank Vetere, and that the mere fact that such evidence was admitted only against the defendant Joseph Castelli did not properly protect the defendant Frank Vetere's rights, because the jury, having heard such evidence and considered it against the defendant Joseph Castelli, would be unable wholly to dismiss it from their minds in consideration of the evidence against the defendant Frank Vetere."

The court states that under its ruling about half of the 506 pages of the printed testimony was admitted. The finding further states:

"The substance of this evidence which is claimed to have been harmful to the defendant Frank Vetere, is as follows: That the defendant Joseph Castelli had killed his wife, of whose murder he and the defendant Frank Vetere were jointly charged, because he was mad at her for telling the deaf people about him, and because she had given him a disease; * * * that he had admitted this was the reason; that said Joseph Castelli had treated his wife very badly, and had been arrested at her instigation for nonsupport, and had been sent to the workhouse as a result thereof; that Joseph Castelli had struck his wife on occasions; that said Joseph Castelli had been taken by the police authorities of New Haven over the route the state claimed was taken by him in going to the scene of the crime, and that he had acted out the tragedy by showing how he struck his wife from behind on the head several times with an instrument; that thereupon he and the defendant Frank Vetere left the scene of the crime together and went to New York together; that the defendant Joseph Castelli had stated that he had planned to have Frank Vetere take Joseph Castelli's wife to New Haven on the day of the killing, and that he told defendant Frank Vetere that he was going to kill her at that place, and had told Frank Vetere to find a room in New Haven where the killing could be accomplished, and that defendant Frank Vetere came to him while his wife was at dinner and gave him the key to the room so that he could get into it, and that after Joseph Castelli had killed his wife he took all her money and jewelry, and he and Frank Vetere went to New York together, and that on the way there he gave the jewelry to defendant Frank Vetere; that said defendant Joseph Castelli had stated that he had paid for Frank Vetere's ticket to New Haven on the day of the killing, and also for the meal Frank Vetere had with Joseph Castelli's wife in New Haven; and that defendant Frank Vetere wrote Exhibit 40, which is made a part of this finding, at the direction of said Joseph Castelli, addressing the postal to Joseph Castelli and signing it as coming from Joseph Castelli's wife."

All of this evidence was vitally prejudicial to Vetere, and it is unreasonable to expect that the jury could have heard this evidence and kept it wholly separate. No matter how carefully the trial court cautioned the jury as to its duty to do this, the jury could not have kept wholly separated in its mind the evidence admissible solely against Castelli and that solely against Vetere. It could not do it, because the human mind cannot even read this record and do it, and

the printed page is cold and dull compared with same testimony given in open court. I think the record shows that the court was fully advised preceding and during the trial of the nature and character of this evidence, and was in a position to determine that substantial injustice would be done to Vetere on a joint trial.

The majority opinion concedes that:

"Ordinarily the fact that one of the accused has made a confession incriminating the other would be a good ground for granting a separate trial."

But it excludes Vetere from the benefit of this rule because:

"Each of the accused had made a full written confession of facts which, if legally corroborated, was sufficient to convict either one of them of murder in the first degree. It follows that no material fact incriminating either one of the accused came to the knowledge of the jury because they were tried together, which would not also have come to the knowledge of a jury if each had been separately tried and his own confession admitted against him."

If this means that because each confession covered the same facts it was immaterial if both were received in evidence, since the jury had before it the admissible confession, which, if corroborated, was sufficient to convict, it would seem to assume that the jury found the admissible confession proven and corroborated without reference to the inadmissible confession. Unfortunately we cannot know what the jury found proven, and we cannot tell what part the inadmissible confessions played in helping them reach their conclusion. The evidence of this character excepted to not only covered written confessions, but written statements of facts and acts and a pantomime of the entire tragedy. It cannot be found that all of this inadmissible evidence was contained in Vetere's confession, nor can it be found that his confession was not illustrated, explained, and corroborated by this inadmissible evidence, some of it intensive in kind and dramatic in quality.

The logic of this argument is somewhat disturbed as we read the questions asked Castellì by the coroner:

"Didn't you make up your mind to kill her before that, and didn't you tell Frank Vetere that you were going to do it? No. Yes. Did you plan to have Frank Vetere take her to New Haven for you last Sunday? Yes; by me. Did Frank know that he was to take her to New Haven and you were to kill her there? Yes."

And throughout the route which the coroner took Castellì over in enacting the pantomime of the killing and what preceded and followed it the coroner constantly asked about Vetere, where he was, what he did, and his part in the tragedy. These references are simply illustrative of this entire record. How can it be said that its introduction was not prejudicial to Vetere? Castellì did not move for a separate trial; he must be held to have waived any prejudice to his rights from the joint trial.

2. Vetere and Castellì were taken in custody in New York, and while in custody, but not under arrest, Coroner Mix of New Haven on April 26th took their statements in New York, first stating to them that he was the coroner for New Haven county, Conn., and engaged in inquiring as to the death of Annie Castellì; that he could not compel them to, and they were not obliged to, say anything about it, unless they wished to, and he inquired if they were willing to tell what they knew about it. Subsequently by extradition proceedings the accused were brought to New Haven, and Castellì was taken on May 3d to the office of the coroner, who wrote on a piece of paper for Castellì:

"I am going to take you the way you took when you came to New Haven and to Crown street. Will you show me?"

And Castellì nodded his assent, and shortly thereafter the coroner, with others, accompanied Castellì over the said route and questioned Castellì in detail as to what he and Vetere did, where they went, etc.; in short, he caused Castellì to enact the pantomime of the tragedy and what took place while they were in New Haven. All of this evidence was duly objected to, and exceptions noted. The court found that Castellì did all of this voluntarily.

This is an instance where a quasi judicial officer of the state procures an accused to incriminate himself without warning him that his acts and words would be used against him. It cannot in fairness be held that the caution given by Coroner Mix in the police station in New York about his giving his statement must have been in the mind of this deaf and dumb man when seven days after the coroner in New Haven told him:

"I am going to take you the way you took when you came to New Haven and Crown street."

He was then entitled to a warning that he did not need to enact the tragedy of his crime in order to furnish the state evidence of his guilt.

A statement made to a coroner by an accused under arrest without a warning from him that he need not make it cannot be held to be legally voluntary. So acts, conduct, and statements explanatory thereof, made at the solicitation, persuasion, or command of a coroner, cannot be held to be legally voluntary if made without such warning.

The only evidence before the trial court as to the voluntary character of this evidence was the statement that no promises or inducements were held out to Castellì to do or say what he then did. This evidence, I think, procured by the coroner without warning, was insufficient and inadmissible because in derogation of our rule as to involuntary confessions. It was a violation of the rights guaranteed to Castellì by article 1 of our Constitution.

(92 Conn. 85)

OTT v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

APPEAL AND ERROR §999(2)—SCOPE OF REVIEW—FINDINGS OF FACT.

Unless the jury's conclusion could not have been reached reasonably and without partiality, corruption, or other improprieties, its conclusion must stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3916.]

Appeal from Superior Court, New Haven County; Gardiner Greene, Judge.

Action by Max Ott against the Connecticut Company. Judgment for plaintiff for \$800, and defendant appeals. No error.

Harrison T. Sheldon, of New Haven, for appellant. Charles S. Hamilton, of New Haven, for appellee.

PER CURIAM. The defendant concedes that the evidence presented to establish its negligence was such as to entitle the plaintiff to go to the jury upon that issue, and that clearly was the case. Upon the issue as to the absence of contributory negligence, evidence was before the jury which, if believed, would furnish a reasonable basis for the affirmative conclusion at which it arrived. Although we are not as strongly impressed by the trustworthiness of some pertinent portions of that evidence as it apparently was, we cannot forget that it was its office to determine what the evidence established, and that its conclusion must stand unless it appears that that conclusion was one which it could not have reached reasonably and without indicating that its members were influenced thereto by partiality, corruption, prejudice, or otherwise improperly.

We cannot say that the trial court erred in ruling that the jury's conclusion that the plaintiff was in the exercise of due care was not one which, under the accepted rules of law, it should disturb.

There is no error.

(92 Conn. 96)

PIERSON v. PIERSON ENGINEERING & CONSTRUCTION CO.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. RECEIVERS §174(4)—PERMISSION TO SUE—DISCRETION OF COURT.

Whether a court will permit its receiver to be sued is largely a matter of discretion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 336.]

2. RECEIVERS §174(4) — APPLICATION TO SUE IN ANOTHER COURT—DISCRETION.

Where the action related to the title or right of possession of property which had already been taken into the custody of the state court, it properly refused to permit its receiver to be sued in the United States District Court, the rule "that where a court has once acquired jurisdiction over a particular subject-matter it retains

it free from interference by any other court" being applicable.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 336.]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Martin E. Pierson against the Pierson Engineering & Construction Company. The application for a temporary receiver was granted, and Maurice E. Davis petitioned the court for leave to sue the receiver. Petition denied, and Davis appeals. No error.

On April 27, 1916, a temporary receiver, afterward confirmed and appointed permanent receiver, was appointed over the Pierson Engineering & Construction Company, a corporation largely engaged in construction work, whose machinery, tools, and equipment were located at various places where the work was then in progress. One Maurice E. Davis applied to the court for an order requiring the receiver to deliver to him certain property described in a so-called conditional bill of sale. The application was denied, and his petition for leave to sue the receiver was then filed and denied. The property in question appears from the papers to include a large part, if not all, of the tangible assets now in the hands of the receiver.

Alvan Waldo Hyde, of Hartford, for appellant. Lucius F. Robinson, of Hartford, for appellee Holden.

BEACH, J. (after stating the facts as above). The petition is singularly brief. It simply alleges that the petitioner entered into an agreement, recorded and acknowledged according to law, with the defendant company, whereby it was agreed that certain goods and chattels delivered by Davis to the company should remain the property of Davis until certain payments had been made by the defendant; and that neither the defendant nor the receiver has made the payments, although the receiver is now in possession of the property. Wherefore the petitioner prays for leave to bring suit to determine his rights under the contract.

There is no allegation or finding that Davis was the owner of the property at the time when the agreement was executed, or that the payments to be made were installments of an agreed purchase price. On the contrary, the agreement refers to "construction work now in progress in the town of Burlington," and recites that a large part of the equipment is located there. So far as this record shows, the transaction between Davis and the Pierson Engineering & Construction Company may have been an attempt to secure Davis for past or present advances by giving him a conditional bill of sale instead of a chattel mortgage. It also appears from the finding that the property described in the agreement was, at the time of

filing the petition, in use by the receiver in carrying out contracts made by the defendant before the receivership.

The petition does not indicate what particular kind of an action the petitioner desires to bring against the receiver. The prayer for relief is broad enough to include, if granted, permission to bring replevin, and take the property out of the custody of the court pending the determination of the petitioner's rights under the contract. Under the circumstances, a summary dispossession of the receiver by replevin is out of the question. The property is already in the custody of the court, which is making use of it in carrying out the defendant's contracts, in an attempt to conserve the defendant's assets for the benefit of all concerned.

[1] Finally, the question whether a court will permit its receiver to be sued is largely a matter of discretion. There is no reason why the superior court, being in possession of the property and able to administer full relief to the petitioner, should allow him to bring another action in the same court to try out his alleged title to or interest in the property.

[2] Presumably, the desire is to bring an action in the District Court of the United States; Davis being described in his petition as a citizen of New York. In such cases much depends on the character of the action. If in the nature of a suit in personam not affecting specific assets, the court of the receivership may consistently allow its receiver to be sued in another court in the exercise of its discretion. But if, as in this case, the action relates to the title to or right of possession of property which has already been taken into the custody of the court, "the rule that, where a court has once acquired jurisdiction over a particular subject-matter, it retains it free from interference by any other court, is that which governs." *Links v. Connecticut River Banking Co.*, 66 Conn. 277, 33 Atl. 1003.

There is no error. The other Judges concurred.

(92 Conn. 47)

STATE v. TRIPLETT.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

CONSPIRACY \Leftrightarrow 47—RAPE \Leftrightarrow 53(3)—ASSAULT—
INTENT—EVIDENCE.

Evidence, on prosecution for conspiracy to commit rape and for assault to commit rape, the overt acts being committed by another, and any liability of defendant being that of accessory, and the purpose of the parties, as shown by the evidence, being to obtain evidence against the woman's character, held not to establish the necessary element of intent to rape.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Rape, Cent. Dig. § 80.]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Hampden Triplett, alias Granville Triplett,

was prosecuted on information in three counts charging: First, a conspiracy to commit assault; second, a conspiracy to commit rape; and, third, an assault with intent to commit rape. He was convicted on the second and third counts, and appeals. Reversed, and new trial ordered.

Dorothy A. Triplett, residing in New York City, is the wife of John E. Triplett, a clergyman residing in New Jersey. The accused is the brother of John E. Triplett and a lawyer resident of and practicing in New York City. In February, 1914, Mrs. Triplett left her husband, taking with her their child, and went to reside with her mother in New York. A few months later she began proceedings in the courts of New York for a separation from her husband upon the ground of his cruel and inhuman treatment and non-support of her, for the custody of their minor child, and for an allowance for the support of herself and child. The accused, acting in his brother's interest, took steps to defeat that proceeding, and employed one, known in the present case by the name of Wilson, to watch Mrs. Triplett, and to secure evidence which might be used against her.

The state offered evidence to prove, and claimed to have proved, that the accused and Wilson conspired together to secure evidence touching Mrs. Triplett's chastity which could be so used, and to that end it was planned and arranged between them that Wilson, under the guise of a real estate agent, should lure Mrs. Triplett to New Haven upon the false pretense that she was to meet a Mrs. Allen, residing there or near there, who was a possible purchaser of a piece of property in Canada belonging to Mrs. Triplett's mother; that Wilson succeeded in arranging for a meeting between Mrs. Triplett and the pretended prospective purchaser at the Hotel Garde in New Haven, where they were to meet, the former being accompanied by Wilson; that Mrs. Triplett so accompanied went to New Haven and to the hotel for the purpose of filling this pretended appointment; that upon their arrival at the hotel Wilson reported that Mrs. Allen had not yet arrived, and that they thereupon went into the dining room; that Wilson thereafter left the dining room upon some pretense and went to the desk and registered himself and Mrs. Triplett as husband and wife under an assumed name, and received the assignment of a room; that meanwhile the accused and two New York men, whom he had employed for the purpose, known as Campbell and Donahue, had arrived at the hotel by prearrangement and taken a room; that at the time Wilson registered he conferred with Triplett or one of his associates as to the program which was to be followed; that Wilson returned to the dining room and reported that Mrs. Allen had arrived and was in her

room upstairs waiting for them; that Wilson and Mrs. Triplett then went, as the latter supposed, to meet Mrs. Allen; that Wilson showed the way to the room which had been assigned to him; that, as Wilson opened the door and Mrs. Triplett entered, she found that no one was there to receive her and that the room was an unoccupied bedroom; that she turned to leave, facing Wilson, who had followed her through the door; that as she was about to depart Wilson pushed her upon the bed and seized her violently to keep her there; that a vigorous struggle ensued, during which Mrs. Triplett was badly bruised and lacerated upon one of her legs and thighs over a considerable area, bruised in her right arm, and her clothing in places torn; that while this struggle was proceeding Triplett and his associates appeared at the unlocked door, knocked, and entered; that the struggle between Wilson and Mrs. Triplett then ceased, Wilson remarking, "I got her," and the accused replying, "I knew damn well you'd get her;" that Mrs. Triplett then passed into the hall, and out of the hotel to the station, where she later took a train for New York; and that the accused followed her downstairs, went to the desk, called the attention of the clerk to the occupancy of the room by a couple not man and wife, and later returned home.

The claim of the accused, overwhelmingly contradicted by the state's testimony, was that after having employed Wilson he became suspicious of his unfaithfulness in that employment, and that he had entered into illicit relations with Mrs. Triplett; that, having overheard a telephone conversation between them making an appointment to go to New Haven by a specified train, he determined to follow them and hastily employed Campbell and Donahue to assist him in tracing their movements; that they succeeded in tracing them to the hotel and in locating them in a room which they visited, only to find Wilson and Mrs. Triplett in bed together and undressed.

Spotswood D. Bowers, of Bridgeport, for appellant. Arnon A. Ailing, State's Atty., and Walter M. Pickett, Asst. State's Atty., both of New Haven, for the State.

PRENTICE, C. J. (after stating the facts as above). The defendant was convicted upon two counts, one for conspiracy to commit the crime of rape upon the person of Dorothy A. Triplett, and the other for an assault upon her committed with intent to commit rape. The state made no claim that he personally participated in an assault upon Mrs. Triplett or performed any overt act in furtherance of such assault by another. The overt acts which furnished the basis of the state's charge were committed by a person known in the case by the name of Wilson. The accused's criminal liability, if liable he is as charged in the two counts, is that of

an accessory. No evidence was offered tending to show that Wilson ravished Mrs. Triplett. There was evidence impressively establishing that he committed an assault upon her. It was incumbent upon the state, therefore, if it would furnish a sufficient foundation for the defendant's conviction upon the last-named count, to establish beyond a reasonable doubt that Wilson's assault was made with the intent and purpose of ravishing Mrs. Triplett, and, if a conviction upon the first-named count was to be justified, to establish in like manner that any combination or conspiracy which may have existed between the accused and Wilson comprehended such ravishment within its scope and purpose. In other words, it was essential to the state's successful prosecution of the defendant, under either of the two counts upon which conviction was had, that it be shown beyond a reasonable doubt that there was an intent or purpose on the part of the parties implicated in the affair under investigation, or some of them at least, that carnal knowledge of Mrs. Triplett be had forcibly and against her will.

Were the evidence confined to the scene in the bedroom in the hotel where Wilson laid violent hands upon Mrs. Triplett, it might well be inferred that his purpose was her ravishment; but the exigencies of the state's case, which required that the accused be criminally connected with what there transpired, demanded that the evidence take a wider range. As a result, we have in the record a disclosure of collateral matters and events vitally important to an intelligent understanding of the situation in which Wilson is found committing his assault, and throwing a flood of light upon the motive behind it and the end it had in view.

The story, as the state's evidence discloses it, is in all its details a long one, and need not now be rehearsed. It is sufficient to say that it shows no other motive behind the affair and no other object sought by means of it than the provision of a foundation for evidence derogatory to Mrs. Triplett's character for use in defeating her pending action against her husband, a brother of the accused, for a separation and support. The theory of the state was and is that the accused was desirous of obtaining such evidence; and to that end employed Wilson, Campbell, and Donahue to carry out a carefully planned scheme in accordance with which Wilson was to lure Mrs. Triplett to the hotel in New Haven and to a sleeping room therein on the false pretense of meeting there a lady on a business errand involving the sale of real estate, and the accused, accompanied by Campbell and Donahue, were to appear upon the scene following Mrs. Triplett's unsuspecting entrance to the room with Wilson.

Assuming that it was the moving purpose of the parties whom Mrs. Triplett faced upon this occasion to obtain evidence or the foun

dation for evidence incriminatory of her character, it is more than difficult to imagine how the addition of her ravishment to the discovery of her presence in the room alone with Wilson could either have added a feature beneficial to her husband's cause or been thought that it would do so. The truth would not have helped, and perjury would have been furnished no better foundation for the desired testimony than her presence in the room supplied. Not only was there nothing to gain by the perpetration of a rape, but the very attempt at its perpetration threatened both disaster to the scheme, through the outcry and commotion that would be likely to result, and dire punishment for the offenders singularly open to detection. It is hard to imagine a more senseless and foolhardy thing for the accused and his associates to have planned to do, if they hoped for success in their imputed purpose, than that which the jury, in order to return its verdict, must have found that they planned and did. It is well-nigh unbelievable that a sane man, much less a trained lawyer, would, in order to carry out a plan devised for the purpose outlined, have permitted so foolish, superfluous, and hazardous a feature to enter into it as that of the rape of the intended victim of it.

As far as the assault is concerned, the explanation that it was prompted solely by the exigencies of the occasion, in order that Mrs. Triplett might be detained in the room and found therein by the waiting and momentarily expected watchers, is far more plausible and reasonable than that it was the first step in a concerted attempt to commit rape. Her discovery in the room was, for the conspirator's purpose, as sufficient an outcome as any other produced by force could have been. That purpose was as claimed by the state, and no other involving the accused in criminal responsibility is apparent, the securing of a plausible and workable foundation for testimony derogatory to Mrs. Triplett's character to be used to defeat her cause against her husband. That foundation might be obtained by the discovery of outward suspicious conditions which might safely be left to speak for themselves before the trier, or it might be secured through the discovery of such conditions to be utilized in testimony which should weave around it manufactured details which would make a more explicit tale of wrongdoing. Her escape, before the prearranged arrival of those hovering near to entrap her under circumstances themselves suspicious and susceptible of being embroidered into something worse than suspicion, would seriously threaten the successful execution of the plan which had been arranged. That fact must have been apparent to Wilson, and his resort to force to prevent her escape was not an unnatural consequence.

As one reads the repulsive story which the state's evidence presents with a striking array of proof, it is easy to see how the jury was influenced to return a verdict which would prepare the way for the infliction of severe punishment upon the defendant for the part he played in it. Although we may share in no slight degree the jury's natural feelings of disgust and repugnance at what the evidence appears clearly to disclose was done to Mrs. Triplett, we are bound to say that an examination of it shows that, whatever else it satisfactorily establishes, there is in it a palpable failure of proof, not to say proof beyond reasonable doubt, establishing that the essential element of an intent to rape was involved in any combination entered into by the parties charged therewith, or that the accused assisted, aided, or abetted in any act which had that design in view. Without such proof a conviction upon either count was without justification.

In view of our conclusion, we have no occasion to consider the sufficiency of the remaining somewhat numerous assignments of error.

There is error, the judgment is set aside, and a new trial ordered. In this opinion the other Judges concurred.

LYONS v. WALSH.

(22 Conn. 13)

(Supreme Court of Errors of Connecticut.
July 6, 1917.)

1. ADJOINING LANDOWNERS §4(6)—LATERAL SUPPORT—RETAINING WALL—DUTY TO MAINTAIN.

Where A. cut down his lot below the level of B.'s adjoining lot, and put a retaining wall wholly on B.'s lot, A.'s successor in title was not bound to maintain the wall, which became part of B.'s lot, though he would have been bound to do so had the wall been placed on A.'s lot; the right of action for destroying lateral support being personal against the wrongdoer, and the wrong binding the land to nothing.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 36.]

2. INJUNCTION §14 — MANDATORY INJUNCTION—RESTORATION OF RETAINING WALL.

While the owner of a lot on which parts of a disintegrating retaining wall on the adjoining lot falls may recover for damages done, he may not have mandatory injunction for restoration of the wall; irreparable injury not clearly appearing.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 14.]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Mary R. Lyons against Marianne Walsh for mandatory injunction for restoration of a neglected wall and for damages for its partial collapse; defendant counterclaiming for substantially the same relief. Judgment for defendant on her counterclaim, and plaintiff appeals. Reversed and remanded, with directions.

The parties own adjoining city house lots on a street in Norwich running north and south. Both lots were originally in one tract, and in its natural condition the land sloped unbrokenly and at a steep pitch from the north. Long before either of the present owners acquired title to her lot, the then owner of the lower lot, who had purchased from the original owner of the tract, leveled a part of his land for building upon it, and in so doing excavated and removed the soil from this portion up to and along a section of his northern boundary line. This destroyed for a corresponding distance the natural lateral support of the adjoining land of the north lot, and to replace it he built into the bank a retaining wall 10 feet high along this portion of the east and west line. This was set wholly upon the upper, or what is now the Walsh, lot, and the dividing line of the two properties lies along its exposed southern face. Some years afterwards, in 1895, and after the defendant had become the owner of the north lot, a later owner of the south lot made another excavation in preparation for further building, and removed more soil up to the line as extended from the eastern end of the wall. This operation removed the lateral support of the Walsh land along the continued line, and in substitution for this support he extended the wall at the same height of 10 feet still further along the line, continuing it wholly on the Walsh land, so that the dividing line of the two lots follows the southern face of the wall throughout its length. The height of the wall measures the depth of the excavations at the line, and no additional burden requiring more than the natural lateral support of the soil has ever been added to the Walsh lot. The parties are ignorant of the circumstances under which the first section of the wall was placed on the Walsh lot, save that its purpose and the person erecting it were as already stated, and, although the remaining part of the wall was built after the defendant had acquired her present ownership, the record is silent as to why this part of the wall was also placed wholly upon her land. No deed dealing with any of the property involved mentions the wall. The plaintiff bought the south lot in 1913, and through neglect and the work of the elements the wall has been disintegrating for several years; there being no evidence of any effort by any one to maintain it or keep it in repair. It is now out of plumb in parts, and stones from it have become loosened and dislodged, and have fallen upon the plaintiff's land. Damage to the plaintiff from this cause during the two years next before this action was brought amounts to \$25. More trouble of this character is likely to occur, and the wall is in danger of further collapse, unless it is strengthened or restored.

There was apparently no dispute between the parties as to these essential facts, and

upon them the plaintiff claimed, by way of equitable relief, a mandatory injunction directing the proper repair or rebuilding of the wall by the defendant, and legal relief in damages for the injury already incurred. The defendant, in pursuance of a counterclaim which rehearsed the more important of the facts and supplemented them with further allegations in the nature of assumed legal deductions from them, claimed a mandatory injunction compelling the restoration of the wall by the plaintiff to a condition of efficiency, or the furnishing of other adequate support for the defendant's land. The trial court rendered judgment for the defendant for a mandatory injunction as prayed for, and for nominal damages, and the plaintiff's claim of error, alternatively stated in its several assignments upon the appeal, is based upon the court's holding that the duty of maintaining the wall rested upon the plaintiff, and in not holding that it rested upon the defendant.

William H. Shields and William H. Shields, Jr., both of Norwich, for appellant. Jeremiah J. Desmond, of Norwich, for appellee.

CASE, J. (after stating the facts as above).

[1] When a former owner of the Lyons land first disturbed its surface, he did so at the peril of answering in damages if his act should destroy the lateral support which was his neighbor's by natural right. The law as to that situation is universally settled:

"The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition." *Gilmore v. Driscoll*, 122 Mass. 199, 201, 23 Am. Rep. 312; *Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579; *Ceffarelli v. Landino*, 82 Conn. 126, 72 Atl. 564.

He apparently recognized this, and sought to forestall the probable result to the higher ground of the upper lot by substituting an artificial support to safeguard it. In every effective sense he accomplished this purpose, but what he actually did was to take away a portion of his neighbor's land and replace it with a solid stone wall. Whether he invaded the adjoining lot by mistake or with its owner's consent is of no consequence, so far as his successors in title are concerned. It was in any event so done as to leave no charge upon his own land. The wall became as much a part of the realty upon which it was built as the earth had been which it replaced, and with the same incidents and burdens of ownership as attach to every part of the land on which it stands. *Ward v. Ives*, 91 Conn. 12, 21-22, 98 Atl. 337.

The accepted law with relation to lateral support is therefore without direct significance here, and of only an incidental interest in its possible bearing upon the equities which the case discloses. Such right arising from it as the defendant's predecessors in title had in relation to the adjoining land

was by way of relief in damages, once a wrongful invasion had been followed by an actual injury to the land. There is, of course, no natural right to equitable interference for the prevention of such an anticipated wrong, though it may very well be that in cases presenting situations peculiar to themselves and disclosing the essential elements of irreparable injury a court of equity will interpose its aid. But the redress contemplated by the law is that which comes from an infringement of the right that works actual damage. The violator is then answerable for his tort, whether he be the owner of the premises on which the initial mischief is committed or the merest stranger to the title. *Gilmore v. Driscoll*, 122 Mass. 199, 208. The action is a purely personal one. The wrong which gives rise to it binds the land to nothing—charges the title with nothing. But if the owner, in anticipation of such an injury arising out of his acts, sets an artificial structure on his own land to prevent it, and to replace what he has removed, he assumes an obligation which equity will recognize, and charges the land with its maintenance, so far, at least, as that maintenance is necessary to preserve his neighbor's rights.

The defendant seems to assume that in some way the situation presented here is controlled by this principle, and relies chiefly upon the earnestly urged unfairness of saddling the maintenance of the wall upon her, when it was confessedly erected by a former owner of the adjoining land to protect what later became hers from the consequences of his invasion. However persuasive her statement of the equities may appear in this limited view of the situation, the claim is not tenable. It ignores the entire absence of the link vitally necessary here to fasten any liability upon the plaintiff—a burden upon the land itself which attaches to her as its owner. She is obviously only reachable through this, and it is not even seriously suggested that under the positive and well-understood law of real property the land came to her charged with any duty to this wall. As to any supposable personal agreement by the builders of the wall to maintain it, if we were at liberty on the record before us to assume that such an agreement ever existed, there is no conceivable theory of law or equity which could transfer the obligations of such a personal undertaking to the plaintiff upon her mere acquirement of a title in no way affected by it.

But, while these considerations are decisive of the case, it is apparent that something might be said for the plaintiff's equitable position here, if there were occasion to treat the matter in that aspect. She succeeded to her present ownership as recently as 1913, and took the land as she found it. The wall was no part of her purchase, but was an open and visible part of the adjoining property.

We may properly assume from the facts found that it was then in an advancing condition of decay. Whatever the original purpose of its erection had been, it became, after her ownership began, a source of annoyance, if not a menace, to her occupation. Even had she taken title with knowledge that the structure had been voluntarily put there by some former owner of the land she was buying, to avoid a personal liability for a tort of his own, this could not weaken her position from the standpoint of equity. She was in no sense equitably, any more than legally, answerable for any act of her predecessor in title, to which she was not a party, and which did not result in a charge upon the land. We are unable to sustain the judgment of the trial court, charging the plaintiff, as it does, with the duty of maintaining the wall, but the finding is comprehensive enough to warrant a final disposition of the case without a retrial.

[2] The plaintiff is entitled to recover for the damage already done to her land by falling parts of the wall; but as to her claim for equitable relief by way of a mandatory injunction directing the rebuilding or restoration of the wall to its original condition, we are not satisfied that irreparable injury is clearly enough disclosed to warrant the exercise of so drastic a power. Equitable relief of this character is, and for the most obvious reasons should be, granted only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice. The facts of the case before us hardly bring it within this requirement.

There is error, the judgment is reversed, and the cause is remanded, with directions to the court of common pleas to enter a judgment for the plaintiff to recover damages, assessed at \$25. The other Judges concurred.

(88 Conn. 55)

DORUS v. LYON.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. LIMITATION OF ACTIONS §85(3)—ABSENCE FROM STATE—RESIDENCE WITHIN STATE.

Where the debtor in 1892 took an apartment in New York City, removing from Connecticut, except that until 1906 he continued to keep a residence at his mother's house in Connecticut, where for a considerable part of each year he spent three days a week, and his name was on the voting list in Connecticut, he was not without the state so as to toll the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 451.]

2. DOMICILE §1—"RESIDENT."

A man may be a resident in two or more states at the same time.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 1.]

3. PROCESS §61—"USUAL PLACE OF ABODE."

The house where a resident of Connecticut habitually spends three days of the week for 14 years, except when away on trips and vaca-

tions, is his usual place of abode for the purpose of serving process upon him.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 69.

For other definitions see Words and Phrases, First and Second Series, Usual Place of Abode.]

Appeal from Court of Common Pleas, Fairfield County; Frank L. Wilder, Acting Judge.

Action by James H. Dorus against Florence G. Lyon, executrix of Charles H. Lyon, deceased. Judgment for defendant, and plaintiff appeals. No error.

The plaintiff's cause of action accrued March 9, 1892, against Charles H. Lyon, then of Bridgeport, and this action was not brought against his executrix until December, 1915. To a plea of the statute of limitations the plaintiff replied that Lyon removed from the state of Connecticut in 1892, and continued to reside out of the state until his death in April, 1915. The reply was traversed, and the finding on that point is that Lyon and his wife took an apartment in New York City in 1892, and removed from the state, and were without the state until his death, except that from 1892 until the death of his mother in 1906 Lyon continued to keep a residence at his mother's house in Bridgeport, where for a considerable part of each year he spent three days a week. Also that Lyon's name was on the voting list of the city of Bridgeport until his death, that he sometimes voted there, and that it was his usual custom to spend Thursdays, Fridays, and Saturdays of each week at his mother's house, where he had a room, except those portions of the year when he was away from Bridgeport on some trip or vacation. There are other findings not inconsistent with the above which, in the view we take of the case, need not be repeated.

William H. Comley, Jr., and Charles A. Hopwood, both of Bridgeport, for appellant. W. Parker Seeley, of Bridgeport, for appellee.

BEACH, J. (after stating the facts as above). [1] The controlling question is whether Lyon was "without the state," within the meaning of General Statutes, § 1125, from 1892 to 1906, so that the statute of limitations did not run against the plaintiff's cause of action during that period. If it did, the plea was good. It seems clear that the finding concludes the point against the plaintiff's contention. The finding is that Lyon was without the state except as therein stated; but the exceptions nullify the affirmation.

In *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 123, we held that the proviso as to absence from the state did not refer to temporary absences, but was intended to preserve the plaintiff's right of action during a period when, by reason of the defendant's

absence, it was impossible to commence an action in personam against the defendant; and we said that if the defendant is domiciled or resident within the state, although temporarily absent therefrom, the statutes still provide a way by which a personal action may be commenced against him, in which a judgment may be obtained which will be binding and conclusive between the parties, and therefore in such a case no saving of the right of the plaintiff to commence such an action is necessary.

In this case the defendant was not even absent from the state. He was customarily in Bridgeport three days in the week, and by the exercise of ordinary diligence the creditor could have ascertained that fact, and commenced his action at any time.

[2, 3] The finding that he sometimes voted in Bridgeport indicates very strongly that Lyon himself regarded Bridgeport as his legal domicile. There is no finding on the point of domicile, but it is expressly found that he had a residence in Bridgeport, and the necessary inference from the other facts found is that he also had a usual place of abode in Bridgeport. A man may be a resident in two or more states at the same time, and the house where a resident of Connecticut habitually spends three days in the week for a period of 14 years, except when away on trips and vacations, is his usual place of abode for the purpose of serving process upon him.

There is no error. The other Judges concurred.

(92 Conn. 32)

CARTER v. ROWE et al.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. MASTER AND SERVANT § 375(2) — WORKMEN'S COMPENSATION ACT — INJURY IN COURSE OF AND OUT OF EMPLOYMENT.

Where one was employed to work on a boat, and on reporting at the appointed time for sailing was informed it would not sail till 11 o'clock, and given permission to use the intervening time as he pleased, and went ashore, his injury by fall while returning at 10 o'clock, and while going through the employers' yard, a not unreasonable route, arose in the course of and out of his employment.

Appeal from Superior Court, New Haven County; James H. Webb, Judge.

Claim of Alexander G. Carter against Henry C. Rowe and others under the Workmen's Compensation Act (Laws 1913, c. 138). From judgment dismissing appeal from decision and award of compensation commissioner of the Third district in favor of plaintiff, and affirming the award, defendants appeal. Affirmed.

Patrick Healey, of Waterbury, for appellants. L. Erwin Jacobs, of New Haven for appellee.

WHEELER, J. The finding of the commissioner recites these facts: On September 23, 1916, the plaintiff entered into a contract of employment as a hand upon the defendants' boat, and was instructed by the defendants to report for duty on the boat, which was to sail at 5 o'clock in the afternoon of September 24th. The plaintiff reported on the boat shortly before the hour of sailing. He was there informed that the boat would sail at 11 o'clock and shortly went ashore, leaving his baggage on the boat. About 10 o'clock in the evening he returned to the premises of the defendants, and while going through their yard to board the boat fell in the darkness and suffered injuries, for which he claims compensation.

[1] The sole ground on the appeal to this court is that the trial court erred in deciding that the injury arose in the course of and out of the employment of the plaintiff. Carter's employment was to have begun at 5 o'clock, and from the time he entered his employer's premises in order to reach the boat until he boarded her shortly before 5, he was doing something incidental to his employment and reasonably within its period. Employment may exist before actual work begins, just as it may continue after actual work has ceased. When he left the boat and went ashore he was, so far as the finding of the commissioner discloses, engaged upon his own business or pleasure, and not in the course of his employment. From the memorandum of the commissioner it appears that this question was not raised before him, which explains its absence from his finding. If Carter left the boat without orders and without permission, he voluntarily left his place of employment, and such dangers as he thereafter encountered could not be held to have arisen in the course of or out of his employment. Any injury so suffered occurred outside the place of his employment, since that was on the boat and not on shore, and while he was bent upon his own business and not upon the duties of his employment. *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584; *Mann v. Glas-tonbury Knitting Co.*, 90 Conn. 116, 118, 96 Atl. 368, L. R. A. 1916D, 86; *Warren v. Had-ley's Colliery Co.*, 6 B. W. C. C. 136.

In his memorandum of decision the trial judge says: "He [Carter] was given permission to use the intervening time as he pleased." The parties at least in the oral argument, have argued the cause as if this fact were a part of the finding before us. If we so assume, it would follow that Carter had been given the privilege of using his time at his will, and of leaving the boat and his employer's premises and returning at his pleasure. This permission would be subject to an implied qualification that he should re-

turn a reasonable time before the boat sailed and by a reasonable route over the owner's premises. The defendants have argued the case upon the theory that the employment of Carter began at 11 o'clock instead of at 5 o'clock. If their assumption were to be made, it would not follow, in the absence of express contract to the contrary, that Carter could not have boarded the boat an hour before she sailed. That, it seems to us, would not have been an unreasonable time to have sought the place of employment before the boat was to sail. Carter might well have supposed there would be duties to perform some time before the sailing. *Fitzpatrick v. Hindley Field Colliery Co.*, 4 W. C. C. If Carter left the boat by permission, and while returning to it and his work he was injured upon his master's premises, and while he was proceeding over a not unreasonable route, and while he was at a place where he had a right to be, and within the period of his employment, which began at 5 o'clock, he was injured in the course of his employment and his employment was a proximate cause of his injury.

There is no error. The other Judges concurred.

(92 Conn. 37)

SWANSON v. LATHAM & CRANE et al.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. MASTER AND SERVANT §418(5) — WORKMEN'S COMPENSATION ACT—REVIEW—QUESTIONS RESERVED.

Where the superior court reserved for the advice of the Supreme Court of Errors questions of law raised on appeal from an award under the Workmen's Compensation Act (Laws 1913, c. 138), only the questions reserved can be considered.

2. MASTER AND SERVANT §417(7) — WORKMEN'S COMPENSATION ACT — FINDINGS OF COMMISSIONER—REVIEW.

Upon an appeal from the findings of the commissioner under the Workmen's Compensation Act, the trial court does not retry the facts, but decides upon the findings of the commissioner, unless the appeal assigns as error the findings, or omission to find any facts, and the court finds that facts have been found, or omitted, which would affect the result.

3. MASTER AND SERVANT §418(6) — WORKMEN'S COMPENSATION ACT — FINDINGS OF COMMISSIONER—REVIEW.

Upon appeal under Workmen's Compensation Act from the decision of the trial court, or upon a reservation in a compensation case, our authority does not differ from that exercised by us in the ordinary appeal for errors in the findings of the trial court.

4. MASTER AND SERVANT §375(2)—INJURIES TO SERVANT—COURSE OF EMPLOYMENT.

Defendants agreed as part of the contract with their employes that they would pay them, in addition to their regular wages, 90 cents each day as transportation charges to and from the place of employment. Defendants arranged

with one of the workmen, who had an automobile, to carry the others. While returning from work, the automobile collided with a train and the workmen including the driver were killed. *Held*, in an action by the widow of a workman for compensation under the Workmen's Compensation Act, that the injury was one arising out of and in the course of the employment.

5. MASTER AND SERVANT — 375(2) — WORKMEN'S COMPENSATION ACT — PROXIMATE CAUSE OF INJURY.

The employment was the proximate cause of the injury.

Case Reserved from Superior Court, Hartford County; Edwin B. Gager, Judge.

Proceeding under the Workmen's Compensation Act by Alice May Swanson against Latham & Crane, employer, and the Aetna Life Insurance Company, insurer. From an award of compensation by the compensation commissioner, the respondents appealed to the superior court in Hartford county. Questions of law raised reserved for the advice of this court. Judgment advised, dismissing the appeal.

Warren B. Johnson and Leonard J. Collins, both of Hartford, for appellants. William A. King and Samuel B. Harvey, both of Willimantic, for appellee.

WHEELER, J. The facts essential to the decision of this appeal, as found by the commissioner, are these:

The claimant is the widow of Andrew S. Swanson, a carpenter who was employed by the respondents, Latham & Crane, building contractors, of Willimantic, to work upon the Dennis house in Stafford Springs, for the repair of which the contractors had the contract. The contractors agreed, as a part of the contract of employment with Swanson and five other employes, including Osterhout, similarly employed, who lived in or near Willimantic, that they would pay them, in addition to their regular wages, their transportation charges, fixed at 90 cents each day, from Willimantic to Stafford Springs and return. These employes were at liberty to remain in Stafford Springs and use the 90 cents for board, or to return to Willimantic and use it for transportation.

The contractors arranged with Osterhout, one of these workmen, to carry these employes to and from Stafford Springs in his own automobile, operated and maintained by him, for the sum of 90 cents a day for each man.

On this particular job the transportation for these men was provided by means of Osterhout's automobile, which the men so used, and the 90 cents for each man paid by the contractors to Osterhout, and charged to Dennis, and later paid by him.

On December 7, 1916, about 5 o'clock in the afternoon, while returning from their

work in Stafford Springs to their homes in Willimantic, the automobile collided with a train at a railroad crossing, and Swanson and the other five men in the automobile were killed.

The questions of law reserved are:

"Did the commissioner err in holding: (1) That the injury to and death of the decedent arose out of his employment with the respondents Latham & Crane. (2) That the injury to and death of the decedent arose in the course of said employment. (3) That the claimant was entitled to compensation by reason of said injury and death. (4) That there was an understanding or agreement between the employers and the Carpenters' Union whereby the former agreed to provide transportation for the decedent. (5) That it was a part of the contract of employment between the employers and the decedent that the latter was to be carried to and from his work by Osterhout."

[1] These questions, following the correspondingly numbered reasons of appeal, are identical with them, except that in questions 3, 4, and 5 the words "upon the evidence," appearing in the reasons of appeal after the words "in holding," are omitted. This omission has not changed the purpose or meaning of the reasons of appeal. The questions reserved are, and were intended to be, those contained in the reasons of appeal.

Assignments of error 4 and 5 in the appeal from the commissioner and questions 4 and 5 upon the reservation were, we presume, intended as statements of error committed by the commissioner in finding the facts set forth in these assignments; the words "in holding" being used in the sense of "in finding." We have examined the evidence with care, and are of the opinion that the trial court might reasonably have found the facts complained of.

[2, 3] Question 3, reserved, which is assignment of error 3, is based upon a mistaken conception of the nature of the appeal from the commissioner. The trial court does not retry the facts. It decides the appeal upon the finding as made by the commissioner, unless the appeal assigns as error the finding or omission to find any facts, and the court finds that facts have been found or omitted, which, if found, in accordance with the evidence, would affect the result. The right of the trial court to correct the finding of the commissioner is similar to that exercised by us upon a proper appeal over the finding of a trial court. And our authority upon appeal from the decision of the trial court, or upon a reservation in a compensation case, does not differ from that exercised by us in the ordinary appeal for errors in the finding of the trial court.

[4] The remaining assignments of error are the holding of the commissioner that the injury suffered arose in the course of and out of the employment. The contract of employ-

ment between the decedent and the respondents required the decedent to work outside of the place of his residence, Willimantic, if his employer should so desire; and the respondents agreed that, while the decedent was at work in Stafford Springs, they, as a part of his contract of employment, would convey the decedent from his home to his work and back to his home each day in an automobile provided by them. The work began when the decedent reached Stafford Springs; the employment began when the decedent boarded the automobile at Willimantic, and continued during the trip and during the work, and on the return trip to Willimantic. Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. The injury occurring during the transportation occurred within the period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it. The case falls clearly within the construction we have heretofore placed upon the terms of the statute "arising in the course of the employment." *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 308, 97 Atl. 320, L. R. A. 1916E, 584. An injury received by an employé while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.

[5] The injury arose in the course of the employment and while the decedent was being transported to his home; consequently the employment was the proximate cause of it. It therefore arose out of the employment; for these are the tests to ascertain in a given case whether an injury arose out of the employment. *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584.

The commissioner did not err in the matters reserved. The superior court is advised to render its judgment dismissing the appeal. The other Judges concurred.

(92 Conn. 91)

OSTERHOUT v. LATHAM & CRANE et al.
(Supreme Court of Errors of Connecticut.
July 6, 1917.)

Case Reserved from Superior Court, Hartford County; Edwin B. Gager, Judge.

Proceeding under the Workmen's Compensation Act (Laws 1913, c. 138) by Cora T. Osterhout against Latham & Crane, employers, and another. From an award of compensa-

tion by the Compensation Commissioners, the respondents appealed to the superior court in Hartford county. Case reserved. Judgment advised, dismissing the appeal.

Warren B. Johnson and Leonard J. Collins, both of Hartford, for appellants. William A. King and Samuel B. Harvey, both of Willimantic, for appellee.

WHEELER, J. The facts are identical with the companion case. *Swanson v. Latham & Crane et al.*, 101 Atl. 492. The decedent, Osterhout, was an employé of the respondents, and the contract of employment with him was the same as with Swanson. He stood in a dual relation to Latham & Crane. As the owner of the automobile, he was their agent to transport in his own automobile Swanson and the other employés, including himself, from Willimantic to Stafford Springs and back each day, for the sum of 90 cents each day for each employé, including himself. As an employé his contract of employment during the period of transportation did not differ in any essential from Swanson's and the other employés'. So far as the facts disclose, Osterhout's case does not differ from Swanson's.

The superior court is advised to render its judgment dismissing this appeal.

(92 Conn. 139)

McNERNEY v. DOWNS.

(Supreme Court of Errors of Connecticut. Aug. 2, 1917.)

1. PRINCIPAL AND SURETY — ACTIONS — DEFENSES.

A surety cannot deny facts recited in his obligation, unless such recital was inserted by mistake, and cannot object that the bond was given without consideration, that judicial proceedings in which it was given were irregular, or that necessary preliminary steps were not taken; but he is not estopped from questioning the legality of its execution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 91-95.]

2. ATTACHMENT — OFFICER'S RECEIPT — VALIDITY.

An officer's receipt, executed to release attached property, which provides that the obligor will redeliver the property or pay a sum certain, and which contains a waiver clause that the obligor is estopped from denying the attachment, the ownership, and the value of the property, is not prohibited by statute, is not against public policy, and is supported by sufficient consideration.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 609-622.]

3. ATTACHMENT — OFFICER'S RECEIPT — ACTIONS — DEFENSES.

In an action on an officer's receipt, executed to release attached property, the obligor cannot object that the judgment against the defendant in the principal action was not binding upon the obligor, because no legal service was made of the process, nor statutory provisions complied with.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 609-622.]

4. ATTACHMENT \Leftrightarrow 190—OFFICER'S RECEIPT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action on an officer's receipt, executed to release attached property, which contained a waiver clause providing that obligor was estopped from denying ownership of attached property, testimony tending to prove that defendant in the principal action was not the owner was inadmissible.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 623-632.]

Appeal from City Court of New Haven; John R. Booth, Judge.

Action by Peter J. McNerney against William S. Downs. Judgment for plaintiff, and defendant appeals. Affirmed.

William S. Downs, of Derby, in pro. per. David M. Reilly, of New Haven, for appellee.

RORABACK, J. The following facts appear to be undisputed: The plaintiff is a deputy sheriff in and for the county of New Haven. On the 30th day of August, 1915, the plaintiff had in his hands for service as such deputy sheriff a writ of attachment against one F. W. Skinner, a resident of the town of Derby, in favor of John H. Dillon and William H. Douglas, of New Haven, which writ was returnable to the city court of New Haven on September 13, 1915. The plaintiff, by virtue of this writ, attached as the property of Skinner certain cigars and liquors, and afterwards took an officer's receipt for the same, which receipt was signed by the defendant. This receipt contained, among others, the following provisions:

"Which said property we hereby, for a valuable consideration, agree and promise, jointly and severally, to redeliver in good order to said officer (or any officer legally authorized to receive the same), on demand, or in default thereof to pay the sum of \$60, or (if demand be not made before judgment is rendered) the amount of damages and costs which shall be recovered by the plaintiff in said case, if the same shall fall short of such sum; it being understood that we are hereby estopped from denying that the property herein described has been attached by said officer, and that we have received the same from him, and is the property of said defendant, and of the value herein named. Schedule of property attached, viz.: Cigars and liquors of the agreed value of \$60."

Skinner at this time was absent from the state and gone to parts unknown, and a true and attested copy of the writ of attachment was left by the officer with C. O'Brien for Skinner; O'Brien at this time having charge of the attached property. On February 11, 1916, Dillon and Douglas obtained a judgment, by default, in the city court of New Haven, against Skinner in this action. On the same date an execution was issued on this judgment, and subsequently returned to the city court wholly unsatisfied. This judgment has never been paid. On March 28, 1916, the plaintiff demanded of the defendant the property attached and described in the officer's receipt, but the defendant failed to deliver the same. On the same date, the

plaintiff demanded of the defendant payment in satisfaction of the judgment and costs, but the defendant failed to pay the same. Prior to the demand upon the defendant by the plaintiff for the property receipted for, the defendant returned and surrendered possession of this property to O'Brien hereinbefore referred to; O'Brien having demanded the same from the defendant.

The trial court reached the conclusion that the defendant was, by the terms of the officer's receipt, estopped from denying that the property described in this receipt was the property of Skinner. It is unnecessary to consider the action of the trial court in sustaining a demurrer to the third paragraph of the defendant's answer, as the same question is presented in the third reason of appeal, which avers that the court erred in ruling:

"That the defendant was by the terms of said officer's receipt estopped from denying that the property described in said officer's receipt was the property of F. W. Skinner."

In 1 Brandt on Suretyship & Guaranty (3d Ed.) § 52, it is said:

"The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts, they cannot afterwards be heard to deny it."

[1] As a rule a surety cannot deny facts recited in his obligation, unless such recital was inserted by a mistake; and he cannot now claim that a bond was given without consideration, that the judicial proceedings in which it was given were irregular, or that the necessary preliminary steps were not taken. If the obligation has accomplished the purpose for which it was given, the surety will not be permitted, thereafter, to free himself from its disadvantages. But a surety is not estopped, by the recitals of the bond, from questioning the legality of its execution. 32 Cyc. 69.

The parties, as it appears from this bond, had agreed that the defendant should be estopped by the terms of the contract from denying that the property had been attached by the officer, that it had been received from him, and that it was the property of the defendant Skinner. It appears that one of the express purposes of this written contract was to exclude, as between the officer and the defendant, the possibility of the latter challenging the right of Skinner to the property attached. Dejon v. Street, 79 Conn. 337, 65 Atl. 145.

[2] This bond was voluntarily given by the defendant, upon a sufficient consideration, and such an undertaking is not prohibited by statute or against public policy. The defendant in the former action, or his agent, by means of this undertaking upon the part of the defendant in the present case, has secured possession of the property of Skinner, and the defendant, Downs, cannot now

escape the liability of the nonperformance of his agreement.

[3] The defendant also contends that:

"The judgment against Skinner was not binding upon this defendant, because no legal service was made of the process, nor the provisions of the statute complied with."

As we have already stated, the defendant cannot now claim that the judicial proceedings in which this receipt was given were irregular, or that the necessary preliminary steps had not been taken before the judgment was rendered. He was not a party to the original action, and the judgment rendered thereon cannot now be collaterally attacked by one who has agreed to redeliver the property attached on judgment to the officer, or pay the damages and costs recovered in that action. Aside from this, the record discloses that this property was lawfully attached by the plaintiff, who it appears left a true and attested copy of the original writ of attachment with the person having charge of the property of Skinner, who, as the finding states, was absent from the state and in parts unknown at the time the attachment was made.

[4] In view of what we have already stated, it is unnecessary to discuss the defendant's claim that the trial court erred in rejecting his testimony, which tended to prove that the defendant Skinner did not own the property receipted for when it was attached. It was not admissible.

Of the other errors assigned, none seem to have sufficient merit to warrant their discussion.

There is no error. The other Judges concurred.

(92 Conn. 35)

STATE v. MAD RIVER CO.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. TAXATION \Leftrightarrow 159—CORPORATIONS—WATER COMPANY.

To render a company taxable under Pub. Acts 1915, c. 292, pt. 2, it must have been principally engaged in selling and distributing water and must have derived gross earnings from such operation within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 279.]

2. SALES \Leftrightarrow 263—NATURE.

Under Pub. Acts 1907, c. 212, § 1, defining sales, a "sale" implies an ownership in the thing sold and the passing of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 746, 749-751, 763.

For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. TAXATION \Leftrightarrow 159—CORPORATIONS—WATER COMPANY.

Pub. Acts 1915, c. 292, pt. 2, taxing companies selling and distributing water, is inapplicable to a concern maintaining reservoirs to render a stream's flow uniform for the benefit of its stockholders who were riparian owners, since there was no sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 279.]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Application by the State of Connecticut against the Mad River Company to determine the amount of a tax. From a judgment fixing the amount of such tax, the defendant appeals. Reversed and remanded for rendition of a judgment denying the application.

Mad river is a small tributary of the Naugatuck river. In 1866, six riparian owners along the former stream entered into an agreement by the terms of which two reservoirs were to be built on streams which flowed into it, and an agent was appointed by them to buy the land and hold the same in trust, collecting from time to time from the parties to the agreement the expenditures entailed in the execution of the enterprise in certain specified portions. In 1872, this agreement was extended to include a third reservoir, also located on a stream tributary to Mad river. Pursuant to these agreements, the necessary land was purchased and the reservoirs built. The title to them was vested in a trustee.

In 1873, the defendant was chartered by the General Assembly. Its purpose, as stated in the charter, was "to maintain and improve the water power by the means of reservoirs, cultivation of timber, and other suitable means on the stream known as Mad river * * * and upon the branches and sources of said stream and to purchase and hold certain improvements already made thereon." The corporation took over, in payment for its stock, all the property acquired under the two agreements recited, and the parties to those agreements became its stockholders. Its sole property was, and still is, the three reservoirs together with their dams and the land connected therewith. It neither owns nor utilizes any canals, pipes, or flumes. It has never diverted any of the water of the streams, upon which its reservoirs are located, from its natural course, nor has it the means or instrumentalities for doing so. The dams and reservoirs are operated so as to hold back and store the water in times of plenty for release at such other times and in such amounts as its stockholders may desire. The water of the streams, after leaving the gates of the reservoirs, is at the service of every lower riparian proprietor. No objection has ever been made by any such proprietor, not a stockholder in the defendant, to the retention of the water impounded and economized in the reservoirs. The highest site owned by any of the stockholders is four or five miles below the nearest reservoir.

For a long time it has been customary for the Scovill Manufacturing Company, one of the defendant's stockholders acting informally as its manager, to advance all the expenses of maintenance and taxation, and obtain reimbursement from the other stock-

holders in proportions agreed upon at the annual meetings. These proportions have varied from time to time. No two stockholders own the same amount of stock, and contributions made by the several stockholders towards the payment of the expenses of the corporation have borne no fixed relation to the amount of stock owned. Each stockholder is represented on its board of directors. The revenues of the corporation are confined to the contributions made to meet the expenses of maintenance and taxation as above stated.

Arthur F. Ellis, of Waterbury, for appellant. George E. Hinman, Atty. Gen., for the State.

PRENTICE, C. J. (after stating the facts as above). [1] The Attorney General brings this application under section 15 of chapter 292 of the Public Acts of 1915 for an order for the payment by the defendant to the state of an amount claimed to be due under and by virtue of the provisions of part 2 of that act, being one providing for the taxation of certain corporations, partnerships, and so forth. To bring the defendant within the operation of these provisions three conditions must be met, to wit: (1) Its principal business must have been that of operating a system of waterworks; (2) that operation must have been for the purpose of selling and distributing water for domestic or power purposes; and (3) it must have had gross earnings from such operation in this state.

[2, 3] It may be assumed without decision that the first and last named of these conditions were satisfied in the defendant's case. The second surely was not. That condition embraces both the sale and distribution of water. If it can reasonably be said that allowing the water of a stream to flow in its accustomed channels and be used and enjoyed freely by those who as riparian owners are entitled to use and enjoy it is distribution within the meaning of the statute, the element of sale of the water thus distributed clearly is wanting. A "sale" implies an ownership in the thing sold and a transfer of that ownership to another. P. A. 1907, c. 212, § 1. It involves the passing of title. The defendant never has had title to the water which it has detained in its reservoirs, and it has never undertaken to give to any one title to it or to any part of it. It has never attempted either to appropriate any water, or to divert any from its natural channels, or to restrict the beneficial enjoyment of the waters of the streams by lower proprietors entitled to such enjoyment. The only thing that it has sought or accomplished is a control of the flow of the water in such manner that through avoidance of waste at times and of shortage at other times the interest of riparian proprietors should be more beneficially served than would otherwise be the

case. The purpose of the defendant is not sale, but conservation. It exists for the rendition of service, and not for dealing in a salable commodity.

There is error, the judgment is set aside, and the cause remanded for the rendition of judgment denying the application. The other Judges concurred.

(92 Conn. 93)

TIERNEY v. MARTONE et ux.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. SHERIFFS AND CONSTABLES ⇨87—SERVICE OF WRIT—DUTIES OF OFFICER.

An officer, duly qualified with a lawful precept, is not required to declare by what authority he acts until the authority is questioned.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 119.]

2. TRIAL ⇨140(1)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

It is within the province of the jury to determine the credibility of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334.]

3. ASSAULT AND BATTERY ⇨40—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where an officer, attempting to serve a writ of attachment, was assaulted and received severe bruises, a broken nose, and was incapacitated to follow his usual vocation for two weeks, and incurred a property loss of \$87 on account of his injuries, a verdict of \$300 was not excessive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55.]

4. ASSAULT AND BATTERY ⇨44—CIVIL LIABILITY—JOINT VERDICT.

Where plaintiff in serving a writ of attachment was assaulted by defendant and his wife at the same time, a joint verdict was warranted.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 63.]

Appeal from District Court of Waterbury; Francis T. Reeves, Judge.

Action by John D. Tierney against Nunziante Martone and wife. Judgment for plaintiff, and defendants appeal. No error.

The plaintiff had a writ directing him to attach the property of Rocco Martone, a son of the defendants. The defendants in their answer justify the assault, alleging that when the plaintiff attempted to attach the son's automobile, the defendants informed the plaintiff that the son was indebted to his mother the defendant Philomena in the sum of \$25 for storage of the automobile, and that it could not be moved until the storage was paid, and that thereupon the plaintiff assaulted the defendant Nunziante, and the defendant Philomena went to her husband's assistance, and used no more force than was necessary to protect themselves from the plaintiff's assault. The cause was tried to the jury, and they rendered a verdict for the plaintiff against both defendants and assessed damages at \$300.

Charles W. Bauby, of Waterbury, for appellants. John J. O'Neill, of Waterbury, for appellee.

SHUMWAY, J. (after stating the facts as above). The defendants complain that the court erred in its charge in its refusal to charge as requested and by the refusal of the court to set aside the verdict as against the evidence and because the damages found were excessive, so far as appears from the defendants' brief, the claimed errors in the charge and refusal to charge are not pressed for consideration by this court. But, however, if they are, the court complied substantially with the requests to charge, except one, as follows:

"If you find that the plaintiff did not disclose to the defendants that he was an officer and had a writ to serve, then you would be justified in reaching the conclusion that the plaintiff was a trespasser, and that the defendants had a right to order him from the premises and use force in ejecting him."

[1] The defendant was not entitled to have the jury so instructed. An officer duly qualified with a lawful precept is not required to declare by what authority he acts until the authority is questioned. It would be better in the orderly performance of his duties for an officer to inform all who may be immediately concerned that he is an officer with a legal process to serve as was done in this case. The defendants' answer alleges that the plaintiff demanded the payment of a bill. It appeared in the evidence that the defendants fully understood the plaintiff was an officer and about to make an attachment. It is also apparent that the affray between the plaintiff and defendant began because of the plaintiff's declaring his intention to seize the automobile by attaching it and the defendants objecting because Mrs. Martone claimed a lien on it for storage. Nunziante Martone testified that the plaintiff made an unprovoked assault on him at the time when he claimed his wife had a lien on the automobile, while the plaintiff testified that Nunziante assaulted him as he started to move it and attempted to obstruct him in the service of the writ.

[2] The defendants' main contention in the brief is that the trial court should have granted a new trial because the verdict was against the evidence and the damages were excessive. The verdict was not against the evidence. The evidence was so conflicting that the credibility of the witnesses became all important, and surely it was within the province of the jury to determine where the truth lay, if possible.

[3] It cannot be said that \$300 was an excessive verdict, as the plaintiff testified he received severe bruises, a broken nose, and was incapacitated to follow his usual vocation for two weeks, and incurred a property

loss and expenditure of \$87 on account of his injuries.

[4] It is suggested that the court erred in accepting a joint verdict against the defendants; the contention being that if the defendant Philomena assaulted the plaintiff, it was a separate assault and not the one in which her husband was concerned. Evidence was offered tending to prove that, while the plaintiff and defendant Nunziante were struggling upon the ground, the defendant Philomena struck the plaintiff several times with a piece of stove wood. If the jury found the facts as stated, they were properly instructed that the defendants committed a joint assault, and were jointly liable. There is no error. The other Judges concurred.

(92 Conn. 29)

HOTT v. CITY OF NEW HAVEN et al.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

MUNICIPAL CORPORATIONS §705(1)—STREETS—DANGEROUS AGENCIES—NEGLIGENCE.

If an express wagon driver ought, in the exercise of due care, to have seen the sagging wire from a broken trolley wire pole and to have appreciated the danger of its becoming entangled with his truck and the possibility of pulling down the pole, he was negligent in driving into the wire, and his negligence was a contributing cause to the death of one struck by the falling wire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

Appeal from Superior Court, New Haven County; Howard J. Curtis and Edwin B. Gager, Judges.

Action by Grace L. Hott, administratrix, against the City of New Haven and others. From a verdict for plaintiff and denial of motion to set aside the verdict, defendant Adams Express Company appeals. No error.

Action to recover damages for negligence brought against the city of New Haven, the Connecticut Company, and the Adams Express Company to the superior court for New Haven County, where demurrers by the city of New Haven and the Connecticut Company were sustained (Curtis, J.), and the case against the Adams Express Company tried to the jury before Gager, J. Verdict for the plaintiff, motion to set aside verdict denied, and appeal by the Adams Express Company. No error.

Edmund Zacher and William B. Ely, both of New Haven, for appellant. Robert J. Woodruff and James J. Palmer, both of New Haven, for appellee.

PER CURIAM. A trolley pole fell upon and killed the plaintiff's intestate. The defendant ascribed the cause of the fall of the pole to the fireman engaged in working around and upon it after it had been cracked and bent by the impact of a fire engine run-

ning into it. The plaintiff ascribed the cause to the defendant express company's auto-truck becoming entangled in one of the wires attached to it which sagged through the bending of the pole, and in this way the truck pulled down the pole upon the plaintiff's intestate.

Our reading of the evidence satisfies us that the jury might reasonably have found the cause of the fall of the pole as the plaintiff claimed. And, further, the jury might reasonably have found that as the truck proceeded down George street its driver ought in the exercise of due care to have seen the sagging wire and to have appreciated the danger of its becoming entangled with his truck and liable to pull down the pole and injure some one of those in the street near by. Further, the jury might have found that the driver of the truck drove on after having received adequate warning. If the jury so found, and the verdict indicates this, the conclusion that the conduct of the driver was negligent and was a material and contributing cause of Hott's death necessarily followed.

The evidence would have justified the jury in finding that Hott just prior to being struck was in the middle of the highway in a position of no apparent danger and at such a distance from this pole, and surrounded as it was by people, that he could not reasonably have been expected to have seen that the pole was in danger of falling, and that in fact it was not in such danger until pulled down by the truck. The conclusion of due care, which the verdict indicates the jury found, cannot be said to have been found upon inadequate evidence.

There is no error. All concur.

(92 Conn. 25)

MASSEY v. FOOTE.

(Supreme Court of Errors of Connecticut.
July 6, 1917.)

1. COURTS ⇨201—PROBATE COURT—JURISDICTION.

A probate court's jurisdiction is entirely statutory, and it possesses only the necessary incidental powers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 86, 87.]

2. EXECUTORS AND ADMINISTRATORS ⇨315(4)—JURISDICTION OF COURTS.

Gen. St. 1902, § 203, empowering probate courts to revoke ex parte decrees before appeal and before final settlement of an estate, etc., does not authorize revoking a distribution order made upon notice, and from which an appeal had been taken.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1306.]

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Proceedings by Lucy A. Massey as guardian of Lydia L. Main Foote, for the allowance of her account as guardian against said

ward. A probate court decree, disallowing the account, was affirmed by the superior court, and the guardian appeals. Affirmed.

C. Hadlai Hull, of New London, for appellant. Edmund W. Perkins, of Norwich, for appellee.

SHUMWAY, J. The only debatable question in this case involves an interpretation of section 203 of the General Statute. The part of the statute bearing upon the question reads thus:

"Any court of probate may modify or revoke any order or decree made by it ex parte before any appeal therefrom, and if made in reference to the settlement of any estate, before the final settlement, * * * upon the written application of any person interested therein. * * *

[1] This court has held and reaffirmed that the entire jurisdiction of probate courts is statutory, special, and limited. In the exercise of such statutory jurisdiction they possess such incidental and implied powers, legal and equitable, and such only, as are necessary to the entire performance of all the duties imposed upon them by law. Potwine's Appeal, 31 Conn. 381; Hall v. Pier-son, 63 Conn. 332, 28 Atl. 544; Schutte v. Douglass, 90 Conn. 529, 97 Atl. 906. In passing upon the jurisdiction of probate courts, this court has considered also the power of probate courts to modify or set aside its orders and decrees. In this case now under consideration only such facts as are material need be recited.

It appears that William L. Main died in 1890, leaving a will which was duly offered for probate and was approved. The estate was distributed by order of the probate court. A portion thereof was distributed to Amos W. Main, a son of William L. Main. Amos W. Main died in July, 1901, leaving a widow, the present plaintiff. She was appointed administratrix upon her husband's estate on July 18, 1901. She duly filed an inventory and charged herself with this item. The interest of said deceased in his estate of his late father was estimated at \$2,000. On the 6th day of October, 1908, distributors were appointed to distribute the estate. The court, having ascertained the heirs and distributees of the estate of Amos W. Main, ordered the estate distributed to them. To the present plaintiff there was distributed as follows: One undivided third of the distributive share of what will remain for distribution of the estate of William L. Main that by the terms of his will would go to Amos Main on the death of the widow of William L. Main, had Amos outlived her. At the time of Amos W. Main's death he had a minor daughter, Lydia L. Main, the present defendant, and a minor son, Clifford M. Main. On the 27th day of July, 1901, the plaintiff was appointed guardian of her minor daughter, Lydia L. Main. The widow of William L. Main died in April, 1913.

By the distribution of the estate of Amos Main on October 6, 1908, which was approved by the probate court, one-third of what remained of William L. Main's estate was distributed to the plaintiff. On the 8th day of April, 1914, the probate court ordered the balance of the estate of William L. Main to be distributed to the beneficiaries named in the will, and these beneficiaries had been ascertained and adjudicated by the decree of the court of October 6, 1908. From the order of the court of April 8, 1914, one of the executors of the will of William L. Main appealed to the superior court, which appeal was pending in said court until October 27, 1914. In September, 1914, the executors of William L. Main's estate petitioned the probate court, setting out that the order of April 8th was informal, incorrect, and erroneous, and on the 27th day of October, 1914, that court made the following order:

"That the order passed on the 8th day of April be, and is hereby, reconsidered and amended to read as follows. * * * The heirs at law of said Amos Main are found to be his two minor children, Lydia L. Main and Clifford M. Main, Mrs. Lucy Massey being their guardian, each of said two children taking one-half of said balance"

—thus giving nothing to the widow. This procedure certainly constituted a revocation of the order of April 8th and if the probate court had authority to do this, the action of the superior court, affirming the order of October 27, 1914, should stand; otherwise it should be revoked.

[2] The statute above quoted gives the probate courts authority to modify or revoke its decrees made ex parte only before an appeal is taken. But in this case an appeal was taken, and the order was not made ex parte, but upon notice. In the case, *Delehanty v. Pitkin et al.*, 76 Conn. 412, 56 Atl. 881, the power of probate court over its decrees was fully considered, and there it was held that a probate court had no authority to revoke its decree, admitting to probate a document purporting to be a last will and testament, although that decree was obtained by fraud. The court in the case last named say it was at that time a "question of first impression in this state," though the "question was recognized, but not decided, in *Potwine's Appeal*, 31 Conn. 381." As indicating how that decision was regarded, the reporter in the *Potwine Case* appended to the opinion a quotation from *Pettee v. Wilmarth*, 5 Allen (Mass.) 144, in which this pertinent clause appears:

"If he [the probate judge] could rescind his first decree, he might rescind the second, and so on indefinitely; and there could be no certainty that any decree had finally established any party's rights, but every person in whose favor a decree had been obtained would hold it precariously at the discretion of the judge who passed it."

The doctrine of *Delehanty v. Pitkin et al.* is affirmed in *Schutte v. Douglass*, 90 Conn.

529, 97 Atl. 906, and it is now so well settled as to be no longer open to question.

It is, however, contended in the appellee's brief that the power of the probate court to revoke decrees extends, not alone to ex parte orders, but to orders in reference to the settlement of any estate before final settlement; that the word "and" conjoining the phrases in the statute above cited "order and decree made by it ex parte," "and if made in reference to the settlement of any estate," should be read "or," thus giving the probate court power to revoke or modify its decree in both cases. No such construction can fairly be put upon the statute; the language used and its meaning is too clear to permit it. There is error in the judgment of the superior court, a new trial is ordered, and a proper guardian's account should be allowed pursuant to the probate decree of April 8, 1914.

The other Judges concurred.

(92 Conn. 43)

ROCHESTER DISTILLING CO. v. GELOSO.
(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. SALES §81(2)—PERFORMANCE—TIME FOR DELIVERY.

In the absence of agreement as to the time in the contract, the law implies the delivery of the goods sold in a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 218.]

2. APPEAL AND ERROR §1008(1)—SALES §182(1)—PERFORMANCE—TIME FOR PERFORMANCE.

It is ordinarily a question of fact and the determination of the trial court is conclusive as to what would be a reasonable time for performance of a contract which fails to state the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Sales, Cent. Dig. § 492.]

3. SALES §123—PERFORMANCE—RESCISSION OF CONTRACT.

Where defendant purchased whisky from plaintiff, who agreed to supply advertising material and watches, the whisky being left in bond, and defendant agreed to pay a sum down and the balance in monthly installments, and he made his first payment, withdrew none of the liquor from bond, and made no demand for the advertising material and watches, he could not on due day of the first note repudiate the agreement, tender back the bond certificates, and recover his first payment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 302.]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by the Rochester Distilling Company against John Geloso. Judgment for plaintiff, and defendant appeals. No error.

Robert L. Munger, of Ansonia, for appellant. Alfred C. Baldwin and Harold E. Drew, both of Derby, for appellee.

WHEELER, J. The plaintiff, a wholesale, and the defendant, a retail, liquor dealer,

on June 3, 1915, entered into a contract of sale of 15 barrels of whisky, by the terms of which contract the plaintiff agreed to sell to the defendant the whisky in bond and to deliver the same by three certificates, certifying that the whisky was stored in bond, subject to the order of the defendant. The plaintiff further agreed to pay the storage insurance on the same, and to send to the defendant various articles of advertising matter, including six watches, and agreed that, if these were not received, the defendant should have the right to cancel the notes which the defendant agreed to give as part of its consideration for the purchase.

The defendant in consideration of the agreements of the plaintiff agreed to pay \$108.98 in cash, and to give to the plaintiff 18 notes, each for \$30, payable serially 30 days from date, 60 days from date, and so on, until the last note in the series became payable. The certificates and notes were duly delivered and the \$108.98 in cash paid, and thereupon the contract became executed and complete, except as to the delivery of the advertising matter. The purpose of the advertising matter was to call the attention of the public to the fact that this particular brand of whisky which the defendant advertised was on sale by him.

[1, 2] No time was agreed upon for the delivery of this advertising material. In the absence of an agreement as to the time, the parties concur in the opinion that the law implies the delivery of the advertising material in a reasonable time. What would be a reasonable time for such delivery depends upon the terms of the sale and the circumstances surrounding the sale. And this ordinarily is a question of fact, and the conclusion of the trial court conclusive, unless the time found to have been reasonable was so short or so long that a court must hold as matter of law the finding erroneous. *Loomis v. Norman Printers' Supply Co.*, 81 Conn. 343, 347, 71 Atl. 358.

Shortly after the contract was entered into the plaintiff began the preparation of the advertising material for shipment and placed its order for the manufacture of the watches with the manufacturer. It is the plaintiff's custom to ship to a customer all of the advertising material agreed to be furnished him when the order is substantially complied with. It is also its custom to ship this material as soon as it is notified that the retail dealer has withdrawn any of the whisky from bond, although sometimes the shipment is made at an earlier date. The defendant did not at any time withdraw any of the whisky from bond.

On July 3, 1915, the first of the notes was

presented for payment, and the same refused. At this time none of the advertising matter had been delivered to the defendant. On July 3, 1915, the defendant notified the plaintiff that by reason of the failure of the plaintiff to deliver the advertising matter he canceled the notes and asked for the return of the remaining notes and the \$108.98, and he thereupon returned to the plaintiff the three certificates for whisky in bond.

On July 14, 1915, the plaintiff shipped all of the advertising matter except the watches to the defendant, but upon tender to him he refused to accept it. At the date of maturity of the first note the watches were in process of manufacture. And at the date of maturity of the second note on August 3, 1915, and at the time of the institution of this action, the watches had not been completed by the manufacturer.

In his brief the defendant says:

"The appeal presents a single question, whether or not, according to the specific terms of this written contract, the defendant did not have the right to refuse to pay any of the notes he had given for the purchase of the whisky if the material described in the memorandum was not delivered until after the maturity of the first note."

[3] The right to cancel the notes at the maturity of the first note would be undoubted provided the failure to deliver the advertising material prior to that time was unreasonable. There is no relation between the period of delivery of the advertising material and the maturity of the first note so far as the finding informs us. The defendant did not deem this delivery essential to the beginning of the contract; for he paid in \$108.98 at its execution, when he must have known some time would elapse before he received this material. The defendant had no occasion to make use of the advertising material prior to the institution of this action, since at no time did he withdraw any of the whisky in bond. He at no time requested the delivery of the advertising material. So far as appears, up to the time when this action was begun the plaintiff had done everything that could be reasonably expected of it to procure the watches.

The conclusion of the trial court that the defendant was not legally justified in refusing to accept these articles, and that the plaintiff was entitled to a judgment for the amount of said notes, necessarily involved a finding that the failure to deliver all of the advertising matter prior to the maturity of the first note, and the failure to deliver the watches prior to the institution of this action, was not unreasonable.

In our view the finding of the trial court cannot be said to be unwarranted in law.

There is no error. The other Judges concurred.

(92 Conn. 11)

COAST & LAKES CONTRACTING CORP. v. MARTIN et al.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. EXECUTION § 129—LEVY—REQUISITES—"MANUFACTURING OR MECHANICAL ESTABLISHMENT"—"MECHANICAL."

Under Gen. St. 1902, § 911, as to levy of execution on machinery, a stone quarry wherein air compressors and steam engines are operated is a "manufacturing or mechanical establishment," so that a levy upon the machinery is valid, though the machinery is not removable; the word "mechanical" meaning pertaining to machinery.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 290-304.]

2. ATTACHMENT § 322—LEVY—SUFFICIENCY.

The sheriff's return of levy of an attachment upon machinery need not state it as his opinion that the machinery could not be removed, since that fact is susceptible of other proof.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1153-1159.]

3. ATTACHMENT § 171—LEVY—POSTING NOTICES—REQUISITES.

Failure to post notices on the outer door of a shed which was not completely inclosed did not invalidate the levy of an attachment on machinery in the shed if the notices were conspicuously posted upon the shed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 492-504.]

4. ATTACHMENT § 152, 171—LEVY—SUFFICIENCY.

A description in the attachment and notice of levy of property as "compressed air machinery" and "three hoisting engines" is sufficient.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 425-427, 492-504.]

5. BANKRUPTCY § 200(3)—ATTACHMENT—EFFECT OF BANKRUPTCY.

Attachment liens, acquired more than four months before proceedings in bankruptcy are begun by filing a petition, are not dissolved by an adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 290-300.]

Appeal from Superior Court, Tolland County; Joel H. Reed, Judge.

Action by the Coast & Lakes Contracting Corporation against Manuel J. Martin and others. Judgment for defendants, and plaintiff appeals. No error.

Frank L. McGuire, of New London, for appellant. Charles B. Whittlesey and Perry J. Hollandersky, both of New London, for appellees.

SHUMWAY, J. This action was brought by the plaintiff, claiming an injunction against the defendant, who is a deputy sheriff of New London county, to restrain him from taking and selling on execution certain property held under attachment. The execution was issued to enforce a judgment rendered in an action brought by Joseph Novy against the Breakwater Company. Novy's action was begun and the attachment made on August 15, 1913. At that time the Breakwater Company was engaged in the business

of quarrying stone in the town of Ledyard. The stone after it was taken from the quarry was carried away and used in the construction of breakwaters and sea walls. The quarry occupied 10 to 12 acres covered by the operations of the company. The land was owned by a corporation called the Rivers & Harbors Improvement Company. Among the articles of property owned by the Breakwater Company were three hoisting engines and compressed air machinery, used by the company in the quarry. On the 27th of December, 1913, a petition in bankruptcy was filed against the Breakwater Company, and it was adjudicated a bankrupt on February 2, 1914. The judgment in favor of Novy against the Breakwater Company was rendered on April 2, 1914. On March 23, 1914, the trustee in bankruptcy of the bankrupt sold the property under attachment to one Siegel, and he on April 4, 1914, transferred the same to the plaintiff in this action. The process in the action of Novy against the Breakwater Company was served and the attachment was made by J. H. Tubbs, deputy sheriff of New London county. He attached, as the property of the Breakwater Company, three hoisting engines and the compressed air machinery. At the time of the attachment the hoisting engines were in different parts of the quarry, and were separately and partially inclosed by rough structures, each having a roof, but open on one or more sides. The compressed air machinery was located in a long building, which was divided into separate rooms by partitions and had doors in front and rear. In the same room were two pumps. The compressed air machinery consisted of two compressors, a steam cylinder and an air cylinder. Each compressor was mounted on a bed, on one end of which was a steam engine and on the other end was the cylinder in which the air was compressed. On each of the compressors was a plate giving the name of the manufacturer, its number, and size. From the judgment in favor of Novy the Breakwater Company appealed to the Supreme Court of Errors, and the judgment of the superior court was affirmed on December 22, 1914, and an execution delivered to Deputy Sheriff Martin, the defendant herein, on February 20, 1915, and on the same day he made levy of the same and posted notices of the sale.

The plaintiff's complaint was doubtlessly framed having in mind sections 831 and 911 of the General Statutes, and with a purpose to allege sufficient facts to show that as the property attempted to be attached had not been removed by the officer, the provisions of these statutes in such cases had not been complied with. One of the important questions in the case is whether or not the acts of the officer as detailed in the finding secured to the plaintiff named in the process a lien on the property attached so that the

same could be held to satisfy an execution issued on final judgment. The statute (section 831) provides that in certain cases an officer making an attachment is not required to move the property attached. The portion of the statute material for the purposes of this case is as follows:

"Attachments of machinery, engines, or implements, situated and used in any manufacturing or mechanical establishment, * * * which cannot, in the opinion of the officer levying upon the same, be moved without manifest injury, shall be effectual to hold the same, without any removal thereof: Provided the service of such attachment shall be completed and a copy of the process and of the accompanying complaint, with the officer's return indorsed thereon, particularly describing the property attached, shall be filed in the office of the town clerk of the town in which such property shall be situated, within twenty-four hours after such attachment shall have been made."

Section 911, relating to levy of an execution on machinery, engines, or other implements, provides that if it cannot, in the opinion of the officer levying the same, be moved without manifest injury, he shall not move it, but shall give notice of such levy by posting a notice thereof on the outer door of building in which such property is situated.

[1] One of the claims of the appellant is that the attachment was void because the Breakwater Company's business of working a quarry was not a manufacturing or mechanical establishment. This statute is peculiar to this state, and decisions in other jurisdictions give but little aid in construing its meaning. The purpose of the statute was to provide the method by which machinery, engines, and implements could be attached without moving them, and thereby held to secure a judgment. The word "manufacturing" has no restricted meaning as used in the statute. It is apparent that such was not the intent when the word "mechanical" was inserted. The primary meaning of the word "mechanical" is "pertaining to machinery," and the fair meaning of the statute is that it was intended to include all establishments outfitted with machines used in conducting such operations as the business required. The machines attached were in use in a mechanical establishment.

[2] Another contention of the plaintiff is that the attachment made by Sheriff Tubbs is void because he did not state in his original return that in his opinion the property could not be removed without manifest injury. The statute leaves it to the judgment of the officer making an attachment to determine whether or not the machine could be moved without injury and the return which an officer makes on the original writ of his doings is only prima facie evidence of the facts stated therein, and they may be disproved by proper evidence. The only thing omitted as claimed is a statement of the officer's opinion that the property could not be moved without manifest injury. That he entertained this or that opinion may be as readily determined in many cases by what

he does as by what he says. But the court has found as a fact that the property could not be moved without injury, and it is admitted that the officer was in fact rightfully of the same opinion at the time of the attachment. It may be that the officer ran a risk that the attachment would not hold if he came to a wrong conclusion, but it would be manifestly unfair to an officer to so rule if he acted in good faith. In the case *Morey v. Hoyt*, 62 Conn. 556, 26 Atl. 127, 19 L. R. A. 611, it was held that under the circumstances in that case it was not necessary to the validity of the attachment of machinery that the property be moved or a reason given in the return why it was not. The attachment did not fail in this case because Deputy Sheriff Tubbs did not state in the return that in his opinion the machines could not be removed without manifest injury, but it is not necessary to rule that it would be so in every case.

[3] The plaintiff contends that the levy of the execution by Deputy Sheriff Martin was void because he did not post notices of the levy on the outer door of the buildings in which the hoisting machines were situated. The structures had no doors which could be moved to permit entrance. The notices were posted in a conspicuous place upon the structures, which was a sufficient compliance with the statute.

[4] The plaintiff complains because the property attached and levied upon was not "particularly described" in the attachment and the notice of levy. The description as made was "compressed air machinery" and "three hoisting engines." The purpose of requiring such description was to notify all persons who were or might become interested in the property that the property was under attachment and levy. No claim is made that the plaintiff was a purchaser without notice. The property was sold to the plaintiff "subject to existing liens." If the plaintiff investigated and made inquiry at the proper place, the town clerk's office in Ledyard, he would have found that what purported to be an attachment lien rested upon the compressed air machinery and hoisting engines in the quarry in Ledyard, the property of the Breakwater Company, and possibly may have found in the quarry the notices posted by Deputy Sheriff Tubbs, indicating the particular property attached. The description was sufficient.

[5] Another claim by the plaintiff is that Novy lost his lien, if he had one at any time, by the adjudication in bankruptcy of the Breakwater Company. Attachment liens acquired more than four months before proceedings in bankruptcy are begun, by filing a petition, are not dissolved by an adjudication in bankruptcy. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. The attachment was made on August 15, 1913. The petition in bankruptcy was filed December 27, 1913. But the plaintiff contends that

under the authority of *Wakeman v. Throckmorton*, 74 Conn. 621, 51 Atl. 554, the judgment in favor of *Novy* should have been restricted "to be satisfied only out of the interest which the defendant had in the property attached." If such restriction had been claimed or a suggestion made to the court that the defendant was a bankrupt, the judgment, no doubt, would have been so restricted, but the judgment is not void. *Novy* must, if he collects his judgment at all, collect it out of the property attached.

There is no error. The other Judges concurred.

(92 Conn. 39)

GALLON v. BURNS et al.

(Supreme Court of Errors of Connecticut.
July 6, 1917.)

1. FRAUD §9—ACTIONS—GROUNDS.

Where fraud and deceit is the ground of action, it must be proved that the representation was made as a statement of fact that it was untrue and known to be untrue by the party making it, that it was made for the purpose of inducing the other party to act upon it, and that the party to whom the representation was made was in fact induced thereby to act to his injury.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8.]

2. FRAUD §22(1)—ACTIONS—DILIGENCE.

Where stockholders of a corporation in selling stock to plaintiff fraudulently represented that the company was solvent, he was not bound to investigate to prevent his being defrauded, nor for failure to investigate could his recovery for the fraud be denied.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19, 20, 22, 23.]

Appeal from Superior Court, New Haven County; Gardiner Greene, Judge.

Action by Joseph H. Gallon against Edward J. Burns and others. Judgment for plaintiff, and defendants appeal. No error.

Hugh J. Murphy and Charles T. McClure, both of New Haven, for appellants. Robert J. Woodruff and James J. Palmer, both of New Haven, for appellee.

SHUMWAY, J. The complaint alleges that the defendants made certain false and fraudulent representations to the plaintiff whereby he was induced to purchase shares of the capital stock of a corporation called the Burns Thomas Company, organized to carry on the business of selling and repairing automobiles. The defendants in their answer deny the making of representations alleged in the complaint. On the trial to the jury the issues were found for the plaintiff and from a judgment in his favor the defendants appeal, assigning as error the court's failure to give proper instructions to the jury. The defendant Burns was secretary and a stockholder and the defendant Thomas was a director and stockholder of the Burns Thomas Company. The court in the charge

used language that may be construed as a statement that Burns was a director and secretary. He was not a director. The defendants complain that the court's remark misled the jury to their harm. The remark was made in connection with the instructions given relative to the duty of the plaintiff to make an investigation for himself in order to ascertain the truth or falsity of the defendants, representations as to the condition of the company. The court said:

"If with such superior means of information the defendants made false statements to the plaintiff with intent to deceive him, and the plaintiff, relying on their better means of information, went on depending on their statements, they cannot escape liability because it was possible for the plaintiff to have obtained information that would have saved him from losing his money."

It is clear that the court's reference to Burns as a director of the company was an inadvertence and did the defendants no harm. There was nothing to indicate that the court intended to intimate that a director of the company would have any better information as to the financial condition than the secretary. The defendants also complain of the above-quoted passage because, as they say, the court removed a question of fact from the jury; as it was for the jury to determine whether the plaintiff should have made an independent investigation as to the condition of the company instead of relying on the defendant's representations.

[1] This claim of the defendants embraces essentially all the errors set out in the ten reasons of appeal, and it is unnecessary to consider them separately. Where fraud and deceit is the ground of action:

"It must be proved that the representation was made as a statement of fact that it was untrue and known to be untrue by the party making it; that it was made for the purpose of inducing the other party to act upon it; that the party to whom the representation was made was in fact induced thereby to act to his injury." *Barnes v. Starr*, 64 Conn. 150, 28 Atl. 980.

The trial court in its charge followed this statement of the law, but the defendant claims that the court erred because it omitted to charge the jury that, if they found the plaintiff was able to make an independent investigation of his own concerning the financial condition of the Burns Thomas Company, then he could not recover in this action under the pleadings.

[2] The defendants state the point in their brief in this manner:

"The plaintiff was bound to use reasonable diligence to ascertain the condition of the company."

Notwithstanding the claim of the plaintiff that he had been induced to purchase worthless stock of the Burns Thomas Company through false representations of the defendants, the defendants insisted that, as it

appeared in evidence that the plaintiff had an opportunity to examine the books of the company and failed to do so, he could not recover in this action. The early case of *Sherwood v. Salmon*, 5 Day, 439, 5 Am. Dec. 167, does not appear to have been questioned in this state. In that case, in an opinion by Judge Swift, the court says:

"I apprehend no authority can be found to warrant the doctrine that a man must use due diligence to prevent being defrauded; otherwise he shall be entitled to no remedy. The truth is, redress is most commonly wanted for injuries arising from frauds, which might have been prevented by due diligence. * * * In such impositions and deceptions, when common prudence may guard persons against the suffering from them the offense is not indictable, but the party is left to his civil remedy for redress of the injury that has been done him."

It is possible that statement of the law might not be regarded as correct in other jurisdictions, and it has sometimes been said that, where a party deceived can protect himself by ordinary care, it is his duty to do so, but it is with this qualification that he must have equal means of knowledge and be equally able to judge of the matter for himself and to stand upon an equal footing with the one using deceit or making the representations; then if he acts without exercising the means of knowledge open to him he does so at his own peril. It matters not in this case which rule is applied; for the plaintiff and defendants were not on the same footing with respect to information as to the extent and character of the business of the Burns Thomas Company, and it would have been erroneous for the court so to have charged the jury. Both Burns and Thomas were stockholders, one the secretary, the other a director having full knowledge of the extent of the business and of the condition of the company, while the plaintiff had no information whatever. The court did not err in omitting to instruct the jury that the plaintiff could not recover in this action if he had an opportunity to examine the books of the company and he failed to do so. The jury were properly instructed that, if they found that the plaintiff relied on the false representation of the defendants that the business was in a sound and healthy condition and the other false statements the plaintiff claimed to have proved, and was thereby induced to buy the stock, he was entitled to a verdict. If a person buys property having a defect known or visible to the buyer, it would be absurd to hold or find as a fact that he relied upon a statement in making the purchase that was contrary to what was known to him to be true. There was no obligation on the part of the plaintiff to examine the books of the company to find out that the defendants were lying, certainly not if, as claimed, he was told by the defendants the books would corroborate their state-

ments as to the prosperous condition of the company.

There is no error. The other Judges concurred.

(92 Conn. 144)

FT. ORANGE BARBERING CO. v. NEW HAVEN HOTEL CO.

(Supreme Court of Errors of Connecticut.
Aug. 2, 1917.)

1. JUSTICES OF THE PEACE ¶129(1) — RECORDS—COLLATERAL ATTACK.

A court held by a justice of the peace is a court of record, and his records in proceedings within his jurisdiction import verity, and cannot be collaterally questioned.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 408.]

2. LANDLORD AND TENANT ¶298(1)—FORFEITURE FOR FAILURE TO PAY RENT—DEFENSES.

A waiver of the forfeiture for breach of covenant to pay rent was a good defense in summary process by the landlord to obtain possession of the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1276-1279.]

3. JUSTICES OF THE PEACE ¶129(1)—JUDGMENT—RES JUDICATA.

The judgment of the justice court, in summary process, adjudging a forfeiture by the tenant, is conclusive evidence that there was no waiver by the landlord of the covenant to pay rent at that time, and equity will not consider the question, in an action to restrain further proceedings in summary process.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 408.]

4. APPEAL AND ERROR ¶5—MODE OF REVIEW.

Erroneous proceedings, in an action of summary process before a justice of the peace, can only be reviewed by the Supreme Court of Errors upon a writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8-21.]

5. INJUNCTION ¶25 — INTERFERENCE WITH JUDGMENTS AT LAW.

While under certain circumstances restraining proceedings upon a judgment is a matter of right, courts of equity only interfere with a judgment at law where some well-defined independent equitable ground exists for restraining enforcement of the judgment.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 24.]

6. LANDLORD AND TENANT ¶112(1) — FORFEITURE—WAIVER.

Where the leniency of the landlord has not put the tenant in any worse position than if the lease had been strictly enforced, the rule that one who does not declare a forfeiture when he is entitled thereto waives the right is inapplicable; it resting upon the grounds of equitable estoppel.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343, 344, 346, 347, 349.]

7. LANDLORD AND TENANT ¶108(1)—OUSTER—DEMAND FOR RENT OR RE-ENTRY—NECESSITY.

Provision in lease for forfeiture for failure to pay rent, and that no demand for rent or re-entry should be necessary for recovery of possession by summary process, is enforceable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 333, 334, 339.]

Appeal from Superior Court, New Haven County; James H. Webb, Judge.

Action by the Ft. Orange Barbering Company against the New Haven Hotel Company. Judgment for defendant, and plaintiff appeals. No error.

The finding shows that on the 17th day of October, 1911, the defendant leased to the plaintiff in writing certain space in the Hotel Taft, in New Haven, to be used as a barbering establishment, for a period of five years from the 1st day of September, 1912, at an annual rental of \$2,700, and with an option for a renewal thereof for a further period of five years at the same rental, the rentals being payable monthly in advance. This lease, among other stipulations, provided that there was to be a forfeiture in the event of nonpayment of rent. The forfeiture clause was in the following language:

"Provided, however, and it is further agreed that, if the rent shall become due and payable as aforesaid, or if the said Ft. Orange Barbering Company shall * * * not perform and fulfill each and every of the covenants and stipulations herein contained to be performed by said Ft. Orange Barbering Company, then this lease shall thereupon, by virtue of this express stipulation therein, at the option of said managers, expire and terminate, and said managers may at any time thereafter re-enter said premises and the same have and possess as of their former estate, and without such re-entry may recover possession thereof in the manner prescribed by the statute relating to summary process; it being understood that no demand for rent and no re-entry for condition broken as at common law shall be necessary to enable the lessor to recover such possession pursuant to said statute relating to summary process, but that all right to any such demand or any such re-entry is hereby expressly waived by the said Ft. Orange Barbering Company."

On or before April 1, 1912, the plaintiff entered into the leased premises, and has ever since continued to occupy the same, claiming the right to do so under the lease. The plaintiff, except in two instances, neglected to pay the monthly rental on the 1st day of each month in advance. In a majority of instances these payments of rent were made after the middle of the month, and on two different occasions one payment was accepted for two months' rent. All of the payments were made by check, mailed by the plaintiff from the city of New York to the defendant at New Haven. These checks were accepted by the defendant as and for the payment of rent then due and owing by the plaintiff. On September 14, 1916, the plaintiff was two monthly payments of rental in arrears, and on this day the defendant served notice upon the plaintiff to quit possession of the premises. It was admitted upon the trial that a check for some installment of rent was sent by the plaintiff to the defendant on September 14, 1916, which the defendant refused to accept and returned to the plaintiff. No evidence was offered by the plaintiff as to the amount of this check, nor as to what installment of rent it should be applied, nor any evidence whatever con-

cerning it. No evidence was offered by the plaintiff to show whether or not, prior to September 14, 1916, the defendant had ever in any manner notified the plaintiff that it would claim a forfeiture of the lease upon the failure of the plaintiff to pay the monthly installments of rent at the time they became due and payable under the terms of the lease. On September 23, 1916, the plaintiff tendered to the defendant a sum of money that would be in full of all rent to October 1, 1916, which the defendant refused to accept. On September 30, 1916, the defendant brought an action of summary process against the plaintiff, returnable before James E. Wheeler, Esq., a justice of the peace for New Haven county, on the 6th day of October, 1916, claiming that this lease had been forfeited by the nonpayment of rent. The parties appeared before the justice and were duly heard, and on October 7, 1916, judgment was rendered in favor of the defendant (the New Haven Hotel Company) that the company recover possession of the premises. Thereupon this plaintiff (the Ft. Orange Barbering Company) sued out a writ of error to the court of common pleas for New Haven county, which writ was subsequently withdrawn by the plaintiff. During the year 1912 the plaintiff carried on the business of a barbering establishment at a loss of \$434.15, but thereafter carried on this business at an annual profit. Upon the opening of this business, supplies were purchased to the amount of \$1,703.50. These supplies, consisting of hat racks, cuspidors, bottles, shaving mugs, massage machines, vases, etc., are still for the most part on hand, and together with towels and linen, of the value of \$150, are of value to the plaintiff. The plaintiff offered no evidence to prove that it ever made any other tender to the defendant of the monthly rentals past due, except the offer of payment made on September 23, 1916, herein mentioned. The plaintiff at the trial declared its willingness to pay to the defendant all installments of rent in arrears, with interest thereon, but made no tender thereof, nor offered evidence of any offer or tender other than that just mentioned. None of the irremovable fixtures in said barbering establishment, such as barber chairs, mirrors, washstands, etc., were installed by or belong to the plaintiff. They were installed by and are the property of the owner of the Hotel Taft. Since the year 1912, the plaintiff has carried on its business on the premises in question at an annual profit, and it is reasonable to expect that this business would continue to be profitable to the plaintiff, should it decide to avail itself of the option to extend said lease for a further period of five years from August 31, 1917, and be permitted to remain in possession of the same.

The plaintiff in its complaint alleged that, "by reason of the defendant's acquiescence in the delayed payments for a period of more

than four years, the defendant induced the plaintiff to believe, and the plaintiff did believe, that a strict performance of the covenants in the lease in reference to the time of payment of the rent on the 1st of each month would not be required"; that "the plaintiff is ready and willing to pay the defendant all the rents that may be due or become due, with such interest as may be due thereon"; that "the defendant has suffered no loss or inconvenience by reason of the delayed payments"; and that the issuance of an execution of summary process would work irreparable loss to the plaintiff. Those allegations were denied by the defendant in its answer. The judgment file finds the issues for the defendant Hotel Company.

Samuel Campner, of New Haven, and Lewis M. Scheuer, of New York City, for appellant. Robert C. Stoddard and Jacob P. Goodhart, both of New Haven, for appellee.

RORABACK, J. (after stating the facts as above). This case turns upon the sufficiency of the findings to sustain the conclusion of the trial court in rendering judgment for the defendant. The plaintiff's objections to the decision of the superior court, which are urged here, are summarized as follows:

"First. Because it appears that the plaintiff will suffer irreparable injury, damage, and loss, should the forfeiture of the lease be enforced. Second. Because it is a fixed rule in equity to give a tenant equitable relief against forfeiture for breach of covenant to pay rent, irrespective of any question as to whether such forfeiture would or would not result in irreparable damage to the tenant, it being the mere inequity of a forfeiture that prompts the relief. Third. Because, in view of the previous relations of the parties and their mutual conduct, it would be unfair, inequitable, and unjust, without previous notice of intention, to enforce strict performance."

[1] This statement of claims involves several questions. One is as to the effect of the judgment of the justice of the peace in the summary process suit. The recovery by the defendant in this action has an important bearing upon the present case. In this state the action of summary process is regulated by statute, and the judgment has the same effect as a common-law judgment in other cases. A court held by a justice of the peace is a court of record. His record, therefore, in judicial proceedings which have taken place before him and are within his jurisdiction, imports verity, and its statements cannot be collaterally questioned. Every act recited in such a record is presumed to have been properly and rightfully done until the contrary appears. *American Bonding Co. v. Hoyt*, 88 Conn. 255, 90 Atl. 932; *Church v. Pearne et al.*, 75 Conn. 351, 53 Atl. 955. The judgment in the justice court against the appellant, the Barbering Company, established the validity of the lease, that it was in possession, its obligations to pay the rent then in question, and that these installments were due and unsatisfied.

[2, 3] A waiver of the forfeiture of the breach of covenant to pay rent was a good defense in the summary process proceeding before the justice court. The judgment of this court against the appellant for the forfeiture is conclusive evidence that there was no waiver at the time this judgment was rendered, and equity will not consider this question in an action like the present one to obtain relief against the forfeiture. *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44.

[4] The action of summary process is a special statutory remedy to enable landlords to obtain possession of leased premises without suffering the delay and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. By section 1078 of the General Statutes the action of summary process is made returnable before a justice of the peace. Section 1081 provides that "no appeal shall be allowed from any judgment rendered in any such action." Under section 817 of the General Statutes a writ of error lies from the judgment of a justice in an action of summary process to the court of common pleas or the superior court, but not to this court. By section 1087 of our statutes a defendant in an action of summary process is allowed but 48 hours after final judgment for filing his bill of exceptions and procuring his writ of error, and is required to give a sufficient bond, with surety, to the plaintiff to answer for all rents that may accrue during the pendency of the writ of error. Erroneous proceedings in an action of summary process can be reviewed by this court only upon a writ of error. This was not done in the case now before us. *Banks v. Porter*, 89 Conn. 307. The jurisdiction of a justice of the peace is limited to claims for legal relief. General Statutes, § 533.

[5] In proper cases the exercise of equitable jurisdiction to relieve against judgments is generally held to be within the discretion of the court, which is to be guided and controlled in its exercise by legal principles, and to be exercised in conformity with the spirit of the law and in a manner to subserve, and not defeat, the ends of substantial justice, and for a manifest abuse thereof it is reviewable by a proper procedure. While, under certain circumstances, restraining proceedings upon a judgment is a matter, not of grace, but of right, courts of equity do not lightly interfere with judgments of law, and do so only with occasions where some well-defined, independent, equitable ground exists for restraining the enforcement of the judgment. 15 *Ruling Case Law*, 730, 731, and cases cited in notes; *Daniell's Chancery Practice* (6th Am. Ed.) —; 3 *Pomeroy's Eq. Juris.* § 1365; *Clark v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319, 320, 25 L. R. A. (N. S.) 827, 139 Am. St. Rep. 763. *Hood v. N. Y., N. H. & H. R. R. Co.*, 23 Conn. 609, 621. "A court of equity does not interfere with judgments

at law, unless the complainant has an equitable defense, of which he would not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Truly v. Wanzer et al.*, 46 U. S. (5 How.) 141, 12 L. Ed. 88.

In the present case there is no allegation or suggestion of any fraud, accident, surprise, or mistake in the proceeding before the justice court. The application of the rule above cited, under the facts here presented, seems to leave the plaintiff but few facts upon which to base its claim for equitable relief, the most important of which is the allegation and claim that the plaintiff was induced to believe that a strict payment of periodical rents would not be required. This contention has not been sustained. It appears that the plaintiff alleges in its complaint that:

"By reason of the defendant's acquiescence in the delayed payments for a period of more than four years the defendant induced the plaintiff to believe, and the plaintiff did believe, that a strict performance of the covenants in the lease in reference to the time of payment of the rent on the 1st of each month would not be required of it."

This, as we have seen, was denied by the defendant. The judgment, by finding the issues upon this part of the case for the defendant, necessarily finds that the plaintiff has failed in its proof upon this subject. A special finding upon this part of the case, which is broader than the general finding of the issues for the defendant in the judgment, is not inconsistent therewith. There is nothing in the finding which suggests a basis for the claim that:

"In view of the previous relations of the parties and their mutual conduct it would be unfair, inequitable, and unjust to sanction the right of the landlord to cancel the lease without previous notice of intention thereafter to enforce strict performance."

Upon the other hand, it appears that the court below has expressly found that:

"No evidence was offered by the plaintiff to show whether or not, prior to September 14, 1916, the defendant had ever in any manner notified the plaintiff that it would claim a forfeiture of said lease upon the failure of the plaintiff to pay the monthly installments of rent at the time they became due and payable under the terms of said lease."

[8] It does not appear from the finding that by the defendant's leniency the plaintiff has been put in any worse position than it would have been, had the strict performance of the lease been enforced. There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is entitled to do so, waives the right

of forfeiture; but this rule rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures, or made valuable improvements, believing that, the landlord falling to assert the right of forfeiture after a breach of the conditions, it would not be asserted. This is not such a case. *O'Connor v. Timmermann*, 85 Neb. 422, 123 N. W. 443, 24 L. R. A. (N. S.) 1063, 1066, 133 Am. St. Rep. 668.

[7] The plaintiff relies upon *Bowman v. Foot*, 29 Conn. 331, as an authority to sustain its contentions. The facts in the *Bowman Case* are easily distinguishable from those in this case, especially as to the express conditions contained in the lease now before us, which provides that:

"It being understood that no demand for rent and no re-entry for condition broken as at common law shall be necessary to enable the lessor to recover such possession pursuant to said statute relating to summary process, but that all right to any such demand or any such re-entry is hereby expressly waived by the said Ft. Orange Barbering Company."

The lease in the *Bowman Case* contains no such provision. It follows, therefore, that no demand for rent or re-entry was necessary before the commencement of the present action. It is also of interest to note that in *Bowman v. Foot* the questions presented in this action were by means of a writ of error.

The plaintiff also lays stress upon the case of *Hartford Wheel Club v. Travelers' Ins. Co.*, 78 Conn. 355, 62 Atl. 207. In that case the questions presented and decided were that:

"The acceptance of rent, accruing after a breach of condition for which the lessor has declared his election to terminate the lease, from a lessee for years, who refuses to recognize the termination of the lease and continues in possession as before, constitutes a waiver of the forfeiture, which is binding alike upon the lessor and the lessee. While provisions in a lease which absolve the lessor from making any demand for rent, from making a re-entry, from giving the statutory notice to quit, and from every other formality, may enable him to commence an action for obtaining possession without such demand and re-entry, they certainly do not prevent the parties from waiving a forfeiture before such action is begun."

In the present case it is not claimed that the Hotel Company accepted any rent after a breach of the conditions for which it declared its intention to terminate the lease. It is also of importance to notice that in the case of the *Wheel Club* against the Insurance Company the procedure adopted to test the question of waiver was also by a writ of error, as we have stated should have been done in the present case. *Burritt v. Lunny*, 90 Conn. 491, 495, 496, 97 Atl. 756.

There is no error. The other Judges concurred.

(92 Conn. 1)

PLUM TREES LIME CO. v. KEELER.

(Supreme Court of Errors of Connecticut. July 6, 1917.)

1. APPEAL AND ERROR \S 574(2)—PERFECTION OF RECORD—EVIDENCE.

Under Gen. St. 1902, § 797, it was irregular to move to make the evidence on rulings part of the record on appeal four months before the trial court's finding was filed; such motion being proper within a week after the movant receives notice of the filing of such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2668.]

2. INSURANCE \S 115(1)—FIRE INSURANCE — "INSURABLE INTEREST."

Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 139.]

For other definitions, see Words and Phrases, First and Second Series, Insurable Interest.]

3. INSURANCE \S 115(4)—FIRE INSURANCE—INSURABLE INTEREST.

Where a quarry tenant erected buildings at a cost of \$2,500 and had a lease which would run for eight years requiring it to keep the buildings and machinery in good repair, it had an insurable interest in the buildings.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 147.]

4. INSURANCE \S 580(1)—PROCEEDS — RIGHTS OF TENANT.

Where the lease would expire in eight years and the tenant had built new buildings to make the premises tenantable and had taken out insurance which the insurer required to be in the landlord's name, and on loss the landlord collected the insurance after having refused to insure his own buildings, the value of plaintiff's buildings being greater than the amount of insurance, it was too late for the landlord to claim that the tenant had no legal or equitable right to recover the insurance money.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1439, 1440, 1442, 1443.]

5. TRUSTS \S 1—"IMPLIED TRUSTS."

A trust may be express or implied, and it is "implied" when deducible from the transaction as a matter of intent (citing Words and Phrases, First Series, Implied Trust).

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1.]

6. TRUSTS \S 63 $\frac{1}{2}$ —IMPLIED TRUSTS.

Where the landlord collected insurance money on policies payable to him by insuring loss of buildings constructed by the tenant whose lease would not expire for eight years, an implied trust was raised in favor of the tenant as against the landlord in the insurance money.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98, 99, 100.]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by the Plum Trees Lime Company against Samuel Keeler. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff is a corporation organized under the statute of laws of Connecticut. This action is brought by Wilbur F. Tomlinson, Charles Kerr, and Alphaus A. Hathaway, its directors, acting as trustees for the

purpose of closing up the business of the corporation pursuant to the provisions of sections 29 and 30 of chapter 194 of the Public Acts of 1903, regulating the voluntary dissolution of corporations. In August, 1910, the defendant was the owner of the premises described in the plaintiff's complaint, as amended, upon which was a ledge or deposit of limestone, with lime kilns and lime shed. On August 4, 1910, the defendant leased these premises to one Alfred P. Phillips, for a term of ten years from date, which premises, under a series of assignments of this lease, passed into the possession of the plaintiff on the 24th day of February, 1912. This lease provided that the lessee should keep the kilns, buildings, machinery, and plant thereon in good repair and should deliver up the same at the expiration of its tenancy in as good condition as they now are in, ordinary wear, fire, and other unavoidable casualties excepted. Subsequent to the 24th day of February, 1912, and up to the 8th day of October, 1914, the plaintiff was engaged in mining or quarrying limestone on these premises, and the burning, manufacturing, and preparing the same for market. At the time of the execution of this lease, and for a number of years prior thereto, these premises had been unoccupied and unused and the kilns and buildings had been grossly neglected. At the time these premises passed into the possession of the plaintiff, the plant thereon consisted of three lime kilns, constructed of noncombustible materials, to wit, exteriorly of brick and lined internally with fire brick, and the structures connected with the kilns built of wood were decayed and unsafe and not practicable for the uses required of them, and a lime shed practically dismantled by the removal of everything that could be carried away; the plant being unfit, inadequate, and insufficient for prosecuting the business of the plaintiff. The plaintiff, for the purpose of enabling it to carry on its business conveniently and efficiently, was compelled to erect and construct, and did erect and construct, various structures and appliances on the leased premises, at its own cost and expense, and for its own purpose and advantage. The structures erected by the plaintiff on these leased premises consisted of a wooden tower on top of the kilns, with a hoisting apparatus thereon for the purpose of hoisting their raw limestone and fuel to the top of the kilns, a platform on top of the kilns with a bridge leading therefrom to the hillside adjoining the kilns for the purpose of affording access thereto with teams and materials, an engine house and other structures and appliances adapted to the business of the plaintiff, costing in the aggregate about \$2,500. The buildings, structures and appliances erected by the plaintiff on these premises were new, and did not replace other similar structures, but were

radically different from those used by their predecessors in occupancy of the premises, and was an alteration in the method of handling the raw material and finished product in the plaintiff's business.

The plaintiff, desiring to protect its property on these premises, made application to the local agent of the Fidelity Phoenix Fire Insurance Company of New York, and the Phoenix Fire Insurance Company of Hartford, Conn., for insurance thereon. At the time of making such application, the plaintiff, by its president and general manager, informed the agent of the condition of the property desired to be covered by the proposed insurance; that the structures to be insured were the property of the plaintiff, and were located on real estate occupied under a lease from the defendant; and that it desired to have the policies issued in the name of the plaintiff, but they were informed by this agent that the policies could not be issued in the name of the plaintiff, but must be issued in the name of the defendant as owner of the land upon which the same were located. The plaintiff, relying upon the statement of the agent, caused the property of the plaintiff, located on these premises, to be insured for the sum of \$600, under policy No. 329, issued by the Fidelity Phoenix Fire Insurance Company, and for the additional sum of \$600, under policy No. 2295, issued by the Phoenix Fire Insurance Company, in the name of the defendant as beneficiary. The plaintiff paid the premium on these policies, retained the same in its possession, and it had no intention of insuring the property of the defendant, but intended to insure its own property located on the leased premises. The defendant was ignorant that these policies, Nos. 329 and 2295, had been issued until after the property insured thereunder had been destroyed by fire, when application was made to him by the plaintiff to execute a proof of loss as required by the insurance companies. The plaintiff, by its officers, requested the defendant to insure his buildings on these premises; but the defendant refused to do so. On October 8, 1914, the buildings, structures, and appliances on these premises belonging to the plaintiff and insured under the policies were destroyed by fire. At the time of the execution of the policies, and at the time of the loss occasioned by the fire, the plaintiff was the owner of the property insured under these policies. Upon proof of loss, the insurance companies adjusted the same, and paid the sum of \$1,200 to the defendant, and the defendant retained the same.

On November 17, 1914, the plaintiff initiated proceedings for the dissolution of its corporate existence pursuant to the provisions of sections 29 and 30 of chapter 194 of the Public Acts of 1903, regulating the voluntary dissolution of corporations, and subsequent to that date the plaintiff ceased

doing business as a going concern, and its directors have since that been acting as trustees in closing up the business of the corporation. All property belonging to the plaintiff is in the hands and under the control of its directors acting as trustees. The plaintiff, by its directors acting as trustees, made demand upon the defendant for the proceeds of the insurance policies, as a part of the assets of the company for the purpose of liquidating its indebtedness and closing up its business. Subsequent to the proceedings to the winding up the corporate existence of the plaintiff, the defendant offered to expend the proceeds of the policies in restoring the defendant's own buildings on these premises which were not insured under the policies. The defendant refused to pay over the proceeds of the insurance to the plaintiff. The proceeds of the insurance policies in the hands of the defendant are insufficient to restore the structures and appliances built by the plaintiff, to an efficient, workable condition. Immediately after proceedings were commenced to terminate the corporate existence of the plaintiff, its directors, acting as trustees, surrendered the possession of the leased premises to the defendant, and the defendant has since been in possession of the same.

Leo Davis, of Norwalk, for appellant.
George Wakeman, of Danbury, for appellee.

RORABACK, J. (after stating the facts as above). The plaintiff, by its complaint, seeks to recover from the defendant the proceeds of two insurance policies described in the complaint. Judgment was rendered for the plaintiff to recover \$819.27.

Several reasons of appeal are based upon alleged errors of the trial court in denying certain paragraphs of the defendant's motion to correct the finding. This motion to correct is informal. If we consider it under sections 795 and 796 of the General Statutes, we do not find, as we should, any written exceptions to any finding of facts or refusing to find facts as requested. Practice Book (1908), p. 268.

[1] The reasons of appeal, if considered under the provisions of section 797 of the General Statutes, are irregular. This section in substance provides that in lieu of the motion to correct, under sections 794, 795, and 796 of the General Statutes, either party may, within one week after he shall have received notice of the filing of such finding, file with the clerk of the court a copy of the evidence on rulings with a motion that such evidence be made a part of the record on appeal, and that the claims of the appellant for such correction may be presented in the assignments of error in the same way that questions of law are now raised. The record discloses that this motion, to make the evidence on rulings part of the record, came too early in the defend-

ant's attempt to take his appeal. It should have been made within one week after he received notice of the filing of the finding. It appears, however, that this motion was in fact made about four months before the finding of the trial court was filed with the clerk of the court. But it appears that the court below recognized the defendant's motion as made under the provisions of section 797, as it ordered a certificate of the evidence. The purpose of the defendant is clear, and we are not disposed, by a strict construction of section 797 of the General Statutes, to deprive him of a remedy which if properly pursued was his.

One of the requests to correct the finding was allowed by the trial court. Other assignments of error relate to facts of but little importance. The evidence as to the remainder of the facts referred to in the motion to correct is either conflicting or of such a nature that we cannot say that the trial court erred in finding or refusing to find certain facts. Therefore the motion to correct the finding is overruled, and the claim for a correction is denied.

[2] The first four reasons of appeal assign error in a general and indefinite manner. They may, however, be considered as suggesting the proposition that the court erred in holding that the Plum Trees Lime Company had an insurable interest in the property insured. It may be said generally that:

"By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself."

It is stated in *Getchell v. Mercantile & Mfrs. Mut. F. Ins. Co.*, 109 Me. 274, 83 Atl. 801, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 739, that:

"The crucial question therefore is: Will the insured be directly and financially affected by the loss of the property insured. If so, he has such an interest as the law will recognize. The loss must not be indirect or sentimental, but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property, and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field, and the decisions take an extensive range with a growing tendency to expand rather than to contract the scope of the term. It has therefore been held that it is sufficient if the insured has any legal interest whatever as an owner in fee, a mortgagee, a tenant for life, or a lessee."

In *Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 194, 23 Am. Rep. 308, the court said:

"The plaintiffs had an insurable interest in this building. They had erected it at their own expense, and used * * * it, in their business, as a carpet store. They might wish to rebuild it, or to indemnify themselves for their expenditure, in the event of its loss by fire. In either case, it was proper for them to procure insurance, and they might lawfully do so to the extent of the value of the building. It is clear that they would derive benefit from its

continuing to exist, and would be injured by its destruction."

The plaintiffs in this case were sublessees of the land on which the building insured stood. See, also, cases cited in note to Ann. Cas. 1913E, 741, and 14 R. C. L. 915, § 91.

[3] In the present case the plaintiff's lease required it to keep the kilns, buildings, and machinery in good repair. It had expended about \$2,500 in erecting buildings, structures, and appliances upon the leased premises. These buildings were new and entirely different from those used by their predecessors in occupancy. This lease it appears, under ordinary conditions, was not to expire until August, 1920. Under these circumstances, the plaintiff had such an insurable interest in the property in question as permitted it to procure the insurance and to recover in case of loss.

The plaintiff's complaint alleges that:

"This corporation, for its own benefit, protection, and advantage, and at its own cost and expense, insured its property, so erected and constructed on the leased premises, by policies which, through error, inadvertence, and mistake, were issued by the insurance companies in the name of the defendant, Samuel Keeler, as beneficiary, instead of in the name of the Plum Trees Lime Company, although the defendant had no interest in these policies or the property insured thereby, other than a nominal one resulting from the error as aforesaid."

[4] These allegations were denied by the defendant in his answer. We learn from the judgment file that the issues upon the questions thus presented were found in favor of the plaintiff. The finding of facts made by the trial court is entirely consistent with this adjudication. It also appears that the defendant when requested to insure his buildings refused to do so; and that the value of the plaintiff's buildings, and structures standing upon the leased premises, when they were destroyed by fire, was much greater than the amount of insurance covered by the insurance policies then in force. Under these conditions, it is now too late for the defendant to claim that the Plum Trees Lime Company had no legal or equitable right to recover this insurance money.

The defendant also claims that the trial court erred in reaching the conclusion that the defendant was holding this insurance money in trust for the plaintiff. It must be conceded that it appears from the face of the insurance policies that the apparent legal title to this insurance and the money derived therefrom was in the defendant. But the court below has found as a fact that the intention of the Plum Trees Lime Company, the party procuring the insurance, was to protect its own property, and not that of the defendant. It has also been found that through mistake and inadvertence the insurance policies were issued by the insurance companies in the name of the defendant, Keeler, as beneficiary, although he has no interest in the policies other than a nominal one.

[5] Mr. Justice Swayne, in *Seymour v. Freer*, 8 Wall. (75 U. S.) 202, 19 L. Ed. 306, defined a trust as:

"Where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion, but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce, whenever its aid for that purpose is * * * invoked."

It is also a familiar principle of law that a trust may be express or implied, and that it is implied when deducible from the transaction as a matter of intent. 8 Words and Phrases, p. 7172.

[6] It follows therefore that from the facts found the trial court properly held that the defendant might well be regarded as holding the proceeds of this insurance money in trust.

One reason of appeal is that the court erred in ruling and holding that the plaintiff was not bound, under its lease, to pay to the defendant rent for the term beginning March 1, 1914, and ending March 1, 1916. From the scant information which the record contains upon this branch of the case we cannot find any error in the action of the trial court in that connection.

Upon the facts found there is no ground for the claim now made that the court erred in holding that the defendant was not entitled to a set-off for his expenses in a former suit in collecting the insurance money now in question. It appears that the only issue in that case was the right of the possession of the checks which were given by the insurance companies in their adjustment of the loss sustained by fire. These checks were made payable to the defendant, Keeler, and were in the possession of Tomlinson, the president of the Plum Trees Lumber Company. This question was litigated between Keeler and Tomlinson. Keeler was successful in this litigation, and Tomlinson paid the costs.

It appears that this litigation was not against the corporation, but against an individual who happened to be president of the company. But a more complete and decisive objection to this claim is that it is apparently based upon a demand for attorney's fees in an action in which no such claim could have been properly allowed.

There is no error. The other Judges concurred.

(87 N. J. Eq. 509)

JOB HAINES HOME FOR AGED PEOPLE
v. KEENE et al. (No. 41/192.)

(Court of Chancery of New Jersey. June 29, 1917.)

1. WILLS ⇐782(12) — DEVISE OF PROPERTY NOT BELONGING TO TESTATOR — CONSTRUCTION.

Where a testator devised to his widow for life, remainder to his son, the realty upon which

he lived and to which he had no title at the time of his death, but upon his death became the absolute property of his widow, as tenant by the entirety and gave widow personal property which she accepted, in the absence of an express statement in the will that the provisions for the widow were given her in lieu of her ownership of the realty, such intention can only be deduced by clear and manifest implication from the will, founded on the fact that the widow's claim of title to the property would be inconsistent with the will and so repugnant to its dispositions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2031.]

2. WILLS ⇐782(12) — RIGHTS OF DEVISEES — ELECTION — PROVISION FOR SURVIVING WIFE.

The intent of a husband to dispose of his wife's property and thus put her to an election will not be inferred where the words of the gift would have their fair and natural import by applying them to the property which he has the power to dispose of by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2031.]

3. WILLS ⇐781 — RIGHTS OF DEVISEES — ELECTION.

In determining the necessity for an election between property rights and rights under a will, general words of description such as "all my lands," "all my estate," etc., do not require the beneficiary to elect, since the testator's language can have full effect when applied only to his share or interest, and he is presumed to have intended to give only the property he had to dispose of.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017.]

4. WILLS ⇐781 — RIGHTS OF BENEFICIARIES — ELECTION — SPECIFIC DEVISE — PROPERTY OWNED BY ENTIRETIES.

A case for an election by the co-owner of property, who is a beneficiary under testator's will, will be presented only where testator's gift of it to another is so expressed by words of description as to import an intent to give to the latter the whole of the common property in its entirety.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017.]

5. WILLS ⇐782(12) — RIGHTS OF BENEFICIARIES — ELECTION — SPECIFIC DEVISE — PROPERTY OWNED BY ENTIRETIES.

Where testator devised to his wife for life, remainder to his son, property owned by entireties by the specific words of description "the house and premises where I now reside," the specific gift to the son put the widow, who also took a bequest of personal property under the will, to an election.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2031.]

6. WILLS ⇐781 — RIGHTS — ELECTION.

Nor could the other sons do so upon her death where they had accepted provisions made for them under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017.]

7. WILLS ⇐718 — RIGHTS — ELECTION — ACCEPTANCE OF BENEFITS.

A person accepting a benefit under a will is required on the doctrine of election to perform all the requirements of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1717-1721.]

8. WILLS ⇐718 — RIGHTS — ELECTION — ACCEPTANCE OF BENEFITS.

A person may not take a beneficial interest under a will and at the same time set up any

right or claim of his own, although otherwise legal and well-founded, which will defeat or in any way prevent the full effect and operation of every part of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1717-1721.]

9. WILLS ⇐792(5)—EVIDENCE—SUFFICIENCY.

Evidence held to justify the conclusion that the other sons consented to and acquiesced in the disposition of the property made by the will, and elected to take the benefits given them by the will rather than assert their right to an interest in the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2061, 2062.]

10. WILLS ⇐796—RIGHTS—ELECTION—VALIDITY.

If beneficiaries under a will made an election in ignorance of their right to property disposed of by the testator, or under a mistake as to the real nature and extent of their rights therein, such election would not be binding and could be revoked unless rights of third parties had intervened which would be interfered with by the revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064-2068, 2070.]

11. WILLS ⇐778—RIGHTS OF LEGATEES AND DEVISEES—ELECTION—NATURE OF DOCTRINE.

The doctrine of election is one resulting in compensation and not in forfeiture.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2004, 2006, 2010.]

Action to quiet title by the Job Haines Home for Aged People against Clarence A. Keene and others. Decree for complainant.

Charles G. Titsworth, of Newark, for complainant. Albert W. Harris, of Newark, for defendants.

FOSTER, V. C. This is an action to quiet complainant's title to certain property in the city of Newark used as a home for aged people.

The premises in question were part of the real estate devised by the last will of Joseph Crane (which was probated October, 1832) to his son and four daughters. Phebe Keene, one of the daughters, thus acquired an undivided one-fifth interest in the property, and by a deed dated October 15, 1832, the remaining devisees conveyed their undivided four-fifths interest to said Phebe Keene and Alfred Keene, her husband.

By his will Alfred Keene, who died in 1880, bequeathed to his wife, Phebe, certain personal property, and also gave her the use of the premises in question for life, and on her death he devised the same to his son, Joseph Edward Keene. In addition to Joseph, Alfred Keene left him surviving two other sons, Thomas Austin Keene and Howard De Witt Keene, and the defendants are heirs at law of Thomas and Howard.

Alfred Keene made the devise to his son Joseph on the death of his widow of specific property, viz. "the house and premises where I now reside," which are the premises in question, and this devise was made to Joseph and accepted by him, as stated in Al-

fred's will, "in full satisfaction of all claims against me or against my estate for any services rendered to me in my lifetime or for any other indebtedness of any kind whatsoever."

Thomas was given and discharged from the amount of his indebtedness to his father, and to Howard was given a bond and mortgage for \$1,800, with the accumulated interest thereon; and Alfred also bequeathed and devised to each of his sons an equal one-third interest in the residue of his estate.

By his will Alfred Keene sought to make a balanced disposition of his estate among his widow and their children, and the widow and children accepted without objection the provisions which he had made for them.

After the death of her husband, Phebe Keene continued to live on the property with her son Joseph for the rest of her life. Thomas had his home in Brooklyn, N. Y., where he died in 1889, and Howard's home was in Yonkers, N. Y., where he died in 1899. Neither of them or any of their children ever lived on the premises in suit after the death of Alfred in 1880. Joseph, however, continued to live on the property from the time of his father's death until he died on November 22, 1912.

Joseph left a last will and testament, which has been duly probated, by which he gave certain legacies to the defendants, the children of his brothers, Thomas and Howard, amounting to about \$4,500, and which they have accepted, and he devised the premises in question and the residue of his real and personal property to complainant for the purpose of establishing and maintaining a home for aged people. Complainant has been in possession of the premises since May, 1914, and has been conducting the same as an auxiliary home for aged people in accordance with the direction of Joseph's will.

Joseph's title to the premises under the devise from his father was never questioned by his mother, Phebe Keene, or by his brothers, Thomas and Howard. Defendants, however, as the respective heirs at law of Thomas and Howard, now claim to own an undivided two-thirds interest in the property by reason of the facts above set forth. Their contention is that under the will of their great-grandfather, Joseph Crane, their grandmother, Phebe Keene, became seised of an undivided one-fifth interest in the property absolutely; that the deed of October 15, 1832, from Joseph Crane's four other children and devisees to Phebe Keene and Alfred Keene, her husband, conveyed their four-fifths interest in the property to Phebe and Alfred as tenants by the entirety; and that upon the death of Alfred the fee to the entire property became vested in Phebe by the joining of her title to the undivided one-fifth interest with her title to the remaining four-

fifths interest which she acquired as the surviving tenant by the entirety. They further contend that, the fee to the property being thus vested in Phebe, the will of her husband, Alfred, by which he gave her, as his widow, a life interest in the property, and on her death devised the same to Joseph, was ineffective to accomplish its purpose, as the property belonged absolutely to Phebe, and on her death intestate the property descended to her three sons, Joseph, Thomas, and Howard, and that the only interest in the property which Joseph could and in effect did devise to complainant was his undivided interest in the property, and that these defendants, as the heirs of Thomas and Howard, both of whom died intestate, inherited the remaining two-thirds interests on the death of their respective parents.

Complainant's answer to the contentions of defendants is that Phebe Keene and all claiming under her, or under her sons Thomas and Howard, are estopped from asserting title to the property, or to the disposition made of it by the will of Alfred, and also by the will of Joseph, because Phebe Keene and her sons Thomas and Howard elected to take and accept the provisions made for them in the will of Alfred in place of their interest in the premises in question, and, further, because the defendants elected to accept the provisions made for them by the will of their Uncle Joseph, in lieu of any interest they may have been entitled to in the property.

Complainant also asserts title to the property which it claims to have acquired by the continued adverse possession thereof of Joseph and complainant since the death of Alfred Keene in 1880. Complainant further insists that, under a provision of Joseph's will which reads, "If any contest the provisions of this will they are to lose all benefits therein," defendants, having elected to receive and accept the benefits given them under his will, are estopped by this provision from contesting the devise therein made to complainant.

The questions to be determined under the issue thus presented are:

Whether Phebe Keene and her sons Thomas and Howard were put to their election by the disposition made of her property by the will of her husband, and if they were, if they exercised their election by accepting the benefits given them by his will.

If Phebe, Thomas, and Howard were not obliged to elect and did not elect under the will of Alfred Keene, were defendants as the heirs of Thomas and Howard put to their election by the devise of the property to complainant under the will of Joseph, and, if so, did they exercise their election by accepting the benefits given them by his will?

If an election in either case was not necessary, or if it were not exercised, has complainant through its own and Joseph's pos-

session acquired adverse title under color of title to the property?

What effect, if any, has the provision of Joseph's will against a contest upon the controversy?

The general doctrine of the law relating to election is stated by Mr. Justice Depue in delivering the opinion of the Court of Errors and Appeals in *Pratt v. Douglas*, 38 N. J. Eq. 516 at p. 536, as follows:

"Where the testator has only a partial interest in the property he disposes of by his will, courts will incline as far as possible in favor of a construction which will apply the language of the will only to the interest or estate which the testator is able to dispose of in his own right, and it requires an unequivocal expression or indication of an intent to dispose of the entire property, in order to raise a necessity for an election. 1 Pom. Eq. Jur. para. 488-493."

And he adds that in *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539, Chancellor Kent from a review of the case deduces a rule that has met with uniform approval:

"That to enable the court to deduce an intention that a testamentary gift to the widow should be in lieu of dower, 'the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them; it must, in fact, disturb or disappoint the will.'"

In *Stephenson v. Brown*, 4 N. J. Eq. 503, certain lands were devised for life to testator's widow, and it was held that:

"The widow was at liberty to take her dower in the lands, or to accept the devise. If she elected to take the devise, she must take it cum onere. There is no rule distinguishing between the widow and other devisees," as "the settled principle of equity is that he who accepts a benefit under a will, must conform to all its provisions and renounce every right inconsistent with them."

[1] In the case before us we find Alfred Keene by his will devising to his son the particular property where he lived and to which he had no title at the time of his death, and which upon his death became the absolute property of his widow, and giving her a life interest therein, together with certain personal property which she accepted. There is no express statement in his will that the provisions made for his widow are given her in lieu of her ownership of the property, and an intention on his part that such should be their effect can only be deduced by clear and manifest implications from his will, founded upon the fact that her claim of title to the property would be inconsistent with the will and so repugnant to its dispositions as to disturb and defeat them. *Pratt v. Douglas*, supra.

[2] An intent of the husband to dispose of his wife's share of property, and thus put her to an election, will never be inferred when the words of the gift may have their fair and natural import by applying them only to the property which he has the power to dispose of by will. 1 Pom. Eq. Jur. § 550.

[3] In determining the necessity for an election there is a distinction between a gift in general words of description such as "all

my lands" or "all my estate" and the like, and a gift of specific property. "In cases of the first class, an obligation to elect does not arise, for the testator's language can have full effect when applied only to his share or interest and he is presumed to have intended to give only the property he had to dispose of."

[4] "In cases of the second class it cannot be said that upon every specific devise or bequest a duty to elect arises. A case for an election by the co-owner of the property so given, who is a beneficiary under the testator's will, will be presented only where the testator's gift of it to another is so expressed by words of description as to import an intent to give to the latter the whole of the common property in its entirety." *Pratt v. Douglas*, 38 N. J. Eq. 538.

[5, 6] The will of Alfred Keene in the devise to Joseph used the specific words of description "the house and premises where I now reside," and it is clear from this that he intended this property upon the death of his widow should be Joseph's absolutely; furthermore, the will states that this gift to Joseph was in satisfaction of testator's indebtedness to him; and the remainder of testator's estate, excepting an undivided one-third interest in the residue, was given to his widow and two other sons. And it would seem under the principle relating to a specific devise stated above that the specific gift of the homestead to Joseph put the widow to her election. She could not assert her title to it and accept the personal property bequeathed to her without defeating and disappointing the will; nor could her sons Thomas and Howard do so on her death, as they had accepted the provisions made for them under their father's will.

On the distribution of Alfred's estate and the payment to the widow and to Thomas and Howard of the gifts made to them, there was nothing but Joseph's undivided one-third interest in the residue out of which testator's indebtedness to him could be paid.

This clearly was not testator's intention. His scheme of distribution contemplated suitable provision for his widow and children and the settlement of the indebtedness owing by him to Joseph. His widow and his sons Thomas and Howard could not take the provisions made for them and then claim title to the property devised to Joseph without disturbing and disappointing testator's other dispositions of his property and defeating his attempt to settle the indebtedness owing by him to Joseph by the devise of his home.

[7] It is well settled that a person accepting a benefit under a will is required, on the doctrine of election, to perform all the requirements of the will. "He cannot disavow a will under which he takes a benefit." *Bird v. Hawkins*, 58 N. J. Eq. 229, at page 246, 42 Atl. 588, at page 595.

[8] And the rule is equally well settled that a man shall not take any beneficial in-

terest under a will, and at the same time set up any right or claim of his own, if otherwise legal and well-founded, which shall defeat or in any way prevent the full effect and operation of every part of the will. *Van Duyne v. Van Duyne*, 14 N. J. Eq. 50.

Mrs. Keene and her sons Thomas and Howard, in accepting the benefits provided for them under Alfred's will, were required on the doctrine of election to relinquish such of their rights as were inconsistent with the provisions of his will in order "that no disposition of the testator therein may be defeated." *Pratt v. Douglas*, supra, 38 N. J. Eq. p. 538.

[9] The fact that Mrs. Keene accepted the provisions made for her by the will and that after the death of her husband she continued for a few years, and until her death, to reside on the property with Joseph in the enjoyment of the life estate therein given her by the will, and that Thomas and Howard removed from the state and established homes elsewhere, and allowed Joseph to assert and to exercise sole ownership of the property, without claiming at any time their right to any interest therein, justifies the conclusion that they consented to and acquiesced in the disposition of the property made by their father's will and elected to take the benefits given them by his will, rather than assert their right to an interest in the property. And the same comment can be made and the same conclusion reached on the conduct of the defendants in accepting the provisions made for them by the will of their Uncle Joseph.

Since the death of Alfred in 1880 all parties, including the defendants, having any right to assert an interest in the premises in question, remained silent until after Joseph's death. They permitted him to lose the opportunity of having the indebtedness owing him by his father paid out of his father's estate, they allowed him for 30 years to bear the expense of maintaining and improving the property, and the defendants accepted the benefits amounting to about \$4,500 which Joseph gave them by his will under the belief that he owned the premises in question, and they now seek to keep the benefits his will gave them and to defeat and disappoint the will in other respects.

[10] It is not claimed that defendants or their parents or grandmother acted or made their election in ignorance of their right to the property, or under a mistake of the real nature and extent of their respective rights therein. If their election had been made under such circumstances, it would not be binding, and could be revoked, unless rights of third parties have intervened, which would be interfered with by the revocation.

In *Young v. Young*, 51 N. J. Eq. at page 500, 27 Atl. 634, Vice Chancellor Pitney stated that:

"The authorities seem to concur in holding that, in order to make the enforcement of one

demand, which is inconsistent with another, a final and binding election to take that, and not the other, the party must either be shown to have acted advisedly, with proper knowledge of all the circumstances, and with a consciousness of the effect of the act relied upon, or the party adversely interested must have so changed his position in reliance upon such action that it would be inequitable to permit the party who has the choice to recede from his former action."

Chancellor Vroom, in *English v. English*, 3 N. J. Eq. 509, 29 Am. Dec. 730, uses this language:

"What acts of acceptance or acquiescence are sufficient to constitute an election cannot be designated with sufficient precision to justify a general rule. Each case, as it occurs, must be governed by its own peculiar circumstances. The general questions are whether the parties acting or acquiescing were cognizant of their rights, whether they intended to make an election, whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed, or whether these inquiries are precluded by lapse of time."

These statements of the law are particularly applicable to the situation under consideration. Lapse of time and the death of Mrs. Keene and her three sons render it impossible to restore the parties to their original position. In reliance upon the election of his mother and brothers, Joseph made no effort to collect the indebtedness owing him from his father's estate; and, relying on their apparent election, he permitted them to divide the greater part of the estate among themselves. During the 30 or more years of his occupancy of the premises, with their consent or acquiescence he treated the property as his own and paid the taxes, made improvements thereon, and generally acted as and publicly claimed to be the owner of the property, and it would now be impossible to have an accounting of his expenditures in order to reimburse his estate. He, furthermore, in connection with the devise of this property to complainant, made substantial gifts to the defendants which they accepted, and do not offer to return; and if they were able and willing to make return of the legacies he gave them, it cannot be said that the amount thereof, with interest, would be sufficient to reimburse his estate for all that was due him.

[11] The doctrine of election is one resulting in compensation, and not in forfeiture (*Young v. Young*, supra), and if it were possible for defendants to properly reimburse and compensate the estate of Joseph for all that was due him, a different construction might be put upon their conduct and upon the acts and conduct of Mrs. Keene and her sons. But, as such compensation cannot be made, principally because the amount required cannot be ascertained with any degree of accuracy, I deem it equitable under all the circumstances that defendants should not be permitted to recede from the former action of themselves and of those under whom they claim; and to hold that Mrs. Keene and her sons exercised their election

under the will of Alfred Keene, and that defendants also exercised their election under the will of their Uncle Joseph. This conclusion makes it unnecessary to pass upon the other questions raised on the argument.

A decree for complainant will therefore be advised, with costs.

(90 N. J. Law, 557)

SWILLER et al. v. HOME INS. CO. OF NEW YORK. (No. 30.)

(Court of Errors and Appeals of New Jersey. July 18, 1917.)

(Syllabus by the Court.)

INSURANCE — 387—FIRE POLICY—INDORSEMENTS.

The indorsement by an insurer on a fire insurance policy of consent to change of ownership in the property insured, without more, is not to be construed as an agreement by the company to become liable to the new owner for a loss occurring after the ownership actually changed but before the consent was given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1025.]

The Chancellor, and Bergen, Minturn, Kalisch, White, and Williams, JJ., dissenting.

Appeal from Supreme Court.

Action by Max and Abe Swiller, copartners, against the Home Insurance Company of New York. From a judgment of the Supreme Court for plaintiffs, defendant appeals. Reversed.

Russell E. Watson, of New Brunswick, for appellant. John P. Kirkpatrick, of New Brunswick, for appellees.

PARKER, J. The suit is to recover loss by fire which plaintiffs claimed to be covered by a policy issued by the defendant company. The policy was issued in the names of Max Herman and Wolfe Fisher, as their respective interests might appear, for a term of one year from October 8, 1912. On February 14th, about 3 p. m., Fisher and Gottlieb delivered a deed conveying the property to the two Swillers, the present plaintiffs, who also received the written policy, and about 4 p. m. of the same day they gave it to their insurance broker, named Levine, with directions to have the ownership transferred to their names. Levine was not the agent of the company. That agent was a corporation named Neilson T. Parker, Inc. Levine did not go to Parker for an indorsement of change of interest until the next morning, when the indorsement was made. In the meantime the fire had occurred. The stipulation of facts shows that, when Levine presented the policy for indorsement of new ownership, neither Parker, Inc., nor the company knew of the fire having taken place, and Levine did not inform Parker of it.

On this state of facts, the trial judge, sitting without jury, held that, although in his estimation the policy was not originally enforceable because Fisher had no interest

in the property at the time of its issue or thereafter, yet plaintiffs were entitled to recover, on the theory, as he stated it, that the question was not one of waiver of the invalidity of the original policy, but of practically new insurance; and that instead of writing a new policy for the remaining portion of the policy (term?) the company extended the old insurance to the new owners.

We think that this was error. It may be conceded that by indorsing the new ownership on a policy which the company could have voided for misstatement of original ownership, or for transfer of ownership to the Swillers without such indorsement, the company entered into a fresh contract with said new owners to insure them for the remainder of the term, and that the premium originally paid was a valid consideration therefor. But when did the remainder of the term begin? In order to uphold the decision below, it is necessary to say that it began when the deed to the Swillers was delivered. Doubtless the company could have so agreed, but the question is: What agreement did it actually make by the indorsement? The only reasonable answer, as it appears to us, is that in the absence of some special stipulation the insurer's consent to change of ownership must be construed as operating to protect the new owner from the time it is given, and that time is, ordinarily, when it is affixed by the company or its authorized agent, and that it does not relate back to any prior time when the ownership in fact changed; or, in other words, that the insurer does not, by assenting to the change of ownership, assume the liability for a loss occurring before that consent was given, of which it knew nothing, and for which, as the policy stood without its consent, it was not liable.

The case is not within the rule in *Hallock v. Insurance Co.*, 26 N. J. Law, 268, 27 N. J. Law, 845, 72 Am. Dec. 379, for in that case the application was made for insurance and premium tendered to the agent before the fire occurred for a term to begin at the date of the application, and the policy was so written. There was consequently in that case no room for argument as to what the company agreed to, and the main question was whether it was relieved from the agreement because the fire had occurred without its knowledge before it had formally entered into it.

One of the defenses set up in the pleadings, and not contradicted as to the facts, was that the policy contained 'a provision that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance, etc., and that by the conveyance to the Swillers such change took place and vitiated the policy. On the trial defendant requested the court to find that the forego-

ing clause was a warranty, of which there had been a breach by the conveyance to the Swillers which had not been waived by an indorsement on the policy or addition thereto; and further that the indorsement in question, placed on the policy after the fire, did not constitute such waiver because the company had no knowledge or notice of such fire. These requests were either overruled or confessed and avoided by the decision placing the judgment upon the ground, not of waiver, but of new insurance. As the case stands before us, defendant is entitled to attack both the refusals of the court and its specific findings of law injurious to defendant. It is not necessary to pass upon the question whether, by the language of the policy insuring Herman and Fisher as their respective interests appeared, the policy, though void as to Fisher, would be good as to Herman. It might even be conceded for the sake of argument that they might have recovered for the loss. The simple question before us is: Was the company under a contractual liability to the Swillers for a loss after title vested in them, and before the indorsement of change of ownership?

The trial court held that it had agreed to such liability by its indorsement made after the fire and without knowledge thereof. This we consider erroneous, for reasons already stated; and for this error the judgment must be reversed.

The CHANCELLOR, and BERGEN, MINTURN, KALISCH, WHITE, and WILLIAMS, JJ., dissent.

BERGEN, J. (dissenting). I am unable to agree with the majority of the court that the refusal of the trial court to find, as requested, that the indorsement entered on the policy on February 15, 1913, which reads as follows:

"Interest in this policy is hereby vested in Max and Abe Swiller, trading under the name of Swiller Bros. as owner instead of as heretofore. Loss if any, first payable as before. Second mortgagee eliminated"

—was not a waiver of previous breaches of warranty as to ownership, called to the attention of the court, because the company had no notice of the facts alleged to avoid the insurance and forfeit the policy, was erroneous.

This request is based upon the assumption that the policy, before it was assigned to the plaintiffs and the indorsement made thereon, was absolutely void because when it was issued to the previous owners, Max Herman and Wolfe Fisher, the latter had conveyed his undivided one-half interest to Nathan Gottlieb. The policy of insurance is not printed in the record, nor was it submitted to the court; the case being tried and determined upon facts stipulated, so we have no knowledge of the terms of the policy, relating to the character of the interests insured,

except as they appear in the stipulations, the first of which is that on October 8, 1912, the defendant issued a Standard fire insurance policy "to Max Herman and Wolfe Fisher, as their respective interests appear, for the term of one year from the 8th day of October, 1912, at noon, to the 8th day of October, 1913, at noon." As I read this policy, it is an insurance against loss of the respective interests of each, and not of their joint interest, and there is no reason why the insurance company could not lawfully contract, as they did, to insure either against loss so far as their respective interests appeared, and if so each had an undivided interest insured. If Fisher had no interest, all the company insured was the interest of Herman, which interest remained insured until he conveyed it to the plaintiffs, and so long as he retained that interest his mortgagee, Augusta McGinnis, one of the plaintiffs, was protected to the extent of his insurable interest by reason of the indorsement making any loss first payable to her as mortgagee.

None of the conditions contained in the policy upon which the breaches of warranty appearing in the requests to charge or find appear in this record; but, assuming that the policy contained these warranties, there was no breach so far as the interest of Herman is concerned, because his respective interest was always in existence and continued to be until he conveyed the property and handed over the policy to the new owner; for "respective interests" means such interests as each of the insured had. It is not a case where tenants in common are jointly insured where conveyance by one would avoid the policy, but an insurance of the respective interest of each as such interest might appear, and therefore there was no breach of warranty so far as Herman was concerned which called for a compliance with the sixth request that the indorsement did not constitute a waiver of the breaches of warranties, because one of the parties held a valid insurance to the extent of his interest. The effect of the new contract created by the indorsement on the policy after the conveyance by Herman and after the loss is not raised by any request to charge and is not to be considered because all of the requests are based upon the theory that the entire policy was void from its inception because Fisher was not one of the owners when the policy was issued, and therefore the very interesting question, how much of the period of the time stated in the policy it was to cover inures to the assignee when the entire policy is assigned and consented to by the insurance company, is not before us.

If it is a new contract based upon all the terms and conditions of the policy, as seems to be the settled law, it may be that the insurance company, by the substitution of a

new owner for the old one, makes the policy good to the new owner for the entire period, which would be nothing more than an agreement to insure the new owner for the entire period covered by the policy, or at least from the time it was assigned to him, and that the company has a right to antedate its policy was settled in *Hallock v. Insurance Co.*, 26 N. J. Law, 268. But no such question is raised in this case, for all of the requests, the refusal to comply with which is the only ground of error alleged, are based upon the claim that, the policy being originally void, the indorsement to the new owner was not a waiver of alleged breaches, because the policy itself was void, and if, as I think, the policy was not void because it was an insurance of respective interests, one of which was insurable, then the requests were based upon a false assumption of law and were properly refused.

The judgment should be affirmed.

(90 N. J. Law, 720)

SPROTTE v. DELAWARE, L. & W. R. CO.
(Court of Errors and Appeals of New Jersey.
June 18, 1917.)

1. CARRIERS §52(2)—BILL OF LADING—CONDITION OF GOODS.

In an action against a carrier for damages to goods by breakage, acknowledgment in bill of lading that the goods mentioned therein were in apparent good order, is sufficient prima facie proof of that fact, where their condition could be ascertained by mere inspection, and the clause, "contents and condition of contents of packages unknown," is not applicable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 109, 152-161.]

2. CARRIERS §52(2)—BILL OF LADING—CONDITION OF GOODS.

In an action against a carrier for damages to goods, where claim is for scratches to furniture, whose condition at time bill of lading was issued was concealed, other proof of good order than mere acknowledgment in bill of lading is necessary.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 109, 152-161.]

Appeal from Supreme Court.

Action by George Sprotte against the Delaware, Lackawanna & Western Railway Company. From a judgment of the Supreme Court, affirming a judgment of the district court for plaintiff, defendant appeals. Affirmed.

The per curiam opinion of the Supreme Court is as follows:

The plaintiff employed a shipping company in Los Angeles to ship a carload of furniture from that point to Dover, N. J. When the goods arrived in New York, they were forwarded by the shipping company to Dover over the defendant's line, and some of the goods were damaged when they arrived.

The defendant issued a waybill in which it was stated that the property was in apparent good order, except as noted (contents and condition of packages unknown). The list contained specific items, some of which were boxes. There was a stipulation that, if defendant was found liable, the damages were to be assessed

at \$169.05, and this sum the district court found. Under the record all we have to deal with is the liability of the defendant between New York and Dover. The defendant claims that the court should have granted its motions for a nonsuit, or directed a verdict for the defendant, because there was no proof that the goods were damaged while in defendant's possession, beyond that the waybill certified that they were received in apparent good order in New York, and the fact that they were received in a damaged condition at Dover.

Such a recital in a bill of lading is prima facie evidence of the fact that the goods were in apparently good condition when received, and, while the common carrier may show the contrary, the burden is on it. No attempt was made in this case to show that the goods were not in good condition when delivered to the defendant, and where a carrier receives freight in good condition, and it is found in its possession damaged at point of destination, negligence will be presumed, unless removed by explanation.

The next point is that it was error to admit the contract with the Los Angeles Moving Company, the initial shipping company. This did not injure the defendant, and, if error, was harmless.

The next objection is refusal to allow defendant's train conductor to testify that nothing unusual happened to the car between New York and Dover. This was immaterial, for, if he so testified, which is the best defendant could expect, it would prove nothing, for the goods were in a closed car, and it was not pretended that anything happened to the car.

As we find no error in this record, the judgment will be affirmed, with costs.

Frederic B. Scott, of New York City, for appellant. King & Vogt, of Morristown, for appellee.

SWAYZE, J. [1, 2] The facts are stated in the memorandum of the Supreme Court. We agree that the bill of lading was sufficient prima facie proof that the goods mentioned therein were in apparent good order, so far as their good order could be apparent. This applies to the greater part of the goods and of the damages claimed. Most of the goods were of such a character that it could be ascertained by mere inspection whether they were in sound condition, and most of the damages were due to breakage. To such goods, where the claim is for obvious injury, the clause "contents and condition of contents of packages unknown" is not applicable. Where the claim was for scratches and similar injuries to furniture, and the condition at the time the bill of lading was issued was concealed by burlap or other covering, there could not be good order apparent in that respect, and proof other than the mere acknowledgment in the bill of lading would be necessary. This difficulty is particularly applicable in this case to the piano, which was boxed. We should have difficulty with the case, if the distinction had been made at the trial, and the question properly raised. This was not done. The plaintiff relied on the bill of lading, as if its terms were applicable alike to all the articles named. The defendant relied on the clause as to contents and condition of contents of packages, as if all

the articles had been so packed as to conceal their real nature. The amount of damages was stipulated. The error was the usual one of attempting to apply general expressions, without discriminating to particular cases. We have nothing to add to what the Supreme Court said as to the rulings on questions of evidence.

We find no error of law pointed out in the record, and the judgment must be affirmed, with costs.

(90 N. J. Law, 478)

EBERLING v. MUTILLOD (two cases).

(Court of Errors and Appeals of New Jersey.
July 19, 1917.)

(Syllabus by the Court.)

1. ANIMALS ⇨68—DOGS—LIABILITY FOR INJURY.

The infant plaintiff, a boy of 16 years old, testified that he had been in the business of delivering newspapers on defendant's estate to him and to his tenants for about a year, and that on the day he was bitten by defendant's dog he was going across defendant's lawn on the regular route he had always taken, having entered through a gate which was open. *Held* that, even if he were a trespasser on defendant's premises, he was entitled to recover damages for the injury resulting from the biting by the dog, under the facts in this case, if it were owned by the defendant (which was admitted), and if defendant knew that the dog had previously bitten other people, of which there was evidence, and unless the plaintiff was guilty of contributory negligence, aside from the mere fact of trespassing, and he was not, according to his own testimony.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 225, 226.]

2. ANIMALS ⇨71—ACTIONS—DEFENSES.

The mere fact of trespassing upon the grounds of another is not, in and of itself, contributory negligence, which will defeat an action to recover damages for injuries inflicted by a vicious animal belonging to defendant and allowed to be at large upon the premises.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 238-241.]

3. ANIMALS ⇨74(8) — PERSONAL INJURIES — JURY QUESTION.

The question whether a person entering upon the grounds of another without invitation or license, and then and there injured by an attack by a vicious animal of the owner, allowed to be at large upon the premises, exercises the degree of care which reasonable and prudent persons would use under like circumstances, is a jury question.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 273.]

Appeal from Circuit Court, Hudson County.

Actions by Emil Eberling, by Rudolph Eberling, his next friend, and by Rudolph Eberling, against Marius Mutilod. From judgments for the several plaintiffs, defendant appeals. Affirmed.

Frederick K. Hopkins, of Hoboken, for appellant. Harlan Besson, of Hoboken, for appellees.

WALKER, Ch. These cases arose out of injuries resulting to a boy from being bitten by a dog. They were tried together before a jury, and were argued together here. In the first action, the plaintiff, Emil Eberling, a minor, sued by his father as next friend, and in the other action the father sued for himself. In March, 1915, the plaintiff, Emil Eberling, was employed in delivering newspapers, afternoons. He was a boy 16 years old. Two verdicts were rendered, one for the boy of \$400, and one for his father for \$23.50, against the defendant, Marius Mutillod, in the Hudson county circuit court, by a jury, and judgments were thereupon entered. The defendant has appealed to this court.

The plaintiff, Emil Eberling, was a newsboy living in the borough of Secaucus with his father, from whom he had not been emancipated. The defendant, Marius Mutillod, was a florist, owning an estate in the borough of Secaucus, Hudson county. He was the owner of a large St. Bernard dog, which he permitted to run at large on his property. It was established that his dog had attacked a man named Fred Montigel, when the defendant, its owner, was present, some time before, and ruined a pair of trousers, for which the defendant paid. There was also testimony that the dog had bitten another man, who had told the owner of it. It appeared from the testimony that it was the custom of the newsboy plaintiff to enter the gate in the northern part of Mr. Mutillod's property and cross the lawn to one of the houses situate on his estate. On March 13, 1915, while delivering papers to Mr. Mutillod's tenants, the boy was attacked by the defendant's dog, which was roaming at large upon the latter's estate. The dog bit the boy several times in the hip. The bites were severe, and he required the care of a doctor for some time.

The defendant's land was only partially inclosed by a fence, in which there were large gates, which were open most of the time, and in that situation the defendant's dog was permitted by him to run at large on the premises. The boy entered through an open gate at the time he was bitten. Defendant's counsel moved to nonsuit at the end of plaintiff's case, and for a direction of a verdict at the close of the testimony, both of which motions were denied, and the cases were submitted to the jury, who found for the plaintiffs, as stated. These are the only grounds of appeal.

It is perfectly obvious that the defendant appellant is not entitled to a reversal of the judgments. The reason is that there was evidence to support them, and this court will not review the findings of fact in a court below, beyond ascertaining that there was evidence to support such findings. *Larned v. MacCarthy*, 85 N. J. Law, 589, 90 Atl. 272. The plaintiffs, under the facts in this case, were entitled to go to a jury if they showed (1) that the defendant owned the dog; (2)

if the boy was bitten by the dog and injured; (3) if the defendant knew that the dog had previously bitten other people. There was testimony establishing defendant's liability and the plaintiff's right to recover on all of these grounds. Ownership of the dog was admitted by defendant.

Counsel for appellant relies upon *De Gray v. Murray*, 69 N. J. Law, 458, 55 Atl. 237; but in our judgment the doctrine in that case is not applicable to the one at bar. It was there held that the owner of a vicious dog will not be liable for injury inflicted by it, if it escapes from control, where the owner has exercised a degree of care commensurate with the danger to others which would follow from such an escape. That is not this case. The owner here failed to control the dog. He appears to have regarded it, or at least to have treated it, as being docile, and not vicious.

[1-3] The appellant contends that the infant plaintiff was not upon his premises by invitation or license, but as a trespasser, and that therefore he is not liable to respond in damages for the injury to the boy inflicted by the biting by the dog. The doctrine of invitation and license need not be considered, for recovery was properly had even if the boy were a trespasser. The doctrine is that, in an action for injuries caused by an attack by a vicious animal kept by a person on his premises, the mere fact that the injured person was a trespasser at the time will not, as matter of law, defeat the action. A leading case on this subject is that of *Marble v. Ross*, 124 Mass. 44. There was evidence tending to show that the plaintiffs' intestate received his injuries in the defendant's pasture, where he was at the time a trespasser, and that, when he went upon the premises, he knew there was a stag there, and understood that it was vicious. It was not contended that the defendant placed the stag in the pasture for the purpose of keeping off trespassers, or of having the stag frighten or injure any one. *Morton, J.*, said, at page 48:

"In the case at bar, it appeared that the defendant knowingly kept a vicious and dangerous stag in a large pasture, and the plaintiffs' intestate, while in the pasture, was attacked and injured by it. The defendant requested the court to rule that, if the plaintiffs' intestate was a trespasser in the pasture, they could not recover. We are of opinion that the court rightly refused this ruling. The mere fact that the intestate was upon the defendant's land without his consent would not defeat the right of action. The unlawful character of his act did not contribute to his injury or affect the defendant's negligence. * * * The fact, therefore, that the intestate was committing an unlawful act at the time of his injury, would not prevent his recovery. Nor does the fact that this unlawful act was a trespass upon the defendant's land necessarily have this effect. It is true that, as a general rule, a trespasser who is injured by a pit or dangerous place upon the land of another, excavated or permitted for a lawful purpose, cannot recover damages therefor, because the owner of the land owes no duty to him, and therefore is not negligent as to him; but it is clear that the owner of land cannot wantonly

injure a trespasser. If he does, he is liable civilly as well as criminally. The law holds the keeper of an animal known to be dangerous, which injures another, to the same degree of responsibility as in cases of wanton injury, and the fact that the person injured is trespassing does not exonerate such owner from the consequences of his negligence."

And at page 49:

"If Marble voluntarily and negligently put himself in a position which was likely to result in injury, and the injury happened, his negligence is a contributing cause, and he could not recover. The fact of his knowledge that the stag was in the pasture and was dangerous would be important evidence tending to show negligence; but we cannot say, as matter of law, that it would conclusively prove it. This might depend upon the size of the pasture, the position of the stag in it, and other circumstances which are proper for the consideration of the jury. The test is whether the plaintiffs' intestate, in entering the pasture, exercised that degree of care which reasonable and prudent men use under like circumstances. This is a question of fact for the jury upon all the evidence."

We think that Marble v. Ross well states the law of the case under consideration. The boy had gone on defendant's estate every day for a year to deliver his papers, and at the time he was attacked by the dog he was on the regular route he had always taken. He was not guilty of any contributory negligence, if he is to be believed when he says that he did nothing to excite the dog, which he did not see until it was about five feet away from him. He had only seen the dog once before, and, although some one had told him that it would bite, the tenants said he should not be scared, because it would not bite or do anything like that.

In no aspect of the cases at bar can it be said as matter of law that the defendant was not liable. The cases were properly submitted to the jury, and the judgments entered upon the verdicts must be affirmed, with costs.

(88 N. J. Eq. 168)

ROWLAND et al. v. NEW YORK STABLE MANURE CO. (No. 42/192.)

(Court of Chancery of New Jersey. July 12, 1917.)

1. NUISANCE §3(3) — PUBLIC NUISANCE — OFFENSIVE ODORS—MANURE PILES.

Storing of manure gathered from city stables in New York and other cities from about May 1st until the latter part of September, during which time approximately 40,000 tons are accumulated, emitting foul, nauseating, and sickening odors, corrupting the air, and penetrating the homes of complainants, living within a radius of a mile, is a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 20-25.]

2. EQUITY §148(2)—JOINDER OF CAUSES OF ACTION—MULTIFARIOUSNESS.

In a bill to abate a nuisance, due to the maintenance of manure piles, the causes of action for injury by defiling the air and by pollution of water were properly joined under Act March 30, 1915 (P. L. p. 184) §§ 24, 25, allowing the joinder of separate causes of ac-

tions arising out of the same transaction, or series of transactions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 345, 354-357.]

3. NUISANCE §21—ABATEMENT—CONDITIONS PRECEDENT.

Complainants could maintain a bill to abate a nuisance created by storing manure in large quantities, without showing that application had been made to the local board of health to take proceedings, and that the board had without just cause refused to do so.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 55-59.]

4. NUISANCE §29—LACHES—EVIDENCE.

That complainants for eight years endured the stench from defendant's manure storage plant would not constitute laches, barring their bill; every day's continuance being a new nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 68.]

5. NUISANCE §23(3)—EQUITY—JURISDICTION IN FIRST INSTANCE.

Where the damage is substantial, a court of equity will in the first instance determine the question of nuisance, and grant relief.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 58.]

6. NUISANCE §25(1) — ACQUIESCENCE — ESTOPPEL.

Defendant's outlay in purchasing and preparing its land for storing manure was without the implied consent of complainants, and does not estop them from maintaining this bill.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 60-63.]

7. NUISANCE §25(2)—INJUNCTION—RESULTING DAMAGE TO DEFENDANT.

Where a nuisance is clearly established, and it appears that it is causing material irreparable injury to complainants, they are entitled to injunction, irrespective of resulting damage to defendant.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 5.]

Bill between William J. Rowland and others and the New York Stable Manure Company to abate a nuisance. Granted.

John P. Kirkpatrick and Russell E. Watson, both of New Brunswick, for complainants. Edgar W. Hunt, of Lambertville, and Spencer Weart and Edward H. Hoos, both of Jersey City, for defendant.

BACKES, V. C. This is a bill to abate a nuisance to habitations, caused by offensive odors arising from manure piles. The defendant's business is that of gathering horse manure from stables in New York, Brooklyn, and Jersey City, and shipping it direct to farmers and dealers in fertilizers, except during the crop-growing season, when the collections are stored at the defendant's plant on the Rocky Hill branch of the Pennsylvania Railroad near Monmouth Junction. Storing begins about May 1st, and continues until the latter part of September, when reshipments commence, lasting until the end of the year. On an average, 20 carloads of manure, of 25 to 30 tons each, are received daily; the annual accumulations approximating 40,000

tons. The cars are unloaded by cranes and dredges, and the manure is stacked in ricks 20 feet high, about 1,000 feet long, and from 30 to 50 feet in width. To keep the manure from burning—the animal heat is so intense as to be physically unendurable—requires soaking with water for a period of three weeks. The water is drawn from what is called the “Black Pool,” which is replenished by the drainage from the manure ricks. A shrinkage in weight of about 25 per cent. results, doubtless, from drainage and evaporation. The complainants allege that these manure piles and the Black Pool emit foul, nauseating, and sickening odors, corrupting the air and penetrating their homes, greatly to their inconvenience and discomfort.

The principles of law applicable to this kind of nuisance have been so often reiterated that I pause before restating Chancellor Zabriskie's pertinent declarations in *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201:

“Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and, when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is: What amounts to that discomfort from which the law will protect?”

[1] The complainants, ten in number (four were admitted during the course of the trial) and their witnesses, reside within a radius of a mile or so of the defendant's plant, in different directions, encircling it, and their evidence (of a score and more) leaves not the shadow of a doubt that they suffered much annoyance and misery from these offensive and disturbing smells. It would be impracticable here, and it would serve no practicable purpose, to recount their testimony. Their definitions and characterizations of the ill-smelling odors vary with the witnesses' power of description; as one of the witnesses tersely put it, “It is hard to describe a bad smell.” A summary of their experiences and the effects and results of the smells, by which, after all, the question of nuisance is to be determined, is that, whenever the wind blew towards them from the direction of the manure heaps, the atmosphere was so laden with the malodor as to cause nausea, headache, and vomiting, to cause them to forego their meals altogether, or to leave them unfinished, to seek shelter in their homes with the doors and windows tightly closed, to at nighttime suddenly awaken them from sound slumber, and to deprive them of sleep, or compel them to seek sleep with the windows down and doors shut. Children were driven into their houses from play, and members of families

from their porches and lawns. All of these things did not, of course, happen to all of the witnesses, but nearly all of them to some, and some to all or members of their families, in their turn, or in groups, as the winds favored during the hot summer months; and especially were they affected during sultry, damp, and foggy periods, when the vapors could be seen arising from the storage grounds and wafted towards their homes. The effluvia was constant, the inflictions intermittent and recurrent, as the air currents shifted. The testimony of the complainants as to this state of affairs is supported by some of the witnesses called by the defendant, and is not overcome by others, who testified that the odors smelled like stable manure and that they were not distressed. I am ready to believe that the smell was like that of stable manure; but stable manure plus noisome gases and vapors generated by these enormous heaps of dung, during the cooling process. It requires no proof to satisfy me of the great difference in volume and pungency of odors emitted by ordinary barnyard manure piles, and those that come from immense deposits, such as the defendant stores; for I need only recall the stifling and overpowering stench that came from the horse stable manure stored in large quantities on the Newark meadows some years ago, and I believe by this very defendant company, and how we were obliged to close car windows and doors, and stop breathing, while traveling by; and, indeed, we experience the same disagreeable sensations in our present daily travel, when passing long trains freighted with this animal excrement. The evidence makes out a clear case of nuisance to the complainants in the comfortable enjoyment of their homes—denounced by judges and text-writers as among the worst class of nuisances—and of a type similar to many reported in our books, which this court suppressed. *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gaslight Co.*, supra; *Meigs v. Lister*, 23 N. J. Eq. 199; *Pennsylvania R. R. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; *Rausch v. Glazer*, 74 Atl. 39; *Laird v. Atlantic Coast Sanitary Co.*, 73 N. J. Eq. 49, 67 Atl. 387; *Kroecker v. Camden Coke Co.*, 82 N. J. Eq. 373, 88 Atl. 955.

The nuisance determined, I will take up, in the order submitted by the defendants' counsel on the argument and in the briefs, the various objections to granting complainants relief.

[2] Before answer filed, a motion was made to strike out the bill as amended, on the ground of multifariousness. The gravamen of the bill, as originally drawn, was nuisance to habitation by defiling the air, and by the amendment an additional injury to one of the complainants was alleged by reason of the pollution, from the “Black Pool,” of a natural stream running through his property. De-

cision was reserved until final hearing, with the understanding that, if it went against the complainants, the amendment was to be withdrawn and an independent bill filed, with the further stipulation that testimony was to be taken on both branches of the case and used in the second suit, if one became necessary. Under the former practice, the joining of these causes of action would have been improper (*Davidson v. Isham*, 9 N. J. Eq. 186; *Morris & Essex Railroad Co. v. Prudden*, 20 N. J. Eq. 530), and would not have been permitted under the rule of this court promulgated by Chancellor Zabriskie at the March term, 1869. *Rowbotham v. Jones*, 47 N. J. Eq. 837, 20 Atl. 731, 19 L. R. A. 663. But, by the supplement to "An act respecting the Court of Chancery" (P. L. 1915, p. 184), the joinder is now allowed. Sections 24 and 25 of subdivision 3 of paragraph "Schedule A" provide:

"24. *Separate Causes of Action.*—Persons interested in separate causes of action may join as complainants or be joined as defendants, respectively, if the causes of action have a common question of law or fact, and arose out of the same transaction or series of transactions.

"25. *'Transactions.'*—The transactions referred to in the preceding section include any transaction which grew out of the subject-matter in regard to which the controversy has arisen."

This remedial provision, which has for its object the simplification of chancery procedure, by uniting in one suit all manner of complaint growing out of the same subject-matter, ought to receive most liberal judicial construction. The causes of action joined in this bill—the corruption of the atmosphere and the pollution of water—arose out of the same transaction, viz., the defendant's maintenance of its manure storage ground, to which the same fundamental principles of law are applicable, generally; and, while proof of one offense does not establish the other, the two causes of complaint are so closely allied in connection with the subject-matter of the controversy as to, for all practical purposes, embody a common question of fact within the letter and spirit of the legislation. Either a common question of law or a common question of fact warrants a joinder; and the use of the disjunctive particle is an indication of the broad sweep of the legislative intent, along with the trend of the times, towards economy of time, labor, and costs of litigation.

[3] By plea, the defendant challenges the complainants' right to maintain this suit without first showing that application had been made to the local board of health to take proceedings, and that the board had, without just cause, neglected or refused to do so. The police power of the state or local boards of health to abate nuisances, and to apply to this court to enjoin them, is limited by the statute to those "hazardous" or "injurious to public health." 2 C. S. 2652. The bill in this case does not charge that the odors are noxious, unwholesome, or hurt-

ful to health, but alleges merely that they are of a character so offensive and disagreeable as to make life uncomfortable, thus stating a case over which the health bodies have no jurisdiction. *State ex rel. Board of Health v. Neidt*, 19 Atl. 318; *State v. Freeholders of Bergen*, 46 N. J. Eq. 173, 18 Atl. 465; *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444. But, if the case were one of a distinct and special injury, affecting the enjoyment of property, arising out of a public nuisance, the injured party would be entitled to redress, without first invoking or resorting to the means created by law for the suppression of public offenses. Equity sometimes will decline, or with reluctance entertain, jurisdiction to abate a public nuisance at the instance of an individual suffering an injury distinct from that of the public, where the remedy at law is adequate and efficacious (*Morris & Essex Railroad Co. v. Prudden*, supra), or where the Legislature has established institutions with power of speedy and economical redress, as, for example, the Public Utility Commission; but this inclination does not extend to subordinating a right of private redress to a co-ordinate remedy in the public.

[4, 5] The defendant further sets up in its answer that it and its predecessor in title carried on business in the same manner at Monmouth Junction continuously for the past eight years, and that "the complainants are in laches, and are therefore debarred from maintaining this suit, unless and until they shall have first established in ordinary proceedings at law the fact that this defendant is guilty of maintaining upon its premises an actionable nuisance." I know of no rule, and no authority has been brought to my attention, to sustain the proposition that equity will not grant relief from a constant or recurring nuisance, because of the laches of the complainants, until the question of nuisance is settled by the verdict of a jury. Where the right or title of the complainant is not disputed, or is apparent, and the fact of the injury has been clearly made out by the evidence, and the damage is substantial, a court of equity will in the first instance determine the question of nuisance and grant relief. *Carlisle v. Cooper*, 18 N. J. Eq. 241; *a. c.*, 21 N. J. Eq. 576; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Stanford v. Lyon*, 37 N. J. Eq. 94. In *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538, Chief Justice Beasley said:

"After a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be deprecated if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complainant, 'Your right is clear; if you sue at law you must inevitably recover, and after several such recoveries it then will be the duty of this court, on the ground of avoiding a multi-

plicity of suits, to enjoin the continuance of this nuisance; still you must go through the form of bringing such suits before this court of equity can or will interfere.' In those cases in which, to the mind of the chancellor, the right of the complainant is clear, and the damage sustained by him is substantial, so that his right to recover damages at law is indisputable, and the chancellor has considered and established his right, I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant."

Where the nuisance is erected and completed, and there is no pressing necessity for intervention, or where on the question of nuisance the evidence is in sharp conflict and doubt exists, a verdict of a jury must be had before equity will aid. *Attorney General v. Helshon*, 18 N. J. Eq. 410; *Tuttle v. Church* (C. C.) 53 Fed. 422; *Elizabeth v. Gilchrist*, 86 Atl. 535. The Chancellor may, in his discretion, decline to hear and determine a close question of fact of nuisance, and may frame an issue for a jury, to inform "the conscience of the court." *Bassett v. Johnson*, 3 N. J. Eq. 417; *Fisler v. Porch*, 10 N. J. Eq. 243; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Newark & N. Y. Railroad Co. v. Mayor of Newark*, 23 N. J. Eq. 515; *Carlisle v. Cooper*, supra.

[6] Upon the argument, and in the briefs of counsel, they raise the question of laches as a bar in its broader aspect. I do not see how the complainants can be charged with sleeping upon their rights, so as to deprive them of relief. It would be most inconsiderate to hold that, having, for the past eight years, lived in a filthy atmosphere, inhaling and enduring the stench from the defendant's business, without complaint, they must patiently submit to further discomfort, and as long as the defendant sees fit to impose upon them. Every day's continuance is a new or fresh nuisance. *Board of Health v. Lederer*, supra; *Society v. Low*, 17 N. J. Eq. 19; *Carlisle v. Cooper*, supra; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Wood's Nuisances*, § 18, footnote cases. Nor are the complainants equitably estopped by acquiescence. The defendant's outlay in the purchase and preparation of its land, for the purpose of carrying on an offensive trade, was not with the implied consent of the complainants; and, if it had been, they rightfully would have refrained from taking action in the expectation that the business could be carried on so as not to harm them. The expenditure of about \$20,000 by the Pennsylvania Railroad Company in laying additional trackage and building a railroad scale on its own right of way to accommodate itself to the trade of the defendant, which is dwelt upon by counsel as a feature in the element of estoppel, can be of no possible concern.

The defendant puts forth considerable effort to cast the blame for the complainants' annoyance upon a nearby manure storage plant belonging to one McGirr, and also upon

loaded manure cars standing on sidings of the Pennsylvania Railroad at Monmouth Junction; but the evidence points unmistakably to the defendant as the prime and principal offender. Witnesses have traced the odors by the sense of smell, and the gases and vapors by the eye, directly to the defendant's storage plant, and also located their origin by the direction of the wind. The McGirr plant is small, and may have, to some extent, contributed to the nuisance of which the defendant is guilty, and so perhaps the railroad company; but either or both neither justify nor excuse the defendant. *Melgs v. Lister*, supra.

[7] The defendant appeals to the court's discretion to withhold relief, for the reason that to grant an injunction would do more harm than a denial would to the complainants. The doctrine of "weighing the inconveniences," it is argued, ought to be applied, because the injury to the complainants is comparatively small when contrasted with the annual loss to the defendant's farmer customers of 38,000 tons of horse stable manure, "enough to fertilize heavily 3,800 acres of land, which would produce, on an average good crop, 760,000 bushels of potatoes," and the consequent loss to the public at large of this great and valuable amount of foodstuff, and the eventual destruction of the defendant's entire business because of its inability, for failure of a market for its commodity or a place to put it during the summer season, to comply with the city stable owner's demands to be rid of his stable manure daily the year round, not to speak of the defendant's loss of profits. A similar appeal in behalf of the public was swept aside by Chief Justice Beasley in the *Higgins Case*, wherein he quoted Lord Cranworth in *Broadbent v. Imperial Gas Company*, 7 De G., M. & G., 436:

"If it should turn out that this company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on. * * * But, unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action toties quoties. That would be a disgraceful state of the law, and I quite agree with the Vice Chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas."

The discretion exercised by courts of equity in refusing injunctions on the ground of greater injury to the defendant is properly restricted to applications pendente lite. *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Higgins v. Water Co.*, supra; *Simmons v. Pater-son*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. But, on final hear-

ing, if the nuisance is clearly established, and it appears that it is causing substantial, material, and irreparable injury to the complainant, for which there is no adequate remedy at law, the law is settled in this state, and by the great weight of authority in other jurisdictions, that the complainant is entitled to relief by injunction, irrespective of the resulting damage to the defendant. *Higgins v. Water Co.*, supra; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Sullivan v. Jones Steel Co.*, 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. The cases on the subject of comparative injury are collected in the footnote to *Bristol v. Palmer*, 31 L. R. A. (N. S.) 881, and supplemental notes in L. R. A. 1916C, 1269. The principle was upheld in *Simmons v. Paterson*, but the Court of Errors and Appeals found itself justified in withholding injunctive relief, "in view of such acquiescence and the magnitude of the injury which would fall upon the public by prohibiting the use of the sewers," and held that a substitute remedy of adequate compensation would be a just disposition of the controversy. The nuisance complained of was the pollution of the Passaic river through the defendant's sewer system, built at an enormous expense under legislative authority, and which had existed for many years. The equities that stayed the court's hands were acquiescence and impending peril to health and life.

The defendant relies upon what was said by Vice Chancellor Pitney in *Hennessy v. Carmony*, supra, as furnishing a distinction between the right to an injunction where the act complained of is a trespass to real estate and where the injury is created by noisome and disagreeable odors interfering with the comfortable enjoyment of habitation. The opinion does not show that the Vice Chancellor differentiated the remedy. *Reilly v. Curley*, 75 N. J. Eq. 57, 71 Atl. 700, 138 Am. St. Rep. 510. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

During the course of the trial, counsel for the defendant admitted that there was no method of treatment nor any contrivance by which the nuisance could be overcome, and that there was no remedy short of a removal of the cause. An injunction will therefore issue, restraining the defendant from storing manure on its premises after the 1st day of April, 1918. The time is thus extended to enable the defendant to carry on its business during the present summer, and to seek another location, if one can be found. This will not be burdensome to the complainants, in view of their toleration for the past eight years, and is equitable to both parties. The complainants are entitled to costs.

HILL v. CARR.

(78 N. H. 453)

(Supreme Court of New Hampshire. Merri-mack. June 30, 1917.)

1. WORK AND LABOR ⇨4(2)—IMPLIED CONTRACTS.

From the acceptance of service rendered the law implies a promise to pay what the service was worth.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 4.]

2. CONTRACTS ⇨175(2) — CONSTRUCTION — "HOME."

In determining the meaning of an oral executed contract that one since deceased should "have her home" with plaintiff, the evidence competent is as to the situation of the parties, the amount of consideration paid, the age of the one to be cared for, and the practical construction given by the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 766, 1068, 1786, 1803, 1810.

For other definitions, see *Words and Phrases*, First and Second Series, *Home*.]

3. CONTRACTS ⇨232(1) — CONSTRUCTION — ELEMENTS.

Conceding a contract for a home for life to have been made for a stated consideration, plaintiff could recover for special nursing and care rendered necessary by a disease which developed long after the making of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1071, 1073-1075½, 1078-1086.]

4. TRIAL ⇨255(12)—NECESSITY OF REQUESTING INSTRUCTIONS.

In action on contract to pay for a home furnished, where defendant claimed that the consideration had been paid, but plaintiff demanded added payment for special services and care rendered necessary by subsequent development of a disease, it was defendant's duty to ask instructions as to how much of the claim was answered by the alleged contract.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 638.]

5. TRIAL ⇨165—DISMISSAL AND NONSUIT—WHEN ORDERED.

A nonsuit is not ordered upon defendant's evidence, for plaintiff is not obliged to yield to the evidence, but is entitled to have it weighed by the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374.]

6. APPEAL AND ERROR ⇨853—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

An instruction that the jury could draw no inference against plaintiff because she did not testify, in the absence of exception, became the law of the case, and was not open on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1524, 3405.]

7. APPEAL AND ERROR ⇨995—SCOPE OF REVIEW.

The Supreme Court has no jurisdiction to decide the comparative weight of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3907.]

Exception from Superior Court, Merri-mack County; Sawyer, Judge.

Assumpsit by Amella H. Hill by Burt W. Carr, executor of Hannah Carr, deceased. On defendant's exception to denial of motion for directed verdict. Exception overruled.

Assumpsit to recover for board, room, care, and special attention furnished the defendant's testator, Hannah Carr, in her lifetime, according to the following specification:

To board and room from June 15, 1902, to March 30, 1907, 250 weeks, at \$4 per week.....	\$1,000.00
To board, room, washing, mending, nursing, and special care of Miss Carr from March 30, 1907, to February 10, 1912, 254 weeks, at \$5 per week	1,270.00
To board, room, washing, mending, nursing, and special care of Miss Carr from February 10, 1912, to February 10, 1914, 104 weeks, at \$7 per week.....	728.00
	<hr/>
	\$2,998.00
1902. Credit.	
June 15. Credit by cash.....	1,000.00
	<hr/>
	\$1,998.00

Trial by jury, with verdict for the plaintiff for the amount of the specification. There was evidence the services for which payment was claimed were rendered and that they were of the value charged. At the close of the evidence the defendant's motion that a verdict be directed for him was denied, subject to exception. No other exceptions are reported.

Harry J. Brown, of Concord, for plaintiff.
Streeter, Demond, Woodworth & Sulloway, of Concord, for defendant.

PARSONS, C. J. [1] From the acceptance by the defendant's testatrix of the service rendered her, the law implies a promise to pay what the service was worth. The fact of service and its value are not contested, but the defendant contends that the evidence conclusively establishes that all the services were rendered under an express contract to furnish them for a fixed sum paid in advance. The only exception before the court is one to the refusal of the court to order a verdict for the defendant at the conclusion of the evidence. To sustain the exception, therefore, not only must the existence of the alleged contract conclusively appear, but it must appear with equal conclusiveness that all of the services claimed in the specification and proved were within the terms of the contract. There was no written evidence of the alleged contract. One of the parties being dead, there was no evidence from the parties themselves as to the contract or its terms. The evidence comes from the plaintiff's husband, who testified that the testatrix, Miss Carr, then a woman 82 years of age "offered \$1,000 to come and have a home with us, and finally we talked it over and concluded to let her come. * * * She said she would give \$1,000 to come and have a home with us; there was nothing said about how long the home should be for, or anything of the kind." Upon this statement of the contract, conceding that the evidence must be held to conclusively establish the existence of such a contract, the question

arises: What did the parties understand to be included in the term "home" which Miss Carr was to have with the plaintiff?

Occasion for discussion of the meaning of the word "home" has arisen in the construction of wills, in which a home is given to one legatee at the expense of another. The word has been construed to mean merely a place of residence (*Clough v. Clough*, 71 N. H. 412, 416, 417, 52 Atl. 449; *Gibson v. Taylor*, 6 Gray [Mass.] 310; *Shuttleworth v. Shuttleworth*, 34 W. Va. 17, 22, 23, 11 S. E. 714; *Kennedy's Appeal*, *81 Pa. 163; *Nelson v. Nelson*, 19 Ohio, 283); and in other cases to include board and maintenance (*Willett v. Carroll*, 13 Md. 459, 468); also necessary food and fuel, but not clothing (*Denfield, Petr.*, 156 Mass. 265, 30 N. E. 1018), and to include both lodging and sustenance, subject to an obligation to render service (*Day v. Towns*, 76 N. H. 200, 81 Atl. 405; *Lyon v. Lyon*, 65 N. Y. 339). "It is manifest that the word 'home' has not such a fixed meaning that it would accurately and precisely limit an obligation like the one here in question. Recourse may therefore be had to other evidence to ascertain the intent of the parties." *Day v. Towns*, supra, 76 N. H. 201, 81 Atl. 406.

[2] The question is: What did the parties understand was to be furnished and received under the term "home" as adopted in their contract, if they made such a contract? The evidence competent for consideration is the situation of the parties at the time, the amount of the consideration paid, the age of the person to whom it was to be furnished, with her probable duration of life, if the home was to be for life, and the practical construction of the parties. "As it is the province of the jury to weigh the testimony of witnesses, and determine its effect, so it is competent for the court, in its discretion, where a contract is merely verbal, and there is doubt as to the precise language used, or as to the understanding of the parties, to leave it to the jury to judge what is proved, and what language was used, and how it was to be understood, subject to proper instructions as to the legal effect of such contract as they may find to have been made." *Folsom v. Plumer*, 43 N. H. 469, 472.

[3] The testatrix, Hannah Carr, was 82 years of age at the time it is alleged the contract was made, and in good health for a person of her age. She had other property. There was a special reason in the necessities of the plaintiff for the payment of the lump sum of \$1,000 at the time. The testatrix was furnished by the plaintiff with room and board; but, becoming ill in 1910, and requiring a nurse, the amount paid by the plaintiff to the nurse was repaid by Hannah. She had a doctor, but there is no evidence the plaintiff paid him. Later she became ill of a cancer, requiring special care and attention of a peculiarly disagreeable character,

which the plaintiff furnished. From this evidence it could be found that, even if the parties understood the furnishing a home to include board and lodging, they also understood it did not include the special nursing and care rendered necessary by the disease which developed long afterward. And, as the service was rendered, the plaintiff, even if the contract was made as the defendant claims, could recover therefor. Hence to have granted the defendant's motion would have been error.

[4] The defendant argues that the plaintiff at the trial claimed to recover for all services charged upon a quantum meruit, or agreement to pay what they were reasonably worth, and that the position that a portion of the services were not covered by the contract set up by him cannot now be taken, since no such position was taken at the trial. The plaintiff claimed to recover for certain services according to her specification. The defendant claimed the evidence conclusively proved a contract, in consideration of \$1,000 paid, to perform all the service for which payment was asked, and in reliance upon that claim moved that a verdict be directed for him. The motion was properly denied, as the contract was not necessarily an answer to all of the specification. It was then the defendant's, not the plaintiff's, duty to ask for an instruction as to how much of the specification was answered by the alleged contract. The presumption is that such instructions as were proper were given.

In this case, however, although no exceptions were taken to the charge, it has been reported, and it appears the issue submitted to the jury was whether the services were rendered under an agreement to pay what was reasonable, with an advance payment of \$1,000 to enable the plaintiff then to pay off a mortgage upon her home, or whether the agreement was that the plaintiff should care for the testator as long as she lived; the \$1,000 paid being full compensation therefor. No exception was taken to the charge, and the question whether there was evidence authorizing recovery by the plaintiff upon the issue submitted is not, as has been said, raised by the exception taken. But this question has been argued, and failure to consider it might give a wrong impression. The question, therefore, is discussed, although technically not presented by the record. As already suggested, it was for the jury to find what the contract was. The services and their value were proved, from which the law implies a promise to pay what the services were worth. The defendant relies upon an express promise by the plaintiff to render the services without further compensation than the \$1,000 then paid. Whether the plaintiff so promised is a question of fact. The evidence tending to prove the promise is the testimony of the husband before recited, and the fact that Hannah paid the

\$1,000, came to the plaintiff's home to live, and remained there until about six months before she died. There was also evidence from two witnesses that the deceased, after occupying the home for a long time, expressed the feeling that she was living on charity, because she had outlived all she had paid in. The parties draw opposite inferences from these statements; but which inference should be drawn is for the jury to decide. Although Hannah Carr left the plaintiff's home about six months before her death, because a physical injury to the plaintiff rendered it impossible for her longer to care for the testatrix, it does not appear she ever claimed that the plaintiff was liable for her subsequent support, or that her conservator, or the defendant, have made such claim.

Whether Hannah Carr paid the \$1,000, and came to the plaintiff's home in reliance upon a promise, such as the husband's evidence tends to prove, involves probabilities of which the jury are judges. Upon this question the considerations before suggested as to the probable understanding of the parties as to the word "home" bear with more or less force. The effect of the contract, if found to be proved, was clearly explained to the jury. Whether the contract was made was properly left to them. The defendant argues that, in the presence of an express promise to pay, the law will not imply one. This is so; but the verdict shows that the express agreement relied on by him was not proved to the satisfaction of the jury. There was also evidence offered by the defendant of statements made by the plaintiff tending to establish the contract as claimed by him.

[5] A nonsuit is not ordered upon evidence offered by the defendant, "for the plaintiff is not obliged to yield to the evidence, and is entitled to have it weighed by the jury." *Pillsbury v. Pillsbury*, 20 N. H. 90, 97. The defendant argues that, as the plaintiff did not go upon the stand to deny making the admissions of which his witnesses testified, she admitted having made them. The claim is that the plaintiff could have testified whether she made the admissions or not, because Hannah was not present when they were claimed to have been made, and could not have testified upon the subject. But Hannah, if living, could have testified to the contract, and the plaintiff's testimony denying an admission that the contract was as the defendant claims would be indirect testimony that the contract was as she claimed.

[6, 7] Whether this would or would not exclude her testimony is now immaterial. The jury were instructed that they could not draw any inference against the plaintiff because she did not testify. This was the law of the trial, and as no exception was taken it became the law of the case. The question is not now open. This is not a case of uncontradicted evidence tending only to one point (*State v. Harrington*, 69 N. H. 496, 45 Atl.

404; *Arnold v. Prout*, 51 N. H. 587, but one where the sufficiency of the evidence relied upon as an answer involves probabilities which are solely for the jury. Of the comparative weight of the evidence, this court is without jurisdiction.

Exception overruled. All concurred.

(78 N. H. 468)

SPENCER v. CONNECTICUT RIVER POWER CO. OF NEW HAMPSHIRE.

(Supreme Court of New Hampshire. Cheshire. June 30, 1917.)

1. EMINENT DOMAIN §152(1) — RIGHT TO DAMAGES—OWNERS.

When land is taken in invitum by eminent domain, the damages belong to the owner at the time of the taking.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 403-405.]

2. EMINENT DOMAIN §271—FLOWING LANDS —LIABILITY FOR DAMAGES.

Although, under Pub. St. 1901, c. 142, § 12, Laws 1907, c. 244, § 3, and Laws 1903, c. 306, § 4, a power company could acquire the right to flow lands of other owners and be relieved from common-law liability for so doing by payment or tender of damages, until such payment it is liable in tort at common law for the damage done by such flowing.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741.]

3. EMINENT DOMAIN §63—EXERCISE OF RIGHT.

Where a power company had caused lands of other owners to be overflowed, but had taken no steps to dispossess the owners of their rights, deeds from such owners to plaintiff conveyed the lands unhampered by the right to flowage then unacquired.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 161-164.]

4. EMINENT DOMAIN §168(3)—EXERCISE OF RIGHT.

Under Pub. St. 1901, c. 142, § 12, Laws 1907, c. 244, § 3, and Laws 1903, c. 306, § 4, if the owner of overflowed lands brings petition for assessment of damages, it must be dismissed if the power company disclaims the intention to take the right to flow the land, and the proceeding is only maintainable if the company desires to acquire such right.

Exceptions from Superior Court, Cheshire County; Branch, Judge.

Petition by Charles P. Spencer against the Connecticut River Power Company of New Hampshire. Order dismissing the petition, and plaintiff accepts. Exceptions sustained.

Petition for the assessment of damages through flowing the plaintiff's land by the defendants' dam. At a hearing before the court it was agreed that the plaintiff acquired title from two to five years after the defendants' dam was filled and the land first flowed. No damages have been paid by the defendants to the persons who owned the premises when the flowage commenced, and no other petition for the assessment of damages for such flowage has been filed. Upon these facts the court ordered the petition dismissed, and the plaintiff excepted.

Joseph Madden, of Keene, for plaintiff. Harold E. Whitney, of Brattleboro, Vt., and Philip H. Faulkner, of Keene, for defendant.

PARSONS, C. J. [1, 2] When land is taken in invitum by eminent domain, the damages belong to the owner at the time of the taking. *Locke v. Laconia*, 78 N. H. 79, 97 Atl. 567; *Hadlock v. Jaffrey*, 75 N. H. 472, 76 Atl. 123; *Hodgman v. Concord*, 69 N. H. 349, 41 Atl. 287; *Bean v. Warner*, 38 N. H. 247; *Moore v. Boston*, 8 Cush. (Mass.) 274. In these cases the legal taking was considered to be coincident with the entry upon the land, and consequently the damages belonged to the owner at the time of the entry. Under the mill act (P. S. c. 142, § 12), and the defendant's charter (Laws 1907, c. 244, § 3; Laws 1903, c. 306, § 4), the defendant could acquire the right to flow lands of other owners and be relieved from common-law liability for so doing only by the payment or tender of the damages ascertained by agreement or through proceedings under the acts. Until such payment the defendant is liable in an action of tort at common law for the damage done by flowing lands of others. *Roberts v. Railway*, 73 N. H. 121, 59 Atl. 619; *Ash v. Cummings*, 50 N. H. 591.

[3, 4] As the defendant, at the time of the plaintiff's purchase, had taken no steps to dispossess his grantors of their property rights which had been invaded by the flowage, their deeds to the plaintiff conveyed the lands unhampered by such a right, then unacquired and which never might be obtained. Although the grantors had a common-law right of action for damages, they did not have a legal right to an assessment under the statute. Their petition for such assessment would have been dismissed unless the defendant had joined in requesting an ascertainment of the value of the flowage right in the land. Upon the defendant's disclaimer of an intention to acquire such a right, a petition by the plaintiff's grantors would have been dismissed, as the present will be upon such plea. *Jones v. Whittemore*, 70 N. H. 284, 47 Atl. 259; *Chapman v. Co.*, 67 N. H. 180, 38 Atl. 16. As the defendant has not yet legally taken the plaintiff's land for flowage purposes, the present proceeding is maintainable, if it now desires to do so, and the damages will be recoverable by the owner at the time of the taking. In *Hadlock v. Jaffrey*, 75 N. H. 472, 76 Atl. 123, the water right taken was taken under a special act authorizing the town to construct water-works, and not under the flowage act, and the decision appears to stand upon the finding in the case that the right was taken by the town prior to the plaintiff's acquisition of title. The plaintiff, by bringing this proceeding, admits the flowage "is or may be of public use or benefit" (P. S. c. 142, § 15), and hence that the defendant may acquire the right of flowage by payment of damages;

i. e., that it may legally take the land, not that it has legally taken it.

As the plaintiff may maintain this proceeding under the original act, it is unnecessary to consider the effect of chapter 326, Laws 1909, amending section 8, c. 244, Laws 1907, which gave the defendant power to erect a dam across the Connecticut below the mouth of the Ashuelot. The special provisions relied upon by the plaintiff appear to relate solely to the flowage from the dam at this point, and if they could be construed to apply to flowage from other dams, they certainly would not have that effect until the defendant had accepted the amendment and built the dam, which does not appear to have yet been done.

Exception sustained. All concurred.

(130 Md. 572)

ADLEMAN v. OCEAN ACCIDENT & GUARANTEE CORP., Limited, et al. (No. 5.)

(Court of Appeals of Maryland. June 26, 1917.)

MASTER AND SERVANT — §393 — WORKMEN'S COMPENSATION LAW — ABATEMENT OF COMPENSATION AWARDED.

Under Workmen's Compensation Law (Acts 1914, c. 800) § 35, fixing compensation for partly dependent persons, and providing for determination of questions of dependency according to the facts existing at the time of the injury resulting in death to the employé, section 42, providing that on marriage of a dependent widow her compensation shall cease, and section 53, giving the Commission power to change or modify former findings or orders, the subsequent marriage of a partly dependent sister of a deceased employé did not determine her right to compensation awarded her by the Commission and authorize the Commission to abate it.

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Proceeding under the Workmen's Compensation Law by Toba Brenner and another against the Ocean Accident & Guarantee Corporation, Limited, insurer and another, to recover compensation for the death of Morris Brenner, employé. From an order of the State Industrial Commission, dismissing the petition of the insurer, praying that the compensation awarded Mary Brenner Adleman be abated, it appealed to the circuit court, where the order was reversed, whereupon Mrs. Adleman appeals. Reversed, with costs to appellant.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Frank G. Wagaman, of Hagerstown, for appellant. Frank Gosnell, of Baltimore, (Alexander Armstrong, Jr., of Hagerstown, on the brief), for appellees.

THOMAS, J. On the 5th of December, 1914, Morris Brenner, an employé of the Reliable Junk Company, of Hagerstown, Md., died as the result of an accidental injury arising out of and in the course of his em-

ployment by said company. His mother, Toba Brenner, and his sister, Mary Brenner, filed a claim for compensation as dependents under Acts 1914, c. 800, known as the "Workmen's Compensation Law," and the State Industrial Accident Commission, on April 7, 1915, passed an order awarding them, as partly dependent upon the deceased, the sum of \$12.50 per week, which the Commission apportioned between the claimants, giving each of them \$6.25 per week, payable weekly, for the period of 4 years and 32 weeks from the 5th day of December, 1914.

On the 10th of June, 1916, the Ocean Accident & Guarantee Corporation, Limited, the insurer in the case, filed a petition alleging that Mary Brenner was married to Nathan Adleman on the 19th of June, 1915, and that she had concealed her marriage from the petitioner until the 1st day of June, 1916, and praying that the compensation awarded her be abated by the Commission as of the 19th of June, 1915. After a hearing, at which the facts stated in the petition, except the alleged concealment of the marriage, were admitted, the Commission passed an order denying the relief prayed and dismissing the petition. From that order the petitioner appealed to the circuit court for Washington county, and that court on the 10th of January, 1917, passed an order reversing the order of the Commission and abating the compensation awarded Mary Brenner as of the 19th day of June, 1915.

This appeal is from the order of the circuit court, and the single question involved is whether the subsequent marriage of a partly dependent sister of a deceased employé determines her right to compensation awarded her by the Commission and authorizes the Commission to abate it. The answer to this question must, of course, be found in the provisions of the act under which the award was made. The Commission took the view that it had no authority to grant the relief prayed, while the circuit court held that under a proper construction of the act the subsequent marriage of Mary Brenner determined her right to the compensation, and that the Commission, and the circuit court on appeal, were authorized to abate it.

The act, after declaring its purpose to provide "sure and certain relief for workmen injured in extrahazardous employments and their families and dependents, * * * regardless of questions of fault and to the exclusion of every other remedy," except as therein provided, and after providing for a commission to administer the law, declares in section 14:

"Every employer, subject to the provisions of this act, shall pay or provide as required herein compensation according to the schedules of this act for the disability or death of his employé resulting from an accidental personal injury sustained by the employé arising out of and in the course of his employment, without regard to fault as a cause of such injury," etc.

Other sections of the act require the employer to secure the payment of the compensation referred to in section 14, and provide how he may do so. Section 35 declares that:

"Each employé (or in case of death his family or dependents), entitled to receive compensation under this act shall receive the same in accordance with the following schedule, and except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

After providing for permanent and temporary total disability and permanent and temporary partial disability, this section contains the following provisions for cases where the injury causes the death of the employé within two years:

"If there are wholly dependent persons at the time of the death, the payment shall be fifty per cent. of the average weekly wages [of the employé], and to continue for the remainder of the period between the date of the death and eight years after the date of the injury, and not to amount to more than a maximum of four thousand two hundred and fifty dollars, nor less than a minimum of one thousand dollars.

"If there are partly dependent persons at the time of the death, the payment shall be fifty per cent. of the average weekly wages, and to continue for all of such portion of the period of eight years after the date of the injury, as the Commission in each [case] may determine, and not to amount to more than a maximum of three thousand dollars.

"The following persons shall be presumed to be wholly dependent for support upon a deceased employé: A wife or invalid husband ('invalid' meaning one physically or mentally incapacitated from earning), a child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) living with or dependent upon the parent at the time of the injury or death.

"In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employé, but no person shall be considered as dependent unless such person be a father, mother, grandfather, grandmother, stepchild or grandchild, or brother or sister of the deceased employé, including those otherwise specified in this section."

Under these sections, where the employé, engaged in any one of the employments covered by the act, dies as the result of an "accidental personal injury * * * arising out of and in the course of his employment" within two years, leaving at the time of his death persons within the class mentioned who were, at the time of the injury, partly dependent upon him, the act imposes upon the employer a liability to pay to such dependents 50 per cent. of the average weekly wages of the employé, to continue for all or such portion of the period of eight years after the date of the injury as the Commission may determine, not to amount to more than a maximum of \$3,000. Except as to those presumed to be wholly dependent, the question of dependency, in whole or in part, and the portion of the period of eight years after the date of the injury during which 50 per cent. of the average weekly wages of the employé is to be paid to those partly dependent, is left to the

determination of the Commission; but when so determined the obligation of the employer to pay, and the right of the beneficiaries to receive, the compensation provided becomes definite and certain. This obligation to pay and the right to receive are not, by the terms of the act, made conditional upon the beneficiary remaining unmarried, or dependent upon his or her subsequent state of dependency, and nowhere in the act is there found express authority to the Commission to abate the compensation. The relief to the dependents of the deceased employé provided by the act is in lieu of that afforded by the common law, and subsection 11 of section 62 of the act defines "beneficiary" as:

"A husband, wife, child, children or dependents of an employé in whom shall vest a right to receive payment under this act."

The act defines the duties and powers of the Commission, and, in the absence of a clear grant of such power, we would not be justified in holding that it is authorized to abate compensation expressly provided by the act as "sure and certain relief" for those who were partly dependent upon a deceased employé, and whose right thereto has been determined and has vested in accordance with the terms of the act. When we speak of the right to the compensation as vesting in the beneficiary, we do not mean to indicate that the right of those partly dependent to the compensation awarded them is a vested right, in the sense that, if they should die before the completion of the weekly payments allowed them, their right to the same would devolve upon their personal representatives. That question is not presented by the record, and we are not to be understood as expressing any opinion in regard to it. But that the right to the compensation provided by the statute vests in such beneficiaries, in the sense that it is not conditional upon their remaining unmarried, and that the marriage of such a beneficiary does not authorize the abatement of the compensation by the Commission, we think is free of doubt.

The appellee relies, and the learned court below based its conclusion, upon section 53, which provides that:

"The powers and jurisdiction of the Commission over each case shall be continuing and it may from time to time make such modifications or change with respect to former findings or orders with respect thereto as in its opinion may be justified."

A reference to several other sections of the act will show the purpose and application of this section. For instance, under section 41, compensation may be suspended by the Commission where an employé refuses to submit to a medical examination. Under section 42, in case of aggravation, diminution, or termination of disability, the Commission may readjust the rate of compensation, and, in a proper case, terminate the payments; and under section 43, if a beneficiary has been a nonresident of the state for one year, the Commission may convert weekly payments

into a "lump sum payment." These and other provisions indicate the power granted to the Commission in the exercise of its continuing jurisdiction, but they afford no support for the contention here made by the appellee. If we assume that under section 53 the Commission may make such modifications or change in its former findings in reference to those partly dependent upon a deceased employé, or its orders in respect thereto, as in its opinion may be justified, the change or modification made must nevertheless be such as is authorized by the act. Subsection 4 of section 35 declares in explicit terms that in all cases, other than those in which the law presumes the claimants to be wholly dependent, the question of dependency, in whole or in part, shall be determined in accordance with the facts existing at the time of the injury resulting in the death of the employé. It is clear that, if the question of dependency is to be determined upon the facts existing at the time of the injury, any modification or change by the Commission of its former finding upon that question must likewise be based upon the facts existing at the time of the injury, and cannot be made to rest upon or to conform to conditions arising and existing subsequent to the date of the injury, provided, of course, the award is to those living at the time of the death of the injured employé.

Here the application is not for a correction or modification of the finding of the Commission upon the facts existing at the date of the injury; but the petitioner, in the face of the express terms of the statute, seeks to have the question of dependency of Mary Brenner determined by the Commission upon a state of facts arising after the injury, the death of the employé, and the award of the Commission, and to have the former finding and order of the Commission changed accordingly. In dealing with a similar provision in the Ohio statute, where it was claimed that it conferred upon the Board of Awards power to abate an award to one wholly dependent upon a deceased employé, the Supreme Court of Ohio said, in *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944:

"If section 39 could be construed as giving the board power to abate an award made under paragraph 2 of section 35, in case of the death of dependent prior to completion of payments, it necessarily follows that it could be construed also as giving the board power and jurisdiction to determine dependency at any time during the period covered by the payments, instead of having its determination expressly limited by the statute, as it is, to dependency at time of death, and, although the statute is inflexible as to amount of award, abate the award at any time the person to whom the compensation was granted ceased to be a dependent. This construction would be directly contrary to the statutory requirements."

Section 49 provides:

"The benefits in case of death shall be paid to such one or more of the dependents of the dece-

dent for the benefit of all the dependents as may be determined by the Commission, which may apportion the benefits among the dependents in such manner as it may deem just and equitable."

It is suggested that under this section and section 53 the Commission may reapportion the compensation among the dependents, and it is argued that, if the Commission has the power to change the award to one of the beneficiaries, it may abate it entirely. We are not required in this case to determine whether the Commission has the power to change its award for the purpose of reapportioning the compensation among the dependents. The statute fixes the amount of the weekly payments the employer is required to make to the beneficiaries at 50 per cent. of the average weekly wages of the deceased employé. That amount cannot be changed by the Commission, but must be paid to one or more of the dependents for the benefit of all, or may be apportioned among them, as the Commission may deem just and equitable. Toba Brenner, the other beneficiary, is not asking for a reapportionment of the weekly payment fixed by the statute; but the petitioner, the insurer, is in effect seeking to have the statutory allowance reduced to the extent of one-half. The terms "just and equitable," used in section 49, relate, not to the amount of compensation to be paid by the employer or insurer, but to the apportionment of the same among the beneficiaries. In that the petitioner can have no interest.

Section 42 provides that:

"In case of the remarriage of a dependent widow of a deceased employé without dependent children, all compensation under this act shall cease," etc.

But there is no such provision in reference to other dependents mentioned in the act, and it is reasonable to conclude that if the Legislature, while dealing with the subject of abatement of compensation, had intended the compensation provided for a sister to abate upon her marriage it would have so declared in plain terms.

We have examined the other cases cited by counsel, but they furnish very little aid in arriving at the proper conclusion in the case before us. Those determining the effect of the marriage of a dependent are based upon statutes unlike the Maryland law, while in the others the question involved was the right of the personal representatives of a deceased dependent to the compensation awarded or provided by statute. As the Maryland act does not provide for the abatement of compensation awarded to a partly dependent sister of a deceased employé upon her marriage, or authorize the Commission to abate it on that ground, we must reverse the order of the court below.

Order reversed, with costs to the appellant, Mary Brenner Adleman.

(131 Md. 1)
WASHINGTON, B. & A. ELECTRIC R. CO.
 v. OWENS. (No. 17.)

(Court of Appeals of Maryland, June 27, 1917.)

1. MASTER AND SERVANT §265(4)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURIES IN INTERSTATE COMMERCE—ISSUES AND PROOF.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]) for death of servant, it is essential to plaintiff's right to recovery to prove that at the time the deceased was injured he was employed in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 880, 899.]

2. MASTER AND SERVANT §276(1)—ACTIONS FOR DEATH—FEDERAL EMPLOYERS' LIABILITY ACT—SUFFICIENCY OF EVIDENCE.

In an action under the federal Employers' Liability Act, evidence that deceased, who was accidentally killed by the discharge of a pistol in the hands of a fellow servant, was employed in a blacksmith shop in which repairs were made on cars engaged in both interstate and intrastate work, was insufficient to show that at the time of deceased's death he was engaged in work in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950, 954.]

Appeal from Superior Court of Baltimore City; John J. Dobler, Judge.

"To be officially reported."

Action by Sylvia L. Owens, administratrix of Marcellus F. Owens, deceased, against the Washington, Baltimore & Annapolis Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

George Winship Taylor and George Weems Williams, both of Baltimore, for appellant. Thomas Mackenzie, of Baltimore, for appellee.

BURKE, J. The appellee, plaintiff below, recovered a judgment in the superior court of Baltimore City against the appellant, and this is the defendant's appeal. The suit was brought under the federal Employers' Liability Act, approved April 22, 1908, to recover damages for the death of Marcellus F. Owens, who was injured by the alleged negligence of the defendant, while he was in its employ, and died as the result of said injury. The first section of that act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and if none, then to the next of kin dependent upon such employé, for such injury or death re-

sulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The declaration contained two counts. In the first count it was alleged:

"On the 2d day of July, 1915, Marcellus F. Owens, the deceased aforesaid, and the husband of the said equitable plaintiff Dora Owens, and the father of the said equitable plaintiffs, Sylvia L. Owens, Gilbert Owens, and Franklin Owens, was and for a number of years last preceding said date had been employed by and engaged in the service of said defendant corporation as a blacksmith or mechanic in the repair works and shops of the defendant, engaged in work upon the cars and instrumentalities used by it in interstate commerce as hereinbefore and hereinafter described; that on the said 2d day of July, 1915, the said Marcellus F. Owens was employed, engaged, and acting in the service of the defendant as a blacksmith or mechanic in the performance of his work upon the car and instrumentalities used by the defendant in its interstate commerce aforesaid between the state of Maryland and the District of Columbia, and within the jurisdiction of the United States of America hereinafter referred to."

At the conclusion of the evidence for the plaintiff the defendant submitted several prayers by which the court was asked to withdraw the case from the consideration of the jury upon various grounds. The same questions as to the plaintiff's right to recover were raised by the defendant's special exceptions filed to granting of the plaintiff's prayers. These prayers and special exceptions were overruled by the court. The rulings on the prayers and special exceptions constitute the only bill of exceptions in the record. These rulings present several important questions as to the plaintiff's right to maintain the suit under the act; but in the view we take of the case only one of these questions need be considered. That question is this: Did the plaintiff offer any legally sufficient evidence tending to show that Marcellus F. Owens was injured while he was employed in interstate commerce, within the meaning of the federal Employers' Liability Act? Upon the substantial and controlling facts, which are few and simple, there is no conflict in the evidence, and these facts are here stated.

The defendant is a common carrier, and owns and operates an electric railroad which runs from Baltimore City, Md., to and into the city of Washington, in the District of Columbia, and also from Baltimore City to Annapolis, Md. It is engaged in both interstate and intrastate transportation. The branch line to Annapolis connects with the main line at Annapolis Junction where the company's repair shops are located. Marcellus F. Owens was in the employ of the defendant working as a helper in the blacksmith shop at this place. There were four persons employed in this blacksmith shop, viz. Robert F. Bryant and Arthur T. An-

draws, both blacksmiths, and William Lowman and Marcellus F. Owens as their respective helpers. About a year and a half before Owens was injured Robert F. Bryant brought to the shop an old army pistol. This old pistol was used in the hunting of rabbits near the shops, and was at times discharged about the shops for amusement or sport. It was kept in a locker in the shop in which Bryant and Lowman kept their clothes and tools. Early in the afternoon of July 2, 1915, William Lowman took the old pistol, which was loaded with powder and paper wadding, from the locker, intending to discharge it either for amusement or to frighten some one about the works. When he was at or near the door of the blacksmith shop the pistol was accidentally discharged and the load entered the right thigh of Owens, who was standing near by at the time. The wound was washed at the shop and Owens went home, and that evening he consulted Dr. Thomas W. Linthicum, who was called as a witness and testified:

"That on July 2, 1915, Marcellus F. Owens was brought to his office about 8 o'clock in the evening suffering from a gunshot wound in the right thigh. The hole at the entrance of the wound was about as large as a half dollar, ragged and torn. He dressed it. Some one had attempted to dress it before, and had removed some of the debris. There was not a bullet in the pistol, but it was loaded with hair or dirt or packing of some kind. The wound was blackened as if a powder wound. He was burned through his clothes. It was deep, and went through nearly all the muscles, practically to the bone. He removed some particles resembling hair. Owens stated to him that it was packing from an old refrigerator. He said that was what the pistol was loaded with. He removed from the wound a lot of hair that looked like packing, although he had never seen packing of a refrigerator. He saw Owens again July 3d, and every day until the day of his death, on July 9th, at the University of Maryland Hospital. He thinks he died from the effects of this wound."

[1, 2] It was essential to the plaintiff's right to recover to prove that at the time the deceased was injured he was employed in interstate commerce work. *Howard v. Ill. C. R. Co.*, 207 U. S. 492, 28 Sup. Ct. 141, 52 L. Ed. 297; *Osborne v. Gray*, 241 U. S. 16, 36 Sup. Ct. 486, 60 L. Ed. 865; *Ill. C. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Minn. & St. L. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358. In what particular service was Owens engaged on the day he was injured? Was it interstate or intrastate commerce? The record is entirely silent. The evidence of the character of work done by him is found in the testimony of Robert F. Bryant as follows:

"Q. What kind of work did you do in the shop? A. Blacksmithing. Q. You did it all? A. No. Mr. Andrews, he had a helper. Q. I don't mean you personally, but in your shop you four men did all the repairs on all the cars of the defendant? A. Doing repairs. Q. That was the only blacksmith shop out there in those works? A. Yes, sir. Q. This railroad line

runs from the District of Columbia over to Baltimore? A. I rode on it that far; yes."

Whether he was employed on the day he was injured in work on cars used in intrastate service—on the Annapolis division—or in repairing cars used on the interstate division, or working on cars used indiscriminately in both kinds of transportation is not shown. The evidence fails to show that at the time he was injured he was employed in interstate commerce, and the case should not have been submitted to the jury. In *Ill. C. R. Co. v. Behrens*, Adm'r, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, the court said:

"The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded, the freight in them was at times destined from within to without the state or vice versa, at other times was moving only between points within the state, and at still other times was of both classes. When the cars were empty, the purpose was usually to take them where they were to be loaded, or away from where they had been unloaded; and oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once, and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state. The question of law upon which the Circuit Court of Appeals desires instruction is whether upon these facts it can be said that the intestate, at the time of his fatal injury, was employed in interstate commerce within the meaning of the employers' liability act.

"Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618 [31 Sup. Ct. 621, 55 L. Ed. 878]; *Southern R. Co. v. United States*, 222 U. S. 20, 26 [32 Sup. Ct. 2, 56 L. Ed. 72]; *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 213 [32 Sup. Ct. 436, 56 L. Ed. 729]; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 432 [33

Sup. Ct. 729, 57 L. Ed. 1511, L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18]. The decision in *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297] is not to the contrary, for the act of June 11, 1906 (34 Stat. 232, c. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316), there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employe, even though his employment had no connection whatever with interstate commerce.

"Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. The act was so construed in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146 [33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153]. It was there said: 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is employed by the carrier in such commerce.' Again: 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases. *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; *Seaboard Air Line R. Co. v. Moore*, 228 U. S. 433 [33 Sup. Ct. 580, 57 L. Ed. 907]; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 158 [33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 158]; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256 [34 Sup. Ct. 306, 58 L. Ed. 591, 594, Ann. Cas. 1914C, 159]; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42 [34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168].

"Here at the time of the fatal injury the interstate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Judge Dobler, who presided at the trial below, followed the ruling of this court in *B. & O. R. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225. In that case Branson suffered injury in the shops at Cumberland while engaged in painting engines and cars used in both interstate and intrastate commerce, and this court allowed a recovery upon the

ground that the work of painting these engines and cars had a reasonable and substantial relation to interstate commerce. But that case has been reversed by the Supreme Court of the United States (*B. & O. v. Branson*, 242 U. S. 623, 37 Sup. Ct. 244, 61 L. Ed. 534), apparently upon the sole ground that Branson was not engaged in interstate commerce at the time he suffered the injury. The court cited in support of its conclusion *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, 180, 36 Sup. Ct. 517, 60 L. Ed. 941.

For the reasons stated, the judgment will be reversed, and, as there can be no recovery in this action, a new trial will not be awarded.

Judgment reversed, without awarding a new trial.

(130 Md. 635)

BUCHER v. FEDERAL BASEBALL CLUB OF BALTIMORE, Inc. (No. 15.)

(Court of Appeals of Maryland. June 28, 1917.)

1. CORPORATIONS §76—STOCK SUBSCRIPTIONS—AGREEMENTS—BONUS.

Defendant, with others, agreed as part of an underwriting agreement to subscribe shares of preferred stock in plaintiff corporation, in consideration of shares of common stock to be transferred to him by the directors in payment of his services, the subscription to the preferred stock to be annulled and returned upon the sale to the public of stock in a specified amount. *Held*, that the defendant could not avoid liability on his subscription on the theory that the contract was invalid, as providing for the issuance of a bonus, since a transfer by the directors to defendant was not the issuance of stock to defendant as a bonus.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 197-209, 213-218.]

2. EVIDENCE §73—PRESUMPTIONS—CONTRACTS.

The appellate court will not presume that agreement of directors of corporation to contribute stock of the corporation under an underwriting agreement as compensation for the services of underwriters had not been legally issued, in order to exempt an underwriter from his obligation under his agreement.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 94.]

3. CORPORATIONS §90(6)—SUBSCRIPTIONS TO STOCK—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action against the underwriter of corporate stock, a subscription agreement is not rendered inadmissible by reason of the fact that one of the subscribers, who signed after defendant, had reserved the option of paying for the stock he was underwriting prior to the date specified in the underwriting agreement, since, if he exercised his option, it could not increase or affect the liability of the other subscribers.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 411-416.]

4. CORPORATIONS §90(6)—SUBSCRIPTIONS TO STOCK—FRAUD—EVIDENCE.

In an action against the underwriter of corporate stock, evidence that defendant was induced to sign by representations and assurance of secretary of the corporation that no liability would be incurred, that the corporation, after the first baseball game of the season, would have money enough for its needs, and that defendant signed the paper without reading it, was properly rejected, as without probative force on the issue of fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416.]

5. CORPORATIONS §80(5)—SUBSCRIPTIONS—FRAUD—STATEMENT OF FACT OR OPINION.

The statement by the secretary of a baseball club that its gate receipts would be sufficient to meet its requirements, and thus relieve an underwriter of its stock of liability, is not a representation of an existing fact, but only an expression of opinion or expectation, which is insufficient as a basis of fraud or deception.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 250.]

6. CORPORATIONS §90(6) — SALE OF CORPORATE STOCK—ACTIONS—EVIDENCE.

In an action by a corporation against an underwriter and subscriber of its stock, evidence that the underwriting agreement was hypothecated for a loan held admissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416.]

7. CORPORATIONS §90(6)—STOCK SUBSCRIPTIONS — UNDERWRITING AGREEMENT — ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a corporation against an underwriter and subscribers of its capital stock, evidence of the sales of stock by the corporation pursuant to the agreement, prior to the time when the subscribers were called upon for payment, was admissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416.]

8. EVIDENCE §271(13) — ADMISSIBILITY — DECLARATIONS.

In an action by a baseball corporation against an underwriter and a subscriber to its capital stock, statements made by the secretary of the club to defendant, after defendant was called on under the agreement to pay his subscription, were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087.]

9. CORPORATIONS §90(6)—SUBSCRIPTIONS—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a baseball corporation against an underwriter and subscriber to its capital stock, evidence as to defendant's knowledge of corporation's financial condition after defendant was called upon to pay under his agreement held inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416.]

10. CORPORATIONS §90(6)—SUBSCRIPTIONS—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a baseball corporation against an underwriter and subscriber to its capital stock, evidence that the secretary of the club, who was also one of the underwriters, had not as yet paid his subscription, was immaterial and inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416.]

11. INTEREST §68 — STOCK SUBSCRIPTION — QUESTION FOR JURY.

A subscription for stock in a corporation under an underwriting agreement, to be paid in the future, not being a contract on which interest is recoverable as of right, the allowance of

interest on such contract should be left to the jury, to determine whether, under the circumstances, a recovery of interest would be equitable and just.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 157.]

12. TRIAL §194(11)—QUESTION FOR JURY.

In an action by a corporation against an underwriter and subscriber to its stock for the recovery of subscription price, an instruction allowing recovery of interest is erroneous, as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 458-460.]

13. APPEAL AND ERROR §1144—DETERMINATION AND DISPOSITION — AFFIRMANCE IN PART AND REVERSAL IN PART.

In an action by a corporation against an underwriter and subscriber to its capital stock for the amount of the subscription, where the court erroneously by instruction allowed the recovery of interest, but plaintiff thereafter offered to waive the interest allowed by the jury, and to accept the amount of the subscription without interest, the court on appeal will affirm the judgment for the recovery of the principal, and remand the cause for new trial as to the allowance of interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4479.]

Appeal from Superior Court of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Action by the Federal Baseball Club of Baltimore, Incorporated, against Frederick Bucher. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

William G. Towers and William P. Lyons, both of Baltimore, for appellant. L. Edwin Goldman and Frank B. Ober, both of Baltimore (Ritchie & Janney, of Baltimore, on the brief), for appellee.

URNER, J. An underwriting agreement between the Federal Baseball Club of Baltimore, Incorporated, and a number of persons, including the appellant, recited that the corporation had then outstanding capital stock to the amount of \$150,000 preferred and \$150,000 common stock, and was desirous of raising money for use as working capital for the ensuing year, and proposed to obtain the necessary funds by increasing its capital stock to \$250,000 preferred and \$250,000 common stock, the preferred to be offered to the stockholders at par, with such bonus, if any, of common stock as might be determined by the board of directors, but that, as the time was deemed unfavorable for offering the new stock to the stockholders and the public, the corporation had requested the other parties to the agreement to underwrite the stock on the terms thereafter prescribed, the underwriting, when completed to the amount of \$25,000, to be effective and binding, and to be used by the corporation for the purpose of

borrowing money thereon to the extent of its requirements. The agreement then provided that each of the underwriters thereby subscribed for the number of shares of the preferred stock of the corporation set opposite his name, and obligated himself to pay therefor at the rate of \$10 per share as and when payment should be called for by notice in writing from the treasurer of the corporation, but such calls to be made in no event prior to July 1, 1915. It was further agreed that the underwriting might be hypothecated by the corporation with any bank or trust company. There was a provision that the baseball club should have the exclusive right to offer the stock to its stockholders and the public "until the dissolution of the underwriting on July 1, 1915," and the agreement then proceeded as follows:

"And in consideration of such services rendered by the subscribers, said Federal Baseball Club of Baltimore, Incorporated, does hereby agree that upon the sale of said stock to the amount subscribed for hereunder to its stockholders or to the public, said subscription obligations shall be returned and the said underwriters shall each receive as compensation for their said services 50 per cent. of the par amount of their subscriptions herein in common stock of the corporation, the same having been contributed for this purpose by the directors, and that all sales of stock effected as aforesaid shall be applied ratably on said subscriptions."

The appellant was one of 25 underwriters, each of whom signed the agreement as a subscriber for \$1,000 of the preferred stock at its par value. By the hypothecation of the underwriting with the Baltimore Trust Company a loan was obtained by the Baseball Club to the amount of \$25,000. The efforts of the club to dispose of the new issue of preferred stock resulted in the sale of only 129 shares, apart from those taken by underwriters, two of whom paid for and received the full amount for which they subscribed. The other 23 subscriptions were reduced ratably, as provided by the agreement, as the result of the sales of stock made by the club subsequent to the underwriting. As the amount realized from such sales at par was \$1,290, the obligation of each of the subscribers was reduced from \$1,000 to \$943.92, and each of them was notified in writing by the treasurer of the club to pay that sum on August 15, 1915, in pursuance of a resolution to that effect passed by the board of directors. The payment thus requested of the appellant having been refused, he was sued in this action, and a judgment, on the verdict of a jury, was recovered against him for the amount claimed, with interest.

There are seven bills of exception in the record. The first exception was taken to the admission in evidence of the underwriting contract. It is contended that the agreement is invalid and inadmissible, because of its provision that the underwriters should receive, as compensation for their services, common stock of the baseball club to the amount of 50 per cent. of their subscriptions for its

preferred stock. This objection is founded on the theory that the agreement provided for the issuance of bonus stock to the subscribers, in the amounts specified, and that such an undertaking is illegal, and renders the subscription void and unenforceable. The principle applied in the case of *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543, is invoked in support of this contention. In the case cited a subscription for preferred stock, with a 50 per cent. bonus of common stock, in a New York corporation, was held to be invalid under the laws of that state. It is urged that the law of Maryland also prohibits such contracts upon the part of corporations created under our statutes. Whether this view is correct in its general theory is a question which need not now be decided, because, if the principle asserted be assumed to be operative in this state, we are satisfied that it does not apply to the special terms of the agreement involved in this suit.

[1] The common stock, to be received by the subscribers for preferred stock under the present contract, was not to be issued by the corporation, and was not intended to be a bonus. It was contributed by the members of the board of directors as a compensation to the underwriters for their services in that capacity. By the terms of the agreement they were to receive the stated amounts of common stock only in the event that the corporation succeeded in selling the preferred stock for which they had subscribed. If that contingency had actually occurred, the subscription obligations were to have been returned and the underwriting dissolved. The subscribers would then have been relieved of the liability they had assumed, and would have received no preferred stock under the agreement, but would have been entitled to the common stock contributed by the directors as compensation for the service rendered in the underwriting transaction. The argument for the appellant on this point proceeds upon the theory that the contribution of the common stock by the directors, to which the agreement referred, in fact represented the direct issuance of the stock by the corporation to the underwriters. We do not feel at liberty to make such an assumption. It is not in accord with the meaning of the language used in the agreement, and we have no reason to assume that the statements of fact therein made are incorrect in any particular. When the agreement was executed, \$150,000 of common stock had previously been issued, and it was some of this stock, apparently, that was owned and contributed by the directors. If it had been intended to compensate the underwriters with some of the unissued common stock of the corporation, that purpose would have been expressed by a simple provision for the *issuance* of the stock for that purpose. There would have been no occasion to recite the *contribution* of the stock from the source indicated.

[2] The opinion in *Trent Import Co. v. Wheelwright*, supra, distinguished the ruling in that case from the decision in *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431, where—

“the defense of a subscriber that certain shares, which he was to receive in conjunction with those for which he had subscribed, were to be illegally issued as a bonus, was disallowed, but it was pointed out that the stock was to be transferred to the subscriber by a third party, to whom it had been lawfully issued, and not by the corporation.”

There is nothing in this record to show that the stock contributed by the directors for the compensation of the underwriters had not been legally issued, and we have no reason, therefore, to adopt such a theory for the purpose of exempting the appellant from his contractual obligation.

[3] The admissibility of the subscription agreement was disputed also on the ground that one of the subscribers, who signed after the appellant, made a written reservation of the privilege of withdrawing any part of the \$1,000 of preferred stock he was underwriting, “together with the bonus stock,” at any time prior to July 1, 1915. It is argued that a subscription thus qualified is not in accordance with the agreement, and hence is not to be considered as meeting in part the provision that the obligation should become effective when the underwriting was completed to the amount of \$25,000. With this subscription thus eliminated, the theory is that underwriting to the prescribed amount has never been procured, and that the agreement has therefore never become effective. The reservation by a subscriber of the privilege of paying for his stock before the time when the underwriting was intended to be dissolved did not relieve him of his equal obligation under the contract, but gave him the option to meet and satisfy his liability before it matured. The exercise of such an option could not increase the responsibility of the other subscribing parties. It could only have the effect of reducing the total of the amounts for which they were severally bound. The right was reserved by the corporation to sell prior to July 1, 1915, to the stockholders, or the public, any or all of the stock underwritten by the agreement, and in view of the provision to that effect, and of the evident design that the stock should be sold, if possible, the option in question, appended by one of the subscribers, would appear to have been superfluous. It was certainly immaterial, so far as the practical rights and interests of the other underwriters were concerned.

[4] The second, seventh, eighth, ninth, and tenth exceptions refer to offers of testimony by the appellant as a witness in his own behalf to prove that his subscription was obtained by fraud. It was admitted by the appellant that he signed the paper and entered “\$1,000” with his own hand in the column headed “Amount at Par Value of

Preferred Stock Subscribed For”; but he desired to testify in substance that he was induced to sign by the representation and assurance of the appellee’s secretary that no liability would be thereby incurred by the appellant, and that the only object of the paper was to tide the baseball club over the first game of the season, after which it would have enough money for its needs, and that he signed the paper without reading it, and in reliance upon the secretary’s statement as to the purpose for which it was to be used. The trial court ruled in effect that the testimony thus proffered was immaterial, and without probative force upon the issue of fraud, to which it was directed. With this view we fully agree. By the appellant’s admission that he understood the paper he signed was to be used for the purpose of raising money, and that he personally wrote after his signature the amount of his subscription, it is settled beyond question that he was not misled as to the fact and measure of the liability he was thereby assuming.

[5] In view of his conceded knowledge as to the object for which his signature was being obtained, he is not entitled to impeach for fraud the obligation into which he entered merely because he did not read the paper, and was assured that the corporation to which he was lending his credit would realize enough money from its operations to repay the loan he was thus aiding it to procure. The statement by the secretary of the baseball club that its gate receipts would be sufficient to meet its requirements, and thus relieve the appellant of any liability on account of his signature, was not a representation of an existing fact, but only an expression of opinion or expectation, upon which he was not justified in placing reliance, and which is an insufficient basis for a charge of fraud and deception. *Robertson v. Parks*, 76 Md. 132, 24 Atl. 411; *Boulden v. Stilwell*, 100 Md. 552, 60 Atl. 609, 1 L. R. A. (N. S.) 258; *Hall v. Brown*, 126 Md. 173, 94 Atl. 530. The case of *McGrath v. Peterson*, 127 Md. 412, 96 Atl. 551, cited by the appellant, was widely different in its facts from the one now under review.

[6, 7] The third and fourth exceptions were taken to the admission of proof that the underwriting agreement was hypothecated by the baseball club for a loan of \$25,000, and the fifth and sixth exceptions opposed the introduction of evidence as to sales of stock by the corporation, under the agreement, prior to the time when the subscribers were called on for payment. There was no error in these rulings.

[8, 9] The eleventh and twelfth exceptions refer to the exclusion of testimony by the appellant as to statements made to him by the secretary of the baseball club after the notice for payment was issued. The subsequent representations thus sought to be proven were immaterial under the issues joined, as was also the knowledge then possessed by the

appellant, and offered to be proven under the thirteenth exception, as to the appellee's financial condition.

[10] An offer to prove, as shown by the fourteenth bill of exception, that the secretary of the club, who was also one of the underwriters, had not as yet paid his subscription, was properly refused, as that fact, if proven, would have been clearly immaterial.

The only remaining bill of exceptions relates to the instructions. Those granted at the request of the plaintiff are said to be objectionable, because they disregarded the issue of fraud raised by the pleadings. We find no evidence in the record legally sufficient to warrant the submission of that question to the jury. It was testified by the defendant that, when he was asked to sign the agreement, he was told by the secretary that the baseball club had made \$8,000 the previous year, but had to advance that sum to the players. The secretary was then called as a witness by the defendant, and stated that he had no exact knowledge on the subject, but he believed that the club had lost a little money the preceding year. This witness, upon whom the defendant relied for the rather indefinite proof just mentioned, testified also that he made no statement to the defendant, on the occasion of his signing the subscription, as to the club's earnings the year before, except that it had not prospered, and hence found it necessary to raise some money by the proposed underwriting. As, according to the defendant's own testimony, he knew that the profits of the former season had been expended, and that the club was in actual need of funds to continue its operations, we can have no doubt as to the legal insufficiency of the evidence offered in support of the issue of fraud. The defendant's prayers were properly refused. They are based upon theories which we have discussed in ruling upon other exceptions.

[11] One of the instructions granted at the plaintiff's instance was to the effect that, if the jury should find in favor of the plaintiff, their verdict should be for the amount due on the defendant's subscription, with interest from August 15, 1915; that being the date designated in the call for payment. Objection is made to this instruction, because it directs the allowance of interest from the date mentioned, instead of leaving that question to the jury's discretion. It was held in the case of *Frank v. Morrison*, 55 Md. 408, that:

"A subscription for stock in a corporation, to be paid for in installments, is not such a contract as falls within the class of those on which interest is recoverable as of right."

In thus ruling the court said that:

"While there are cases in which interest is recoverable as of right, such as bonds, contracts in writing to pay money on a day certain, such as bills of exchange or promissory notes, or

contracts for the payment of interest, or where the money claimed has been actually used, yet with such exceptions it has long been the settled practice of the courts of this state to refer the question of interest entirely to the jury, who may allow it or not in the shape of damages, according to the equity and justice appearing between the parties, on a consideration of all the circumstances of the particular case as disclosed at the trial."

[12] By virtue of this rule of practice, a granted prayer in the case cited, *directing* the allowance of interest, was held to be erroneous. The same principle applies to the instruction now under consideration. It should properly have left to the jury's discretion the question as to whether interest should be added to the principal sum claimed.

[13] Before the entry of the appeal an offer was made by the plaintiff to the defendant, as shown by the record, to waive the interest allowed by the jury, and to accept settlement on the basis of a verdict and judgment for \$943.92, being the amount due on the subscription, without interest. This offer does not appear to have been accepted. The verdict was for the sum of \$1,011.15, which is evidently made up of the principal debt and interest thereon from the time it was payable to the date of the trial. There is no difficulty, therefore, in separating the interest from the total amount of the judgment. By section 22a of article 5 of the Code of Public Civil Laws, as enacted by chapter 248 of the Acts of 1914, it is provided:

"If it appears to the Court of Appeals that a reversible error affects a severable item or part only of the matters in controversy, the court may direct final judgment as to the remaining parts or items thereof, and may direct a new trial as to the said severable part or item only."

In pursuance of this provision the judgment will be reversed only to the extent of the interest item it includes, as to which a new trial will be awarded, and as to the remaining amount of the judgment, \$943.92, it will be affirmed, and directed to be finally entered.

Judgment affirmed in part, and reversed in part, and new trial awarded; the appellant to pay the costs.

(130 Md. 665)

WILMER v. PHILADELPHIA & READING
COAL & IRON CO. (No. 4.)

(Court of Appeals of Maryland. June 26, 1917.)

1. INJUNCTION \S 118(6) — ACTIONS FOR INJUNCTION — PLEADING — EXHIBITS.

Where plaintiff sued, as substituted trustee of an insane cestui que trust under a will, for an accounting for minerals removed from land in which the cestui que trust had an interest, and to enjoin the further removal of minerals, but did not file with his bill copies of the will and of the order appointing him as trustee, an injunction could not properly have been granted, as the court could not accept plaintiff's construction of the will, especially where it appeared that defendant was claiming under a

lease purporting to be signed by the committee of the estate of the cestui que trust.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 242.]

2. TRUSTS §251—ACTIONS BY TRUSTEES—DEFENSES—PAYMENT TO CESTUI QUE TRUST.

Where an insane cestui que trust of an interest in land had received the benefit of the lease, equity could not permit his trustee to recover for the removal of the minerals because of some defect in the execution of the lease, or because the payments were made through the committee of the estate of the cestui que trust, and not through the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 357.]

3. EVIDENCE §43(3)—JUDICIAL NOTICE—PROCEEDINGS IN OTHER SUITS.

The Court of Appeals is not required to ignore facts appearing in its records in a different case, to which plaintiff and defendant were parties and in which the same lease was involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 64.]

4. APPEAL AND ERROR §518(5)—RECORD—MATTERS INCLUDED—EXHIBITS.

A statement giving the purport and substance of an exhibit filed with the bill was improperly included in the record, unless such statement was itself filed with the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2348-2350.]

5. TRUSTS §287—RATIFICATION OF UNAUTHORIZED ACTS—RATIFICATION BY COURT.

Where the same person was trustee under a will creating a trust and committee of the estate of the insane cestui que trust, and as trustee he acquiesced in a lease executed by him as committee and which should have been executed as trustee, the court had power to ratify his act, even after the bringing of a suit by his successor as trustee for an accounting for minerals removed under the lease.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 325, 344.]

6. INSANE PERSONS §71—LEASES—EFFECT OF IRREGULARITIES.

If the court authorized the committee of an insane person to execute a mining lease, the informal execution of it, or its failure to recite such authorization, did not justify a second recovery of the rents and profits from the lessee.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 118-124.]

7. INSANE PERSONS §71—LEASES—VALIDITY—LAW GOVERNING.

The powers of a committee of an insane person appointed in Maryland over property in Pennsylvania, and the effect of a lease of property in Pennsylvania executed by him, depend upon the laws and decisions of Pennsylvania.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 118-124.]

8. COURTS §18—JURISDICTION—LOCATION OF REAL PROPERTY.

Where a substituted trustee under a will brought a suit for an accounting for minerals taken from land in which his cestui que trust had an interest, and it appeared that the minerals were so taken under a lease executed for the cestui que trust by a committee of his estate, the title of the property under the lease was so directly involved that a court of Maryland could not properly determine the questions involved, the land being situated in Pennsylvania, as the validity of the lease, and not the question of accounting, was the primary question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 50-68.]

9. TRUSTS §261—ACTIONS BY TRUSTEE—PLEADING.

Where a substituted trustee under a will brought suit for an accounting for minerals taken from land in which his cestui que trust had an interest between the years 1890 and 1899, and it appeared that plaintiff was himself one of the lessors in a lease of the land executed in 1899 and was presumably familiar with the facts, he would not be permitted to assert such a stale claim without alleging some explanation of his own delay for two years in bringing suit, or for the inaction of his predecessor for nearly a quarter of a century.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 371.]

10. TRUSTS §261—ACTIONS BY TRUSTEE—PLEADING.

If plaintiff's cestui que trust had not received his share of the profits of the mining operations, or if plaintiff could not ascertain whether the cestui que trust had or had not received such profits, he should have so alleged in his bill.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 371.]

11. TRUSTS §261—ACTIONS BY TRUSTEE—PLEADING.

Where, in a suit by a substituted trustee of an insane cestui que trust for an accounting for minerals taken from land in which the cestui que trust had an interest, it appeared that a trustee and a committee were both named for the cestui que trust, and that for a large portion of the time the same person was named as both, plaintiff could not rely on general allegations as to himself and his predecessor, but should definitely allege whether the cestui que trust's share, or any part of it, had been paid to plaintiff's predecessor as committee, or to any one else.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 371.]

12. MINES AND MINERALS §52—INJUNCTION—COTENANTS.

The taking of minerals from land will not be enjoined at the suit of a party claiming only a comparatively small interest in the land, where an injunction might do the defendant great injustice, and no good ground for such a drastic proceeding appears, especially as the remedy by injunction in favor of a cotenant is sparingly exercised.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 142-146.]

Appeal from Circuit Court No. 2 of Baltimore City; Carroll T. Bond, Judge.

Suit by Edwin M. Wilmer, substituted trustee, etc., against the Philadelphia & Reading Coal & Iron Company. From a decree sustaining the demurrer and dismissing the bill, plaintiff appeals. Affirmed.

See, also, 124 Md. 599, 93 Atl. 157.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

David Ash, of Baltimore, for appellant.
Ralph Robinson, of Baltimore, for appellee.

BOYD, C. J. This is an appeal from a decree sustaining a demurrer to, and dismissing, an amended bill of complaint, filed by the appellant against the appellee. The plaintiff alleges that he is the duly substituted trustee under the will of Jane H. Nicholas for the purposes of the trust therein created, by an order of circuit court No.

2 of Baltimore City, passed the 12th day of July, 1913, and that the defendant (appellee) is a foreign corporation "engaged in the business of mining, transporting, and selling coal and other mine products, with offices located in the city of Baltimore, and transacting business in said city"; that by the terms of the will of Jane H. Nicholas, who was the owner of a one-sixth fee-simple interest in certain land situated in Schuylkill county, Pa., described in an indenture, a copy of which is filed, her estate was divided into six equal parts, one of which devolved upon the plaintiff as such substituted trustee, for the benefit of Philip N. Nicholas, for the term of his natural life, he being still living; that the signature of George C. Nicholas, the alleged committee of Philip N. Nicholas, to said indenture, by his alleged attorney, was unauthorized; and that it was incompetent for said alleged committee so to lease said land, without leave of the court first had and obtained.

It is then alleged that by the terms of the will an undivided fee-simple interest in said land had devolved upon the plaintiff, as tenant in common with certain other cotenants therein, the defendant being one of them; that the defendant had occupied said land from the 1st of January, 1890, the time of the death of said Jane H. Nicholas, or prior thereto, to the present time, mining the same, and since said date opened new mines thereon without the leave of the plaintiff, or any predecessor of his in title, and received the rents, issues, and profits thereof, which amounted to a great sum of money, after the deduction of all necessary expenses in the operation of the mines, and used the same for the purposes of its mining business, and for the erection and occupation of works and houses thereon, and has encroached upon the rights of the plaintiff, its cotenant in the premises, as herein more particularly set forth, without leave, license, or warrant in law, and without any contract or lease with or on behalf of the plaintiff, or any predecessor of him in said trust; that the defendant has been and still is mining large quantities of coal and other products of said land from mines already opened prior to the 1st of January, 1890, and prior to the date of the alleged indenture, and from mines opened subsequent to said dates, etc.

It is further alleged that defendant is still using and otherwise disposing of the coal and products of mining taken from said land, as well as the land itself, and has erected buildings, tracks, and machinery thereon, and has otherwise wrongfully used said land continuously, year after year, to the present time, "to the exclusion of your orator from his rights therein and in utter disregard of said rights, to the great loss and damage of and to said trust estate, and the depletion of the coal and other mineral deposits upon said land, and the value of said

land, and has unwarrantably leased and undertaken to lease portions of said land for other purposes than mining to strangers to this plaintiff, who have no privity of contract with your orator." It is alleged that plaintiff had demanded an accounting, but the defendant had failed to account to him, or any predecessor of him, in the premises, for any part of the rents, issues, or profits of said land, or for any matter of account whatsoever, since the 1st of January, 1890.

The bill prays for (a) an accounting; (b) that defendant be decreed to pay the plaintiff all sums found to be due on said accounting; (c) that the defendant be enjoined "from further excluding your orator from said land, and from further interfering with the rights of your orator in said land held by this trustee in trust as aforesaid, and from mining or removing any coal or other property from said land; and from further occupying said land adversely to the interests of your orator"; (d) that defendant be adjudged to pay to the plaintiff such damages as he may have sustained from the wrongful acts of the defendant; and (e) for further relief.

[1] As there were not filed with the bill copies of the order of court, by which the plaintiff alleges he was appointed, and of the will of Jane H. Nicholas, we have no information in the record of their contents beyond the allegations in the bill. The judge of the lower court could not properly have granted the injunction prayed for without having those exhibits before him. *Miller's Equity Procedure*, § 582, pp. 689, 690; *Miller v. Balto. Co. Marble Co.*, 52 Md. 642, 646. Under the circumstances of this case it was necessary to have before the court a copy of the will, as the court is not authorized to accept the construction placed on it by the plaintiff, especially as the copy of the lease filed with the bill shows that it was signed and executed by "George C. Nicholas, Committee of the Estate of Philip Norbourn Nicholas." The amended bill seems to proceed on the theory that the defendant and the plaintiff are tenants in common. In addition to what we have quoted, it is alleged that:

"Excepting as arising from said cotenancy, no contractual rights or privity exist or have existed between him, or his predecessor in title, and said defendant."

It is contended by the appellee that the bill in effect alleges an ouster. The "indenture" referred to, marked "Plaintiff's Exhibit A," is a lease dated January 1, 1900, to the appellee by a large number of persons, including "George C. Nicholas, Committee of the Estate of Philip Norbourn Nicholas, by his Attorney in Fact, Cumberland Dugan." Edwin M. Wilmer, individually, is also one of the lessors. By that lease the lessors undertook to grant, demise, and let to the defendant "the exclusive right and privilege of digging, mining, and carrying away an-

thracite coal wholly at their own cost and expense in and from their interest (being two hundred and eighty-three five hundred and seventy-sixths part) of, in, and to" certain tracts in Schuylkill county, Pa., with the right to deposit the slate, dirt, and refuse thereon, for the term of 15 years, from the 1st day of January, 1890, to the 31st day of December, 1913. It is signed, sealed, and acknowledged, and, when executed by attorneys in fact, it purports to be executed under letters of attorney intended to be recorded in Schuylkill county, Pa.

Although according to the bill the appellant was not appointed substituted trustee until the 12th of July, 1913, and he was individually a party to that lease, the first prayer of the bill reads as follows:

"(a) That said the Philadelphia & Reading Coal & Iron Company, defendant, may answer this bill, and discover and set forth in detail the amount of tonnages of coal and other products mined at, on, and from the land aforesaid, by, on, or on account of or for the benefit of said defendant, as well as to discover and set forth, in detail, the tonnage of each and every grade of coal and other products mined as aforesaid, by said defendant, monthly since the month of January in the year 1890, and to set forth in detail all sums by it received from said coal and other products, and each of them, from or on account of sales, or in any other manner whatsoever, from and since the 1st day of January, 1890, as well as all profits by it in any way made during the said time on said land, and the products thereof, and each of them, and account with your orator for all your orator's interest in the rents, issues, and profits of said land, so occupied as aforesaid, by said defendant, from and since the 1st day of January in the year 1890 to the present time."

Then follow the prayers for a decree requiring the defendant to pay over all sums found to be due on said accounting, for an injunction, for damages, and for general relief.

The argument of the case was devoted mainly to the question whether relief should be granted to the appellant in this state, inasmuch as the land in question is in Pennsylvania, the title to which the defendant alleges is involved and is really the main issue. It would probably require a large force of clerks to furnish the information demanded by the prayer quoted above, and, although it is true that the appellant was not appointed trustee until July, 1913, he was one of the lessors in the lease referred to, and presumably had every opportunity to know what was received by the lessors, and what each was entitled to. The lease contains many provisions for the protection of the lessors, amongst others one requiring the company to furnish them, on or before the 10th of each month, a correct statement of the number of tons of coal mined and shipped from the premises during the previous month, others permitting them, their agents, engineers, and inspectors, at all times to enter the mines, providing for distress for rent in arrears, for re-entry, etc.

[2] While there is a general denial of the

defendant having obtained any rights under the lease from the plaintiff or "any predecessor of his in title," it is not alleged or contended that Philip N. Nicholas did not get the full benefit of what he was entitled to. It would be a monstrous injustice to hold the appellee responsible for the share coming to Philip N. Nicholas during the many years the defendant was operating under the lease, if in fact he received the benefit of it. Can it be seriously contended that if a number of tenants in common make such a lease as this, and one cotenant does not join in it, but accepts his share, that he could subsequently recover it, because he did not unite in the lease, in a court of equity? No one could pretend that one capable of acting in his own right could thus bring reproach upon the administration of justice, and would a court of equity, having charge either of a committee of a lunatic appointed by it, or of a trustee acting for such a person, or both, be required to allow another recovery of such share, although it was actually received and used for the benefit of the ward of the court, merely because there was some defect in the execution of the instrument? Of course not; on the contrary, it would be the manifest duty of the court to protect a lessee from the attempt of a trustee appointed by it to again collect the amounts already paid, if the ward of the court, whether a lunatic or a mere beneficiary under a trust, had in fact already had the benefit of the amount due, even if it was paid through a committee and should have been through the trustee, unless there was something more shown than is in this bill.

Although it is not before us on this demurrer, take for illustration what the learned judge below said in his opinion on the demurrer to the original bill. While he did not feel authorized to consider them in passing on the demurrer, he spoke of certain facts which the counsel for the parties agreed upon in the course of the argument, one of which was that the same person who was appointed to hold the interest of Philip N. Nicholas as committee was trustee under the will; "that he never acted as trustee, but that under the title of committee only he executed a mining lease to the defendant, and during the 20 years of occupancy by the lessee received, as committee only, a regular accounting of rents and profits under the lease, from all three seventy-seconds in which the lunatic had an interest." If that was the case, is there any principle of law, equity, or good morals which would permit the appellant to again collect from the appellee the share of Philip N. Nicholas, if it be conceded that his trustee did not collect it as such, but did as committee? It may very properly be urged that the bill does not so admit, but it nowhere alleges that the appellee has not paid to some one, and only refers to the appellant and "his predecessor in title" as not receiving it, by which we

understand the bill to mean that plaintiff's predecessor as such did not unite in the lease or receive the money. In *Wilmer v. Phila. & Reading C. & I. Co.*, 124 Md. 599, 93 Atl. 157, the Coal & Iron Company filed a bill of interpleader against the present appellant and the Baltimore Trust Company as committee of Philip N. Nicholas. The Trust Company had been substituted as such committee. The subject-matter of the bill was a fund derived from the interest in the coal lands owned by Philip N. Nicholas as one of the heirs of C. G. Nicholas, who was a party to the lease, and Wilmer, trustee, sought to bring into that case the interest of Philip N. Nicholas in those lands under his mother's will. Wilmer there contended that the Coal & Iron Company was not an indifferent stakeholder, because it "has paid the revenue since the death of C. G. Nicholas to some one," and it was nowhere suggested that all that was due had not been paid to some one for the benefit of Philip N. Nicholas. The court held however, that only the fund in the hands of the plaintiff could be considered under the bill of interpleader. In the absence of some allegation to the contrary, it may be fairly inferred that Philip N. Nicholas got the benefit of all he was entitled to, as Cumberland Dugan was not only the attorney in fact for George C. Nicholas, committee, but for the other lessors in that lease, and was a lessor himself.

[3, 4] In the interpleader case (124 Md. 599, 93 Atl. 157) a letter from Wilmer, trustee, addressed to the Coal & Iron Company, was filed, in which it was stated that George C. Nicholas, surviving trustee of Philip N. Nicholas under the will of Jane H. Nicholas, had been removed and that he had been appointed trustee in his place. That letter bears the same date as the order appointing him, and although, as we have already pointed out, the order was not filed with the bill, as it should have been, we cannot be required to ignore the fact which appears in the records of this court in a case to which the present appellant and appellee were parties, and in which the very lease in question was involved. Indeed, in this record there immediately follows the amended bill of complaint a statement which is said to give the purport and substance of Exhibit A, and in it reference is made to the indenture of lease printed in the record of this court in the case in 124 Md. 599, 93 Atl. 157, thus referring us to that record, and, moreover, we assume that the statement was filed with the bill, as otherwise it ought not to have been in this record. Beyond all that, there is in the record in this case a copy of the indenture referred to, which shows the necessity of explaining such matters as we have referred to.

[5] Assuming, then, that George C. Nicholas was both trustee under the will for, and committee of, Philip N. Nicholas, it cannot be doubted that, as he executed the lease as committee, he must be held to have acquiesced

in it, even if it be conceded that he ought to have executed it as trustee, and not as committee, or was not duly authorized to execute it as committee. The court certainly had the power to ratify his act as such trustee, and presumably he duly accounted for the funds received by him, as there is no allegation or suggestion to the contrary. If the court having jurisdiction of the trust, which is the court in which the bill was filed, is satisfied that it would have ratified the action of the trustee if it was necessary for the trustee to have that done, and that the cestui que trust got the benefit of what he was entitled to, it could and doubtless would even now do so. It is said in 38 Cyc. 106, in the article on Tenancy in Common, written by the learned attorney for the appellant, that:

"Tenants in common, being owners of several interests, may ratify the acts of each other or acquiesce therein; and generally such ratification or acquiescence with full knowledge of material facts is effective, and after such ratification or acquiescence the ratifying parties and their respective grantees are estopped from denying the effect thereof."

See, also, 38 Cyc. 104; 7 R. C. L. 876, 877, and note to *Du Rette v. Miller*, Ann. Cas. 1913D, 1165.

[6-8] By reason of the failure of the appellant to file the will, we cannot determine the powers of the trustee under it; but the powers of a court of equity, under sections 114 to 123 of article 16 of the Code of Public General Laws of 1904, in reference to persons non compos mentis, are very broad and comprehensive, although a sale, lease, or mortgage of the estate of a person non compos mentis by his committee is safeguarded by a number of provisions for his protection. The bill does not in terms allege that the court did not authorize the committee to make the lease, and, if it did, the informal execution of it, or failure to recite the fact in the lease, would not justify a second recovery of the rents and profits. It is true that the bill alleges that the signature of George C. Nicholas, etc., "is entirely unauthorized"; but why it is we are not informed by the bill. How far a committee appointed in this state can exercise powers over property in Pennsylvania must depend upon the laws and decisions of that state, and it would be for the courts of that state to determine the effect of such a lease as this, signed by a committee or his attorney in fact, if he was both trustee and committee for Philip N. Nicholas, as he seems to have been. It would seem, therefore, to be clear that the title of this property, under the lease, is so directly involved that a court of this state could not properly determine the questions which would be necessary in order to do justice to the parties. The question of accounting is not the primary one, for if the lease be held to be valid, or the rights of the defendant protected under the theory suggested by us above, or for other reasons satisfactory to the Pennsylvania

courts, there will be no occasion for an accounting under this bill.

[9, 10] We have thus only discussed the demurrer in connection with the lease, for although the bill undertakes to go back to January 1, 1890—9 years before the lease was to operate, and over 25 years before the original bill was filed—without something more definite as to what transpired between the 1st of January, 1890, and the 1st of January, 1899, when the lease began to operate, than we find in this bill, a court of equity would not be justified in permitting a trustee under its jurisdiction to thus delve into the past, much less in granting relief to such a stale claim. It is true that the plaintiff was not appointed substituted trustee until a little over 2 years before the original bill was filed, but the lease filed as an exhibit shows that he was one of the lessors of the land, and presumably he was familiar with the facts, and yet he makes no explanation of his own delay of 2 years, or of the inaction of nearly a quarter of a century by his predecessor. If his predecessor ought to have received the share in question as trustee, and did not in that capacity, but did as committee, and properly accounted for it, what we have said is sufficient to show that in our opinion the plaintiff should not be permitted to recover, and if there was no such receipt, or the appellant could not ascertain whether or not there was, he should have so stated in his bill. Frankness in a court of equity demanded at least that much.

[11] So as to what, if anything, became due between the time of the expiration of the lease, on December 31, 1913, and the filing of the bill, we are not sufficiently informed how the defendant was holding, but the allegations are of the most general and indefinite character. We do know from the case in 124 Md. 599, 93 Atl. 157, that the Baltimore Trust Company was at some time appointed committee of Philip N. Nicholas; but whether his share, or any part of it, has been paid to that company as committee, or to any one else, we are not informed by the bill, although in 124 Md. 599, 93 Atl. 157, in his cross-bill, the appellant alleged that the Trust Company "under color of its alleged committee ship has wrongfully received and accepted money due to him as trustee." Frankness is demanded in all cases, but peculiarly so in one such as this, where there is enough before the court to inform it that a trustee and a committee were named for the same person, and that at least for a large portion of the time the same person was named as both. It is not enough for one who has been substituted for one of the places to rely on general allegations as to himself and his predecessor, especially as, when one person occupies two positions of trust for the same person, and receives money for his *cestui que trust* or ward, presumably he receives it in the proper capacity, in the

absence of something to the contrary, and, if he did not, but applied it to the use of his *cestui que trust* or ward, a court of equity could readily adjust and correct the error, so as to protect all parties entitled to protection.

[12] That under the circumstances an injunction should not have been granted would seem clear. There is only involved a comparatively small interest in the land. To enjoin the defendant from prosecuting its business on that land might do great injustice, and there does not appear in the bill any good ground for such a drastic proceeding. The remedy by injunction in favor of a cotenant is sparingly exercised. 38 Cyc. 97, 98; 17 Amer. & Eng. Ency. of Law, 705. If the contention of the appellee be correct that the bill alleges an ouster, there would be still less ground for the relief asked; but we have not thought it necessary to discuss that question, as we are satisfied that the plaintiff is not entitled to relief under this bill, for the reasons we have stated.

Decree affirmed; the appellant, individually, to pay the costs.

(120 Md. 587)

WARFIELD v. VALENTINE et al.
(No. 7.)

(Court of Appeals of Maryland. June 26, 1917.)

1. APPEAL AND ERROR \S 337(3)—CONDITION OF CAUSE—PENDENCY OF PROCEEDINGS IN LOWER COURT.

On bill for specific performance, plaintiff's appeal from an *ex parte* order substituting administrators *pendente lite* on account of death of one of the parties defendant is premature, where notice of such order was served on plaintiff, and he filed petition against such administrators, and thereafter petitioned for rescission of the order, which petition was pending at the time of the attempted appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1877.]

2. APPEAL AND ERROR \S 78(1)—ORDERS APPEALABLE—FINALITY OF DETERMINATION.

An order setting for hearing a motion to dissolve an injunction is not within the provisions of Code Pub. Civ. Laws, art. 5, \S 26, authorizing appeals from final decrees or from orders in the nature of final decrees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 426, 470, 472.]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

"To be officially reported."

Bill for specific performance by S. Davies Warfield against John R. Valentine and others. From an order making administrators *pendente lite* parties defendant, and from an order setting for hearing defendants' motion to dissolve an injunction, plaintiff appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

John B. Deming and George Whitelock, both of Baltimore (Whitelock, Deming & Kemp, of Baltimore, and T. Scott Offutt, of

Towson, on the brief), for appellant. Osborne I. Yellott and Frank Gosnell, both of Baltimore (Marbury, Gosnell & Williams, of Baltimore, on the brief), for appellees.

THOMAS, J. This is the second appeal in this case. On November 1, 1915, a bill of complaint was filed in the circuit court for Baltimore county by the appellant against Thomas H. Emory for specific performance of an alleged contract by which Emory sold to the plaintiff two farms or tracts of land in Baltimore county, containing in the aggregate 775 acres of land, more or less. John R. Valentine was made a party defendant in the bill because of the purchase by him of the property through an agent of Emory, with the view, as alleged in the bill, of defrauding the plaintiff, and because of an alleged understanding between Valentine and the plaintiff that, if either of them purchased the property, "the other should be considered as having a share or interest in the same." The bill prayed (1) for the specific enforcement of the alleged contract between the plaintiff and Emory; (2) or, in the event the court should refuse that relief, that a decree be passed declaring that Valentine purchased the property in trust for himself and the plaintiff; and (3) that Emory and Valentine, and their servants, agents, etc., be enjoined until the further order of the court from taking any steps to carry out the contract of sale between them. An order restraining and enjoining the defendants as prayed in the bill was passed by the court on the day the bill was filed, and thereafter the defendants filed their answer, admitting the contract of sale between the defendants, but denying the other averments upon which the plaintiff relied for relief.

The proceedings in the case from the filing of the bill to the date of the order for the present appeal are set out in the record of the former appeals of Theodore W. Forbes and Osborne I. Yellott, administrators pendente lite, and John R. Valentine, January term, 1917, and are referred to in the opinion of this court filed March 13, 1917.

On the 6th of September, 1916, Theodore W. Forbes and Osborne I. Yellott, administrators pendente lite, filed a petition in the case, alleging that Thomas H. Emory had died at Saranac Lake, N. Y., on the 15th of August, 1916, leaving a paper writing purporting to be his last will and testament; that before the will was admitted to probate by the orphans' court of Baltimore county a caveat thereto was filed by an uncle and two aunts of the deceased, as his heirs at law and next of kin; and that the orphans' court of Baltimore county had appointed the petitioners administrators pendente lite, with authority to intervene in this case, and praying the court to pass an order making them parties defendant. On the same day the court below passed an order making them parties

defendant in the case, "provided that a copy of this order shall be served upon the plaintiff, or one of his counsel of record, and also upon John R. Valentine, or his counsel of record, on or before the 12th day of September, 1916." A copy of the order was accordingly served on counsel of record for the plaintiff and on counsel for the defendant Valentine on the 6th of September, 1916.

On the 8th of September, 1916, the plaintiff filed a petition against the administrators pendente lite and John R. Valentine, in which, after stating that Thomas H. Emory had died, and that a caveat had been filed to the paper purporting to be his last will and testament, he alleged that it was necessary in order to preserve the property that the farm be operated, that Forbes and Yellott should not be permitted to assume the control and management of the same, and that some competent and disinterested person should be appointed receiver to take charge of it; and thereupon the court appointed the Safe Deposit & Trust Company of Baltimore receiver, to take possession of and to manage and operate the farm "until it shall have been determined who is entitled to the ownership thereof."

On the 21st of October, 1916, the court below passed an order setting a motion of the defendants to dissolve the injunction theretofore granted for hearing on the 28th of October, 1916, and requiring a copy of the order to be served on the plaintiff on that day. On the 26th of October, 1916, the plaintiff filed a petition alleging that the order of September 6, 1916, making the administrators pendente lite parties defendant, was passed "upon the ex parte application" of the said Forbes and Yellott; that "pending the determination of the controversy concerning said supposed will, it is impossible to determine who will be the holders of the legal title to said real estate, from whom a conveyance must be made to your petitioner, in the event that this court shall decree the relief prayed in the bill of complaint, and therefore until the determination of said controversy it is also impossible for this court to ascertain who are sufficient parties defendant in the room and stead of said decedent"; that the plaintiff was not notified of the passage of the order of the orphans' court of Baltimore county authorizing the administrators pendente lite to intervene in this case, "nor of the filing of any application or petition therefor, nor was he notified of the application of said Yellott and Forbes to be made parties hereto, nor of the passage of the order aforesaid making them parties until after the same had been passed"; that he had no opportunity to be heard in reference thereto, and that he "is advised that the passage of said order by this court was improvident and inadvertent." The petition prayed for the "rescission" of the order of September 6, 1916, and that the administrators pendente lite be dismissed as parties

defendant. The court passed an order setting the petition for hearing on the 28th of October, 1916, and on that day, and while the petition of the plaintiff for a "rescission" of the order of September 6, 1916, making the administrators pendente lite parties, and the motion to dissolve the injunction, were still pending in the court below, the plaintiff filed his order for the present appeal from the order of September 6, 1916, and the order setting the motion to dissolve the injunction for hearing.

In the case of Baldwin v. Mitchell, 86 Md. 379, 38 Atl. 775, Judge Page, speaking for this court, said:

"There are no provisions in our statutes defining the powers of" an administrator pendente lite, "or establishing particular and exceptional rules for the discharge of his duties, as in the case of an administrator ad colligendum. Sections 61 to 64. The intention of our law, therefore, seems to be clear that he must be subject to the same general rules as control general administrators. Within 12 months from the date of his letters, he must render his first account, and, if necessary, an additional account every 6 months thereafter. If his letters be revoked before the 12 months expire, he must then exhibit his account without delay, and hand over to the executor or new administrator all the property of the decedent in his hands. He may sue for the recovery of the assets and be sued for debts due from the decedent; and if such suits are still pending when his letters are revoked, the new administrator may prosecute or defend them. Section 69. With powers and duties such as these, no sufficient reason can be assigned why he shall not be required to discharge the decedent's debts, as other administrators are required. We are of opinion, therefore, that our statutes do not contemplate such an administrator as having been appointed for the special purpose only of taking care of the assets."

It is said in Miller's Equity Procedure, § 64:

"In cases of specific performance the general rule is that only those persons are proper parties who are parties to the contract or those who have been substituted in their place as executors or heirs. This general rule, however, has been somewhat enlarged in its scope. If a purchaser assigns his entire interest in the contract of purchase, his assignee may sue the vendor; the assignor is a proper party to such a suit. If the vendor conveys the property to a purchaser with notice, the latter is a necessary party defendant. * * * If the purchaser be dead, and the vendor sues for specific performance, the personal representative of the purchaser must be a party, because the personal assets are primarily liable for the debt; and the heirs or devisees also, because the conveyance must be made to them. If the purchaser dies and the heirs of the purchaser sue the vendor, the personal representative of the purchaser should also be a party, for the heirs are entitled to have the contract paid out of the personal estate. If, on the other hand, the vendor be dead, and his personal representatives seek a specific performance against the purchaser, the heir or devisee of the vendor should be a party, for he alone is competent to convey title. And if the vendor be dead, and the purchaser seeks a specific performance, the heirs or devisees of the vendor should be made parties."

The same rules are recognized in 1 Daniel's Ch. P. & P. (6th Am. Ed.) star p. 285, where it is further said:

"Where the bill is filed to redeem a mortgage against the heir of a mortgagee, the personal

representative must also be made a party to the suit, because, although the mortgagee upon paying the principal money and interest has a right to a reconveyance from the heir, yet the heir is not entitled to receive the money."

In the case of Stewart v. Griffith, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. Ed. 782, 19 Ann. Cas. 639, where the bill was filed by the executor of a deceased vendor for a specific performance of a contract for the purchase of certain land, the Supreme Court said:

"It is urged that the probate of the will does not establish it conclusively as to real estate, and that the heirs might attack it hereafter; but it is answered that by the contract the land had become personalty as against them, and that therefore so far as this land is concerned the will is safe from collateral attack. Moreover, as it is clear that the estate has and is subject to a binding contract, it is hard to see how it matters to the heirs who does the formal acts of accomplishment so long as he is accountable to the orphans' court."

Section 95 of article 16 of the Code provides for the appointment of a trustee to execute a deed decreed to be executed (Hollander v. Central Metal Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. [N. S.] 1135), and the general rule is that, in proceedings for the sale of real estate, all persons who by any possibility may be entitled to an interest are proper parties. Miller's Equity Pro. § 67; Handy v. Waxter, 75 Md. 517, 23 Atl. 1035. So if it be conceded that the heirs at law, devisees, or executor of a deceased vendor are necessary parties to enable the court to decree specific performance of a contract of sale of land at the suit of the purchaser, the authorities referred to would seem to indicate that, pending a caveat to an alleged will of the deceased vendor, the administrator pendente lite is at least a proper party, not because he is authorized under section 81 of article 16 of the Code to convey the real estate, but because he would be entitled to receive the purchase money, if specific performance of the contract is decreed pending the caveat.

[1] But we are not called upon in this case to pass upon the right of the administrators pendente lite to be made parties defendant, or to express an opinion in regard to the propriety of the order of September 6, 1916, making them parties. It appears from the return of the sheriff that a copy of the order was served on counsel for plaintiff on the day the order was passed. On the 8th of September the plaintiff filed a petition against the administrators pendente lite and Valentine for the appointment of a receiver to take charge of the property, and no objection was raised to the order making them parties until the petition of October 26, 1916, was filed by the plaintiff, praying that the order be rescinded. After having invoked the jurisdiction of the court below to review and rescind its order of September 6, 1916, passed without objection, the plaintiff, in effect, refused to submit to its jurisdiction, and, abandoning his petition, enters an appeal for the purpose of having the order reviewed by this

court. The course pursued by the plaintiff is certainly not in accord with the usual practice in this state, and is one, we think, that should not receive the approval of this court. Section 4 of article 16 of the Code provides that:

"Any representative of a deceased party may appear and suggest in writing the death of the party under whom he claims, and be made a party in place of the person so dying. * * * on giving such notice to the opposite party as the court may direct."

And section 36 of article 5 of the Code provides:

"On an appeal from a court of equity, no objection to the competency of a witness, or the admissibility of evidence, or to the sufficiency of the averments of the bill or petition, * * * shall be made in the Court of Appeals, unless it shall appear by the record that such objection was made by exceptions, filed in the court from which such appeal shall have been taken."

In the case of *Carrington v. Basshor Co.*, 121 Md. 71, 88 Atl. 52, this court said:

"The jurisdiction of a court of equity in this state, upon proper averments, to appoint receivers for a corporation, is not and cannot be questioned, and it is therefore obvious that, had the Basshor Company appealed from the orders referred to, independent of the fact that it consented to the orders, it would not have been allowed to object in this court to the sufficiency of the averments of the bill or to the jurisdiction of the court below. * * * Upon what principle [then] can the appellant escape the requirements of the rule? He was not a necessary party to the bill, and not having been made a party, it is true that, so far as the record shows, he did not have an opportunity to resist the relief prayed prior to the orders of which he now complains. But after these orders were passed he was, upon his own application, made a party defendant, and if he had such an interest in the subject-matter of the suit as entitled him to defend it, and he desired to make the defense stated in his answer, before taking his appeal, he should have applied to the court below for a rescission of the orders upon those grounds. * * * Had he done so, and had the * * * court adopted his view of the bill, there would have been no occasion for this appeal. To permit him to make the objections now would require this court, in the face of the statutes and the rules stated, to consider questions that were not raised or determined in the lower court."

As the plaintiff had notice of the order complained of in this case, and as the lower court, because of the present appeal, has not passed upon his objections to the petition of the administrators pendente lite and the order passed thereon, we think, upon the principle announced in *Carrington v. Basshor Co.*, supra, that his appeal is premature.

[2] It needs no citation of authority to show that the order of October 21, 1916, setting the motion to dissolve the injunction down for hearing, is not within the provisions of section 26 of article 5 of the Code, authorizing an appeal from a final decree, or an order in the nature of a final decree, and it follows from what has been said that the appeal must be dismissed.

Appeal dismissed, with costs.

(130 Md. 808)
STATE, to Use of SCOTT et al. v. WASHINGTON, B. & A. ELECTRIC
R. CO. (No. 10.)

(Court of Appeals of Maryland. June 26, 1917.)

1. APPEAL AND ERROR \Leftarrow 1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action against a carrier for death of a passenger, the exclusion of evidence as to the condition of deceased's health prior to the date of the injury was harmless, where a witness was permitted without contradiction to testify as to the condition of deceased's health on the day of his death and for two weeks prior thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201.]

2. CARRIERS \Leftarrow 369, 370 — INJURIES TO PERSONS ON TRACK—PROXIMATE CAUSE.

Where passenger was forcibly ejected from car by carrier's servant, and the injury from which he died was received at a distance of more than a mile from the point of his ejection, and was suffered by reason of his being struck by another of carrier's trains, held, his ejection was not the natural and probable consequence of defendant's wrongful act in ejecting him, but that the proximate cause of his injury was his want of care in being upon defendant's tracks.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1459, 1483, 1485-1487.]

3. CARRIERS \Leftarrow 370—ACTION FOR INJURIES—INJURY OF PASSENGER AFTER BEING EJECTED.

A passenger ejected from car, who thereafter walks along defendant's tracks, assumes the risk of its perils.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1459.]

Appeal from Circuit Court, Prince George's County; John P. Briscoe, B. Harris Camaller and Fillmore Beall, Judges.

"To be officially reported."

Action for death by the State of Maryland, to the use of Eleanor Sanford Scott and another, infants, against the Washington, Baltimore & Annapolis Electric Railroad Company. Judgment for defendant, and use plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Leonard J. Mather and Robert W. Wells, both of Washington, D. C. (Frank M. Stephen, of Upper Marlboro, on the brief), for appellants. George Weems Williams, of Baltimore (T. Van Clagett, of Upper Marlboro, on the brief), for appellee.

BURKE, J. The appeal in this case was taken from a judgment rendered in favor of the appellee in the circuit court for Prince George's county under an instruction of the court by which the case was withdrawn from the consideration of the jury and a verdict directed for the defendant.

The suit was brought in the name of the state, for the use of Eleanor Sanford Scott, the widow of Oscar Scott, and his infant son, Kenith Walter Scott, to recover damages for the death of the husband and father, who was alleged to have been killed by the negli-

gence of the defendant. The record contains two exceptions taken by the plaintiff during the course of the trial; the first relating to a ruling on evidence, and the second to the granting of the prayer submitted at the close of the plaintiff's case, withdrawing the case from the consideration of the jury. The declaration contained two counts; but there was no evidence to support the second count, and it is conceded that no recovery could have been had under that count.

The defendant is a common carrier of passengers for hire, and owns and operates an electric railway between the city of Washington, in the District of Columbia, and Baltimore city, in the state of Maryland. Oscar Scott, the deceased, boarded the defendant's car as a passenger at White House Station, Fifteenth and H streets, Washington, for Dodge Station, on the defendant's line, on July 1, 1915, about 7:20 p. m., and was killed at Springman's Crossing, Md., by a car of the defendant running from Baltimore to Washington. The alleged breach of duty on the part of the defendant, upon which the suit is based, is specifically set out in the first count of the declaration. After stating that the deceased was a passenger upon the defendant's cars, and that it was its duty to exercise the highest degree of care towards his safety, it alleged that:

"Said defendant railroad company became and was negligent, in that on the day aforesaid, after said plaintiff's intestate, who had been drinking intoxicating liquor, had purchased a ticket entitling him to safe transportation from this city to a place or station in the state of Maryland called Dodge Park, and to fit, proper, and adequate protection while he, said plaintiff's intestate, was being conveyed to his said destination, and after said plaintiff's intestate had been placed upon one of the defendant company's cars by said defendant company, by and through its servants, agents, and employés, and had taken his seat therein, and after said car had been started from Washington for the destination of said plaintiff's intestate at said Dodge Park Station, in the state of Maryland, as aforesaid, but long before it had reached there, said defendant company, in violation of the duty owed said plaintiff's intestate, as aforesaid, who was behaving himself in a seemly and proper manner, by and through its conductor, servant or servants, or agents then and there in charge of said car, maliciously, willfully, and wantonly assaulted, beat, kicked, and grievously wounded and injured said plaintiff's intestate, without cause therefor on his part, and violently ejected and threw said plaintiff's intestate from its said car, whereby and by reason of which said treatment, in the then condition of said plaintiff's intestate, he was so dazed, disabled, and injured as that, after being thus ejected from said defendant company's car, he was in a helpless condition, and wandered aimlessly about said defendant company's tracks and right of way in his effort to find and go to his home at said Dodge Park, in the state of Maryland, as aforesaid, until later he was struck and killed by another of said defendant company's cars, which was south-bound and on its way from Baltimore to the city of Washington and District of Columbia."

Assuming, as contended by the plaintiff, that the expulsion of the deceased from the defendant's car in the District of Columbia

was unlawful, and that he was assaulted and maltreated by the defendant's agents in charge of the car, the important legal question presented by the appeal is this: Does the record contain any evidence legally sufficient to show or tending to show any legal connection between the negligence alleged and the death of Scott? Stated in another way, did the plaintiff offer any evidence legally sufficient to show that there existed the relation of cause and effect between the negligence alleged and the death of Oscar Scott? The determination of this question depends upon an accurate statement of the material facts appearing in the record. In the last analysis, questions of proximate and remote cause must depend on the facts of each particular case. 7 Am. & Eng. Ency. of Law (2d Ed.) 1381.

Oscar Scott was 32 years of age. He was a carpenter, and was familiar with the defendant's road, having been employed by the company as an inspector of ties. He lived near Dodge Station, Prince George's county. Shortly before his death he was working at his trade and was making \$4 per day. On the morning of July 1, 1915, he left home and went to Washington. Mrs. Scott, his widow, testified that he did not go to Washington that morning to work, as he was sick; that he had been home two weeks. The record contains nothing as to Scott's whereabouts from the time he left home until he boarded the car on his return trip at about 7:20 p. m. He took a seat in the smoking compartment. He was sick and vomited in the car. A witness said he was "sick at the stomach." There were four occupants of the smoking compartment, viz., Scott, a colored man, and two white men. After Scott vomited, the two white men went into the passenger compartment.

W. C. Robinnett, the motorman, testified: That he saw Scott on the car; that as the car came along Bennings Race Track the conductor came out front and said to him:

"That he had a passenger back there that wouldn't pay his fare, and that he had been drinking and wouldn't pay his fare, and he said: 'Stop up there; I want to put him off.' That was along at Bennings; it was along about Bennings Race Track. So when we got to Minnesota avenue I stopped the car and waited a minute, sitting in my cab, and I heard a commotion out in the baggage room. The baggage compartment was on the front, the smoker next to that, and the passenger compartment behind that. I heard the commotion out there, and I sat still in my cab. I heard the conductor arguing with him, trying to get him to pay his fare, and he would not pay his fare. He said he was not going to pay the conductor his fare. Then I stepped back in the baggage part where he was."

When the car reached Minnesota avenue, the conductor attempted to put Scott off. He resisted. He was put off twice, and jumped back, and held to the hand bars. The car would move slowly and stop.

The witness White testified:

"He got off the car a couple of times—they got him off the car and he would jump back on. He was right on the other side of Minnesota avenue when witness saw the conductor kicking; about a block and a half or two blocks from Minnesota avenue. The car had stopped the last time they put him off; the car was running slow; it would stop like, and they couldn't get him off, and it would run a little further; he was hanging onto the grips—standing on the steps; didn't see whether or not he was dragged; heard the conductor tell Mr. Scott to get off; that is all witness heard. Didn't hear Mr. Scott make any reply. Didn't hear the motorman say anything. The motorman took part in putting Mr. Scott off. The last witness saw of Scott he was going back down the track toward Minnesota avenue. Scott's apparent condition during the time he was being put off was that of a sick man. He was vomiting when he first got on the car; that is what made me go out of the smoker. The conductor's manner exercised towards Scott throughout the ejection was 'an ugly manner.'"

Bernard F. Howard testified:

He was in the passenger compartment, and heard a commotion in the smoking car. "That between the smoking and passenger compartments there was no other compartment on the car; when the attention of witness was first attracted by the commotion did not investigate at first to see what it was about, but later on he did, and found that after the car left Minnesota avenue—they stopped at Minnesota avenue and I understood they were putting a man off—but witness was reading, and did not pay much attention to it until after they started up, and witness heard some woman in the back say, 'That man will get killed.' The car witness was in had a motorman and a conductor, and after witness went in the smoking car to see what the commotion was about—didn't notice how many people were in the smoking car at the time; only went to the door; thinks there were very few, but couldn't tell how many—first thought that the conductor and Scott were guying or fooling with each other, and witness went back and sat down, but after the car started at Minnesota avenue, and heard this woman back there say, 'That man will get killed,' went forward through the smoking car and found Scott standing on the bottom step, with his hands on the brakeholds, and saw the conductor trying to get Scott to get off, and after Scott wouldn't get off he started kicking his hands; cannot tell with what force these kicks were drove with, but he was kicking with his left foot, and seemed to be worked up trying to get the man off, and he kept kicking him on the hands, trying to make him loosen his hold on the handholds. They had run—they were running very slow—about a square and a half, witness guesses, as far as he could judge from the inside of the car, and 'Scott was holding on and refused to get off. He was telling the conductor that he had his ticket, and he knew he had his ticket, and the conductor told him to get off. He said he wanted his hat, and the conductor told him to get off and go after his hat. The hat was lying between the tracks. The motorman asked Scott to get off. Scott said: 'What in the h— have you got to do with it? What do you want to get into it for?' The motorman said: 'I don't want to get into this; but, if I do get into it, then you will have to get off.' Then I turned around and went back into the passenger part of the car and sat down with my wife. Witness told the conductor once that he oughtn't to put that man off between the tracks, but he didn't pay no attention, and Scott was finally put off about a square and a half the other side of the fire stop at Minnesota avenue, as near as witness could judge of it; he was put off the forward end of the car, on the inside, between the tracks. Didn't see him at the particular

time that his hold was severed from the car, but when witness started to sit down with his wife he heard somebody say that the man was off, and that the man had fell underneath the car. That witness looked underneath the car, and saw Scott getting up like from the side of the car, and staggering along towards the edge of the track."

[1] It thus appears that Scott was finally ejected from the car in open daylight, in the District of Columbia, not far from Minnesota avenue, and that he was by no means in a physically helpless condition, as he displayed considerable strength and determination in resisting expulsion from the car. He was no doubt excited and disturbed by this encounter with the conductor; but there is no evidence in the record, or offer of evidence, that he was mentally unsound, or had ever suffered from any mental disorder. The condition of the deceased's health on the day of his death and for two weeks prior thereto was testified to by Mrs. Scott, and there was no contradiction of her evidence, and therefore there was no reversible error in the ruling embraced in the first exception, wherein the court refused to permit Mrs. Scott to testify as "to the condition of the plaintiff's health just prior to July 1, 1915."

From Minnesota avenue, near which Scott was finally expelled from the car, to Springman's Crossing, where he was killed, the distance is variously estimated from $1\frac{1}{2}$ to $2\frac{1}{2}$ miles. He appears to have walked this distance over or along the defendant's right of way in less than an hour, as he was seen by one of the witnesses in the Casualty Hospital, Washington, at 8:30, where he died. The facts do not support the allegation of the narr. that after the deceased was ejected from the car "he was in a helpless condition, and wandered aimlessly about said defendant company's tracks and right of way in his effort to find and go to his home at Dodge Park." That conclusion could be reached only upon the merest conjecture.

The law does not indulge in metaphysical speculation and refinements upon the question of causation. In *B. & P. R. R. Co. v. Reaney*, 42 Md. 117, Judge Alvey said:

"In the application of the maxim, 'In jure non remota causa sed proxima spectatur,' there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. It is certainly true that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequence of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would

have been done without such concurrence. *Marble v. Worcester*, 4 Gray [Mass.] 395. But it is equally true, that no wrongdoer ought to be allowed to apportion or qualify his own wrong, and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716."

In *Baltimore City Passenger Ry. Co. v. Keup*, 61 Md. 74, the same distinguished judge said in discussing the question of proximate cause:

"It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all condition of things, produce like results? * * * The general rule is stated [in *Addison on Torts*, 5] with as much clearness and precision as will be found in any other text-writer, and he states the rule to be 'that whoever does an illegal act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act.'"

A clear exposition of the doctrine is found in *Railway v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, in which Judge Strong said, in discussing a case in which a sawmill and a quantity of lumber were destroyed by fire alleged to have been negligently communicated from the defendant's steamboat:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd* (Squib Case) 2 W. Bl. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been

foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the sawmill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

[2] Applying the accepted doctrine announced in the cases to which we have referred to the facts of this case, we hold that the death of Oscar Scott was not the natural and probable consequence of the alleged wrongful act of the defendant in expelling him from its cars. All the facts and circumstances of the case show that he was able to take care of himself; that he was physically able to do so, and knew exactly what he wanted, and the strength he displayed in resisting expulsion, and the short time he consumed in walking over or along the tracks of the company to Springman's Crossing on his way home indicate that he was not helpless or irresponsible.

[3] No one was produced at the trial who saw the deceased, from the time he was put off the car and started back towards Minnesota avenue, until he was killed at Spring-

man's Crossing. It was said in *B. & O. R. R. Co. v. Allison*, 62 Md. 479, 50 Am. Rep. 233:

"A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way, as a footway, and not for any business with the railroad is a wrongdoer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use it, or create any obligation for especial protection. *R. R. Co. v. Godfrey*, 71 Ill. 500 [22 Am. Rep. 112]. Whenever persons undertake to use the railroad in such case as a footway, they are supposed to do so with a full understanding of its dangers, and as assuming the risk of all its perils. 71 Ill. 500 [22 Am. Rep. 112]; *McLaren v. Railroad Co.*, 8 Amer. & Eng. R. R. Cases, 219; *Railroad Co. v. Goldsmith*, 47 Ind. 43; *Railroad Co. v. Houston*, 95 U. S. 702 [24 L. Ed. 542]; *Railroad Co. v. Jones*, 95 U. S. 442 [24 L. Ed. 506]; 1 *Thompson on Negligence*, 453, 459; *Morrissey v. Railroad Co.*, 126 Mass. 377 [30 Am. Rep. 686]. In *Maenner v. Carroll*, 46 Md. 212, which was a suit for injury received by falling into an excavation which had been dug on the private property of the defendant over which persons were in the habit of passing, but which was not a public highway, this court declared the same principle as controlling, and adopted the language of the court in *Hounsell v. Smyth*, 7 C. B. N. S. 731, that in such case 'one who uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils.' *Binks v. Railroad Co.*, 3 B. & S. 244, *Bolch v. Smith*, 7 H. & N. 736, and *Gautiel v. Egerton* L. R. 2 C. P. 371, are cited in support of the law thus indorsed. Inasmuch, therefore, as the presence of the deceased upon the road of the appellant at that point was a trespass it would seem to be necessary to show some negligence, amounting to the omission of a general and imperative duty toward him notwithstanding, which ought to subject the appellant to liability in the action brought."

This the appellant utterly failed to do. It is said in 7 Am. & Eng. Ency. of Law, 382:

"In the application of the principle that the law looks at the proximate, and not at the remote, cause of an injury, lies the great difficulty in the law of contributory negligence. No general rule for determining when causes are proximate, and when remote, has yet been formulated. But the principles that govern the determination of the question are well settled. When it is once established that a person injured by the negligence of another has been guilty of a want of ordinary care, it becomes necessary to determine whether such want of ordinary care proximately contributed to the injury as an efficient cause, or only remotely, as a condition or remote cause thereof. If it proximately contributed, there can be no recovery; but, if it was only a remote cause or condition of the injury, a recovery can be had."

We therefore hold that the proximate cause of the death of Oscar Scott was his own want of care in being upon the defendant's tracks under the circumstances disclosed by the evidence. The appellant relies upon the cases of *Warren v. Railway*, 243 Pa. 15, 89 Atl. 828; *McCoy v. Millville Trac. Co.*, 83 N. J. Law, 508, 85 Atl. 358; *Railway v. Parry*, 67 Kan. 515, 73 Pac. 105; *Eldson v. Railway (Miss.)* 23 So. 369; *Guy v. Railway*, 30 Hun (N. Y.) 309; *Railway v. Ellis, Adm'r*, 97 Ky. 330, 30 S. W. 979. But those cases can have no controlling effect in this, because the facts wholly fail to bring this case within the principles announced therein. Those cases dealt with the obligations of the railway towards passengers who were, from drunkenness or other causes, helpless and unable to care for themselves.

For the reasons stated the judgment will be affirmed.

Judgment affirmed.

(130 Md. 566)

MERRYMAN v. WHEELER. (No. 3.)

(Court of Appeals of Maryland. June 26, 1917.)

1. DEBT, ACTION OF —11—DECLARATIONS—SUFFICIENCY.

A declaration, averring and declaring upon a contract under seal, giving the date thereof, and alleging that the defendant covenanted and agreed to pay the plaintiff a certain and fixed sum for the erection and completion of a dwelling house, that the house was erected according to the terms of the contract, and there was due and owing under the contract a sum named, according to a statement filed with the declaration, and that the defendant refuses to pay the sum due the plaintiff, although wanting in clearness, was good in an action of debt upon a specialty.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 27, 28.]

2. ASSUMPSIT, ACTION OF —19—DECLARATION—SUFFICIENCY.

The declaration was not good in assumpsit.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-89.]

3. COVENANT, ACTION OF —12—DECLARATIONS—SUFFICIENCY.

Nor was it a good declaration in an action of covenant.

[Ed. Note.—For other cases, see Covenant, Action of, Cent. Dig. § 16.]

4. ASSUMPSIT, ACTION OF —6(2)—ACTION ON SPECIALTY.

Assumpsit is not sustainable upon a specialty.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 23-36.]

5. COVENANT, ACTION OF —1—WHERE PAYMENTS DUE.

Covenant will not lie, when the payments are all due and payable.

[Ed. Note.—For other cases, see Covenant, Action of, Cent. Dig. §§ 1-7.]

6. DEBT, ACTION OF —12—IMPROPER PLEAS.

The suit and declaration being in debt on a specialty, the defendant's pleas—(1) that he never was indebted as alleged; (2) that he did not promise as alleged—were improper.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 29-33.]

7. DEBT, ACTION OF —12—PLEAS—GENERAL ISSUE.

In an action of debt upon a specialty, the general issue plea is non est factum; and, if other defenses are relied upon, they must be specially pleaded.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 29-33.]

8. DEBT, ACTION OF —12—PLEAS—PAYMENT AND SET-OFF.

The declaration being in debt upon a specialty, defendant's pleas of payment and set-off were good, and, if sustained by proof, would have been a sufficient answer to plaintiff's claim.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 29-33.]

9. DEBT, ACTION OF —12—IMPROPER PLEAS—FAILURE TO SUSTAIN DEMURREE.

In debt on a specialty, the ordinary general issue pleas in assumpsit were improper, and the court erred in overruling plaintiff's demurrer thereto.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 29-33.]

10. DEBT, ACTION OF —18—EVIDENCE—SUFFICIENCY.

In debt on a specialty, evidence at the conclusion of plaintiff's testimony held legally sufficient for submission to the jury.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 41, 42.]

Appeal from Circuit Court, Baltimore County; Wm. H. Harlan, Judge.

"To be officially reported."

Suit by Marion H. Merryman against George F. Wheeler, Jr. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded, with costs to appellant. Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

James E. Tippet, of Baltimore, for appellant. T. Scott Offutt, of Towson (George Hartman and George G. Wheeler, both of Towson, on the brief), for appellee.

BRISCOE, J. The plaintiff brought this suit against the defendant, in the circuit court for Baltimore county, to recover an alleged balance due on a building contract, dated the 22d day of June, 1916. The plaintiff's declaration states the cause of action as follows: For that the defendant, by his contract under seal bearing date May 17, 1906, covenanted and agreed to pay the plaintiff the sum of \$3,600 for the erection and completion of a certain frame dwelling house in the village of Towson, Baltimore county, state of Maryland; that the plaintiff erected said house according to the terms of said contract; and that there is due and owing to the plaintiff under said contract the sum of \$197.60, as per statement herewith filed, which sum the defendant refuses to pay. The building contract was filed with the declaration, and is set out in the record. With the declaration and contract the following account was filed:

George F. Wheeler, to Marion H. Merryman, Dr.
To amount due on contract for erection of house on Penna. Ave., Towson \$3,600.00
By cash on account as per contract .. 3,340.00

Sept. 5, 1906, balance due \$ 260.00
To int. on \$260.00 for eight and one-half years, \$132.60; Aug., 1915, received int. \$132.60, and received on account of principal 62.40
\$ 197.60

The defendant, it appears, demurred to the declaration. This demurrer was overruled, and the declaration held to be good, upon the theory that the suit was one in assumpsit, and not upon a sealed contract. Thereupon the defendant pleaded: First, that he never was indebted as alleged; second, that he did not promise as alleged; third, payment; and, fourth, that the plaintiff is indebted to the defendant in the sum of \$630, with interest, in liquidated damages, at \$10 per day of 63 days, for violation of article 6 of the

contract declared on, by failure to complete and carry out said contract by August 17, 1906, the date named therein, the defendant being inconvenienced by said delay until October 20, 1906, which amount the defendant is willing to set off against the plaintiff's claim.

The plaintiff's demurrer to the defendant's first, second, and fourth pleas, was overruled, and thereupon the docket entries show that issue was joined upon all four pleas, and the case was submitted to the court for trial. At the conclusion of the evidence on the part of the plaintiff, the court granted a prayer directing a verdict for the defendant, upon the ground that under the pleadings and the evidence the plaintiff was not entitled to recover, and the verdict must be for the defendant. The action of the court, in its ruling upon this prayer, constitutes the only exception brought up by the record. A judgment on the verdict in favor of the defendant for costs was entered on the 13th of November, 1916, and from that judgment this appeal has been taken.

[1] While the declaration filed in the case is somewhat loosely drawn, and is wanting in that clearness of statement which is required by the rules of good pleading, we think its averments are sufficient to entitle it to be sustained as a good declaration in an action of debt upon a specialty. The declaration avers and declares upon a contract under seal, bearing date the 17th of May, 1906, and alleges that the defendant covenanted and agreed to pay the plaintiff a certain and fixed sum for the erection and completion of a dwelling house; that the house was erected according to the terms of the contract, and there was due and owing under the contract the sum of \$197.60, according to a statement filed with the declaration; and that the defendant refuses to pay the sum due the plaintiff.

The suit is therefore upon a contract under seal, to recover in debt upon a specialty, and where the amount claimed to be due is specially stated in the declaration to be due and owing according to the terms of this contract. The contract and an account showing the plaintiff's claim is filed with the declaration and made a part thereof. The general rules as to the proper and essential averments to make a good declaration and to constitute a ground of action, under our various forms and system of legal pleading, will be found set out in article 75, p. 1638, of the Code, and the cases there cited.

[2-5] It is clear, under the averments of the declaration in this case, it cannot be treated as a good declaration, either in assumpsit or in covenant. It is well settled that assumpsit is not sustainable upon a specialty, and covenant will not lie or be supported when the payments are all due and payable, as in the present case. 1 Chitty's Pleading, 118, 129, 388, 376, 385; Fisher's Essentials of Pleading, 122, 124; 1 Poe's

Pleading and Practice, 145, 146, 139; Booth v. Hall, 6 Md. 4; Waldeck Co. v. Emmart, 127 Md. 474, 96 Atl. 634.

[6, 7] The suit and declaration in the case, being in debt on a specialty, the defendant's first two pleas were improper pleas. The general issue plea in this form of action is non est factum, and if other defenses are relied on they must be specially pleaded. 1 Poe on Pleading, 625; Fisher's Essentials of Pleading, 55, 56; 1 Chitty on Pleading, 510, 511; Waldeck Co. v. Emmart, 127 Md. 476, 96 Atl. 634.

[8] The defendant's third and fourth special pleas of payment and set-off were good and proper pleas, and, if sustained by proof, would have been a full and sufficient defense and answer to the plaintiff's claim. Steele v. Sellman, 79 Md. 1, 28 Atl. 811; 1 Poe's Pleading, 626, 651, 614; 1 Chitty on Pleading, 595, 511; Code P. G. L. art. 75, § 12.

[9] The action of the court in overruling the plaintiff's demurrer to the defendant's first and second pleas was therefore error, because they were the ordinary general issue pleas in assumpsit, and not proper pleas in debt on a specialty. The case appears to have been tried upon joinder of issue on the third and fourth pleas, and these were good pleas, and it is not clear that the plaintiff suffered any injury by the ruling of the court on the pleadings, and we should hesitate to reverse the judgment for the defective pleading, if this was the only error in the rulings of the court below disclosed by the record. McCart v. Regester, 68 Md. 429, 13 Atl. 361; Chappell v. Real Estate Co., 89 Md. 263, 42 Atl. 936; Charles Co. v. Mandanyohl, 93 Md. 150, 48 Atl. 1058.

[10] There was error in the ruling of the court in granting the defendant's prayer withdrawing the case from the jury, at the conclusion of the plaintiff's testimony, because the evidence as disclosed by the record was legally sufficient to have taken the case to the jury, and it should have been submitted for their consideration, and not decided by the court. Burke v. Baltimore, 127 Md. 555, 96 Atl. 693; Baltimore v. Neal, 65 Md. 438, 5 Atl. 338.

The plaintiff testified in substance that he was a contractor and a builder, and that he had been employed by the defendant to build a house for him in Towson, Baltimore county; that it had been completed, and was now occupied by the defendant; that at the time the house was completed there was a balance due on the contract price of \$360, and the whole of this amount had not been paid. He then testified as to a conversation with the defendant about 15 months prior to the suit, as to the indebtedness and the balance due on the contract, as follows:

When Mr. Wheeler came down to my house, my daughter was sitting in the room. Mr. Wheeler said: "Mr. Merryman, about the balance due you, you are mistaken, as it is only \$260; that is all that I owe you, but I cannot

pay all that now, but I will pay it along as I can. I have one of my sons working in Baltimore now, and he is willing to help me out." I told him that that was all right, and asked him how much he could give me, and when the payments would be made. He told me that he would make a payment the coming week. He made that payment, and he made payments along at different times until he had paid \$195, and then he stopped. He ran along for a long time, and I didn't know why he didn't pay me. I sent him a statement, and then he called to see me and said: "Mr. Merryman, I have paid you all the money that I am going to pay you." Then I said to him that that was not right, that I had waited nine years for this money, that I needed the money to keep my children in school, that I had waited nine years for the money, and, if he did not pay me, I was going to make him pay me.

He further testified that he had received and had been paid for all the work on the house, except the \$360, less the credit of \$195.

Miss Merryman, the plaintiff's daughter, testified that she knew the defendant; that she was present and heard the conversation and interview between her father and the defendant, at the father's house, relative to the amount of money due, and stated that the conversation was as follows:

Q. Did you hear what Mr. Wheeler said at the interview about owing Mr. Merryman any money? A. Yes, sir. Q. State what was said. A. Father said that he owed him \$360, and he admitted that he owed him \$260. Q. Mr. Wheeler said that he owed your father only \$260? A. Yes, sir. Q. Did you hear him say that? A. Yes, sir; and his son was present at that interview, too. Q. Whose son? A. Mr. Wheeler's son. Q. Was any payment made at that time to your knowledge—the time of the interview? A. None that I know of.

Upon this state of facts, without a further discussion of the testimony, we think the case was one, upon the authorities, for the consideration of the jury, and the instruction of the court below was clearly erroneous.

For the reasons stated, and for the errors indicated, the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, and new trial awarded, with costs to the appellant.

(130 Md. 683)

BEACHEY et al. v. HEIPLE et al. (No. 21.)
(Court of Appeals of Maryland. June 27, 1917.)

1. EQUITY §227 — DEMURRER — PREMATURE FILING—OBJECTIONS AVAILABLE.

Where by agreement demurrers to a bill were refiled two days after an amendment of the bill by interlineation, and a decree sustaining the demurrers and dismissing the bill was filed long before an order of publication against a nonresident defendant could have expired, the demurring defendants had no standing to object to the bill on the ground that such nonresident was a necessary party and had not been served by publication with the bill as amended.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 518.]

2. EQUITY §150(1) — MULTIFARIOUSNESS — JOINDER OF DEFENDANTS.

As alleged in the bill, plaintiffs and B. purchased land, and title was taken in B.'s name as trustee; the terms of the trust being that he should dispose of it for the benefit of plaintiffs and himself. He sold the land to the A. Co. for cash, a note of the A. Co. secured by bonds, and \$80,000 of bonds, but represented to plaintiffs that only \$15,000 of bonds were received. In consummation of the fraud he conveyed the property to the A. Co., M., and O. Temporary certificates were issued in lieu of bonds, certificates for \$65,000 being issued to M. and the A. Co.'s agents, who subsequently exchanged them for bonds. M. loaned her bonds to the A. Co., which pledged them to a bank, and plaintiffs did not know whether the bank was a bona fide holder, but, if so, claimed the equity in the bonds. The A. Co.'s agents were not bona fide holders, but received the bonds as part of the plan to defraud plaintiffs. B. had disappeared, and the clerk of a Pennsylvania court had taken into his custody the temporary certificates issued to B. and filed them in court. The trustee under the deed of trust securing the bonds was demanding the delivery of these certificates before issuing bonds in exchange therefor. Plaintiff sought the appointment of a new trustee, and the recovery by him of all of the bonds, and an injunction against their transfer. *Held*, that the A. Co., its agents, M., O., the trustee under the deed of trust, the clerk of the Pennsylvania court, and the bank mentioned were all proper parties, and the bill was not multifarious because of their joinder with B. as defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 842, 871, 873, 878.]

3. EQUITY §150(1) — MULTIFARIOUSNESS — JOINDER OF DEFENDANTS.

The objection to a bill on the ground of multifariousness ought only to apply where the case of each defendant is entirely distinct from that of other defendants, and it is not indispensable that all of the parties should have an interest in all of the matters contained in the bill; it being sufficient if each party has an interest in some material matters in the suit and that they are connected with others.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371, 373, 378.]

4. EQUITY §362 — DISMISSAL — GROUNDS — MULTIFARIOUSNESS.

If a bill is multifarious by reason of the misjoinder of defendants, plaintiffs should be put to their election, and the bill should not be dismissed in toto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761.]

5. TRUSTS §371(1)—ENFORCEMENT—PLEADING.

In a suit by co-owners of land, title to which was held in the name of B., one of the co-owners, as trustee, to enforce the trust in the consideration for a sale of the land by B., of a part of which consideration B. and other defendants had sought to defraud plaintiffs, the allegations of the bill *held* not contradictory and inconsistent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588, 599.]

6. TRUSTS §359(3)—ENFORCEMENT—NATURE OF REMEDY.

A co-owner of land, holding title for himself and other co-owners as trustee, conveyed the land, corporate bonds being a part of the consideration, but deceived his co-owners as to the amount of bonds, and with the purchasers, agents, and others sought to defraud his co-owners of a part of the bonds. He had disap-

peared, and his co-owners brought a suit to have a new trustee appointed, to collect and recover the bonds wrongfully diverted from the parties holding them, and for an injunction against their transfer. *Held*, that equity had jurisdiction, as, even though a court of law would have had jurisdiction in some matters, it could not have appointed a new trustee, or given plaintiffs all the relief they were entitled to, and a court of equity at least had concurrent jurisdiction because of the fraud, and special jurisdiction because of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 566.]

7. EQUITY §119 — SERVICE OF PROCESS — SERVICE BY PUBLICATION.

The proceeding being in rem, and not in personam, the original trustee could be proceeded against by publication.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 293-305.]

8. TRUSTS §371(2)—ENFORCEMENT—PLEADING.

As the statute of frauds does not provide that trusts shall be constituted by writing, but only that all declarations or creations of trust shall be manifested and proved by writing, a bill seeking the enforcement of a trust need not charge the trust to be in writing, as the writing is no part of the trust, but only the evidence to prove it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 589-591.]

9. TRUSTS §63½—RESULTING TRUSTS—OPERATION OF STATUTE OF FRAUDS.

Under the statute of frauds, resulting trusts are not required to be in writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93.]

10. TRUSTS §89(1) — RESULTING TRUSTS — SUFFICIENCY OF EVIDENCE.

A resulting trust must be clearly proved, to justify the court in granting relief.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134.]

11. EQUITY §152—PLEADING—EXHIBITS.

A co-owner of land, who held title as trustee for himself and his co-owners, conveyed the land as trustee, but attempted to defraud his co-owners of a part of the corporate bonds received on the sale, and they brought a suit to establish and enforce the trust in such bonds, and to enjoin a transfer of the bonds by the person holding them. *Held*, that a copy of the deed from the trustee should have been filed with the bill, under Code Pub. Civ. Laws, art. 16, § 142, providing that no order or process shall be made or issued upon any bill, petition, or other paper until such bill, petition, or other paper, together with all exhibits referred to as parts thereof, be actually filed with the clerk of the court, as the failure to file such copy prevented the issuance of an injunction, and the copy should also have been filed to justify the other relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 383-385.]

12. APPEAL AND ERROR §1106(3) — REMAND WITHOUT DECISION—GROUNDS.

It being improbable that the demurrer to the bill was sustained because of the failure to file a copy of such deed, and the bill not being demurrable on any other ground, the Court of Appeals would remand the cause without affirming or reversing, and a copy of the deed could then be filed and further proceedings taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4389-4391.]

13. COSTS §243 — COSTS ON APPEAL TO ABIDE THE EVENT.

On remand of a cause without affirming or reversing, the costs will be allowed to abide the result of the case.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 933, 939, 946.]

14. TRUSTS §365(2)—ENFORCEMENT—LIMITATIONS AND LACHES.

A co-owner of land, holding title as trustee for himself and his co-owners, conveyed the land, taking corporate bonds as part of the consideration, but deceived his co-owners as to the amount of the bonds, and in collusion with the purchaser's agents and others sought to defraud his co-owners of a part of the bonds. He disappeared, and less than three years after the sale his co-owners filed a suit, in which an amended bill, filed less than a year later, sought to establish and enforce a trust in the bonds withheld. The amended bill alleged that plaintiffs were not aware of the real transaction until shortly before the amended bill was filed, and long after the original bill was filed. *Held*, that the suit was not barred by limitations or laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571.]

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Suit by E. M. Beachey and others against Aaron F. Helpie and others. From a decree sustaining demurrers and dismissing the bill, complainants appeal. Cause remanded, without affirming or reversing.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Frank B. Ober and Stuart S. Janney, both of Baltimore (Ritchie & Janney, of Baltimore, on the brief), for appellants. Julius H. Wyman and Jacob S. New, both of Baltimore (James T. O'Neill and Duvall & Baldwin, all of Baltimore, on the brief), for appellees.

BOYD, C. J. This is an appeal from a decree sustaining demurrers to and dismissing an amended and supplemental bill of complaint, filed by the appellants against the appellees and others. The original bill made the Ajax Consolidated Coal Company, the Mortgage Guarantee Company, Aaron F. Helpie, and Harvey M. Berkley defendants, and the amended and supplemental bill made the State Bank of Maryland, the Walker-Wadsworth Company, A. B. Osgoodby, Mary L. Macmullen, and James Connell defendants, in addition to those in the original bill. Mary L. Macmullen, James Connell, A. B. Osgoodby, the Walker-Wadsworth Company, and the State Bank of Maryland demurred to the amended bill, alleging as reasons for the demurrers: (1) That the plaintiffs had not stated such a case as entitled them to relief; (2) multifariousness; and (3) that the court was without jurisdiction; and the Ajax Company demurred on the ground of multifariousness.

We will state at some length the facts alleged in that bill. The three plaintiffs and Berkley, all of whom were residents of Somerset county, Pa., each contributed \$541.67 and

purchased coal in lands in that county, subject to a mortgage for \$4,233.32, described in a deed dated October 29, 1902, in which Harvey M. Berkley, trustee, was the grantee. The deed was taken in his name "for convenience and other reasons." He was a lawyer of high standing, in whose honesty and integrity the plaintiffs had every confidence, and he attended to the legal details of the transaction. The terms of the trust are alleged to be that Berkley should dispose of the property for the benefit of the four interests and distribute the proceeds in four equal portions to himself and the three plaintiffs; they being equal owners. During the summer of 1913, Berkley, as trustee, with the consent of and acting for the plaintiffs, sold the property to the Ajax Consolidated Coal Company, a corporation of Pennsylvania, whose principal office was in the city of Baltimore. Berkley reported to the plaintiffs that the consideration for the sale was \$1,800 cash, bonds of the Ajax Company of the par value of \$15,000, and a note of that company for \$3,100, secured by \$5,000 of bonds. The bonds were a part of an issue of the Ajax Company for \$250,000, secured by a deed of trust or mortgage to the Mortgage Guarantee Company of Baltimore, as trustee; but the plaintiffs charge that, in addition to the cash, the note, and the bonds mentioned, Berkley received and the Ajax Company paid for said property \$65,000 bonds of that issue—that being the true consideration received by Berkley and paid by the company. They allege that they did not know of the payment of the \$65,000 of bonds until long after the original bill was filed, and shortly before the amended bill was filed.

In order to conceal from the plaintiffs the true consideration received, and in consummation of the fraud, Berkley conveyed the property to the Ajax Company, Mary L. Macmullen, and James Connell, as tenants in common. Mary L. Macmullen, who is a resident of Norfolk, Va., had no interest or part in the property, and paid no consideration for it, but received the conveyance in payment of a pre-existing debt due her or her father's estate by Berkley, although the plaintiffs believe she was innocent of any intention to wrong them. Connell is a resident of Pennsylvania, and has no financial or other responsibility, had no interest in the property or the sale, never paid any consideration, but was used as a cloak and sham, in order to disguise the real transaction. The Walker-Wadsworth Company, a corporation of Maryland, was financial agent of the Ajax Company, and was employed by it to buy the property, arrange the terms of payment, and to sell the bonds of the Ajax Company. Osgoodby was treasurer and active manager of the Walker-Wadsworth Company, and conducted the negotiations. He collaborated with Berkley, trustee, in order to deprive the plaintiffs of the real consideration for the property, and the deed to Mary L. Macmullen

and James Connell was made pursuant to an understanding with the Walker-Wadsworth Company and Osgoodby, in order to divert from the plaintiffs their true share in the consideration paid for the property. The true consideration was as stated, which was paid; but the plaintiffs have not received it.

The bonds of the Ajax Company not being engraved at the time of the purchase, temporary certificates, called "interim bond certificates," were issued, which were to be surrendered and bonds delivered when the latter were engraved. There was paid to Berkley, trustee, the \$1,800 cash, the promissory note of \$3,100, secured by an interim bond certificate for \$5,000, and another such certificate for \$15,000. A certificate for \$22,000 of bonds was delivered to Mary Macmullen, and one for \$19,000 was ostensibly delivered to Connell, but it was surrendered, and the bonds represented by it were delivered to the Walker-Wadsworth Company. A certificate for \$24,000 of bonds was made out in the name of the latter company and delivered to Osgoodby as its representative. All the certificates have been surrendered, and the bonds delivered, except to Berkley, trustee. Berkley withheld from the plaintiffs all knowledge of the true consideration, but the actual consideration is approved by the plaintiffs, and has been approved and ratified by the Ajax Company. That company has always paid the semiannual interest on its bonds, except those still on deposit with the Mortgage Guarantee Company, the interest on which it has always expressed a willingness to pay when they are delivered to the true owners. The bonds represented by the two certificates of \$5,000 and \$15,000 are in the hands of the Mortgage Guarantee Company; but it demands the delivery of the two certificates before surrendering the bonds, to which plaintiffs are entitled.

In August, 1913, Berkley suddenly and mysteriously disappeared, and it is not known whether he is living or dead. After his disappearance, Aaron F. Heiple, prothonotary and clerk of the common pleas court of Somerset county, Pa., under the advice of the Judge of that court, took into his custody certain papers that had been in the possession of Berkley, amongst which were the interim bond certificates issued to Berkley and the promissory note referred to. Heiple has filed them with the clerk of the lower court, and he answered the original bill. By the terms of the trust the certificates should be indorsed by the trustee and the bonds collected from the Mortgage Guarantee Company and distributed to the plaintiffs; but, owing to the disappearance of Berkley, there is no trustee to make the indorsement and the distribution. The \$22,000 of bonds delivered to Mary L. Macmullen have been by her returned or loaned to the Ajax Company, and are now on deposit with

the State Bank of Maryland, it claiming to hold them as security for some indebtedness of the Ajax Company; but the plaintiffs have no knowledge whether the bank is a bona fide holder, for value, without notice of the right of the plaintiffs, and at any rate there is a substantial equity in them. The remaining \$43,000 of bonds were received by the Walker-Wadsworth Company, or Osgoodby acting for it, and neither is a bona fide holder for value, nor has either paid any consideration therefor, but they were received as part of a preconceived plan to defraud the plaintiffs, and they should be delivered to the trustee to be appointed in the place of Berkley for distribution in accordance with the terms of the trust.

The amended bill prays: (1) That a new trustee be appointed in place of Berkley, with power to execute the trust reposed in him; (2) that said trustee be authorized to receive the interim bond certificates and the promissory note outstanding in the name of Berkley, trustee, and deposited with the clerk of the lower court, to make such indorsements and execute such instruments and writings as may be necessary, upon surrender of the certificates, to secure the bonds represented by them, and that the Mortgage Guarantee Company be ordered to deliver the said bonds to the trustee; (3) that the trustee be directed to collect and recover the bonds wrongfully delivered to Mary L. Macmullen and now deposited with the State Bank of Maryland, and that she and the bank be ordered to deliver them to said trustee free and clear of any claims by them; (4) that the Walker-Wadsworth Company, and Osgoodby for said company, be ordered and directed to deliver the \$43,000 of bonds received and held by said company, or said Osgoodby, to said trustee, free and clear of any claims of either of them; (5) that said trustee be ordered to hold all of said bonds and said note until the court determines who are entitled to them, and upon said determination that the trustee deliver them to such person or persons as the court may direct; (6) that in the meantime an injunction issue enjoining the State Bank of Maryland from disposing of, transferring, or making delivery to any one, except the trustee, of the bonds described in the amended bill, and that a similar injunction be issued against the Walker-Wadsworth Company and Alfred B. Osgoodby, as to the bonds in their possession or control; and (7) for general relief.

We will consider the objections to the bill in the order stated in the brief of the appellees:

[1] 1. *Alleged Irregularity of the Proceedings.* On January 22, 1917, the demurrers to an amended bill were sustained, with leave to file another amended bill. The next day the court granted the plaintiffs leave to amend that bill by interlineation. On January 25th an agreement of solicitors was en-

tered into that the demurrers theretofore filed be considered as refiled to the bill as amended, per order of January 23, 1917, and the same day a motion for hearing was filed. The appellees contend that there was no order of publication against Berkley on the bill as amended by interlineation, and that, as he was a necessary party, the demurrers were properly sustained. As the demurrers were by the agreement refiled on January 25th, it would be a most novel application of equitable procedure if the defendants, who had been summoned and were represented in court by solicitors, could thus object to an amended bill because a nonresident was not then in court under an order of publication. The decree appealed from was filed on February 13th, long before an order of publication could have expired. If the amendment was such as to require a new order of publication, which we need not, if we could, determine, as the record does not show what it was, those who were still in court, and especially those who by their solicitors entered into the agreement referred to, had no standing to object to the bill for such reason; their demurrers being filed two days after the interlineation.

[2] 2. *Multifariousness.* As Alfred B. Osgoodby and the Walker-Wadsworth Company are charged with fraudulent conduct in connection with the transaction, which resulted in what the plaintiffs complain of, they were properly joined with Berkley. It might work great injustice to them if they were not made parties, as not only the bonds, but their reputations, were involved. If they were guilty of fraud at all, under the bill they were as guilty as Berkley. *Duckett v. Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; *Id.*, 88 Md. 8, 41 Atl. 161, 1062; *Safe Deposit Co. v. Cahn*, 102 Md. 530, 62 Atl. 819. If they were not guilty, they ought to demand, rather than avoid, an investigation. The Ajax Company was also clearly a proper party. Just how the plaintiffs were deceived by the deed being made to that company and Mary L. Macmullen and James Connell, as tenants in common, is not clear; but as the bill alleges the sale was to the Ajax Company, and the deed was made to the three, that, taken in connection with other allegations in the bill, as to the receipt of bonds and the subsequent disposition of them by Mary L. Macmullen and James Connell, shows they are also proper parties. The Mortgage Guarantee Company is the trustee in the deed of trust given to secure the bonds. It is not objecting to being made a party, and could not well make a valid objection. On the contrary, it might well have asked to be made a party, if it had not been. Nor is Aaron F. Heiple objecting. He is merely interested in seeing that the papers he found are properly disposed of. Nor do we see any valid objection by the State Bank of Maryland on

this ground. It is true it is only interested in the \$22,000 of bonds, so far as the bill discloses; but they were received from a party who had no right to them, and whose name at least was connected with the sale made by the alleged fraudulent trustee, and if the plaintiffs sustain their main contention—that they are interested in all of the \$80,000 of bonds—then, if there is any equity in those bonds held by the bank, it is directly interested in knowing who the real owners are. Of course, if it is contended in the proceedings, as the bill indicates may be done, that it is not a bona fide holder, but had notice of the alleged interest of the plaintiffs, it will be directly interested in the whole matter, to the extent of the bonds held by it; for, if the plaintiffs have no interest in the bonds, then there will be no question as to whether the bank is a holder for value, without notice of any defect in the title, but, if they have such interest, there may be the further question—at least to be contested—as to whether the bank is a bona fide holder for value. If there was a separate proceeding for the \$22,000 of bonds, the costs necessary to be incurred in undertaking to establish the right of the plaintiffs to the bonds would be as great as they could be in this case.

[3, 4] The objection to a bill on the ground of multifariousness "ought only to apply where the case of each defendant is entirely distinct from that of the other defendants; and it is not indispensable that all the parties should have an interest in all the matters contained in the bill. It will be sufficient if each party have an interest in some material matters in the suit and that they are connected with others." *Miller's Eq. Proc.* 139, § 110; *Phelps, Jurid. Eq.* § 42. "This objection is more frequently overruled than sustained." *Phelps, Jurid. Eq.* § 43. Or, as said in note 3 to section 105 of *Miller's Eq. Proc.*, it "is much more often taken than sustained." For cases illustrating the application of the doctrine, see *Trego v. Skinner*, 42 Md. 428; *Neal v. Rathell*, 70 Md. 592, 17 Atl. 566; *Regester v. Regester*, 104 Md. 359, 65 Atl. 12; *Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583; *Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797; *Roth v. Stuerken*, 124 Md. 404, 92 Atl. 808. If the bill had been held to be multifarious, the plaintiffs might have been put to their election; but the bill would not have been dismissed in toto. *Miller's Eq. Proc.* 114. The court can amply protect all parties by such decree or decrees as it may pass as to costs in other matters. What was said by Judge Miller in *Neal v. Rathell*, supra, is sufficient as to the suggestion that two decrees may be necessary, to avoid a further discussion of that.

[5] 3. *The Alleged Contradictory and Inconsistent Allegations.* We confess our inability to find such. While the bill refers to

the subject several times, it is distinctly and unequivocally alleged throughout that Berkley reported to the plaintiffs that he had sold the property for \$1,800 cash, a promissory note for \$3,100 (secured by bonds of \$5,000 par value), and bonds of \$15,000 par value, while he in reality sold it for the cash and note mentioned and \$80,000 in bonds. The statement that the plaintiffs ratify and approve the sale, and that the stockholders and directors of the Ajax Company did also, is in no wise contradictory or inconsistent. If they did not approve or ratify the sale made by the alleged fraudulent trustee, they certainly would not be entitled to recover bonds which were given in part payment therefor. Their suit to recover the bonds, etc., given for the purchase, would probably be all of the ratification necessary, but the allegation can do no harm. The object in saying that the Ajax Company approved and the stockholders and directors ratified it was simply to show that the company was not seeking to avoid the sale by reason of Berkley's fraud. If that had injured the company, and it was not aware of the fraud at the time, or did not afterwards ratify his action, possibly it could have declined to carry out the sale. The plaintiffs did not ratify the fraud of Berkley, or claim in the bill that he did not sell with their consent; but they complain of his fraud in not truly representing to them the terms of sale, and giving himself and others the benefit of part of the purchase price to which they were entitled.

[6, 7] 4. There can be no possible question about the jurisdiction of a court of equity. The plaintiffs are undertaking to establish that a trust existed in their favor, and the deed itself shows that Berkley held the property as trustee. Even if a court of law would have had jurisdiction in some matters, a court of equity, to say the least, certainly has concurrent jurisdiction in cases of fraud, and special jurisdiction in cases of trust. A court of law could not appoint a new trustee, or give the plaintiffs all the relief they are entitled to, if the facts were as they allege. The Mortgage Guarantee Company, which holds the \$15,000 of bonds, to be delivered on the surrender of the interim bond certificate, and the \$5,000 of bonds as security for the note, is a Maryland corporation. The \$22,000 of bonds delivered to Mary L. Macmullen are held by the State Bank of Maryland, and the \$19,000 delivered to Connell were turned over to the Walker-Wadsworth Company, as were the other \$43,000 of bonds, and it and the bank are Maryland corporations. The proceeding does not involve the title to real estate in Pennsylvania, but bonds which are in Maryland, although secured on such real estate, and the Ajax Company, although a Pennsylvania corporation, has its principal office in Baltimore. There could be no possible doubt about the right to proceed by publication

against Berkley, trustee, as it is a proceeding in rem and not in personam. Many authorities might be cited to sustain the jurisdiction of a court of equity in such a case as this, but it seems to us that it is only necessary to recall the facts alleged and the familiar principles of equity procedure and the grounds for relief, as thoroughly established in this state.

[8] 5. *Statute of Frauds*. As to the objection that the statute of frauds precludes the plaintiffs from recovery, one of the cases cited by the appellees as to multifariousness might be cited as an answer to that contention. *Ruhe v. Ruhe*, supra. But there are several complete answers to the objection as now raised. Section 7 of St. Car. II, c. 3 (statute of frauds), does not provide that the trust shall be constituted by writing, but "all declarations or creations of trusts and confidence, of any lands, tenements or hereditaments shall be manifested and proved by some writing," etc. See *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Gordon v. McCulloh*, 66 Md. 245, 7 Atl. 457. "It therefore follows that a bill need not charge the trust to be in writing; at least it is not demurrable on that account, for the writing is no part of the trust, but only the evidence to prove it at the hearing. *Davies v. Otty*, 33 Beav. 540, affirmed on appeal Id., note; *Forster v. Hale*, supra." 3 Ves. Jr., 696; s. c., 5 Ves. Jr. 308; 2 Alex. Br. Stat. (Coe's Ed.) 743. In this bill the allegations are ample.

[9, 10] But section 8, St. 29 Car. II, takes resulting trusts out of the statute, and such trusts are not required to be in writing. Without deeming it necessary to cite many of the numerous cases on that subject, we will content ourselves by referring to the excellent volume last referred to, on pages 744-746, and to *Dixon v. Dixon*, 123 Md. 44, 90 Atl. 846, Ann. Cas. 1915D, 616, one of the last expressions of this court on the subject. Of course, all such trusts must be clearly proven, to justify the court in granting relief.

[11-13] 6. *Deed Not Filed*. The objection that a copy of the deed from Berkley was not filed was sufficient to prevent an injunction being issued, and we think it should have been filed in order to justify relief other than the injunction prayed for. In *Chappell v. Clark*, 92 Md. 98, 48 Atl. 36, it was held error to pass an order requiring a bond to be given by the trustee, as well as granting an injunction before an exhibit was filed, being contrary to what is now section 142, art. 16. The court was entitled to have the deed before it, as there may be something in it which it would think reflected upon some of the questions involved. We have no means of knowing whether the lower court sustained the demurrer on that ground alone, although it is not probable that it would

have dismissed the bill simply for that reason, and as that is the only defect we find in the bill which made it demurrable, we will remand the cause without affirming or reversing the decree. A copy of the deed can then be filed, and further proceedings taken. We will follow the practice established by this court when this course is pursued, by letting the costs abide the result of the case.

7. What we have said above is sufficient as to Berkley not now being before the court. Defendants cannot oust plaintiffs by appearing and demurring before an order of publication can be published against a necessary nonresident party.

8. It is said the appellants do not come into court with clean hands; but there is nothing to show the application of that maxim excepting statements outside of the record.

[14] 9. *Limitations and Laches*. Nor do we think that the appellants' claim is barred by limitations or laches. The original bill was filed December 17, 1915, and in the amended bill it is distinctly alleged that the plaintiffs were not aware of the real transaction until long after the original bill was filed, and shortly before the amended bill was filed, which was October 17, 1916. As will be seen, the original bill was filed in less than three years after the sale, and after Berkley disappeared. The plaintiffs could not be expected to proceed at once, as it probably took a considerable time to ascertain the necessary facts—what Berkley had done with the papers, whether he could be located, etc.

Cause remanded, without affirming or reversing the decree; the costs, above and below, to abide the final result.

(130 Md. 597)

HAMILTON CORP. v. JULIAN et al.

(No. 8.)

(Court of Appeals of Maryland. June 26, 1917.)

1. NUISANCE ¶19—THREATENED NUISANCE—INJUNCTION.

An injunction will be granted to restrain acts which, when completed, will constitute a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 55.]

2. NUISANCE ¶8(9)—PRIVATE "NUISANCE"—WHAT CONSTITUTES.

Bowling alleys and moving picture theaters may become "nuisances" in certain places, when they create a disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 20-22.]

For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

3. NUISANCE ¶32—THREATENED NUISANCE—PLEADING.

Bill alleging that defendant is erecting a building which can be used only as a bowling alley and a moving picture theater, in an exclusive residence neighborhood, and such use

will render plaintiffs' property untenable as a home for themselves and as a boarding house, is sufficient to entitle plaintiffs to an injunction against such use of the property.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 77-83.]

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge. "To be officially reported."

Bill by Ella S. M. Julian and others against the Hamilton Corporation. From an order overruling defendant's demurrer, it appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

John B. Gontrum, of Baltimore (Henry B. Mann and John S. Biddison, both of Baltimore, on the brief), for appellant. C. M. Armstrong, of Baltimore (J. Elmer Weishelt, of Baltimore, on the brief), for appellees.

BRISCOE, J. This is a bill in equity brought by the plaintiffs against the defendant, in the circuit court for Baltimore county, for an injunction to enjoin and restrain the defendant from erecting, maintaining, and conducting a bowling alley and a moving picture theater building upon its lot in the village of Hamilton, in Baltimore county. The defendant is a corporation duly incorporated under the laws of the state of Maryland, and its incorporators reside and own a lot in the village of Hamilton, adjoining the plaintiffs' property. The plaintiffs are also residents of Hamilton, and own a lot therein, improved by a dwelling house, which they occupy as a home, and where they also conduct a boarding house as a means of livelihood. The lot is described as situate on the southwesterly side of Hamilton avenue, having a frontage on this avenue of about 50 feet, and extending thence southwesterly, with an even width of 50 feet, about 214.2 feet, and designated as lot No. 8 on the plat of the land of the Lauraville Hall & Land Company of Baltimore County.

The bill alleges that the village of Hamilton is exclusively a residential suburb of Baltimore City, and that the section of the plaintiffs' residence is exclusively a residential neighborhood, except several places of business necessary and suitable for the accommodation of the residents of the community, and that these by their ordinary and proper use are not calculated to interfere with or impair the reasonable use and enjoyment of property in the neighborhood by the owners and occupants thereof. The bill then avers that the defendant corporation is erecting and constructing on its lot adjoining the plaintiffs' property a building in which they are going to conduct public bowling alleys for profit, that the building is of large dimensions, over 100 feet in length by 50 feet in width, and is within 25 feet of plaintiffs' dwelling house, that this building is not susceptible of any other use, and that this use

will impair the reasonable enjoyment of the plaintiffs' property as a residence and a boarding house. The bill further charges that the defendant is also about to erect and construct on its lot another building where they will conduct a moving picture theater, and this building will be within 21 feet of plaintiffs' dwelling, and that the uses to be made of both buildings, with the noises incident to such places, will work a special injury to the plaintiffs and their property; that both the bowling alleys and theater, to be located and operated in the manner and way as proposed, will deprive them of the reasonable use and enjoyment of their property rights, render it untenable as a home for themselves, and destroy its use and benefit as a means of support for them, and make it undesirable and unavailable as a place of residence for their boarders and lodgers, and greatly impair its value.

The prayer of the bill is for an injunction restraining and enjoining the defendant, the Hamilton corporation, (1) from establishing, maintaining, or conducting a bowling alley, or bowling alleys, upon the lot in the village of Hamilton, in the Fourteenth election district of Baltimore county, designated as lot No. 9 on said plat of the Lauraville Hall & Land Company of Baltimore County; (2) that the defendant be enjoined from establishing, maintaining, or causing to be established, maintained, or conducted, upon the lot, a moving picture theater; (3) that the defendant be commanded and required to remove immediately the bowling alley building now being erected by them upon the lot, and enjoined from erecting hereafter a bowling alley building thereon; (4) that the defendant be enjoined from erecting or constructing on the lot a moving picture theater building; (5) and for other and further relief as their case may require.

Subsequently the case was heard upon the bill and a demurrer thereto, and from an order of court, passed on the 18th day of December, 1910, overruling the demurrer to the bill, with leave to answer, this appeal has been taken.

The cause and grounds of the demurrer are stated to be: (1) That the plaintiffs have not stated in their bill such a case as entitles them to any relief in equity against this defendant. (2) That the allegations of the bill are too general, vague, uncertain, indefinite, argumentative, and inferential to require this defendant to answer the same, or to entitle the plaintiffs to any relief in the premises.

[1] The object of the bill, it will be seen from its recitals, is in substance to enjoin and restrain a prospective, probable, or threatening nuisance, and the single question here involved is whether its averments of fact, as admitted by the demurrer to be true, are sufficient to entitle the plaintiffs to the relief sought by the bill. The rules of law,

controlling the rights of parties under similar facts and circumstances, alleged by the bill in this case, have been settled by numerous decisions of this court. In *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, it is said:

"The general rule is that an injunction will only be granted to restrain an actual existing nuisance; but where it can be plainly seen that acts which, when completed, will certainly constitute or result in a grievous nuisance, or where a party threatens or begins to do, or insists upon his right to do, certain acts, the court will interfere though no nuisance may have been actually committed, if the circumstances of the case enable the court to form an opinion as to the illegality of the acts complained of and that irreparable injury will ensue."

See *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325; *Chappell v. Funk*, 57 Md. 465; *Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270; *Hendrickson v. Standard Oil Co.*, 126 Md. 578, 95 Atl. 153; *Singer v. James*, 180 Md. 382, 100 Atl. 642.

[2] While it is true that bowling alleys and moving picture theaters, kept and conducted for profit, are not nuisances per se, yet they may be and may become so in certain places, when they create a disturbance to the serious annoyance and physical discomfort to persons of ordinary sensibilities living in the neighborhood. 29 Cyc. 1154, 1168, 1183; *Harrison v. People*, 101 Ill. App. 224; *Cleveland v. Citizens' Gas Co.*, 20 N. J. Eq. 201; *Tuttle v. Church (C. C.)* 53 Fed. 426; Appeal of *Ladies' Decorative Art Club (Pa.)* 13 Atl. 539. In *Miley v. A'Hearn (Ky.)* 18 S. W. 530, the

court held that in similar cases a party is not required to wait until the injury is inflicted. The object of the writ is preventive, and it wards off the injury. The case must be a clear one; but if the danger be probable and threatening, and likely to ensue, the aid of the court may be invoked. *Broder v. Saillard*, 2 Ch. Div. 692; *Ball v. Ray*, 8 Ch. App. 471; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Smelting Co. v. Tipping*, 11 H. L. Cases, 642.

[3] In the present case, the averments of the bill are sufficient, if they can be sustained by the proper proof, to warrant the granting of the relief sought by the bill. The real question in all such cases, as stated by the authorities, is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the party. A prospective or threatening nuisance is subject to the same test and against which a party would have a clear right to preventive relief in equity.

In view of the averments of the bill in this case, and in the absence of answer and proof, we must hold upon the authorities that the court below was entirely right in overruling the demurrer, and in requiring the defendant to answer the plaintiffs' bill.

Order affirmed; the appellant to pay the costs.

(90 N. J. Law, 383)

WHITAKER et al. v. MAYOR AND COUNCIL OF DUMONT BOROUGH.

(Supreme Court of New Jersey. Aug. 11, 1917.)

1. MUNICIPAL CORPORATIONS ⇐456(4)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—VALIDITY.

Borough Act (1 Comp. St. 1910, p. 244) § 83, par. 1, provides for laying out and opening up streets; and paragraph 2 authorizes a single ordinance for making several improvements in a street already laid out. *Held*, that an assessment attempting a single levy for laying out a new street and for grading and for construction of sidewalks is invalid.

2. MUNICIPAL CORPORATIONS ⇐456(4)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—VALIDITY.

Since the cost of sidewalks must be paid by the owners of the lands in front of which they are constructed, an assessment for laying out and opening a street, for grading, and including an amount for sidewalk construction, is invalid.

Certiorari by Benjamin J. Whitaker and others against the Mayor and Council of the Borough of Dumont, to set aside assessments for special benefits. Assessments set aside.

Argued February term, 1917, before SWAYZE, MINTURN, and KALISCH, JJ.

William M. Seufert, of Englewood, for prosecutor. Frank G. Turner, of Jersey City, for respondent.

SWAYZE, J. Although the writ removes only the assessment, the prosecutor improperly assigns reasons for setting aside the ordinances under which the improvements were made. The justice who allowed the writ acted advisedly in limiting its scope. The prosecutor had allowed the time for questioning the ordinances to pass by, and he could only question the assessment. This consideration disposes of most of the reasons assigned.

[1] In order to determine the question of the validity of the assessment, we have had to pick out from the voluminous and somewhat confused record the essential facts. Three ordinances were approved April 11, 1911. One established the grade of part of Madison avenue. One provided that the avenue be widened to 50 feet where it was then less, that it be graded and improved according to the grade to be established therefor, that the improvements be done according to such plans and specifications as the mayor and council might adopt therefor, and that the cost be assessed upon the property benefited thereby. The third provided for the construction of cement sidewalks. Subsequently the borough authorities called for bids "covering the grading work and construction of cement sidewalks." Separate bids were received and separate contracts were awarded (1) for the sidewalks; (2) for the grading and macadamizing. Subsequently some additional grading, macadamizing, and improving was done. On March 15, 1915, the cost and expenses were ascertained to be \$11,368.49, of

which \$7,869.75 was for roadway construction and \$3,827.84 was for "sidewalk grading." Of the total, all but \$670.24 was assessed on property owners as special benefits. The return of the commissioners shows that their assessment was for laying out, opening, and improvement of Madison avenue. Obviously this is not an assessment of the cost of grading and paving and laying sidewalks. Section 3 of the Borough Act discriminates between laying out and opening, which are provided for in paragraph I, and grading and paving, which are provided for in paragraph II. Paragraph II authorizes a single ordinance for the making of more than one of the improvements therein specified, all of which are cognate in character and relate to the improvement of existing streets, but does not authorize the inclusion in the same ordinance of provisions as to laying out and opening, which have to do with new streets. Moreover, paragraph II requires a separate assessment of damages and benefits for each improvement, and, whatever doubt there may be as to the extent to which this goes (*Cook v. Manasquan*, 80 N. J. Law, 206, 76 Atl. 310), there can be no doubt that a distinction must be made between benefits due to laying out and opening under paragraph I and improvements under paragraph II. The observance of the rule is especially important in a case like the present, where there was no ordinance to lay out and open a street, and apparently no laying out and opening in point of fact. We cannot tell how much of the assessments the commissioners attributed to laying out and opening, and how much to the improvement of the street. All we can tell from the return is that some of the assessment was for laying out and opening for which there was no authority.

[2] There is a further difficulty. The amount of the assessment is much in excess of the cost of the street improvement, and obviously includes some of the cost of the sidewalks. The return of the commissioners says nothing about an assessment for the sidewalks. Under the statute, the cost of sidewalks is to be paid by the owners of the lands in front of which the same is constructed, a very different method from that of an assessment for benefits. The commissioners could not legally have combined the two in a single assessment, and it is probably for that reason that they returned no assessment for sidewalks; but they could not, by thus omitting to assess for sidewalks according to the statute, clothe themselves with authority to assess for the street improvements more than they cost. The suggestion that the expense of the sidewalks was not included in the \$11,368.49 for which the assessment was made is futile. The determination of cost on page 58 shows that there was included for "sidewalk grading" \$3,827.84. This determination we must assume to be correct, although the

amount seems large for grading alone. The resolution printed on page 142, on which counsel relies, must be incorrect. The item "side grading" has no meaning that we can ascertain, unless it refers to the sidewalks. Moreover, there was a contract for the construction of sidewalks, and as near as we can tell the road construction alone would not, under the contract therefor, amount to the total cost as ascertained.

The assessment must be set aside, with costs. As to the sidewalks there should be a new assessment. Whether a new assessment of the cost of the street improvement is permissible is not clear. The answer to the question seems to depend chiefly on whether the ordinances authorized the macadamizing of the street. We will hear counsel as to the form of the judgment to be entered.

(90 N. J. Law, 378)

TRENTON & MERCER COUNTY TRACTION CORP. v. INHABITANTS OF CITY OF TRENTON et al.

(Supreme Court of New Jersey. Aug. 2, 1917.)

1. CARRIERS \S 12(4) — REGULATION — FARES — JURISDICTION.

Public Utility Commission has jurisdiction, under P. L. 1911, p. 380, § 17h, to forbid street railways to put into effect proposed withdrawal of sale of six tickets for 25 cents, increasing rate to 5 cents.

2. CARRIERS \S 12(9) — CONTRACT AS TO RATES — RESCISSION.

Street railway company cannot rescind contract with city as to fares because of its own mistake, not induced by city, as to power reserved by city to alter its franchise ordinances.

3. CARRIERS \S 12(9) — CONTRACT AS TO RATES — WHEN COMPLETE.

Where street railway company's directors had ordered its officers to execute agreement as to fares on passage of ordinance of same tenor and officers cannot vary its terms and directors do not intend to pass on matter again, agreement becomes binding on passage of ordinance, since all that remains to be done is to execute formal contract.

4. CARRIERS \S 12(9) — CONTRACT AS TO RATES — CONSIDERATION.

Where city was threatening to alter franchises of street railway company to its detriment, passage of ordinance which does not contain threatened changes is sufficient consideration for agreement of company to continue existing fares.

5. CARRIERS \S 12(9) — CONTRACT AS TO RATES — EFFECT ON LESSOR ROADS.

An ordinance as to street car fares, passed by agreement between city and company, is binding also as to lines of companies under long-term leases to party to agreement.

Certiorari by Trenton & Mercer County Traction Corporation against the Inhabitants of the City of Trenton and others, to review an order of the Board of Public Utility Commissioners. Affirmed.

Argued November term, 1916, before SWAYZE, MINTURN, and KALISCH, JJ.

Frank S. Katzenbach, Jr., of Trenton (Edward M. Hunt, of Trenton, on the brief), for

prosecutor. George L. Record, of Trenton (Charles E. Bird, of Trenton, on the brief), for City of Trenton. Frank H. Sommer, of Newark, for Board of Public Utility Commissioners.

SWAYZE, J. Although the voluminous record in this case has necessarily required a long time to examine, the decision may well be rested on a single point, and that within narrow compass. The prosecutor seeks to set aside an order forbidding it to put into effect a proposed withdrawal of the sale of six tickets for 25 cents on street railways operated by it. These railways are three in number, the Trenton Street Railway Company, the Mercer County Traction Company, and the Trenton, Hamilton & Ewing Traction Company. They are operated under leases and agreements of October 15, 1910. The two latter had been leased prior to 1909 to the first named for 999 years.

[1] We think it clear that the Public Utility Commission had jurisdiction under section 17, par. "h" of the act. P. L. 1911, 380. The withdrawal of the sale of six tickets for a quarter was an increase of an existing rate under which 82 per cent. of the passengers carried paid a fare of only $4\frac{1}{2}$ cents; by the proposed withdrawal they would be forced to pay a fare of 5 cents.

[2] We find it unnecessary to pass upon the question whether the original ordinances and their acceptance amounted to a contract by which the companies were authorized to charge as much as 5 cents, or whether they amounted only to a limitation by which the companies were forbidden to charge more than 5 cents. It is likewise unnecessary in our view to consider whether a fare of $4\frac{1}{2}$ cents is reasonable in view of present conditions and the situation of the company. We find that in 1909 a new contract was made between the city and the company which requires the company to sell six tickets for 25 cents upon all cars operated in the city of Trenton. The facts are as follows: For many years tickets had been sold at that rate. In 1909 the street railway company proposed to stop the sale. Naturally great public interest was aroused, threats were made of attacks upon the franchises of the company, and the city authorities were preparing for such an attack and for amendments of the ordinances. An agreement was reached by negotiation, and on October 4, 1909, the Trenton Street Railway Company adopted a resolution waiving its right to notice of alterations in the ordinances, and directing its officers to execute an agreement already prepared (a copy of which was set forth), immediately after the passage of a new ordinance, a draft of which had been submitted by the city counsel to the railway company. This ordinance provided for the sale of tickets at the old rate by the company upon all cars

operated in the city of Trenton. The ordinance was passed by the common council on October 19th and approved by the mayor on October 22d, 18 days after the resolution of the railway company. Had the agreement been signed by the officers of the company as directed by the resolution of October 4th on the faith of which the city passed the ordinance, no question could have arisen. Instead of that, the company, after the passage of the ordinance, rescinded the resolution because, as the rescinding resolution states, it was falsely recited therein that the city had reserved the right to alter the ordinances whenever in the judgment of the common council it became necessary for the public good. It is a little difficult to understand upon what theory it is supposed the false recital vitiates the action of the company. It is not charged that the city did anything to mislead the company in this respect; it could not have done so, since the ordinances were necessarily as well known to the company as to the city; and the proposed written form of contract, submitted by the city counsel, recited what was the exact truth, that the right of alteration or amendment was reserved "by the several ordinances aforesaid or some of them." The addition of the qualifying words was enough to call the attention of the company to the existence of a question as to the extent of the city's right. With this draft before them, the directors chose to put a broader statement in the recitals of their own resolution. Manifestly they ought not to be permitted for their own mistake to withdraw from the agreement after the city had acted thereon.

[3] It is argued that the parties did not intend that there should be a complete contract until the written agreement was executed. The case, it is said, is within the rule of *Water Commissioners of Jersey City v. Brown*, 32 N. J. Law, 504, decided by the Court of Errors and Appeals in 1866, and applied by the Supreme Court in *Donnelly v. Currie Hardware Co.*, 66 N. J. Law, 388, 49 Atl. 428. These cases are not applicable. In the first the water commissioners directed that their engineer and attorney should prepare a contract and submit the same for approval by the board before being executed. The court said that several particulars as to the time of finishing the work, as to the manner of doing it, and as to the guaranty of its permanence remained to be settled. The second case was decided upon the ground that there had been no agreement as to the time allowed for beginning and completing the work and the mode of payment, matters which are generally provided for in such arrangements. As Lord Cranworth said in *Ridgeway v. Wharton*, 6 H. of L. Cases, 238, at 268, the fact that the parties intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agree-

ment; but at the same time he protested against its being supposed because persons wish to have a formal agreement drawn up that therefore they cannot be bound by a previous agreement if it is clear that such an agreement had been made; and he expressed his approval of Sir William Grant's decision in the leading case of *Fowle v. Freeman*, 9 Vesey, 351. In *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, it was held that a final agreement had been reached, although the parties intended that a lease embodying the agreement should be executed. The applicability of that case to the present is not weakened by the fact that a written memorandum would have been there necessary to satisfy the statute of frauds if the vendee had not taken possession. The taking possession did not supply the terms of the lease, and before decreeing that the lease should be executed, it was necessary for the court to find that a final agreement had been previously reached, and that the execution of the lease was necessary only by way of part performance of the agreement, and not as a condition precedent to the existence of a final agreement. The facts of the present case bring it within the rule of *Wharton v. Stoutenburgh*. The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter. The case is as if in *Water Commissioners of Jersey City v. Brown*, the agreement had been already prepared and adopted by the water commissioners.

[4] There was sufficient legal consideration for the agreement by the company. It is true the ordinance did not affirmatively concede any benefit to the company; on its face it was rather a detriment; but that is too narrow a view to take. The situation was that the company was liable to attack, and the ordinances might be altered or amended in such a way as to be very harmful, or at least productive of long and expensive litigation. What the company secured was the adoption of an ordinance which contained no such drastic changes; the benefit to the company was in what the ordinance omitted, not in what it contained. In saying this, we are not to be understood as suggesting that the mere act of passing the ordinance in pursuance of the agreement would not be a sufficient consideration in a legal sense.

We think there was a valid contract requiring the company to sell six tickets for a quarter, and hence the Public Utility Commissioners might well conclude that such a rate was just and reasonable under the circumstances of the case.

[5] It is said, however, that the Mercer

County Traction Company and the Trenton and Hamilton & Ewing Traction Company could not be affected by the ordinance because no official action was taken by either with reference to its terms. This argument overlooks the fact that both those companies were at the time under lease to the Trenton Street Railway Company for a term of which more than 990 years were still to come. The probability of the two lessor companies being affected prejudicially by the ordinance is negligible.

The order is affirmed, with costs.

(88 N. J. Eq. 213)

**FOUR CORNERS BLDG. & LOAN ASS'N OF
NEWARK v. SCHWARZWAELDER.**
(No. 42/244.)

(Court of Chancery of New Jersey. July 10, 1917.)

1. NEGLIGENCE — 1—DEFINITION.

Apart from any willful act, the "negligence" for which a person can be held responsible consists either in the performance of an act which under all the circumstances he is bound not to perform, or the nonperformance of an act which under all the circumstances he is bound to perform.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

2. BUILDING AND LOAN ASSOCIATIONS — 23(8) — GROSS NEGLIGENCE OF DIRECTOR — KNOWLEDGE OF MEETING.

A director of a building and loan association was guilty of gross negligence in permitting the secretary to pursue the custom of calling up various members of the board of directors on the occasion of a meeting and getting their permission to note them as present when they were absent, and the director must be held bound for such knowledge as he would have acquired if in fact present at a meeting.

3. BUILDING AND LOAN ASSOCIATIONS — 23(8)—KNOWLEDGE OF DIRECTOR.

Where a director of a building and loan association was not present at a meeting at which the minutes stated a report on an application for loan was made by the committee of which the director was a member, or at a meeting at which the loan was transferred from the applicant to another, but he was present at the meeting at which minutes of the meeting when the loan was transferred were approved, he was bound by knowledge of whatever appeared in the minutes.

4. BUILDING AND LOAN ASSOCIATIONS — 23(8)—"NEGLECTANCE" OF DIRECTOR—LIABILITY.

Where a director of a building and loan association, also executor of a decedent's estate, permitted the association to make a loan on premises on which the estate held a mortgage, the director, knowing of the application, and of the issuance by the association of the check therefor in time to have stopped payment, was guilty of such negligence as rendered him responsible to the association for the loss occasioned it by reason of his failure to act.

5. BUILDING AND LOAN ASSOCIATIONS — 23(8)—"NEGLECTANCE" OF DIRECTOR—LIABILITY.

Where the minutes of a meeting of directors of a building and loan association at which defendant director was present showed that the treasurer reported a disbursement on account

of a particular mortgage, and defendant director, had he made inquiries, would have ascertained immediately that the money had been advanced on property on which the estate represented by him as executor already held a mortgage, and would also have discovered that the loan had never been authorized by the association, so that the disbursement was illegal, the director was guilty of such "negligence" as to make him responsible for consequent loss to the association; it being his duty, under the constitution of the association, to loan the funds and see to their safe investment.

6. BUILDING AND LOAN ASSOCIATIONS — 23(8) — DIRECTORS — DELEGATION OF DUTIES TO COUNSEL.

The directors of a building and loan association have no right to shift to their counsel the duty imposed on them to loan the association's funds and see to their safe investment.

7. BUILDING AND LOAN ASSOCIATIONS — 23(8)—LIABILITY OF DIRECTOR.

That other directors of a building and loan association were responsible for any loss to the association through a loan, as well as defendant director, was no objection to relief to the association as against defendant director.

Suit between the Four Corners Building & Loan Association of Newark and Frank Schwarzwaelder. Further argument directed.

Raymond, Mountain, Van Blarcom & Marsh, of Newark, for complainant. Francis Child and Thomas S. Henry, both of Newark, for defendant.

LANE, V. C. This is a proceeding to compel defendant to reimburse complainant for losses alleged to have been sustained by complainant on account of two loans, one of \$5,000 on property in South Orange, and one of \$4,000 on property in East Orange.

The complainant is a building and loan association, and the defendant was one of its directors at the times the respective loans were made. The defendant was also at the same time one of the executors of the estate of Loehnerberg, which estate, it subsequently transpired, held mortgages, prior to those of the building and loan association, upon the properties in question, with the result that, upon a foreclosure of a mortgage prior to that held by the Loehnerberg estate on the South Orange property, the equity of the building and loan association was wiped out, and upon the foreclosure of the mortgage held by the Loehnerberg estate on the East Orange property the building and loan association, in order to protect its rights, was obliged to buy in the property, which it still holds. The charge is that the defendant, as a director of the building and loan association, has been guilty of such negligence as makes him responsible for the losses accruing to the building and loan association. In French v. Armstrong, 79 N. J. Eq. 283, 82 Atl. 101, Vice Chancellor Stevens, in dealing with the responsibilities of directors of building and loan associations, said:

"In Williams v. McKay, 40 N. J. Eq. 189 [53 Am. Rep. 775], the case of a receiver of a savings bank against its managers, it was held by the Court of Errors that the receiver rep-

resents not only the corporation, but its depositors and creditors, and that the managers stand to such depositors and creditors in the character of trustees: that the trust was direct, and that as such that it was exempt from the operation of the statute of limitations. It appears to me that building and loan associations stand on very much the same footing as savings banks. They are quasi public institutions, dealt with as such by the Legislature * * * and having very similar objects. They are both designed to conserve the scanty savings of wage-earners and other people of small means. If the managers of saving banks are trustees of creditors and depositors, I see no reason why the directors of building and loan associations do not stand in precisely the same relation to their creditors and so-called stockholders."

And the Court of Appeals in *Gerhard v. Welsh*, 80 N. J. Eq. 206, 82 Atl. 871, dealing with the responsibilities of directors of a building and loan association, was apparently of, although not directly so stating, the same opinion, citing the opinion of the chancellor on final hearing in *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

In *Williams v. McKay*, 40 N. J. Eq. 189, at page 195, 53 Am. Rep. 775, the Court of Appeals said:

"The duty belonging to such a situation is a plain one—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind."

And on final hearing the Chancellor, 46 N. J. Eq. at page 56, 18 Atl. at page 835, said:

"Trustees of the character of the defendants are not merely required to be honest, but they must also bring to the discharge of the duties that they undertake ordinary competency, together with reasonable vigilance and care. They cannot excuse imprudence or indifference by showing honesty of intention coupled with gross ignorance and inexperience, or coupled with an absorption of their time and attention in their private affairs. The rule in this respect is admirably stated by Judge Earl of the Court of Appeals of New York in *Hun v. Cary*, 82 N. Y. 74 [37 Am. Rep. 546], in this language: 'One who voluntarily takes the position of director and invites confidence in that relation, undertakes, like a mandatory, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men, and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge gratuitously. These defendants ordinarily took the position of trustees of the bank. They invited depositors to confide to them their savings and to intrust the safe-keeping and management of them to their skill and prudence. They undertook, not only that they would discharge their duties with proper care, but that they would exercise the

ordinary skill and judgment requisite for the discharge of their delicate trust."

And see *Campbell, Receiver, v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120, and *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 Atl. 543.

In *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, the Supreme Court of the United States in dealing with the liability of directors said with respect to what is negligence:

"If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' * * * In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances."

[1] It seems to me that leaving out of consideration any willful act the negligence for which a person can be held responsible consists either in the performance of an act which under all the circumstances he is bound not to perform or the nonperformance of an act which under all the circumstances he is bound to perform.

In *Citizens' Building, Loan & Sav. Association v. Coriell*, 34 N. J. Eq. at page 392, the court said, referring to and approving an opinion by the Pennsylvania court:

"It was there said that, while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or willful misconduct, or breach of trust, for their own benefit, and not for the benefit of the stockholders, for gross inattention and negligence, by which such fraud or misconduct has been perpetrated by agents, officers, or codirectors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear absurd and ridiculous, provided they are honest, and are fairly within the scope of the powers and discretion confided to the managing body."

Quere, whether the last remark is quite consistent with the duty of a person becoming a director in an institution such as a building and loan association to bring to his office ordinary competency? In this case there is no charge, or at least no proof, of fraud, embezzlement, or willful misconduct, or breach of trust for the benefit of the defendant, nor is there any question of a mistake of judgment. The sole question is whether the defendant was guilty of gross inattention and negligence (which means simply the failure to give such attention and to perform such acts as the circumstances required) as to make possible the fraud and

misconduct which was undoubtedly perpetrated by an officer of the complainant.

First. The facts are as follows with respect to the South Orange loan: Roland D. Crocker was the solicitor for the association. In 1909 he conveyed the property to Mabel Daly, who immediately made a mortgage to the executors of the estate of Loehnberg, of whom defendant was one. The property was then immediately reconveyed by the Dalys to Crocker, who held title until April 1, 1913, when he conveyed it to Arthur M. Sims, who by instrument dated on the same day mortgaged it to the complainant. Crocker caused an application to be made to the complainant for a loan on the property as early as October, 1912, in the name of Louis Wagner, for \$7,000. The defendant was appointed one of the inspection committee. At a meeting of the directors held on the 25th of October, 1912, at which the defendant was present, a report of the defendant, the only one of the committee reporting, was presented, recommending a loan of \$5,000. The property is clearly described in the minutes. On the 28th of February, 1913, at a meeting of the directors at which the defendant was present, it was recommended that the officers be empowered to grant such amount of the loan as should be unanimously recommended by the committee, which included the defendant. The minutes of a meeting of the directors held on March 28, 1913, the defendant not being present, state that all the members of committee recommended that a loan of \$5,000 be granted to Louis Wagner on the property in question. The next reference to the matter is in the minutes of a meeting held on April 25, 1913, at which the defendant was not present. The minutes state:

"Referring to application for loan by Louis Wagner, Brooklyn, N. Y., to whom a loan of \$5,000 was granted on property 60-62 south side of Second street, South Orange, Mr. Wagner having sold the property to Arthur Sims, and all of the committee, Mr. Frank Shulz and Mr. Thomas F. Peer and Mr. Frank Schwarzwald, reporting in favor of loan of \$5,000 to Arthur Sims on property 60-62 south side Second street, South Orange, N. J., it was, on motion of Mr. Merlinger, seconded by Mr. Stone, ordered that the committee recommendation be received and granted."

[2] The minutes of a meeting of May 23, 1913, at which, according to the minutes, defendant was present, state:

"On motion duly made and seconded, minutes of last meeting and special meeting were approved."

And at the same meeting the treasurer's report was received, the first item of disbursement being the sum of \$4,813.50 for Arthur Sims mortgage. Again at a meeting of the directors July 2, 1913, at which the defendant, according to the minutes, was present, the minutes of May 23, 1913, were read and approved. It is insisted for the defendant that the fact that the minutes of May 23 and July 2, 1913, indicate that he was pres-

ent does not prove that fact, because it was a custom of the secretary to, if there was a lack of quorum, call up various members of the board and get their permission to note them as present. The defendant swears that he never knew of any loan to a man named Sims, and that therefore it must be that the secretary pursued the course heretofore adverted to with respect to these two meetings. If this be true, then the defendant is unquestionably guilty of gross negligence in permitting such a practice to be pursued, and he must be held bound for such knowledge as he would have acquired if he were in fact present. In considering this phase of the case I have dealt with it as if he were in fact present at the two meetings in question, and I find as a fact that there is not sufficient evidence to indicate that the minutes are incorrect. Crocker caused to be filed a forged satisfaction of the mortgage held by the Loehnberg estate, and also caused to be filed a forged satisfaction of a first mortgage held by one Bercaw upon the property. The Bercaw mortgage was foreclosed, and the property sold for less than a sufficient amount to pay anything on the subsequent incumbrances.

[3] The testimony is to the effect that the defendant examined the premises in question as executor of the Loehnberg estate upon various occasions, that he was familiar with the loan, and that he received interest regularly from Crocker until he disappeared in September, 1914. It is inconceivable to me that, when he acted as an inspector upon the application of Louis Wagner, and examined, as he says, the property, he did not realize that an application was being made to the building and loan association for a loan upon property upon which he already held a mortgage. He advised the loan. He made no inquiry as to how his mortgage was going to be taken care of. The officers were empowered to grant a loan at a meeting at which he was present, and he still took no steps either to inquire as to how his loan was going to be taken care of or to advise the association that the estate which he represented held a mortgage. Although he was not present at the meeting held March 28, 1913, at which the minutes state a report was made by the committee of which he was a member, recommending that a loan of \$5,000 should be granted, or at the meeting of April 25, 1913, at which time the loan was transferred from Wagner to Sims, yet he was present at the meeting of May 23, 1913, at which the minutes of the meeting of April 25, 1913, were approved, and he is therefore bound by knowledge of whatever appears in these minutes. The minutes of April 25, 1913, distinctly refer to the transfer from Wagner to Sims, and describe the property, and refer to the fact that all the members of the committee, including himself, had reported in favor of the loan. At the meeting of May 23, 1913, he made no

inquiry as to how the money due on the mortgage held by the estate that he represented would be paid, nor did he notify his fellow directors of the existence of such a mortgage. At the same meeting the treasurer reported that he had disbursed the sum of \$4,813.50 for the Arthur Sims mortgage. Apparently, if the defendant's story is to be believed, he sat quiet when this report was presented and made no inquiry whatever to ascertain the authority of the treasurer for the disbursement of this large sum of money. He knew that he had recommended a loan of \$5,000 on property already incumbered by a mortgage under his control, and from October to May made no inquiry as to what had become of the matter. The check was not paid until July 10, 1913, so that if he had protested on May 23, 1913, the payment of the check might have been stopped. On July 2, 1913, at a meeting at which the defendant was present, and before the payment of the check, the minutes of May 23, 1913, were approved, and the Sims mortgage, at least constructively called to his attention.

[4] It seems to me that all of the circumstances indicate that with respect to this loan the defendant is guilty of such negligence as renders him responsible for the loss which was occasioned to the association by reason of his failure to act. The duties of the directors of the association are defined in section 2, art. 9, of the Constitution:

"Section 2. The board of directors shall meet regularly at four p. m. on the third Thursday of each and every month, at such place as they or a majority shall appoint for the purpose of receiving from the stockholders their monthly dues, interest and fines, and pay the same into the treasury; to loan out the funds and see to their safe investment, and to attend to the financial concerns of the association generally."

Article 2, § 3, provides:

"No money shall be loaned on any property already incumbered."

Under the authorities to which I have referred it is no excuse to say that the defendant was ignorant and incompetent or so engrossed in his own affairs as not to be able to give proper attention to the affairs of the building and loan association. He was bound to apply to his duties as director of the building and loan association that degree of care which an ordinarily prudent man would exercise with respect to his own affairs.

The question is the amount of damages for which he may be held. If it appears that the first mortgage was foreclosed and that the property did not realize sufficient to pay the first mortgage, then, if in fact the defendant had brought to the attention of the building and loan association the existence of his mortgage, it is, of course, conceivable that his mortgage might have been paid off out of the proceeds of the loan, and the loan still made, and still would have resulted in the loss. It is, on the other hand, conceivable that if the existence of this second mortgage

held by the Loehnberg estate had been disclosed, then an investigation would have been made which might have disclosed the existence of the prior mortgage and the rascality of Crocker and would have saved the association from any loss. Upon this point I desire to hear counsel.

[5] Second. With respect to the East Orange loan. There is nothing in the minutes of the board of directors authorizing the granting of the loan to Aschenbach on the property in East Orange. The files merely show an application signed by Aschenbach, without date, asking for a loan of \$4,000. It bears the name of William B. Howell, Robert L. Hopkins, as the committee recommending it. It contains no description of the property except "Map of Ampere section of property of East Orange Ampere Loan Company." In December, 1909, William H. Daly and wife had executed a mortgage to the Loehnberg estate of which defendant was executor, for \$4,000. In September, 1910, Albert B. Aschenbach and wife executed a mortgage to the complainant association for \$4,000 upon the same property. The only reference to this loan is contained in the minutes of a meeting of the board of directors held on September 22, 1910, at which the defendant was present, at which the treasurer reported a disbursement on September 4th of \$3,919 on account of Aschenbach mortgage. The defendant made no inquiries with respect to this payment. If he had, he would have immediately discovered that the money had been advanced upon property upon which the estate represented by him already held a mortgage. He would also have discovered that the loan had never been authorized and the disbursement was therefore illegal. Unless reports of officers are to be received and approved pro forma and members of a board of directors excused from any investigation whatever, it seems to me that the act of the defendant was gross inattention and such negligence as make him responsible for the consequences of his inattention. I cannot conceive that he has performed his duty as a member of the board of directors, intrusted with the savings of poor investors whose duties are defined to be "to loan out the funds and see to their safe investment." Here again the question arises as to the measure of damages. The Loehnberg mortgage was foreclosed, the property bought in by the association, which still holds it. I will hear counsel upon this point.

[6] In defense of this director it is said that he properly relied upon counsel of the association, Crocker, who up to the time he absconded in September, 1914, bore an excellent reputation. The duty of counsel is to act as legal adviser to the board, to examine the title to every security, and report thereon to the directors, to prepare obligations and contracts, and to transact the legal business of the society. The directors have no right to shift to counsel the duty imposed upon

them to loan out the funds and see to their safe investment. There is no proof before me that counsel ever reported to defendant or to the board that the title to either of the premises in question was clear. If counsel of the association had reported, it would immediately have occurred to the defendant that the report was false, because a mere examination of the papers would have demonstrated that the two mortgages held by the Loehberg estate had not been satisfied, and that the titles were not clear.

The statute of limitations is pleaded, but not seriously argued. The point seems to be disposed of by the following cases: *Dailey v. Kiernan*, 75 N. J. Law, 275, 67 Atl. 1027; *Orane v. Ketcham*, 83 N. J. Law, 327, 84 Atl. 1052; *Fryer v. Mount Holly Water Co.*, 87 N. J. Law, 57, 93 Atl. 679; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *French v. Armstrong*, 79 N. J. Eq. 283, 82 Atl. 101.

[7] The fact that other directors may be also responsible for any loss which occurred by reason of the East Orange loan appears to present no objection to relief. *Stockton, Receiver, v. Anderson*, 40 N. J. Eq. 486, 4 Atl. 642; *Williams v. McKay*, 46 N. J. Eq. at page 39, 18 Atl. 824.

Within a week counsel on either side may present such additional argument upon the facts or law as they may be advised.

If there is an apparent error in dates, amounts, etc., or with respect to any fact, I wish counsel would bring it to my attention, as these conclusions have been prepared without having before me a copy of the testimony. I do desire to hear from them particularly with respect to the queries which I have above indicated.

WARNE v. GREENBAUM. (No. 43/261.)

(Court of Chancery of New Jersey. July 26, 1917.)

1. VENDOR AND PURCHASER §130(7)—SUFFICIENCY OF TITLE BY ADVERSE POSSESSION.

Fact that some unknown heirs of complainant's predecessor in title did not join in conveyance to person under whom she claims does not render title unmarketable, where she and those under whom she claims have been in open, continuous, and undisputed adverse possession of premises under color of title for more than 45 years and no claim is made that unknown heirs were under any disability that would prevent them from asserting their rights.

2. ADVERSE POSSESSION §85(1)—HOSTILE CHARACTER—COLOR OF TITLE—PRESUMPTION.

One who enters under color of title and openly and continuously uses property must be assumed to do so with intent to claim adversely to unknown heirs.

Action by Grace Warne against Adolph Greenbaum. Decree for complainant.

August C. Streitwolf, of New Brunswick, for complainant. Leo Goldberger, of Perth Amboy, for defendant.

FOSTER, V. C. This bill is filed for the specific performance of a contract dated November 18, 1916, made by the parties for the purchase and sale of certain real estate in the city of Perth Amboy.

The case has been submitted on an agreed state of facts, from which it appears that complainant, a widow, by the contract in question, agreed to sell and convey to defendant the premises described in the bill for \$10,450, subject to a mortgage for \$5,000, and that on the execution of the contract a payment of \$500 was made on account of the purchase price. The balance of the price was to be paid and "a free and clean warranty deed for the property" was to be delivered by March 1, 1917. On this date a warranty deed, containing the usual covenants, duly executed by complainant, conveying the property to defendant, was tendered to defendant, and he refused to accept the same on the ground that complainant was not the owner of the fee of said premises, and that certain undivided rights therein were vested in the heirs of William Bennett, deceased, unknown and outstanding.

William Bennett at the time of his death in 1800 owned the premises in fee. By his will, not dated, but made in 1790, and probated in the Prerogative Court in 1800, he devised the premises under the following paragraph of his will:

"I give and bequeath all my estate, real and personal that shall be remaining after the aforesaid conditions and orders be fully observed to my son William and his heirs and assigns forever, and if it should so happen that my said son should die, or not have lawful issue of his body, before he shall arrive at the age of twenty-one years, then and in such case all my estate to my said son William hereby bequeathed shall descend to my brothers and sisters' sons in manner following, that is, one moiety or one-half part to the sons of my brother, Hendrickson William Bennett, and one-fourth part to the sons of my brother-in-law Walter Stires." (Also known as Walter Hires.)

The son William Bennett was an idiot, and he died unmarried in 1865, and by the terms of his father's will the sons of Hendrickson W. Bennett and Jacobson W. Bennett and of Walter Stires (or Hires) or their lawful issue became seised of the premises, and some of them made a deed for their interest in the premises to Joseph Imlay in 1866, and to Henry S. Little in 1867, the last named having acquired all of Imlay's rights in the premises. On April 1, 1871, Henry S. Little conveyed the premises to Hezekiah Warne and Abraham Warne. On February 2, 1873, Hezekiah Warne and wife conveyed their interest in the property to Abraham Warne. All these deeds were duly recorded. Abraham Warne died intestate seised of the premises on July 21, 1883, leaving his widow, Cornelia Warne, and his sons, Wood Warne, Abraham Warne, and Elmer Warne, surviving, all residents of Matawan in this state. Cornelia Warne was granted letters of adminis-

tration, and she died in 1893, and thereafter Wood Warne died, leaving a widow, Mary Warne, now deceased. On March 21, 1893, Abraham Warne, unmarried, conveyed all his right, title, and interest in the premises to his brother Elmer. On June 12, 1913, Elmer died testate, and by his will duly probated, he devised the property to his widow, Grace Warne, the complainant.

It is admitted that complainant, her prior grantors, and those in devolution of interest in succession to the title, commencing from the deed into Henry S. Little on July 3, 1867, have remained in the undisturbed, quiet, and peaceable enjoyment of the premises, and that the Warne family have remained in the continued, quiet, and peaceable enjoyment thereof since the deed into Abraham and Hezekiah Warne, dated April 1, 1871, and have been holding adversely to any devisees or heirs of such devisees named in the will of William Bennett. It is further admitted that there are several unknown heirs of the sons of Hendrickson W. Bennett, Jacobson W. Bennett, and Walter Stires (or Hires), whose names and addresses are unknown, who were not parties to any of the deeds mentioned, and who have a vested interest in the premises by virtue of their heirship. Defendant contends that the outstanding interests of these unknown heirs render complainant's title incomplete and prevent her from owning the premises in fee, and that these outstanding interests render the title unmarketable. Complainant's answer is that by reason of the continuous and uninterrupted possession of herself and her predecessors in title since April 1, 1871, her title is complete and marketable, and that defendant should be required to perform the contract by paying the balance of the purchase price and accepting a deed for the property. The question thus presented for determination is the validity of the title acquired by complainant through adverse possession against the interests of the unknown heirs mentioned.

[1] From the facts stated, and in the absence of any statement to the contrary, it appears that complainant and those under whom she claims have been under color of title in the open, continuous, undisputed, peaceable, and adverse possession of the premises she agreed to sell and convey to defendant, for more than 45 years; and no claim is made that her, or their, right or title thereto was ever questioned, or that the unknown heirs, or any of them, were under any disability that would prevent them from asserting their rights to, or from claiming any interest in, the premises to which they might be entitled. Such being the situation, it must be controlled by the rule of *Foulke v. Bond*, 41 N. J. Law, 527, where Mr. Justice Depue, speaking for the Court of Errors and Appeals, at page 545, observed:

"The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted. * * * A party relying on title derived from such a source must prove possession in himself, or in those under whom he claims, of such a character as is calculated to inform the true owner of the nature and purpose of the possession to which the lands are subjected."

[2] In the absence of any facts to the contrary, and in view of the fact that complainant and her predecessors entered under color of title and openly and continuously used and enjoyed the entire property, it must be assumed that they did so with the intent to claim adversely to the unknown heirs, and therefore the further statement of the law by Justice Depue on this branch of the subject is particularly appropriate to the present case, for he said:

"That entry under color of title confers an advantage, in that it operates, under some circumstances, as a disseisin, and determines the *quo animo* with which the entry was made. Having color of title is also advantageous to the disseisor in giving character to his possession after entry made."

The rule of *Foulke v. Bond* has been repeatedly followed in our courts to the present time; and, as the facts presented show title in complainant by adverse possession, against the unknown heirs referred to, a decree will be advised for the specific performance of the contract.

(30 N. J. Law, 507)

STATE v. JEFFERSON. (No. 60.)

(Court of Errors and Appeals of New Jersey.
July 18, 1917.)

DISTRICT AND PROSECUTING ATTORNEYS vs. 11
—MALFEASANCE IN OFFICE—INDICTMENT—
CONDITION PRECEDENT.

Const. art. 6, § 3, par. 3, providing that judgments in case of impeachment shall not extend further than to removal from office, etc., but the party convicted shall be liable to indictment, etc., does not require impeachment of the prosecutor of the pleas of the county as a condition precedent to his indictment for malfeasance in office.

Error to Supreme Court.

Matthew Jefferson was convicted of malfeasance in office, and, from a judgment of the Supreme Court (88 N. J. Law, 447, 97 Atl. 162) sustaining the conviction, he brings error. Affirmed.

Howard L. Miller, of Camden, and Clarence L. Cole, of Atlantic City, for plaintiff in error. Josiah Stryker, of Trenton, and John W. Wescott, Atty. Gen., for the State.

GUMMERE, C. J. The judgment brought up by the present writ is one affirming the conviction of the plaintiff in error in the Cape May quarter sessions upon an indictment charging him with malfeasance in office. The office held by him was that of prosecutor of the pleas of the county, and

the specific malfeasance charged against him was the protection of violators of the criminal law and affording them immunity from punishment for a money consideration.

Numerous assignments of error were submitted to the Supreme Court and received consideration by that tribunal in the opinion promulgated by it. The same grounds of attack upon the conviction which were there made have been repeated before us. With a single exception, we are content with the disposition made of them by that court and for the reasons set out in the opinion.

The only assignment which we consider merits further discussion is that directed at the refusal of the trial court to grant a motion in arrest of judgment, which was based upon the ground that the plaintiff in error, being a state officer, could not be legally indicted and tried for malfeasance in office until after impeachment proceedings had been instituted against him and a judgment of conviction rendered therein. The argument is that this is a right afforded to him by article 6, § 3, par. 3, of our Constitution, which declares that:

"Judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit or trust under this state; but the party convicted shall nevertheless be liable to indictment, trial and punishment according to law."

A consideration of the English cases is not helpful in solving the question presented, for the reason that the courts of impeachment of this country, both federal and state, although modeled on the English tribunal, so far as its formation and methods of procedure are concerned, differ from it fundamentally in the purpose of their existence and the power exercised by them. Stated specifically, the jurisdiction of the English court is purely criminal, inflicting punishment of the same kind and in the same measure as the ordinary criminal courts of the kingdom. For instance, Lord Stafford, after an indictment for high treason had been presented against him, and before trial thereon, was proceeded against by articles of impeachment for the same offense, was convicted by the House of Lords, sentenced to death on the conviction and executed. 7 How. St. Trials, p. 1297. So, too, after the rebellion of 1745 some of the participants therein were indicted and convicted in the common-law courts and executed on such convictions, while articles of impeachment were exhibited against at least one of the other participants, and the trial thereon resulted in his conviction and execution. Campbell's Life of Lord Hardwick, p. 106. The courts of impeachment of this country, on the other hand, perform no punitive function. The single purpose of their existence is the protection of the people against public servants who have betrayed their trust and have violated the law which they were sworn to obey. The sentence pronounced against the offender affects neither

his life, liberty, nor property, but merely removes him from the office he has disgraced and bars him from ever afterward holding any office of honor, trust, or profit.

From what has been said it is apparent that the constitutional provision appealed to by the plaintiff in error was not adopted from any rule of procedure prevailing in England. So far as my examination has gone, it first appears in the New York Constitution of 1777, and next in that adopted by New Hampshire in 1784. It was written into the federal Constitution in 1787, and after that from time to time was adopted as part of the fundamental contract of at least 17 of our sister states. Its purpose must be either that claimed for it on behalf of the plaintiff in error, or else to settle beyond controversy the claimed right of a person convicted by a court of impeachment to plead that conviction as a bar to a trial on an indictment for the same offense which brought about his removal from office.

So far as the researches of counsel and the court have gone, but one case has been found in which a contention similar to that advanced by the plaintiff in error has been made, viz. Commonwealth v. Rowe, 112 Ky. 482, 66 S. W. 29. In that case the Supreme Court of Kentucky, after a full consideration of the question, reached the conclusion that the impeachment of a commonwealth's attorney is not a condition precedent to his indictment for malfeasance in office and punishment thereunder. The opinion is a carefully considered one, and the conclusion reached seems to be fully supported by the logic of the argument set out in it. But, independent of the reasoning of the case cited, we are entirely satisfied that the conclusion of the Kentucky court is the correct one. If it be true that the effect of the constitutional provision is to stay proceedings in the criminal courts until after a conviction in the court of impeachment, then punishment for a crime in such a case is made to depend upon whether or not the House of Assembly will see fit to present articles of impeachment against the offending officeholders. This they may or may not do, as the judgment of its members may dictate. It may be that the offender's term of office will have expired during the recess of the Legislature or will expire almost immediately after its convening, and that impeachment proceedings therefore will be inadvisable. Other reasons for nonaction by the House of Assembly will readily suggest themselves. That any such possible immunity from punishment was intended to be conferred upon the betrayers of public trust by the framers of this provision of the Constitution cannot be conceded and never has been so understood by our people. The history of our own state is a demonstration of this fact. From 1784, when Peter Hopkins, a justice of the peace, was impeached by the House of Assembly, down to the present time, there

have been just four impeachment trials in New Jersey. Certainly no one will suppose that during this period of 133 years the four persons thus proceeded against constitute all of the officeholders under the state government who have been untrue to the trust imposed in them. In fact, the very slightest examination of our official reports will demonstrate the contrary.

The history of the federal court of impeachment is similar. The records of the Senate show that from the adoption of the Constitution in 1787 until now articles of impeachment have been presented against one President, one United States Senator, one member of the cabinet, and six members of the judiciary. All other civil officers serving under the federal government who have been guilty of criminal conduct while in office have been dealt with by the ordinary tribunals of justice.

The records of our sister states have not been available to us for inspection, but it is more than probable that they will disclose a similar condition; for, as was said by Prof. Theodore W. Dwight in an article on "Trial by Impeachment" (American Law Register, vol. 6, N. S. p. 257): "This mode of trial is rarely exercised and practically dormant."

It has been suggested, rather than argued, that, unless the indictment of a state officer is postponed until the termination of impeachment proceedings, the interests of the state will suffer by its deprivation of the services of the officer while the title to the office remains in him. It is suggested when applied to the present case it would seem to savor of grim humor, if it were not for the seriousness of the matter. When it is remembered that the specific charge upon which the plaintiff in error was convicted was the shielding of violators of the criminal law from punishment for a pecuniary consideration, the suggestion that by his conviction and sentence the state is being "deprived of his services" is very wide of the mark; it would be much more accurate to say that by it the state is being protected against the further prostitution of his office.

We conclude that the refusal of the motion in arrest of judgment was proper, and that on the whole case the conviction should be affirmed.

(88 N. J. Eq. 119)

AHRENS v. KELLY et al. (No. 41/334.)
(Court of Chancery of New Jersey. July 31, 1917.)

1. USURY \S 130—FORECLOSURE OF MORTGAGE—DEFENSE—AVAILABILITY.

Where a son executed a second mortgage, and his mother signed the bond accompanying it, and the property was conveyed to her, subject to the mortgage to secure other advances, on foreclosure, she could set up defense of usury.

2. USURY \S 55 — CONTRACT BY AGENT — KNOWLEDGE OF PRINCIPAL.

Although the illegal bonus was paid to another, if it was paid pursuant to the terms of

contract of loan with the knowledge of the mortgagee, the mortgage will be declared usurious.

3. USURY \S 117 — CONTRACT BY AGENT — KNOWLEDGE OF PRINCIPAL—EVIDENCE—SUFFICIENCY.

In a bill to foreclose a mortgage, evidence held sufficient to show that the mortgagee, although he did not negotiate for the loan, knew that the loan was usurious.

Bill by Augusta N. Ahrens against Mary Kelly and others. Decree for complainant.

Runyon & Autenreith, of Jersey City, for complainant. Randolph Perkins, of Jersey City, for defendants.

LEWIS, V. C. The bill in this case is filed to foreclose a mortgage made by the defendant Patrick J. Kane and Esther Kane, his wife, to William G. Ahrens. The instrument bears date the 7th day of March, 1913, and covers property at the corner of Bergen and Bramhall avenues, Jersey City. The mortgage was for the sum of \$10,000, and was second to one held by the New Jersey Title Guarantee & Trust Company for \$23,000. Kane used the money (i. e., the \$8,000 of the \$10,000 paid on the mortgage) in erecting an apartment house, and also secured other sums from his mother, Mary Kelly, who executed the bond accompanying the mortgage. On May 21, 1913, he conveyed the property to his mother, and they both testify that at the time of this conveyance there was an agreement between them that the mother would turn back the property to her son upon being reimbursed.

[1] An answer and counterclaim were filed, alleging that the transaction was usurious; but it was urged by the complainant that, even if this were the case, under the rule laid down in *Lee v. Stiger*, 30 N. J. Eq. 610, *Scull v. Idler*, 79 N. J. Eq. 466, 81 Atl. 746, and other cases, Mary Kelly, the defendant, could not be allowed to set up usury against such mortgage. I am not inclined to this view of the matter under consideration. This is not the case of affording to a "mere adventurer, who may happen to slip into the seat of the borrower, a right to speculate on a violation of law which has done him no harm," as was said in *Lee v. Stiger*. That Mrs. Kelly took the conveyance expressly subject to the mortgage is a mere technical defense. Mrs. Kelly signed the bond, and is liable for deficiency judgment thereon. She really took the deed as security for her loan, and under the view expressed in *Trusdell v. Dowden*, 47 N. J. Eq. 396, 20 Atl. 972, is entitled to defend. Kane, the son and mortgagor, is also a party to this suit, and he certainly has, under *Andrews v. Stelle*, 22 N. J. Eq. 478, this right.

[2, 3] It was further contended that, in case the transaction was tainted with usury, Albanesi, who negotiated the loan, was the agent of Kane, and not of Ahrens, the complainant, and that he (Ahrens) knew nothing

about the arrangement between Kane and Albanesius, and that, if the former had any remedy, it was by suit against the latter for illegal brokerage. The facts developed at the hearing satisfied me that the complainant, Ahrens, knew all about the Kane transaction with Albanesius, and that he must be held accountable within the rule laid down by Vice Chancellor Van Fleet in *Borcherling v. Trefz*, 40 N. J. Eq. 502, 2 Atl. 369, that "to taint a contract with usury it is not necessary that the illegal interest or bonus shall have been taken by the lender himself; but if it be shown that an illegal consideration was paid to some other person than the lender, pursuant to the terms of the contract of loan, with the knowledge of the lender, the contract must be declared usurious." This view has been numerous followed. Kane says that Ahrens was present at the time of the first payment; that he saw the two checks that were left lying on the desk and the one check that was taken. Ahrens did not go on the stand and deny this. The testimony relative to his exaction of a bonus from the owner for an extension of the mortgage, and his demand for another that he did not get, gives us some idea as to his disposition regarding transactions of this kind. Moreover, it does not seem probable that he would have loaned this considerable sum of money on a second mortgage to a person of Kane's financial standing, merely to secure interest, without a thorough understanding. He is too shrewd a business man to do this.

The division of the first payment of \$4,000 into three parts—\$2,000, \$1,500, and \$500—and the giving of the three checks is suggestive. Kane's story is that Ahrens produced the three checks. He says that Ahrens had already told him he would have to pay a bonus of \$2,000 to get the \$10,000. His story is that the checks were laid upon the table in Albanesius' office; that he indorsed them there, and left the \$1,500 check and the \$500 check lying on the desk in the presence of Albanesius and Ahrens. The \$2,000 check he took and deposited in the New Jersey Title Guarantee & Trust Company, as is shown by his passbook. This story appears to me to be a truthful narration of events at the outset of the transaction. Can it be doubted that Ahrens saw the indorsement of Albanesius on the two checks, one for \$500 and the other for \$1,500? Albanesius denies Kane's story. But, as I said before, Ahrens did not do this. Albanesius says that the arrangements with Kane were all made before Ahrens was brought in. Albanesius says that he had many financial transactions with Kane; that Kane gave him a note of \$1,500, which he held at the time of the first payment on the Ahrens mortgage; that the check of \$1,500 was taken by him in payment of this note, and that the \$500 check was for securing the loan for Kane, which, of course, is \$350 beyond what the law allows for brok-

erage. Albanesius also says that Kane's indebtedness arose by cash money loan transactions. He was subpoenaed to produce all his books, papers, and checks of every description pertaining to the transaction; but he did not produce any. Subsequently, while on the witness stand, upon his attention being directed to the matter, Albanesius produced a note of \$1,500, signed by Kane, which he says he has held since the time of the first payment, although he alleges it was paid by Kane with the \$1,500 check he received on the first payment. Kane says that at the time of the first payment Albanesius asked him to sign the \$1,500 note so as to cover up the transaction, and that he owed no money whatever to him; that he never borrowed a cent from him, and never had any dealings with respect to money. From the evidence before me, it is quite apparent that it would be hard for Albanesius to prove the consideration of this note for \$1,500.

It is difficult for me to disconnect Albanesius and Ahrens in this transaction. They were neighbors and friends, and had been for years; and the testimony is that they called each other "Dick" and "Bill," and that they had several financial transactions together, and at the time of the hearing Ahrens was renting and living in a house belonging to Albanesius, and Ahrens has a mortgage on Albanesius' property for an amount in the neighborhood of \$40,000. It is inconceivable that he did not discuss with his friend the nature of the transaction that he had on hand with Kane. It is also observable, from the testimony of Ahrens, Rita Smith, and the complainant, that Ahrens had every intention of exacting from Mrs. Kelly all he could get in the way of bonuses for extensions. He admits that he got \$400 of the \$500 check which was paid for the renewal of the mortgage and there is no denial that when the mortgage fell due another bonus of \$500 was demanded. We have a similar situation throughout the entire life of the mortgage. Miss Smith was a mere dummy in the transaction. On September 8, 1914, when a half year's interest was paid, Ahrens told Mrs. Kelly that he wanted the principal. She urged him to let the mortgage stand and he said that he had a friend who might take it, providing the bonus of \$500 was paid. On September 14th Mrs. Kelly paid the bonus. As before stated, Ahrens admits that he got \$400 of it. On that day Ahrens executed an assignment of the mortgage to Rita B. Smith, which was recorded. Rita B. Smith immediately executed an assignment to Ahrens' sister, Augusta N. Ahrens, although this assignment has never been recorded. Ahrens' testimony is that his sister had \$2,000 interest in the mortgage from its inception. Mrs. Kelly paid interest on March 7, 1915, and September 7, 1915, to Miss Smith. When the last

interest was paid, the mortgage became due, and Mrs. Kelly asked Miss Smith to grant her a further extension but Miss Smith refused. On October 30, 1915, she sent the following letter to Mrs. Kelly:

"Dear Madam: I had to have some money, and have sold the mortgage I held on your Bergen avenue and Bramhall avenue property to Miss A. N. Ahrens.

"Respectfully, Rita B. Smith."

Miss Smith's evidence, and her attitude while on the witness stand, satisfactorily shows that she had absolutely no interest whatever in the mortgage, but was merely acting for Ahrens. She was in ignorance of the entire matter and did what she was told to do.

On the brief it is urged by the complainant that the answer is defective. The counterclaim charges usury, and the particulars of the transaction are set out in the answer. My recollection is that the solicitor of the defendants made application to amend the answer, so that it might conform with the proofs and meet the views expressed by Vice Chancellor Emery in *Kase v. Bennett*, 54 N. J. Eq. 97, 33 Atl. 248, and that leave to do this was granted. In this case the usury charged appears by the facts as well as by the conclusions of law from the facts. *Durant v. Banta*, 27 N. J. Law, 624. The usury is proven, not left to conjecture. *New Jersey Patent Tanning Co. v. Turner*, 14 N. J. Eq. 326. I cannot fairly and reasonably infer that this was not a usurious transaction. *Gillette v. Ballard*, 25 N. J. Eq. 491, affirmed 27 N. J. Eq. 489.

The complainant in this case is entitled to a decree for the amount of the principal of this mortgage, less the usurious charges at the time of its inception. The bonuses paid on the renewal September 14, 1914, must be applied on the principal.

(83 N. J. Eq. 113)

SUMMIT SILK CO. v. FIDELITY TRUST CO. OF BALTIMORE, MD., et al.

(No. 37/111.)

(Court of Chancery of New Jersey. July 27, 1917.)

CORPORATIONS — 432(2) — **CONTRACTS** — **PRESUMPTION.**

A contract made in the name of a corporation by its president in the usual course of business, which its directors can authorize and make, or ratify, is presumed binding on it, till it is clearly shown it was not authorized or ratified, especially where acquiesced in till the other party has become insane.

Suit by the Summit Silk Company against the Fidelity Trust Company of Baltimore, Md., guardian of Emily E. De Forest, a lunatic, and another. Heard on pleadings and proof. Decree for defendants.

McDermott & Enright, of Jersey City, for complainant. Vredenburg, Wall & Carey, of Jersey City, and Charles L. Kingsley, of New York City, for defendants.

LEWIS, V. C. This suit is brought to restrain the defendants from prosecuting an action at law, in ejectment, against the Summit Silk Company regarding certain premises at Summit, N. J., in which Emily De Forest has the legal title; the complainant claiming to be the equitable owner, alleging that Emily is a mere trustee.

Emily and Harriet De Forest, sisters, were married to two brothers, one of whom was named Othnell De Forest and the other was named William H. De Forest, Jr. In August, 1892, the Summit Silk Manufacturing Company was organized as a corporation of this state. It was a close corporation, and the objects stated in the certificate of incorporation were the manufacture and sale of silk and silken goods, to buy lands and to erect thereon buildings, machinery, etc. The incorporators were Othnell De Forest, John Nightingale, and William H. De Forest, Jr., and shortly after the organization Othnell De Forest, William H. De Forest, Jr., and Harriet De Forest became the directors. Othnell De Forest was elected president, and William H. De Forest, Jr., the secretary and treasurer. Mrs. Emily E. De Forest was the principal owner of the stock. The factory was built on a plot of land consisting of about eight acres; the factory taking up about two acres, and leaving a little over six acres vacant.

In 1895 the Summit Silk Manufacturing Company wished to have some houses erected on this plot for its employés; but, as it did not have the funds with which to erect them, the president applied to the Summit Building & Loan Association for a loan. He found out from that association that a corporation could not become a member of the association, and he was, therefore, unable to borrow any money from that association. Thereupon, in March, 1895, Emily E. De Forest became a shareholder to the extent of 35 shares in the afore-mentioned association. Her dues for March, April, and May, 1895, were paid on June 13th of that year, and were charged to her account on the books of the Silk Company. On July 23, 1895, the Silk Company duly made, executed, and delivered to her the deed, dated July 10, 1895. The deed recites the payment of the consideration of \$2,000. This deed is Emily E. De Forest's muniment of title, and her bond of \$14,000 was given to the Summit Building & Loan Association, together with the security of this title, and the association then made her a loan of \$7,000, with which to erect five double tenement houses on the piece of ground which the Silk Company had conveyed to her.

On the land conveyed to Emily the five double houses were erected, and the payments to the contractors were made by checks of the Summit Building & Loan Association, drawn at the order of said Emily

De Forest. Fire insurance on the houses was placed in the name of Emily E. De Forest; the houses were rented to the employes in the factory of the Silk Company, and the rents were collected by the superintendent or a clerk in the employ of the Silk Company. As the rents were collected, they were put in the bank to the credit of the Silk Company, and its check was drawn to the order of the Summit Building & Loan Association at the rate of \$75.25 per month. Taxes, insurance, and repairs were also paid out of the rents.

In the course of about 12 years, the 35 shares of the Summit Building & Loan Association matured, and in the first part of February, 1907, the Building & Loan Association sent its check for \$7,000 to Emily E. De Forest, and the mortgage was canceled, being discharged of record July 18, 1908. From the time of the maturity of the shares in the Building & Loan Association until May, 1910, the rents from these houses were collected by clerks and officers of both the Summit Silk Manufacturing Company and its successor, the Summit Silk Company, the present complainant, and were paid over to Emily E. De Forest. During this period taxes, insurance, and repairs on these houses were paid by Emily E. De Forest, either personally or through others acting in her behalf.

In January, 1907, Elvero Godone, P. J. Ferrara, and Emily E. De Forest were elected directors, and Mr. Godone was made president, and Mr. Ferrara secretary and treasurer. The Silk Company became embarrassed, and arrangements were made to organize a new company and give extensions to the new company, which was taking over all the liabilities and assets of the old company on two years' time. The result was the organization of the Summit Silk Company as a corporation to take over the entire property and assets of the old company, with proper deeds and other instruments of conveyance thereof, and the new company to assume the payment of all indebtedness. The meeting at which the transfer was organized was held on February 20, 1908. The proceedings are recorded in the minutes on several pages. Emily E. De Forest was present by proxy; she also signed a waiver of notice of the time, place, and objects of the meeting. Following the meeting of February 20, 1908, and in pursuance thereof, deeds and a bill of sale were executed to transfer all the property of the Summit Silk Manufacturing Company to the Summit Silk Company. The principal deed is dated February 20, 1908, and includes the lands in dispute; that is to say, it included the property conveyed to the Summit Silk Manufacturing Company by Harriet De Forest and husband, excepting therefrom only the six lots which were previously conveyed to Harriet De Forest and which are not in dispute. On February 20, 1908, the Summit Silk Manufac-

turing Company executed a bill of sale, by which it sold and transferred to the Summit Silk Company "all its property wheresoever situate, including its machinery, tools, and fixtures located in its factory in the city of Summit, New Jersey, and elsewhere, including office furnishings, patent rights, patents, good will, merchandise, accounts, bills, notes, money and all other assets."

These instruments establish that the purpose of the Summit Silk Manufacturing Company was to transfer to the Summit Silk Company all its property of every kind and character. It becomes important, therefore, to ascertain whether the lands and houses in dispute were, in equity, the property of the Summit Silk Manufacturing Company, which made a deed of all its property to the Summit Silk Company.

On October 14, 1895, the old company duly made, executed, and delivered to Harriet De Forest its deed for certain of its property adjacent to that conveyed to Emily by the deed of July 23, 1895, and upon which were erected three double tenement houses similar to those erected by Emily upon her land. On October 18, 1910, Emily was judicially adjudged a lunatic by the circuit court of the city of Baltimore, Md., and the Fidelity Trust Company of Baltimore was appointed her guardian, while she was then located at Baltimore, and has also been appointed guardian of her property and estate in New Jersey by the Chancellor.

On December 12, 1912, an action was commenced in the New Jersey Supreme Court by the guardian to eject the new company from the houses and premises at Summit, and on October 20, 1913, the present bill to restrain the ejectment suit was filed for the purpose of obtaining the benefit of certain equitable defenses. Those defenses in brief are as follows: First, that there was no consideration for the deed made by the Summit Silk Manufacturing Company to Emily De Forest, under which she claimed a right to the possession of the land; second, that the deed was executed without the authority of the company; third, that she had assented to a sale of the same property to the Summit Silk Company by the Summit Silk Manufacturing Company after her deed had been recorded, and was estopped to question the title of the Summit Silk Company; fourth, that she held the title only in trust for the Silk Company, which, it is alleged, had furnished the money for the purchase of the land and the construction of the buildings thereon. Mrs. De Forest contends that all these defenses are available at law, except the one which seeks to establish a trust.

The minutes of the stockholders and directors are very meager, and do not disclose that there was any authority given by the stockholders or directors to convey the property in question to Mrs. Emily De Forest, or, for that matter, to Mrs. Harriet De Forest—Harriet De Forest's situation in re-

gard to the land which has been deeded to her by the old company being precisely the same as Emily's with the exception that, when the old company turned over its property to the new company, the land heretofore deeded to Harriet was excepted, no mention being made of the deed to Emily. This is a peculiar fact, and may or may not be significant as to whether she was the true owner of the lands in question.

It is undoubtedly true, however, that when a contract is made in the name of the corporation by the president in the usual course of business, which the directors have the power to authorize and to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation, until it is shown that the same was not authorized or ratified. Paul Gerli, who had been the chief creditor of the old company, and who had stepped in as the controlling factor of the new company, knew that these rents were being collected by the clerks or other employés of the new company, and he knew that they were being transmitted to Mrs. Emily De Forest; in fact, the evidence shows that he directed it to be done, and upon the closing of the account of Mrs. Emily De Forest and of her sister, Mrs. Harriet De Forest, he drew and signed the checks to those two ladies for the proportionate amounts due them, respectively.

About the year 1910, when Mrs. Emily De Forest had become mentally incompetent and was no longer able to take care of herself and her affairs, Paul Gerli suddenly ceased remitting the rents from these houses to Mrs. Emily De Forest. His explanation of this action on the witness stand was that he had felt sorry for the De Forests in their financial reverses, and that after the death of Mrs. Emily De Forest's husband he had contributed these rents to her support as a matter of charity, but that when his own Silk Company had difficulty in meeting expenses he felt obliged to cut off his philanthropic contribution. If this were true, it would certainly stamp Mr. Gerli as an extraordinarily generous man, considering that Mrs. Emily De Forest was nothing to him. It is very difficult to get at the facts in the case, as both Mr. Othnell De Forest and his brother, William H. De Forest, Jr., are dead, and the lips of Mrs. Emily De Forest are sealed through insanity. We cannot get her story; but I am satisfied that the transfer of the land to Mrs. Emily De Forest by the old company was for an adequate monetary consideration; second, that the deed to her was in due form of law and unassailable in this proceeding, with no sufficient testimony to undermine its, at least, *prima facie* validity; third, that the credit of Emily De Forest was pledged to obtain the moneys that were used in the construction of the houses, and that her obligation was paid off by the rents

from those houses, and that no money of the Silk Company went into those houses. It is apparent that neither Mrs. Emily De Forest nor Mrs. Harriet De Forest desired the burden of handling the rents, etc., when they had husbands to do it for them. Women, very frequently, do not care to assume these burdens. I think this fully accounts for the facts already mentioned. I am quite satisfied that the whole business was done in a perfectly natural manner under all the circumstances of the case; and it must be remembered that the burden of establishing the various contentions of the complainant is upon the complainant, and must be sustained by the clearest and most convincing proof, more particularly because one of the circumstances attendant upon the claim of the Silk Company is that it was asserted only after a blight had fallen upon the mind of Mrs. Emily De Forest, and after it had acquiesced in her apparent right for about two years, and also because of the fact that Mrs. Emily De Forest is unable to give her testimony in this proceeding. If there be any doubt whatever, it must be resolved in favor of the incompetent woman.

The real question before the court is whether Emily is a trustee for the Silk Company, and as I find that there is no resulting trust, but that Emily is the owner of both the legal and equitable title in the premises in question, that disposes of the case.

I shall advise a decree in accordance with these views.

(38 N. J. Eq. 73)

EUGSTER v. EUGSTER. (No. 41/284.)

(Court of Chancery of New Jersey. July 11, 1917.)

DIVORCE \S 40 — GROUNDS — DESERTION — ACQUIESCENCE OF WIFE.

A wife cannot be denied divorce for acquiescing in the separation from her of a husband, who shows that he married her in order to plunder her, and who beats her and treats her otherwise with cruelty.

Petition for divorce by Maria A. Eugster against Benedict Eugster on the ground of desertion, with answer and cross-petition for divorce on the ground of desertion. Heard on pleadings and proofs taken in open court. Decree for petitioner.

Henry Leon Slobodin, of New York City, for petitioner. Edward P. Stout, of Jersey City, for defendant.

STEVENSON, V. O. It was the second marriage of each. Both were in middle life. The wife had property. The husband had only his capacity to earn wages at his trade. Quarrels soon occurred. The husband apparently desired to get possession of his wife's property. Very soon the parties separated.

The case of the husband on his cross-

petition in my judgment entirely fails. The only question, and it is a somewhat close one, is whether the petitioner consented to the separation—acquiesced in it to such an extent and with such a mind as to deprive the desertion of the husband of the element of obstinacy. In undertaking the solution of this problem I start with the conviction that the defendant, the husband, is utterly unreliable as a witness. His untruthfulness was manifested on the stand, and his deposition as read from the printed page in respect of various matters is improbable, if not incredible. On the other hand, I was strongly impressed with the honesty and accuracy of the petitioner's testimony. She told her story just as she recollected the facts, without regard to whether what she said helped or hurt her cause. The doubtful feature of the petitioner's case, above referred to, is disclosed by her own testimony.

Although I followed the testimony of the witnesses closely, I found it necessary to have the entire testimony written out by the stenographer. This testimony I have perused with care. My conclusion is that the consenting mind of the petitioner was caused by the violations of duty on the part of the defendant—that the petitioner would have been willing to live with the defendant if he had done his duty. A wife is not to be blamed for acquiescing in the separation from her of a husband who shows her that he married her in order to plunder her, beats her, and treats her otherwise with cruelty. *Smith v. Smith*, 55 N. J. Eq. 222, 37 Atl. 49; *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552; *Martin v. Martin*, 78 N. J. Eq. 423, 79 Atl. 261; *Kipp v. Kipp*, 77 N. J. Eq. 585, 78 Atl. 682.

A decree nisi in favor of the petitioner will be advised.

(87 N. J. Eq. 390)

BEALL et al. v. NEW YORK & N. J. WATER CO. et al. (No. 39/353.)

(Court of Chancery of New Jersey. July 16, 1917.)

(Syllabus by the Court.)

1. EQUITY §422—PRACTICE—DECREES.

On final hearing in the court of chancery, but one decree may be entered, no matter how numerous the parties or the issues.

2. EQUITY §423—PRACTICE—DECREES.

The purpose to be accomplished by a decree in equity is to finally settle and determine the rights of all persons interested in the subject-matter of the suit.

3. EQUITY §415—PRACTICE—DECREE.

In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely.

4. EQUITY §415—PRACTICE—DECREES.

There should be an adjudication in a decree of the rights to which a party or parties are entitled. This does not include several negative

adjudications against the complainant as to precise questions put in issue on which he is unsuccessful, but it is only necessary that a general adjudication in favor of defendant, so far as he is successful, need be made, unless there are specific matters or things to be awarded to him, and which cannot appropriately be made the subject of an omnibus adjudication.

5. EQUITY §427(1)—PRACTICE—DECREE.

While it seems that every matter put in issue by the pleadings is to be presumed to have been adjudicated, if there be a decree for or against one or more of the parties to the suit, yet for greater certainty it is better formally to adjudicate in terms all issues in a chancery suit, either generally or specifically, as the nature of the case may require; and a decree can always be so framed.

6. COSTS §172—EQUITY—ATTORNEY'S FEES.

The allowance of a counsel fee to a party to a suit in equity under the chancery act (P. L. 1902, p. 540, § 91, amended by P. L. 1910, p. 427), is discretionary.

7. COSTS §172—EQUITY—COUNSEL FEES.

The rule is that, where a complainant and a defendant are each successful on one or more substantial issues, neither party is entitled to costs or counsel fee against the other.

8. EQUITY §428—PRACTICE—DECREE.

When a complainant prevails in part, and a defendant in part, the complainant is entitled to enter the decree, which should adjudicate the relief to which he is entitled, and dismiss the bill as to the relief to which he is not entitled, reciting that the cause came on for hearing in the presence of counsel for the respective parties, naming the parties and counsel, but not reciting that the decree is entered upon the motion of counsel for either party; the name of complainant's solicitor only being indorsed on the back of the decree.

Bill by Turner A. Beall and others against the New York & New Jersey Water Company and others. On motion for settlement and entry of decree. Decree entered.

Collins & Corbin, of Jersey City, for complainant. McCarter & English, of Newark, for defendants New York & New Jersey Water Co. and others. Fort & Fort, of Newark, for defendant Fletcher.

WALKER, Ch. This cause was heard before Hon. James E. Howell, Vice Chancellor, who filed an opinion and died before advising a decree. Counsel for complainants, on due notice to defendants, have moved before me for the settlement of a decree in accordance with the views expressed in the late Vice Chancellor's opinion.

The Vice Chancellor prefaced his opinion with a statement of the objects of the suit and the prayers for relief, and observed that the scope of the bill and application for relief are much broader than the points submitted at the hearing. After stating the relief to which the complainants are entitled, he remarked that the remainder of the points taken by the complainants must be decided in favor of the defendants; that is to say, the decree must provide that, as to those points, the complainants' allegations and proofs fail to make an actionable case against the defendants, which points he shortly described,

and indicated the reasons that led to his conclusions concerning them.

Messrs. Collins & Corbin, for the complainants, submit a form of decree to be entered as on their motion, making appropriate recital of the reference, hearing, filing of opinion, and death of the Vice Chancellor before decree made, and notice of the present application to the Chancellor to settle the decree, which draft adjudges the affirmative relief only decided upon in the opinion, and does not contain any adjudication of a negative character, namely, that complainants are not entitled to relief as to any of the several matters concerning which the allegations and proofs failed to establish an actionable case against defendants, which would be affirmative in its character so far as the defendants are concerned. This form of decree provides for costs and counsel fees to the complainants against the individual defendants.

Messrs. McCarter & English, on behalf of the defendants whom they represent, also submit a draft of decree, not expressed to be made on motion of any counsel, but with their firm name indorsed on the back thereof, which decree first adjudges that certain of the relief prayed be denied, and then decrees the affirmative relief to which the complainants are entitled, but is silent on the question of counsel fee and costs.

Messrs. Fort & Fort, representing the defendant J. Gilmore Fletcher, also submit a form of decree, as on their motion, which adjudges that, in so far as any relief is prayed against their client, the bill be dismissed, and that he recover against the complainants his costs of suit, including a counsel fee.

Messrs. Collins & Corbin insist that they are entitled to enter the decree on behalf of the complainants, that it should not contain any negative adjudications against them, which would be affirmative ones in favor of defendants, and that the defendant Fletcher is not entitled to have the bill dismissed as against him, with or without costs and counsel fee.

The assertion made on behalf of Fletcher that he is charged with fraud personally, disassociated from the other defendants, is not borne out. His counsel's claim is that he was made a defendant, and relief prayed against him, because of various specific allegations of fraud on his part as director of the New York & New Jersey Water Company. He was, moreover, a director of the Suburban Water Company, and one of the transactions directed in the opinion to be set aside is a proceeding by Fletcher and his fellow directors of both the New York & New Jersey Water Company and the Suburban Water Company which resulted in procuring \$125,000 of the bonds of the New York & New Jersey Water Company for the benefit of the Suburban Water Company, in exchange for a certain conveyance, which the opinion holds is unlawful and should be set aside, because five of the directors, including Fletcher, were

directors of both companies—interlocking directors—which imparted to the transaction the character of a dominant corporation obtaining an advantage of a servient one.

[1, 2] The first question presented is as to who is entitled to enter the decree. The purpose to be accomplished by a decree in equity is to finally settle and determine the rights of all persons interested in the subject-matter of the suit. See the remarks of Vice Chancellor Van Fleet in *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570 (reversed in *Jones v. Fayerweather*, 46 N. J. Eq. 237, 19 Atl. 22, but not on this point). On final hearing but *one* decree is entered, no matter how numerous the parties or the issues.

[3, 4] In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely (*Bull v. International Power Co.*, 84 N. J. Eq. 14, 92 Atl. 796); but there should be an adjudication in a decree of the rights to which a party or parties are entitled. This does not include, as I understand it, several negative adjudications against a complainant as to precise questions put in issue and on which he is unsuccessful, but that it is only necessary that a general adjudication in favor of the defendant, so far as he is successful, need be made, unless, of course, there are specific matters or things to be awarded to him, and which cannot appropriately be made the subject of an omnibus adjudication. This, I think, appears from the mere contemplation of the fact that, if the complainant were wholly unsuccessful, a simple decree would be entered reciting that he was not entitled to relief touching the matters set forth in his bill, and that the bill should be dismissed, and that, too, without long recitals to the effect that he was not entitled to this and that specific relief, etc.

[5] It is true that the Vice Chancellor states in his opinion the allegations in the bill which the proofs failed to establish, and says that the decree must provide, as to them, that an actionable case was not made. This does not indicate to me, however, that he meant that they should be set out *seriatim* in the decree; and I think the decree will afford the defendants all the protection they need by a clause dismissing the bill as to all and singular the matters and things alleged therein, and which are not adjudged in favor of the complainant. This form of decree would give the defendants all they are entitled to by way of estoppel of record against any other suit or action by the complainants, or those in privity with them, with reference to any of the allegations of the bill which are not adjudicated in their favor.

Every matter put in issue by the pleadings is undoubtedly to be presumed to have been adjudicated, if there be a decree for or against one or more of the parties to the suit.

And yet the expression of the judges in the decided cases generally is that a former judgment is conclusive as to all demands in issue and adjudicated in the former suit. *Southern Pacific R. R. Co. v. United States*, 108 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Willoughby v. Chicago Ilys. Co.*, 50 N. J. Eq. 656, 25 Atl. 277. In any event, for the sake of greater certainty, it would appear to be better to formally adjudicate in terms all issues in a chancery suit, either generally or specifically as the nature of the case may require; and a decree can always be so framed. The form of judgments of courts of law are not as elastic as decrees in equity, and sometimes do not show what were the points submitted for decision. In this situation it seems that resort may be had to parol evidence to show what was submitted and decided. See *Wells on Res Adjudicata*, § 102.

[6] Now, as to the question of costs: It has already been observed that each of the parties, complainants and defendants, have succeeded in part, and, I should add, that both sides have succeeded on substantial issues. In *Diocese of Trenton v. Toman*, 70 Atl. 881, I held, when Vice Chancellor, that under the chancery act (P. L. 1902, p. 540, § 91) the allowance of a counsel fee to complainant was discretionary. That section was amended in 1910 (P. L. p. 427), but in no way which is important with reference to the case now before me. The allowance of counsel fee to one party against another in a case like the one sub judice is not compulsory, but discretionary, and therefore the rule that, where the complainant and defendant are each successful on one or more substantial issues, neither is entitled to costs as against the other, applies; and this, obviously, extends to counsel fees as well.

[7, 8] The result reached is that a decree may be entered by the complainants' solicitors, granting the relief to which complainants are entitled, as stated in the opinion of the late Vice Chancellor, containing a paragraph dismissing the bill as to all and singular the matters and things alleged against the defendants and which are not in and by the decree adjudged to the complainants, and also a paragraph to the effect that neither of the parties, complainants or defendants, is entitled to costs and counsel fees as against the other or others, with the right reserved to the complainants to apply for costs and counsel fee to be paid by the New York & New Jersey Water Company out of such avails as may be gotten for it by and through the relief awarded in the decree.

Now, as to the form of the decree: In our practice it is quite usual, in the ordering part of a decree, to recite that it is made upon motion of counsel, naming them, for the

party entering the decree; but I think that, where a complainant prevails in part, and is consequently entitled to enter a decree, that decree, where a negative adjudication is to be made against the complainant, which is affirmative so far as the defendant is concerned, ought not to be entered, apparently on the motion of complainant's counsel, when, in truth, it is not, and I think it unusual to enter a decree with alternate recitals of motions made on behalf of complainants and defendants, naming counsel as moving for the respective parties, for the specific relief accorded to each. I concede that this may be done without impropriety, and yet I am unaware of any practice authorizing it. In this connection, I have taken occasion to look up some forms of decrees, for the purpose of ascertaining whether or not such a practice as just referred to, exists. In the forms printed in the *Equity Draftsman* (American Notes, 1861) at page *823 et seq., the decrees are not expressed to be made upon the motion of counsel. The decree in *Page v. Harris*, commencing at page *830, is one awarding relief to both complainant and defendant; and at page *832 it is recited that the matter came on "in the presence of counsel learned on both sides," and the ordering part commences, "And his honor doth declare that the plaintiff is entitled to," etc. And, further on, it is ordered that "the said plaintiff do forthwith grant and execute to the said defendant," etc.

It may be that the reason that the English decrees in chancery were not expressed to be made on motion of counsel, naming them, was because the decrees were not signed by the Chancellor, but were drawn up by the register of the court in conformity to the Chancellor's opinion. *Dan. Ch. Pl. & Pr.* *1008 et seq. However this may be, our own approved forms of decree seem to have been drawn upon the English model, for in *Dick. Ch. Prec. (Rev. Ed.)* the form of a final decree, at page 178, while it recites the presence of counsel, does not purport to be made on motion of counsel. This is true of the forms of decrees in foreclosure proceedings at page 361 et seq. and of a final decree of divorce at page 463.

The decree to be entered in the case at bar will recite that the cause came on for hearing in the presence of counsel for the respective parties, naming the parties and counsel, but will not recite that it is made on motion of counsel for any one of them. The decree will, however, be entered by the complainants' solicitors, whose firm name will be indorsed upon the back thereof. The draft must be submitted to defendants' solicitors, who, if they object to its form, will be heard on that question.

(32 Conn. 120)

AINS v. HAYES.

(Supreme Court of Errors of Connecticut. Aug. 2, 1917.)

LANDLORD AND TENANT §211(2) — SALE OF PREMISES—RECOVERY OF DAMAGES BY TENANT—"COMPELLED."

Under agreement that, if tenant was compelled to vacate through a sale of the cottage, he was to receive \$50 and moving expenses, that lessor sold the house to a party, who, after installing gas, raised the rent to an amount which the tenant could not pay, would not authorize recovery, where the increase in rent was reasonable; the tenant not being "compelled" to leave by the terms of the sale or by the action of the purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compel.]

Appeal from Court of Common Pleas, Fairfield County; John J. Walsh, Judge.

Action by Vetal F. Ains against Edward D. Hayes. Judgment for plaintiff, and defendant appeals. Judgment set aside, and cause remanded for rendition of judgment in favor of defendant.

This action is for damages for compelling the plaintiff to move, occasioned, as alleged, by the sale of a house formerly owned by the defendant. A memorandum of agreement relating to this transaction was in the following words:

"Bridgeport, Conn., August 15, 1914.

"I hereby agree, if Mr. Ains is compelled to vacate my cottage on Ezra street through my selling said cottage, he is to receive the sum of fifty (\$50) dollars and moving expenses, which are not to exceed the sum of \$14.

"Edward D. Hayes."

The controlling question in issue was whether or not the plaintiff was compelled under the terms of the contract to move through the defendant's selling the cottage. The finding shows that:

The defendant was the owner of a house consisting of five rooms and a bathroom, but with no water. This building was situated on the corner of Ezra street and Fairfield avenue, in Bridgeport, Conn. Ezra street was a new street, and Fairfield avenue had just been laid out through a newly opened tract of land in the northern part of the city of Bridgeport. The place is now a residential neighborhood, and this house was the first one erected on this street. The cottage on this property was lacking in modern improvements, and consisted of a small five-room house upon a city lot. Prior to July 15, 1915, the wife of the plaintiff called at the house of the defendant and inquired if he had any rents. The defendant stated that he had a house which was not complete, as the water and gas had not been connected, but that water could be drawn from a spring a few hundred feet away until the city water supply was connected, which would be in a few months. The defendant showed the plaintiff the building and offered to rent the same for \$14 per month, to commence on August 1, 1915. The plaintiff was willing to take the

house on these terms, providing the defendant would give him assurance that he would not sell it to anybody who would compel the defendant to vacate the premises. The defendant accepted these terms, and on August 15, 1915, executed the written agreement hereinbefore set forth. The defendant received no consideration for this writing. The plaintiff occupied these premises and paid the rent therefor until October 1, 1916. On July 15, 1916, the defendant sold this house to one Koehler, who knew about this agreement between the plaintiff and the defendant. Koehler installed gas in the house between July 15 and September 9, 1916, and then notified the plaintiff that, beginning October 1, 1916, the rent for the house would be \$25 a month. This sum was more than the plaintiff could afford to pay for the house rent and was entirely beyond his means, and in consequence of the increase of rent the plaintiff was obliged, on October 1, 1916, to find another rent. The cost of the plaintiff's moving was \$7.50. The court rendered judgment for the plaintiff, to recover the sum of \$50 and \$7.50 costs of moving, with double costs.

John A. Cornell, Jr., Spotswood D. Bowers, and Charles E. Williamson, all of Bridgeport, for appellant. Henry E. Shannon and Frank L. Wilder, both of Bridgeport, for appellee.

RORABACK, J. (after stating the facts as above). There is nothing disclosed in the finding of facts which shows that the plaintiff was subjected to such a degree of compulsion as to warrant the rendition of a judgment in his favor. The contract states that it was agreed that, if the plaintiff was compelled to vacate the defendant's premises because of the sale of them, he was to receive the sum of \$50 and moving expenses. The word "compelled" may in some cases refer to compulsion exercised through the process of the courts, or through laws acting directly upon the parties. Such certainly is not the present case. The word "compel" in its ordinary sense means:

To drive or urge with force; to constrain; oblige; necessitate, whether by physical or moral force. Webster's International Dictionary.

As applied to the agreement of Mr. Hayes, the meaning of the language, "if Mr. Ains is compelled to vacate my cottage on Ezra street through my selling said cottage," is this: Mr. Ains may be compelled to leave through the terms of the sale, by which the purchaser is to take immediate possession; or Mr. Ains may be compelled to leave by the action of the purchaser, immediately upon his purchase, notifying him to leave; or Mr. Ains may be compelled to leave by the action of the purchaser in, immediately upon his purchase, making it unreasonable to expect him to continue in possession, as, for example, by raising the rent to a prohibitive rental.

The record is also barren of facts which

alunde tend to sustain the plaintiff's claim that he was compelled to vacate these premises because they had been sold. It does not here appear that either the defendant, or the party purchasing his property, did anything which the law condemns. There was no actual or threatened exercise of power possessed, or supposed to be possessed, over the person or property which the plaintiff occupied. It is not even claimed that the plaintiff was ever notified or requested to surrender possession of the property, which had been leased to him by the defendant. There is nothing to suggest that this increase in the rental was arbitrary or unreasonable. Upon the other hand, it is fair to infer, from the facts found, that the owner of the property might have been justified in making an alteration in the charge for the use of his premises. The property had been improved, and the facts were not the same when the plaintiff vacated these premises as when he leased them. The only compulsion shown came from the plaintiff's inability to pay the rental of the property. This fact cannot be resorted to for the purpose of fastening liability upon the defendant.

There is error, the judgment for the plaintiff is set aside, and the cause remanded for the rendition of judgment in favor of the defendant. The other Judges concurred.

(92 Conn. 135)

SCHWARTZ v. DASHIFF et al.

(Supreme Court of Errors of Connecticut. Aug. 2, 1917.)

1. PAYMENT \Leftrightarrow 39(5) — APPLICATION OF PAYMENTS.

Where contract for sale of goods provides that purchase price shall be paid in installments of \$25 per week, evidenced by notes, and payee applies payments to notes not due, those which were due at the time, and to which payments should have been applied, are extinguished, although not they, but notes not due, were surrendered at the time of payment.

2. SALES \Leftrightarrow 187—PRICE—INTEREST.

Where plaintiff sold defendant trunks, purchase price to be paid when trunks were sold by defendant, she is not entitled to recover interest on purchase price of trunks not sold.

Appeal from City Court of Danbury; Samuel A. Davis, Associate Judge.

Action by Rosa Schwartz against Morris Dashiff and another. From the judgment, plaintiff appeals. Affirmed.

Action to recover on an alleged written contract, and to recover the value of goods, wares, and merchandise, brought to the city court of Danbury. Facts found, and judgment rendered for the plaintiff for \$65.50, and appeal by the plaintiff. No error.

Chester H. Brush, of Danbury, for appellant. Henry C. Wilson, of Danbury, for appellees.

RORABACK, J. The complaint contains four counts. The principal controversy is as to the allegations of the first count of the amended complaint, which reads as follows: On or about April 30, 1915, the plaintiff sold to the defendants a part of a stock of gents' furnishings, under a written agreement in the following language:

"Danbury, Conn., April 30, 1915.

"I, Rosa Schwartz, from 104 White St., Danbury, Conn., county of Fairfield, have sold to Dashiff & Kruzansky, style of firm E. Z. System, at 32 White St., Danbury, Conn., part of stock consisting of gents' furnishing and clothing, amounting to \$485.75, same being paid as follows: \$25 cash; the balance \$25 weekly per notes; \$60.75 note due May 1, 1915, and balance in notes as agreed on the notes.

"Dashiff & Kruzansky."

The defendants failed to make payments in accordance with the terms of said contract, and there remained due on the same August 7, 1915, the sum of \$100. To facilitate the weekly payments called for in the contract, a series of notes for \$25 each, payable one week apart, were executed. Four of these notes remained unpaid August 7, 1915. The fourth note has been paid since the commencement of this suit, on the 7th day of August, 1915.

The defendants in their answer admitted the sale of the goods, that the agreement described in the complaint was signed by them, that notes payable one week apart were given to the plaintiff, and that there were 16 notes, each for \$25, made by them. The remaining allegations of this count were denied by the defendants. The defendants in their answer also aver that by a mistake 17 notes were given, instead of 16, as intended, and that the seventeenth note was without consideration and void.

The finding shows that by the written contract the sum of \$485.75 was to be paid in installments as follows: \$85.75 in cash at or about the time of the sale, and the balance of \$400 in 16 promissory notes of \$25 each, payable one week apart. \$85.75 was paid to the plaintiff by the defendants, and a series of notes, all dated May 1, 1915, was signed and delivered by the defendants to the plaintiff. These notes were numbered from 1 to 16, inclusive. It also appears that 17 notes were made and delivered by the defendants to the plaintiff. The notes falling due on July 3 and August 7, 1915, were both numbered "13." The parties did not intend to make the seventeenth note, and there was no consideration therefor. These notes were not presented in their numerical or chronological order, but several of them were presented without regard for such order. Notes 1 to 11, inclusive, 15, and 16 were paid by the defendants prior to the date of the complaint. No. 14 was paid by the defendants to the plaintiff subsequent to the time when the action was commenced, and before the trial. Fourteen of the series of 16 notes were

paid by the defendants to the plaintiff. Note No. 12 and two notes, each numbered "13," were presented to the defendants for payment; but payment was refused on account of the discrepancy in number and presentation. It may be ascertained by a little mathematical calculation that notes Nos. 14, 15, and 16 were not due at the time when this action was commenced on August 7, 1915. It appears that note No. 14, improperly numbered "13," was due August 7, 1915, note No. 15 was due on August 14, 1915, and note No. 16 was due on August 21, 1915. These notes were the only ones unpaid when this action was commenced. No. 14 has been paid since the commencement of this action. There are now two notes, of \$25 each, or \$50 unpaid. This was the exact amount which the defendants offered to allow the plaintiff to take judgment for. This the plaintiff refused to accept. This is also the amount of the judgment rendered for the plaintiff upon this part of the case.

[1] The right of the plaintiff to recover in this connection depends upon the allegations of her complaint and her claim that the defendants failed to make payments in accordance with the terms of the written contract, and that there was \$100 due thereon when she commenced her action on August 7, 1915. As stated, it appears that by the terms of the contract three of these notes, namely, Nos. 14, 15, and 16, were not due when this action was instituted. The terms of the contract were in conformity with the terms of the notes, except as to the one which was apparently given by mistake. The plaintiff, by her improper presentation and collection of these notes, attempted to change the terms of the contract and the terms of several of the notes. The surrender of the notes before they were due did not alter the terms of the contract, or of the notes due or not due. These payments should have been accepted and applied to that portion of the indebtedness and the notes due when these payments were made. When so applied, the debt or debts now said to be due when this action was brought were necessarily extinguished. Whether or not the notes affected by these payments were surrendered is immaterial as to the discharge of the debt or debts to which such payments should have been applied. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 78 Conn. 129, 130, 55 Atl. 604.

The alleged cause of action now before us is based upon certain notes, which were due and paid, and which had no legal existence, when this action was commenced. The defendants offered to allow the plaintiff to take judgment for \$50. This offer was refused by the plaintiff. It follows, therefore, that the plaintiff has no ground to complain of the action of the trial court in rendering judgment in her behalf for \$50 and costs, up-

on this branch of the case. This also puts an end to the plaintiff's claim that the court below should have allowed her interest upon the notes.

[2] The remaining reasons of appeal require only a passing notice. One of them objects to the judgment rendered, upon the ground that no interest was added to the judgment for certain trunks referred to in the second count of the complaint. A sufficient answer to this claim appears in the finding of the court that these trunks were not to be paid for until sold, and that they were not sold when the plaintiff commenced her action.

There is no error. The other Judges concurred.

(91 Vt. 507)

STATE v. MANCINI.

(Supreme Court of Vermont. Windham.
Aug. 2, 1917.)

1. CRIMINAL LAW §1122(5)—REVIEW—PRESERVATION OF EXCEPTIONS.

Refusal of requests to charge, though exceptions thereto were allowed and argued, cannot be considered when no copy of the requests is in the record.

2. BREACH OF PEACE §1 — WHAT CONSTITUTES.

If the circumstances justify an officer in arresting without warrant, it is the duty of the arrested person to submit, and his resistance would constitute a breach of the peace, but in the absence of such circumstances the attempted arrest would be an assault, and resistance would not constitute a breach of the peace.

3. ARREST §63(1)—NECESSITY OF WARRANT.

An officer may arrest without a warrant for a breach of peace committed in his presence, and in some circumstances to prevent a breach of the peace.

4. BREACH OF THE PEACE §1—WHAT CONSTITUTES—STATUTE—CONSTRUCTION.

Since P. S. 5870, is not a definition of breach of the peace, but merely defines certain modes of committing such offense, the offense may be committed in other ways; the term being generic and including all violations of public peace or order.

5. BREACH OF THE PEACE §1—WHAT CONSTITUTES—"PUBLIC PEACE."

The "public peace" is that sense of security and tranquility, so necessary to one's comfort, which every person feels under the protection of the law, and a breach of the peace is an invasion of the protection which the law thus affords; and a violation of public order or decorum, if calculated and intended to disturb public tranquility, may constitute a breach of the peace.

[Ed. Note.—For other definitions, see Words and Phrases, Public Peace; First and Second Series, Breach of the Peace.]

6. DISTURBANCE OF PUBLIC ASSEMBLAGE §1 —WHAT CONSTITUTES—"DISTURBANCE."

Any conduct contrary to the usages of a particular sort of meeting and class of persons assembled, and which interferes with its due progress or is annoying to the assembly in whole or in part, is a "disturbance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disturbance.]

7. DISTURBANCE OF PUBLIC ASSEMBLAGE 66-1-WHAT CONSTITUTES.

One attending a dance at the invitation of those in charge must conform his conduct to their reasonable requirements, and he does not have the absolute right to drink beer at a dance.

8. DISTURBANCE OF PUBLIC ASSEMBLAGE 66-14-WHAT CONSTITUTES.

When persons attending an appointed lawful meeting of any description conduct themselves in a manner lawful in itself, but at variance with the purpose of the gathering and inconsistent with its orderly procedure, it will ordinarily be for the jury to say whether their conduct was such as amounted, in the circumstances, to a disturbance of the peace.

9. DISTURBANCE OF PUBLIC ASSEMBLAGE 66-14-WHAT CONSTITUTES.

The court cannot say, as a matter of law, that it was not a breach of the peace for a man in attendance at a dance to walk through rooms used in connection with the dance with his hands filled with beer bottles shortly after a disturbance over an arrest of a drunken person.

10. BREACH OF PEACE 66-7-EVIDENCE-ADMISSIBILITY.

In prosecution for breach of the peace, evidence that the officer who made the arrest was a deputy sheriff is admissible as bearing upon his right to arrest without a warrant.

11. BREACH OF THE PEACE 66-7-QUESTIONS FOR JURY-EVIDENCE-ADMISSIBILITY.

Since in a prosecution for breach of the peace the jury must decide whether the acts constituted a breach, it is proper to exclude the answer of the arresting officer to the question as to what acts of defendant he objected to.

12. DISTURBANCE OF PUBLIC ASSEMBLAGE 66-1-POSSESSION OF INTOXICATING LIQUORS-RIGHTS OF OFFICERS.

An officer preserving peace at a public dance has a right to intercept an attendant who is carrying intoxicating liquor and inquire as to what was to be done with the liquor, if he reasonably believes that it is to be sold, furnished, or given away in violation of law.

Exceptions from Brattleboro Municipal Court; Frank E. Barber, Judge.

Frank Mancini was convicted of a breach of the peace, and he excepts. No error.

Argued before MUNSON, C. J., and WATSON, HASLTON, POWERS, and TAYLOR, JJ.

O. B. Hughes, State's Atty., of Brattleboro, for the State. Gibson & Daley and W. D. Smith, both of Brattleboro, for respondent.

MUNSON, C. J. Mancini has been convicted in the municipal court of Brattleboro on a complaint charging a breach of the peace by tumultuous and offensive carriage, and by assaulting one Adin Miller. A dance was in progress in the grange hall in Dummerston, and the constable of Dummerston was in attendance in his official capacity. Some time in the middle of the night he procured the attendance of Miller, who was a deputy sheriff, but wore nothing on this occasion indicative of his office. Three men had been arrested before the occurrence in question, and were then being confined in the lodgeroom. This room and the supper room were

in the rear of the building on the lower floor, and were connected with an ante-room in front, which was reached by a stairway from the main hall above. As Miller was coming from the supper room, he saw four men in the anteroom coming towards him with bottles in their hands, one of whom was Mancini. Miller, without saying anything, stepped up to Mancini and took hold of some of the bottles he was carrying, whereupon Mancini and another of the party wrenched them from Miller's hands. Upon this Miller "collared" Mancini, and Mancini pushed his hands over Miller's face, trying to get at his throat. At the time Mancini attempted this, Miller said, "You are fighting an officer; you are under arrest." Miller kept his hold on Mancini and took him to the lodgeroom, Mancini fighting him all the while in an effort to get away. Miller testified that he arrested Mancini for a breach of the peace.

[1] The exceptions state that the respondent made several requests to charge, and was allowed exceptions to the court's refusal to comply with them; and these requests are referred to and made a part of the bill, and are required to be printed. Two of these exceptions are argued, but they cannot be considered, as no copy of the requests has been furnished. The transcript of the evidence and charge is referred to and made controlling according to section 2 of County Court rule 31, and it appears from this that certain exceptions to the admission and exclusion of evidence were taken by the respondent, and that there was a motion to direct a verdict on several grounds presented informally in an oral discussion. This covered the claims that there was no evidence to warrant the finding of a breach of the peace or of any violation of law by the respondent; that the respondent had a right to the possession of the bottles, and to use force enough to retain possession; that Miller acted throughout without authority; and that the respondent had a right to resist him as he did.

[2] There was ample evidence to sustain the complaint, if the circumstances were such as to justify Miller in arresting without a warrant. If this was the case, it was the respondent's duty to submit, and his resistance would constitute a breach of the peace as charged. *State v. Carpenter*, 54 Vt. 551. But if the respondent's previous conduct was not such as to make him liable to arrest without a warrant, Miller's interference was, in the circumstances, an assault upon the respondent which he could lawfully resist. *State v. Hooker*, 17 Vt. 658; 2 Bish. Cr. Law, § 37; note, 84 Am. St. Rep. 698. So in order to determine whether the respondent had a right to make the resistance he did, it will be necessary to ascertain whether the officer could law-

fully make the arrest. 2 R. C. L. 474; note 84 Am. St. Rep. 700.

[3] An officer may arrest without a warrant for a breach of the peace committed in his presence, and in some circumstances he may do this to prevent a breach of the peace. 5 C. J. 408. The question whether certain conduct constitutes a breach of the peace often depends largely upon the circumstances of the particular case. An act which would be lawful in some circumstances may amount to a breach of the peace if done in other circumstances. 8 R. C. L. 285.

[4] If it were conceded that respondent's conduct previous to his being "collared" by Miller did not constitute a breach of the peace by tumultuous and offensive carriage, this would not be determinative of the case. A breach of the peace may be committed in other ways than those specified in P. S. 5870. This section is not a definition of the crime known as breach of the peace, but is a statute defining certain modes of committing that offense. *State v. Boyd*, 99 Atl. 515. The term is generic, and includes all violations of the public peace or order. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

[5] A breach of the peace is described as "a violation of public order; the offense of disturbing the public peace." *Bouv. Dict.* The public peace is that sense of security and tranquility, so necessary to one's comfort, which every person feels under the protection of the law; and a breach of the peace is an invasion of the protection which the law thus affords. *State v. Archibald*, 59 Vt. 548, 9 Atl. 362, 59 Am. Rep. 755. A violation of public order or decorum, if calculated and intended to disturb the public tranquility, may constitute a breach of the peace. *Bouv. Dict.*; *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828; *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 243, 32 L. R. A. (N. S.) 505; *Delk v. Commonwealth*, 166 Ky. 39, 178 S. W. 1129, L. R. A. 1916B, 1117.

Mr. Bishop says that whatever, of sufficient magnitude for the law's notice, one willfully and unjustifiably does, to the disturbance of the public order or tranquility, is indictable at common law. 1 Bish. Cr. Law, § 533. He refers to "breaches of the peace" as a term of indefinite, yet large, and sometimes greatly expanded, meaning, and says further that:

"Commonly and more narrowly it signifies any criminal act of a sort to disturb the public repose." Section 536.

With reference to the disturbance of assemblies he says:

"When people assemble for worship, or in their town or other like meetings, or probably always when they come together in an orderly way for a purpose not unlawful, the common law makes it a crime to disturb their meeting. * * * What amounts to disturbance varies

with the nature and objects of the meeting." Section 542.

P. S. 5871 prescribes the penalty incurred by "a person who by a disorderly or unlawful act disturbs a town, society or district meeting, or a school or any meeting lawfully assembled." In considering what constituted a disturbance under a similar statute in Massachusetts, Shaw, C. J., said:

The question "cannot easily be brought within a definition, applicable to all cases; it must depend somewhat upon the nature and character of each particular kind of meeting and the purposes for which it is held, and much also on the usage and practice governing such meetings. * * * It must be decided as a question of fact in each particular case; and although it may not be easy to define it beforehand, there is commonly no great difficulty in ascertaining what is a willful disturbance in a given case." *Commonwealth v. Porter*, 1 Gray (Mass.) 476.

[6] Speaking generally, the rule applicable to disturbances of public assemblies is that any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress, or is annoying to the assembly in whole or in part, is a disturbance. 2 Bish. Cr. Law, § 309.

[7] It is urged that the respondent was only doing what he had a right to do; that he was the owner of the beer and had a right to do as he pleased with it, if it was not used for an illegal purpose. But the respondent's right to possess and drink the beer at the time and place in question was not absolute. It was not even such as it might have been in that place at some other time, as when the place was otherwise occupied. The respondent was there at the invitation of those in control of the dance, and it was his duty to conform his conduct to their reasonable requirements. See 2 Bish. Cr. Law, § 310.

[8] The importance of the attending circumstances as an element in determining whether the conduct complained of amounts to a breach of the peace, is indicated by many adjudged cases, and is fairly apparent from the statutory characterization of the act as one which disturbs or breaks the public peace. It has been held in this state that a boxing match, while not a breach of the peace as conducted in ordinary athletic sports, may be so conducted as to become such, and that it is for the jury, under proper instructions, to determine from the nature of the conduct whether the offense has been committed. *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801. And when persons attending an appointed lawful meeting of any description conduct themselves in a manner lawful in itself, but at variance with the purpose of the gathering and inconsistent with its orderly procedure, it will ordinarily be for the jury to say whether their conduct was such as amounted, in the circumstances, to a disturbance of the peace.

[9] Here four young men, one of whom was the respondent, with hands filled with beer

bottles, were making their way through the rooms used for and in connection with the dance. Officers were present to preserve order and protect from annoyance those properly pursuing the purpose of the gathering. Others had been arrested for a drunken disturbance shortly before this occurrence, in circumstances from which it may fairly be presumed that the fact was known to the respondent. The officer in charge had previously cautioned the respondent in connection with his possession of a suit case apparently containing bottles, and told him to behave himself. We cannot say as a matter of law that the respondent's conduct was not, in the circumstances, a breach of the peace. On the evidence, the question was for the jury under proper instructions.

[10] Against objections that the evidence was irrelevant and immaterial, the state was permitted to show that Miller was a deputy sheriff, and that the respondent was arrested and placed in a temporary lockup. Neither ruling was error. It was material to show that Miller was a peace officer as bearing upon his right to arrest without a warrant. The arrest and placing in a temporary lockup were a part of the transaction under investigation, and so not immaterial.

[11] Miller was called as a witness for the state, and testified to the facts leading up to the respondent's arrest. In cross-examination he was asked:

"And the only breach of the peace that you complain of is because the respondent objected to your taking a bottle of beer from his hand as you have described?"

The question was excluded, and the respondent excepted. The reason advanced in support of the exception is that Miller was the complaining witness. It does not appear that this was the fact. Besides, it was immaterial what particular thing in the respondent's conduct Miller complained of. The jury, and not the witness, was to judge of the quality of the acts which the prosecution relied upon as constituting a breach of the peace. The witness had testified fully as to the facts both in direct and cross examination.

In his argument to the court on the respondent's motion for a directed verdict, the state's attorney said, in effect, that a drunken fracas had taken place earlier in the evening. The respondent asked that an exception to the statement be noted, but the court ignored the request, and could properly do so, for the reason, among others, that the evidence warranted the statement.

[12] The state's attorney claimed and argued in substance that when Miller saw the respondent coming into the hall with bottles of beer, he had a right to investigate and ascertain whether or not it was being carried in for unlawful sale or distribution. The respondent excepted because there was no evidence that Miller had reason to believe that

it was for unlawful sale or distribution, and no evidence that he seized it for that reason. The court, "in view of the discussion" (apparently referring to that had in the presence of the jury on the motion for a verdict), charged on this subject that intoxicating liquor, being goods the sale and distribution of which are prohibited in this state—in other words being contraband—the officer had a right to intercept the respondent and inquire of him as to what was to be done with the liquor, if he reasonably believed that it was to be sold, furnished, or given away in violation of law. The respondent excepted to this on the ground that the evidence did not disclose that Miller had any reason to believe, or did believe, that the liquor was being carried by the respondent for any unlawful purpose.

It was not claimed that the argument and charge on this point did not correctly state the law; so we have no occasion to consider anything more than whether the evidence met the respondent's objection. Miller testified that he grabbed the bottles because he thought it was not just the thing to bring them into the hall; that he wanted to see what was going on; that he arrested the respondent because he thought he was breaking the peace by bringing "stuff" into the hall; that he took the bottles to see what they were. In answer to the respondent's questions the witness said:

"My mind was to know why they were bringing such stuff into the hall and what they were going to do with it; it occurred to me that three or four fellows, coming into the hall with their hands full of bottles, couldn't use it all themselves, and were violating the law and disturbing the peace; (that) it was a breach of the peace, bringing this stuff into the hall under the conditions that night."

It appeared from the testimony of the officer in charge that earlier in the evening the respondent had in the hall a dress suit case containing bottles, and that witness spoke to him about it and cautioned him, as hereinbefore stated, and that the respondent thereupon took the dress suit case outside the hall, three or four fellows going with him. This evidence and the inferences to be drawn from it fairly tended to support the argument and charge.

Other exceptions not noticed are too clearly without merit to require special consideration.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

(11 Vt. 515)

ESTABROOKS et al. v. ESTABROOKS.
(Supreme Court of Vermont. St. Johnsbury.
Aug. 11, 1917.)

1. EASEMENTS — 48(3)—EXTENT OF RIGHT—EXPRESS GRANT—CONSTRUCTION.

Where testator, owning two adjoining lots, with a driveway running across both, devised

to plaintiffs lot then occupied by them, with right of way "as now used" across the other, then occupied by testator, without designation of terminal points, and plaintiffs had, for years before and after making of will, while testator was living, gone to and from his driveway by way of street leading up to it, as well as over their driveway, plaintiffs were entitled, in accordance with testator's intention, to use of driveway through both ways of approach in use in his lifetime, and fact that, because plaintiffs have moved to a different part of the lot, they had to use a longer section of street as approach to driveway, does not defeat that right.

2. EASEMENTS §—25—EXTENT OF RIGHT—EXPRESS GRANT—CONSTRUCTION.

Where testator, owning two adjoining lots, with a driveway running across both, devised to plaintiffs lot then occupied by them, with right of way across the other, then occupied by himself, so long as either one should live and occupy premises described as "dwelling house, outbuildings, and land where they now reside," testator intended to give them right to use driveway so long as they occupied any part of that lot, and since right was given for their personal benefit, and not for benefit of land, their conveyance of part of premises gave grantees no interest in right of way.

Appeal in Chancery, Caledonia County; Willard W. Miles, Chancellor.

Action by Lydia A. Estabrooks and another against Henry F. Estabrooks. From a decree for plaintiffs, defendant appeals. Modified and affirmed, and remanded.

Harry Blodgett, Dunnett & Shields and Walter W. Wesley, all of St. Johnsbury, for appellants. Porter, Witters & Harvey, of St. Johnsbury, for appellees.

MUNSON, C. J. The premises involved in this controversy were owned in one parcel by Warren Estabrooks, who was the father of the defendant and the father-in-law and grandfather, respectively, of the plaintiffs, and who died April 3, 1906, leaving a will executed November 11, 1901. At the time the will was made the testator was occupying the premises devised to the defendant, and the plaintiffs were living on the premises devised to them, and enjoying the privilege which is the subject of the dispute. The clause creating the easement is as follows:

"Also a right of way, as now used from said land to Main street, in St. Johnsbury, across the lot where I now reside, to them and each of them so long as either of them shall live and occupy the premises aforesaid; and said right of way shall then terminate."

It should be noticed here that the grant is of "a right of way," without the designation of terminal points, and that its course from the plaintiffs' land across the servient estate is to be determined solely by the existing use; for these features of the grant are made the basis of important claims, to be taken up after the case has been fully stated. The premises divided between these parties by Warren Estabrooks' will extended from Main street easterly to North Pearl street and Warren avenue; the last being a street extending easterly from the north end of North

Pearl street nearly at a right angle. The lot devised to the plaintiffs was a projection of the property extending southerly along North Pearl street, and bounded on the north by a line which was nearly in line with the south line of Warren avenue. But the north part of this lot was separated from North Pearl street by a triangular piece, not owned by Warren Estabrooks, the base line of which was 17 feet and the side lines about 100 feet. This base line is practically a continuation to North Pearl street of the line which bounded plaintiffs' lot on the north. The driveway through the defendant's land from Main street to North Pearl street enters that street at its junction with Warren avenue, about 15 feet north of the point where the line just described strikes North Pearl street. The buildings occupied by the plaintiffs at the date of the will, and until June 11, 1914, were located on the northerly end of their lot. A driveway extended from the barn around the rear end and north side of the house, and then curved to the north, and crossed the division line at the corner between the plaintiffs' lot and the triangular piece, and entered the defendant's driveway about 18 feet from the line of North Pearl street. There was a walk extending from the plaintiffs' driveway near the rear of the house, which entered the defendant's driveway about 60 feet west of the driveway connection; but this walk has since been discontinued. There were steps which led down to North Pearl street from the lawn in front of the house, crossing the triangular piece about 28 feet north from its point. A portion of the passageway leading to these steps was grassed over. It does not appear that objection to the maintenance of the steps has been made by any one. The defendant has excepted to the chancellor's failure to find that there was a concrete walk from the easterly front steps connecting with the driveway, claiming that the existence of such a walk is established by uncontradicted evidence.

The plaintiffs used the driveway leading from their buildings to the defendant's driveway, and the defendant's driveway from the point of junction to Main street, as their convenience and necessities required, without let, hindrance, or obstruction. They also used the walk above described as a means of passing between their house and the defendant's driveway, in going to and from Main street. On coming from their driveway into that of the defendant, they sometimes turned to the right and passed into North Pearl street. The driveway between Main street and the plaintiffs' house was used by grocerymen, hackmen, and visitors, and for the delivery of coal. Grocerymen and milkmen sometimes came up North Pearl street, made their deliveries and passed across to Main street, and sometimes made the trip in the

reverse order. Hackmen engaged by the plaintiffs would sometimes come up North Pearl street, stop for the plaintiffs at the steps before described, and drive along to the North Pearl entrance, and thence across to Main street, and would sometimes cross directly from Main street to North Pearl street, and thence to the steps, and receive the plaintiffs there. The plaintiffs used all the described routes at their convenience. The buildings occupied by Warren Estabrooks at the date of the will and until his death, and since occupied by the defendant, are located on Main street, somewhat back from the street, with the barn directly in the rear of the house, and the westerly end of the driveway crossing the premises constitutes the defendant's approach from Main street to his buildings. At the southeasterly corner of the barn is a gate connected with a farmyard, which has been used at times to close the right of way.

On the 11th of June, 1914, the plaintiffs conveyed to Mary Caldbeck the lot devised them by Warren Estabrooks, excepting a small lot in the southeast corner, and reserving their interest in certain springs and a right to remove the barn. Subsequent to the conveyance the barn was moved onto the lot not conveyed, and converted into a dwelling, and the plaintiffs have since resided there. The will gives a right of way from the plaintiffs' land, across the defendant's land, to Main street. Within such limits as these terms may be held to establish, the extent and location of the right are to be determined by the use then existing. The continuance of the right is conditioned upon the occupancy of the premises by the grantees of the right. The final question is whether the present occupancy meets the requirement of the will.

The plaintiffs claim that the right devised to them covered every line of approach by which they had been accustomed to reach the driveway crossing the defendant's land; that they had a right to make use of the public street between their steps and the entrance to the defendant's roadway as a connecting link between the two; and that the right to make use of that street remains to them, notwithstanding their transfer of that part of the premises which included their former dwelling and its approaches. The defendant argues that this is a grant of "a right of way," and not of two or more; that the way granted extended from the plaintiffs' premises across the defendant's land to Main street, and not from Pearl street across the defendant's land; that no right was given the plaintiffs to come upon the defendant's land from any other place than their own property.

[1] For a series of years before and after the making of the will, and while the testator was living at the house now occupied by the defendant, the plaintiffs and those having

business at their place came to and from the testator's driveway by way of North Pearl street, as well as over the driveway which led directly from the plaintiffs' buildings to the testator's driveway. In these circumstances, the words "as now used from said land to Main street * * * across the lot where I now reside," are not to be taken as capable of only one construction, and so conclusive as regards the testator's intention. It is difficult to believe that one having the interest the testator had in these devisees intended that the delivery of their household supplies should be accomplished only by going in from Main street and returning the same way, when their driveway entered his only 18 feet from North Pearl street. We think it was the intention of the testator that the plaintiffs should have the use of the roadway between the two streets through both the ways of approach then in use.

[2] It having been ascertained that the plaintiffs were entitled to use a section of North Pearl street in connection with the way across the defendant's land while living in the dwelling since conveyed, the fact that their change of location to another part of the lot requires the use of a longer section of the street cannot of itself defeat the right. So we treat the remaining claim of the defendant as standing squarely upon the question of occupancy. By the terms of the will the plaintiffs are entitled to the right as long as they shall "occupy the premises aforesaid," and the premises referred to are described in the will as "the dwelling house, outbuildings and land where they now reside." The defendant argues that this language required the plaintiffs to remain in possession of the entire premises, if they wished to retain the right, and that they do not now occupy the "aforesaid premises," but only a very small portion of them.

It is clear that the right to cross the defendant's lot was given for the personal benefit of the testator's daughter-in-law and granddaughter, and not for the benefit of the parcel devised to them. The right was conditioned upon their occupancy of the premises, and was to cease upon the death of the survivor. This right being personal, the plaintiffs' conveyance of a part of the premises gave their grantees no interest in the right of way. The plaintiffs' continued occupancy of the remainder of the lot presents the same situation as regards their personal benefit which the testator had in contemplation when he made his will. We think the testator intended that the plaintiffs should have access to and from Main street over the driveway across his premises, through the North Pearl street entrance, as long as they continued to occupy any part of the lot adjoining that street.

Decree modified, and affirmed as modified, and cause remanded, with mandate.

(120 Md. 581)

WESTERN MARYLAND RY. CO. v. SANNER. (No. 6.)

(Court of Appeals of Maryland. June 26, 1917.)

1. MASTER AND SERVANT §129(1)—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE.

Under federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665], recovery can be had only for cases of accident in which negligence is the cause of the injury.

2. MASTER AND SERVANT §87—ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT—"NEGLIGENCE" AS PREREQUISITE TO RECOVERY.

The word "negligence," not being defined in federal Employers' Liability Act, must be taken to mean such act of commission or omission as would at common law have been sufficient to entitle an action thereunder to be submitted to a jury.

[For other definitions, see Words and Phrases, First and Second Series, Negligence.]

3. MASTER AND SERVANT §112(3)—ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE.

Fact that a railroad has constructed no special walk or path along its track for the use of employes in operating switches is not such negligent omission as will make defendant liable to its servant under the federal Employers' Liability Act.

4. MASTER AND SERVANT §112(3)—ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT—CONDITION OF TRACK.

Fact that the embankment or slope on which a railroad was built did not come up to the bottom of the ties is not of itself such negligence as will render railroad liable to an employé, jumping from freight train where the track at that point is on a curve and the rails on the outer tangent of the curve are necessarily higher than on the inner tangent.

5. MASTER AND SERVANT §265(1)—TRIAL §139(1)—ACTIONS FOR INJURIES—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE.

In an action under the federal Employers' Liability Act, it is incumbent upon the plaintiff to show affirmatively all the elements of his right of recovery, and in the absence of evidence to fully support the verdict, should one be found, it becomes the imperative duty of the court to direct a verdict for defendant.

6. MASTER AND SERVANT §285(8)—ACTIONS—FEDERAL EMPLOYERS' LIABILITY ACT.

In action by railroad employé under the federal Employers' Liability Act for injuries alleged to have been caused by failure of railroad to provide safe approach to switch for use of trainmen, evidence held insufficient to warrant submission to jury.

7. MASTER AND SERVANT §280—ACTIONS—EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK—EVIDENCE.

In action by railroad employé under the federal Employers' Liability Act for injuries alleged to have been caused by failure of railroad to provide safe approach to switch for use of trainmen, plaintiff held, under the evidence, precluded from recovery by assumption of risk.

Appeal from Superior Court of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Action by James Howard Sanner against the Western Maryland Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

George R. Gaither and George P. Bagby, both of Baltimore, for appellant. George Moore Brady, of Baltimore (William Milnes Maloy and William Joseph Tewes, both of Baltimore, on the brief), for appellee.

STOCKBRIDGE, J. This suit was brought to recover damages for personal injuries resulting to the appellee under the following circumstances:

James H. Sanner was a brakeman on a passenger train of the appellant, running from Cumberland, Md., to Elkins, W. Va. On the 13th of July, 1914, he was on a west-bound train, and as the train approached a place known as Neff's Siding, where it was to meet an east-bound train, the plaintiff took a position on the locomotive in order to be ready to jump off and throw the switch, which would enable his train to pass into the siding. As the place came in sight, it was seen that the east-bound train had already arrived at the point, and that the switch was open for the west-bound train to enter. The engineer accordingly, instead of bringing his train to a stop before reaching the switch, ran past it, and at a point some 30 or 40 feet beyond the plaintiff jumped from the locomotive, and one of his legs gave way under him. He picked himself up and continued to discharge his duties for the remainder of the run. By the next morning his knee had swollen considerably, and gave him pain. He returned to Cumberland, where he was visited by the physician of the company, who treated the case as one of a sprain. Little or no improvement taking place, he was later sent to Baltimore, where an X-ray was made of the injured joint. This showed that "one of the ligaments in the joint had been torn, and a little, tiny piece of bone was pulled off with it." This amounted to a permanent injury, incapacitating the plaintiff from further work as a railroad man, an occupation which he had followed for a number of years.

[1] The theory on which the suit was brought was that it fell within the provisions of the act of Congress of 1908, chapter 149. Section 1 of that act provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, where the injury results "in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." It is therefore clear that not all cases of accident and injury are included within the provisions of the act, but only those in which negligence is the cause from which the injury results.

That it was not intended to apply to all cases is also made clear by the title of the act, which is:

"An act relating to the liability of common carriers by railroad to their employés in certain cases."

[2] In order to determine whether a certain case is within the provisions of the act, it is first necessary to ascertain whether there has been actionable negligence on the part of the railroad. Nowhere in the act is any definition of negligence to be found. Therefore the term must be taken to mean such act of commission or omission as would at common law have been sufficient to entitle the case to be submitted to a jury. That negligence in this case is claimed to have been the failure of the railroad to provide a safe approach to the switch for the use of the trainmen whose duty it might be to open or close the switch lever.

The accident happened about 6 o'clock p. m., or an hour and a half before sunset, when it must have been perfectly light. The immediate cause of the injury to the plaintiff is claimed to have been the existence of a hole or gully 5 feet long, 3 feet wide, and 4 feet deep, into which the plaintiff fell as he dropped from the locomotive. He made no examination of it at the time of the accident, but on the following day, from the rear of an east-bound train in motion, he observed a hole or gully at or near the point where he had suffered his injury. There is no positive identification of the hole or gully he then saw as being the same one into which he had actually fallen. Nor is there any identification of the spot by any other witness. The plaintiff testified to the appearance of the hole he saw on the following day as indicating that it had been there for a considerable length of time, but no knowledge of any defect is brought home to the railroad, or any of its employés.

Can it be said that the existence of such a hole, assuming for the time being that it did exist, constitutes actionable negligence? A number of railroad men testified as to the conditions of the approach to switches on the railroads by which they were employed, but their evidence only shows that different modes prevail upon different roads, not that there is any generally recognized method of construction.

[3] Assuming, as for the purpose of the present inquiry must be done, the absolute truth of all the plaintiff's testimony, and that the railroad company had constructed no special walk or path for those operating the switch, that fact alone is not sufficient to fasten a liability upon the appellant, as being an act of negligent omission on its part.

[4] It was further claimed by the plaintiff as an act of negligence that the embankment or slope upon which the railroad was built did not come up to the bottom of the ties at this point by a considerable distance;

but the plaintiff also testified that the road at this point was on a curve, and other witnesses testified without contradiction that, because of this curve, the rail on that side was $2\frac{1}{2}$ inches higher than on the other side. This fact would of itself show a reason for the elevation of the ties at this point, over that maintained under different conditions.

[5] The rule of law in this case is that announced by Judge Alvey in *State v. Malster*, 57 Md. 309:

"It is incumbent upon the plaintiff to show affirmatively all the elements of the right to recover. Unless the court can see that there is such evidence in the cause as will thoroughly support a verdict, if the jury should find it to be credible and proper to be made the basis of their finding, it becomes an imperative duty of the court to instruct the jury to find their verdict for the defendant."

And this statement has been followed and adopted in numerous cases since. The refusal of the defendant's first prayer was therefore clearly prejudicial error.

[6, 7] In view of this conclusion, it is not essential that the second question presented by the record, viz. the assumption of risk by the appellee, should be discussed at any length. It is, however, proper to say that, under the adjudicated cases, the appellee is precluded from recovery upon this ground also. In *Masterson v. Namquit Worsted Mills*, 32 R. I. 10, 78 Atl. 258, the plaintiff turned an ankle, and the accident was said to have resulted from an inequality in the floor; his arm was caught in some belting and injured. He sued the master for negligence in the construction of the floor, and it was held that, even if it could be said that the defendant was negligent in the construction of the floor, it was a defect as obvious to the plaintiff as the defendant, and that as it was so obvious he assumed the risk, and the verdict for the defendant was sustained. In *A. T. & S. F. R. R. v. Alsdurf*, 47 Ill. App. 200, a brakeman was killed on a siding. In the center of the track the spaces between the ties were filled to the top of the ties, and then receded so that there was no ballast at the ends of the ties. In deciding the case the court says:

"In the absence of any agreement, the railroad was not bound to furnish a better track than such as were in general use, or to furnish such a track as the jury might rightfully regard as safer than the customary one. The deceased must be held to have understood the ordinary hazards attending his employment as a brakeman, and to have voluntarily taken upon himself those hazards when he entered appellant's employment. Hazards arising out of the usual and general methods of construction on well-managed railroads of the side tracks upon which brakemen perform their duties must be considered as ordinary and incidental to the business generally, and therefore as being generally assumed by the contract of employment."

In *Fletcher v. Freeman-Smith Lumber Co.*, 98 Ark. 202, 135 S. W. 827, it is said:

"Where a brakeman received injuries at his accustomed place of work, the risk of danger from the steepness of the grade, being open to his observation when he took service, was assumed by him."

And the same rule has been adopted and followed in this court. *Westinghouse Manufacturing Co. v. Monroe*, 129 Md. 59, 98 Atl. 206, and cases there cited. For the reasons thus indicated, the judgment appealed from must be reversed, without a new trial. Judgment reversed with costs.

(130 Md. 645)

PATTERSON et al. v. MAYOR, ETC., OF CITY OF BALTIMORE. (No. 9.)

(Court of Appeals of Maryland. June 26, 1917.)

1. EMINENT DOMAIN §202(4) — ASSESSMENT OF COMPENSATION — EVIDENCE — VALUE FOR SPECIAL PURPOSE.

In a proceeding to condemn and open a street through a tract of land, it was admissible to show that the tract was available for city lots, and to point out its special advantages for residential or industrial purposes, though it had been held as an unimproved and undeveloped tract and not laid out into lots.

2. WITNESSES §252 — PLATS TO EXPLAIN TESTIMONY—DISCRETION OF COURT.

Where in such proceeding a witness was permitted to state fully his views as to the effect on the tract of land of locating a street as proposed by the city, and testified concerning the irregularity in the shape of the lots into which the tract might be divided, and the jury was taken upon the ground and saw the actual conditions for themselves, and two plats were admitted in evidence, it was within the court's discretion to exclude a plat prepared by the witness and showing the plan proposed by him as the best method of developing the tract.

3. EMINENT DOMAIN §203(1) — ASSESSMENT OF DAMAGES—EVIDENCE.

In a proceeding to condemn land for a street, evidence as to whether the street as laid out by the city was the most advantageous to the owners of the property, and as to what plan would give the property the most utility, was not admissible, as the question was the damages sustained by the plan adopted by the city, and not whether this was more injurious than some other plan.

4. EVIDENCE §507 — EXPERT TESTIMONY — MATTERS OF COMMON KNOWLEDGE.

A question asked an expert witness was properly excluded, where men of sufficient intelligence to sit on a jury could answer the question as well as the witness.

5. MUNICIPAL CORPORATIONS §413(1)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—"OPEN"—"LAYING OUT."

Baltimore Charter, § 6, authorizes the city to provide for laying out, maintaining, etc., any street in the city, and for assessing, either generally on the city property or specially on property benefited, the damages and expenses, and paying over compensation to each person entitled before any street shall be opened. A different part of the section authorizes the city to provide by general or special ordinance for grading, paving, and curbing any street condemned, etc. *Held*, that the Legislature made a distinction between opening a street and grading, paving, or curbing a street, and in a proceeding to condemn and open a street the city could not assess the benefits to the property from the grading or paving of the street, as "open" is the equivalent of "laying out," which is defined as the adoption of outlines or locations, and not the work of construction or improvements (citing 5 Words and Phrases, Lay Out; see, also, 5 Words and Phrases, First and Second Series, Open).

6. MUNICIPAL CORPORATIONS §266—PUBLIC IMPROVEMENTS—STATUTORY PROVISION.

Acts 1912, c. 32, amending Baltimore Charter (Code Pub. Loc. Laws, art. 4) § 175, relative to the laying out, opening, or grading of streets, but providing that nothing therein shall affect any right or liability accrued, or any proceeding begun or pending prior to the passage of that act, and the Acts 1914, c. 125, dealing with the same subject, did not apply to a proceeding commenced before they were enacted.

7. EMINENT DOMAIN §203(1) — DAMAGES — EVIDENCE.

In a proceeding to condemn and open a street, evidence that the city for some years had not been exercising its power of assessing the cost of grading and paving streets on abutting owners was irrelevant, as the nonexercise of its power did not prevent the city from exercising it in the future.

8. EMINENT DOMAIN §204 — ASSESSMENT OF COMPENSATION—EVIDENCE—BENEFITS.

Where in a proceeding to condemn and open a street it is attempted to show the benefits in advance of the paving and curbing, the width of the driveway and sidewalks to be adopted should be shown.

Second Appeal from Baltimore City Court; Chas. W. Heulsler, Judge.

Proceeding by the Mayor, etc., of the City of Baltimore against Laura Patterson and others, to condemn and open a street. From an inadequate award, the property owners appeal. Reversed and new trial awarded.

The following is city's prayer No. 3, referred to in the opinion:

The jury are instructed that the measure of damages in this case is the market value of the property taken by the city of Baltimore, in this proceeding, at the time of the taking, considered without reference to the opening of Twenty-Fifth street or any effect that such opening may have upon the property; and, in addition, such damage, if any, as may, by such opening, have been caused to the remaining property concerned. The fair market value of the property taken is the price that a purchaser, willing but not compelled to buy, would pay for it, and which a seller, willing but not compelled to sell, would accept for it.

They are further instructed that the measure of benefits is the increase in the market value of the property in controversy caused by the opening of Twenty-Fifth street through the said property, and that this increase should be considered as the amount which a purchaser, willing but not compelled to buy the property, would pay for it, and which a seller, willing but not compelled to sell, will accept for it, after Twenty-Fifth street shall have been opened, graded, paved, and curbed; it being proper to take into account the fact that the property owner will be burdened when the street shall be paved, with the special paving tax of 15 cents for each front foot on each side of said street for a period of 10 years as a matter of law; and that, as a matter of fact, in order to utilize this property, it will be necessary for the property owner to pave the sidewalk and to grade the property back to a usual depth in connection with that street. (Granted.)

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Arthur W. Machen, Jr., and Raymond S. Williams, both of Baltimore, for appellants. S. S. Field and George Arnold Frick, both of Baltimore, for appellees.

BOYD, C. J. This is the second appeal by the appellants in a proceeding for the condemnation and opening of Twenty-Fifth street from the east side of Greenmount avenue to the west side of Harford avenue, under Ordinance No. 416 of the mayor and city council of Baltimore, approved December 9, 1909. The former appeal is reported in 127 Md. 233, 96 Atl. 453. There are 37 exceptions in the record—the last one presenting the rulings of the lower court in rejecting 11 of the appellant's 13 prayers, and granting the city's third and seventh prayers and overruling the special exception to the city's seventh prayer, and the others containing exceptions to rulings on the evidence.

[1, 2] The first 20 exceptions relate to damages. Undoubtedly an important element in estimating damages for land taken under condemnation proceedings may be its availability for or adaptability to certain purposes. In this case, although the tract of land owned by the appellants had not been laid out into lots, but had been held by them and those under whom they claim for many years as an unimproved and undeveloped tract of land, it was admissible to show that it was available for city lots, and to point out the special advantages for residential or industrial purposes the particular parts of it had. In the testimony of Mr. Atwood, a witness for the appellants, who was shown to be an experienced civil engineer and surveyor, and had been a commissioner for opening streets for one term and city surveyor for two terms, he was permitted to state fully his views as to the effect of locating Twenty-Fifth street according to the location made in these proceedings. The appellants, however, did not deem that sufficient, but sought to introduce two plats made by the witness. The first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, twelfth, thirteenth, and nineteenth exceptions relate to those plats. The Belt Line of the Baltimore & Ohio Railroad Company runs through the tract of the appellants, dividing it into two parts of about equal areas, each part containing in the neighborhood of 50 acres. It is only the part south of the railroad which is involved in this case. Mr. Atwood testified that Twenty-Fifth street, as proposed to be located, was 100 feet wide and runs, roughly speaking, parallel with the railroad and approximately from 100 to 120 feet from it. His theory was that by thus laying out the street, the depth between the railroad and the north side of the street was not sufficient "to utilize it for most businesses of any large character," and if that side of the street was used for residences, they would run back to the railroad, which would be disadvantageous to them. He

spoke a good deal about the irregularly shaped lots, and said that the proposed location of the street had the effect of forcing the irregularities to the south of the street, instead of putting them along the railroad. The lots were not actually laid out on the ground, and the plats prepared by him were simply of a plan he proposed as the best method of developing the tract. While we do not see any particular injury that would likely have been done by admitting the plats in evidence, it is possible that they might have misled and confused the jury, rather than helped them. The jurors were taken upon the ground, and could see for themselves the actual conditions there. Presumably the location of the proposed street was pointed out to them, as well as such other locations as were relevant. Considerable discretion in such matters must be left to the trial judge, and if there be room for a difference of opinion as to whether the plats offered by the appellants could have aided the jury, without the danger of misleading them, the action of the lower court was at least within the discretion that must be allowed it; especially was that so as to the plat on the blackboard referred to in the third exception. The plat used in the condemnation proceedings and one used by the appellants at the former trial were before the jury, and with a witness as intelligent as Mr. Atwood on the stand, there ought to have been no difficulty in his making his views plain to the jury with the use of the plats which were before them, for all legitimate purposes. There was therefore no reversible error in the rulings in any of those exceptions, although some of the questions possibly might have been admitted without injury.

[3, 4] In the seventh exception Mr. Atwood was asked to say whether he was able to state whether or not this land "possesses a special adaptability for use for the laying out through the same of streets or roads or rights of way for the purpose of constructing or making or creating building lots or lots for commercial and industrial purposes, and, if so, *state to the jury what plan would be the highest utility of this property for those purposes.*" He was permitted to answer the question except as to the last clause, which we have italicized. The court was clearly right in excluding that. The question for the jury was not "what plan would be the highest utility of this property," but what damages the appellants were entitled to by reason of taking the land, in the way proposed. It may be that some other plan might produce better results to the appellants than the one proposed, but, if that be so, that was one of the questions the jury could consider. The city cannot be required to adopt the plan which "would be the highest utility of the property" for the purposes named, and to permit different experts to answer such a question, we might have as many opin-

lons as there were experts. They would soon get into the realms of speculation. This record well illustrates how conflicting the views of experts are on such questions, and, while their opinions, if kept within proper bounds, are admissible and helpful, if not, they are confusing and of no use in attaining the ends of justice. Mr. Atwood was permitted to testify to the effect this location of the street had on the property. The eleventh exception more clearly illustrates what we mean, in that Mr. Atwood was asked whether the opening of the streets, "of the width and location proposed in these proceedings would accord with the best plan for the development of the property—by best, I mean the most advantageous to the owners of said property rather than the city as a whole." The city was not laying out a plan for the development of the property. It might well be that a street of less width and differently located would cause less damage to the owners than the one proposed, but if such a rule be adopted as the question suggested, a city might be compelled to adopt plans for the benefit of the owners of the land being condemned, rather than those for the public good. We do not understand that to be the law of this state. Sometimes it happens that a public improvement of this kind is materially and injuriously affected by the effort to please or benefit some particular person, but such action by public officials should be condemned, and not sanctioned by the courts. Of course owners are generally entitled to more compensation for taking 100 feet in width than they would be if only 60 feet were taken, and if the location is specially injurious, that fact can be considered in fixing the damages. The seventh, eleventh, fifteenth, sixteenth, and eighteenth questions were properly held to be inadmissible. The fourteenth was harmless, as the witness had already said he "would not put any blind street out there." We see no special objection to the seventeenth, unless it was already sufficiently answered in the previous evidence. The twentieth did not require an expert to answer. If the jurors were men of sufficient intelligence to sit on a jury, they could answer the question as well as the witness. So while there is no doubt that the appellants had the right to show the uses for which the property was adaptable, we cannot agree with them as to the methods adopted for the purpose, and we find no such error in any of the 20 exceptions already referred to as would justify us in reversing the case.

It may be well to add here that in addition to evidence being admitted on the subject, the lower court by the appellants' second prayer expressly instructed the jury that:

"In arriving at the market value of the land to be taken, the jury must take into consideration its availability for building lots and for industrial purposes, if they find it had such availability, even though they also find that said

land is not at present used for such purposes," and that, in fixing the damages for injury to the remaining land of the petitioners, "they should also consider whether the availability, if any, of said remaining land for use as building lots or for industrial purposes will be decreased at all, and, if so, to what extent, by the condemning and opening of Twenty-Fifth street of the width and of the location proposed in these proceedings."

[5] The most important question in this case is the measure of benefits to be assessed against the appellants. The city's prayer No. 3, which was granted, so directly presents the question as to suggest the advisability of considering that before considering the other exceptions to the rulings on the evidence. We will request the reporter to publish that prayer in his report of the case. The time fixed by that instruction for the consideration of the jury, as to the benefits was:

"After Twenty-Fifth street shall have been opened, graded, paved and curbed; it being proper to take into account the fact that the property owner will be burdened when the street shall be paved, with the special paving tax of 15 cents for each front foot on each side of said street for a period of 10 years as a matter of law, and that as a matter of fact, in order to utilize his property, it will be necessary for the property owner to pave the sidewalk and to grade the property back to a usable depth in connection with that street."

These proceedings were begun under "An ordinance to condemn and open Twenty-Fifth street from the easternmost side of Greenmount avenue (formerly York road) to the northwesternmost side of the Harford turnpike road." The new charter of Baltimore city in section 6, art. 4, Public Local Laws, under the head of "General Powers," subhead "Streets, Bridges and Highways," is subdivided in the revised edition of the charter published in 1915 by the law department of the city. Under subdivision "(A) Opening, Extending, Widening, Straightening, or Closing up Streets," the city is authorized "to provide for laying out, opening, extending, widening, straightening, or closing up, in whole or in part, any street, square, lane or alley within the bounds of the city, which in its opinion the public welfare or convenience may require." It then provides for damages and benefits, and authorizes the city "to provide for assessing or levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening, or closing up the whole or any part of any street, square, lane or alley in said city." After providing for appeals to the Baltimore city court from the decisions of the commissioners for opening streets, or other persons appointed by ordinance to ascertain the damage which will be caused or the benefit which will accrue to the owners by locating, opening, etc., any street, it contains this clause:

"To provide for collecting and paying over the amount of compensation adjudged to each person entitled * * * before any street, square, lane or alley, in whole or in part, shall be so opened," etc.

It authorizes the city to acquire the fee-simple interest in any land for the purpose of opening, etc., the street. That part of the section says nothing whatever about grading, paving or curbing.

Later the section provides under the subdivision "(B) Grade Line of Streets" for grade lines, and under subdivision "(C) Grading, Paving, Curbing, etc., Streets" it specifically gives authority "to provide by ordinance for grading, shelling, graveling, paving and curbing," or for regrading, etc., of a street, lane or alley "now condemned, ceded, opened as a public highway, or which may hereafter be condemned, ceded, opened, widened, straightened, or altered," etc. Then under subdivision (D) it authorizes the city to provide by general ordinance, subject to section 85, for grading, graveling, shelling, paving, or curbing or for regrading, etc., of any street, lane, or alley, whenever the owners of a majority of the front feet of property binding such street, etc., shall apply for the same, etc. There are thus made distinct provisions for opening, etc., streets, from those in reference to grading, paving, and curbing.

We have at some length referred to the charter, as it seems to us its provisions settle the question, independent of authority. When this ordinance was passed (1909) this section was the same as what we have stated above, and the revised edition of the charter only makes the subdivisions and refers to the original acts and decisions of the courts for convenience. It is difficult to read those provisions of the charter and reach a conclusion other than that the Legislature intended the acquisition of the land for a street before it was graded and paved. This proceeding was begun under what is above referred to as subdivision (A), and not under subdivision (B). At the time the ordinance was passed there was no provision in the charter for an ordinance to include the opening and grading of a street, but it was clearly intended to require the city to first condemn the land for the opening (if it was not dedicated or otherwise acquired), and then afterwards provide for the grading, paving, and curbing. It is true that Act 1912, c. 32, § 175, which relates to the duties of the commissioners for opening streets, was amended to read:

"Whenever the mayor and city council shall hereafter by ordinance direct the commissioners for opening streets to lay out, open, extend, widen, straighten, *grade* or close up, in whole or in part, any street," etc.

—but that act, which made a number of changes, expressly provided that:

"Nothing herein contained shall be construed to affect any right or liability of any party accrued, or any proceeding begun or pending prior to the passage of this act, but all such rights

shall remain and such proceedings shall continue, in the same manner, and to be of the same effect, as if the provisions hereinabove mentioned had remained as they were prior to the passage of this act."

Then it was expressly limited to a case when the mayor and city council "shall hereafter by ordinance direct," etc. But regardless of that it is clear that the Legislature itself made a distinction between opening and grading, paving or curbing, and therefore it is difficult to see how an ordinance for opening a street can be construed to include the *grading, paving or curbing*. Indeed, until the city acquires title to the land to be used for the street, a number of practical difficulties suggest themselves. Just how, in assessing benefits in a case like this, the cost of paving a street can be accurately ascertained has not been made clear. As we have seen from the charter, there are a number of materials which can be used, either of which will be a compliance with the statute, and the kind of material used is a very important matter, as the cost must depend upon that. It may be a long time before the street is paved, and prices necessarily vary. If, for example, the price is estimated now, and the street is not paved for a year or more, who can say that the price may not be greatly reduced by that time? In that instance the property owner would sustain the loss, but, on the other hand, if the paving had been estimated several years ago, the probabilities are that by this time the cost of the material has greatly increased. Judge Miller said in *Dashiell v. Baltimore*, 45 Md. 615, 626:

"A street may be and often is opened and condemned for many years, before any steps are taken to pave it."

In our judgment the ordinance under which these proceedings were instituted, and the statutes then in force, must control, and the ordinance did not include grading, paving, and curbing.

Our examination of the authorities strengthens the views we have on the subject. It was said in *Reed v. City of Toledo*, 18 Ohio, 161:

"By the term 'opening' we do not understand the improvement of a street or highway by grading, culverting, etc.; the term is generally (we think always) clearly distinguishable from such kind of improvement. The term 'opening' refers to the throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface. And we think in the charter this distinction is very clearly drawn."

Or, as said in 3 Dillon on Munc. Cor. (5th Ed.) § 1042:

"So authority to open a street and assess the damages on the property benefited does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the improvement of the street by grading, culverting, and the like."

In Municipal Corporations in Maryland, by the present Attorney General (section 12) it is said:

"The two systems for opening and condemning streets and for grading and paving them are essentially different from each other. They are provided for by different laws and ordinances, executed by different officers and governed by different rules and regulations."

He referred to *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Dashiell v. Baltimore*, 45 Md. 615, and *Baltimore v. Hook*, 62 Md. 371. While it is true the conditions in those cases differed from those in this case, the principles are, for the most part, the same. In *Douglass v. Rigglin*, 123 Md. 18, on page 22, 90 Atl. 1000, on page 1002, it was said:

"It constituted an opening of the street for the use of the lots according to the evident sense in which the term 'open' was used in the reservation under the agreement of sale. It was plainly employed in this connection as equivalent to the 'laying out' of the proposed street, and this has been defined to mean 'the adoption of outlines or locations, and not the work of construction or improvement.' *Oberheim v. Reeside*, 118 Md. 273 [81 Atl. 590]; 5 Words and Phrases, 4087."

See, also, *Bauman v. Ross*, 167 U. S. 548, 586, 17 Sup. Ct. 966, 42 L. Ed. 270; *Hutt v. Chicago*, 132 Ill. 352, 23 N. E. 1010. In *Baltimore v. Smith*, 80 Md. 458, 31 Atl. 423, which case only involved benefits, and at that time the question of damages for opening a street was not open for review on appeal from benefits alone, the jury was instructed that the only matter for their inquiry was the amount of increase in the actual market value of the lots fronting on the street opened which would be caused by the acquisition, through those proceedings by the city, of title to the land in the bed of the street to be used as a public street, and the verdict should be limited to such increase. The sixth prayer granted in *Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331, was to the same effect.

There would seem to be no doubt that the city would still have the power to assess the property owners with the whole cost of grading, paving, and curbing in a proceeding taken for paving, etc., after the property is condemned. Section 6 of the charter so authorizes. If the city has no authority to now assess for those purposes, but did so in this case, we are not prepared to say, as it contends, that it would be estopped from doing so again. There may be circumstances under which it would be estopped from collecting the same assessment twice, but in a case such as this, where the property owners can undoubtedly be assessed for some benefits, if the measure of benefits established be erroneous, it would, to say the least, be difficult for them to be protected. But independent of that, if, as we think, the benefits can now properly include those to accrue from the street after it is "opened, graded, paved, and curbed," the appellee has no right to assess the appellants with them in this proceeding and, besides, the appellants have

the right to a correct interpretation of the law.

[6] It was conceded by the appellee that it was formerly the established rule not to take into consideration the cost of grading, paving, etc., in a proceeding of this kind, for opening, but the learned solicitor contends that the contrary rule has, for some years, been in force. We find no change in the law to authorize it, which is applicable to this case. We have already indicated that the Acts of 1912 and 1914 do not apply. The provision quoted above from the act of 1912 can leave no doubt as to that act, and we find nothing in the act of 1914 indicating an intention on the part of the Legislature to repeal or change that provision. The case of *Cahill v. Baltimore*, 129 Md. 17, 98 Atl. 235, was relied on in support of the city's contention, but, without discussing the question as to burden of proof, which is all of that case which can be claimed to be applicable, it is sufficient to say that that proceeding was not instituted until after the act of 1912 was passed, and hence was not included in the saving clause of that act as this one was. As seen by reference to the first appeal, *Baltimore v. Cahill*, 126 Md. 596, 95 Atl. 473, the ordinance was not passed until April, 1913.

[7, 8] We do not understand the relevancy of evidence tending to show that the city had not, for some years, been exercising its powers of assessing the cost of grading and paving on the abutting owners. If a municipality has the power to grade and pave under either of several methods, and it for some years adopts one of them, it does not follow that the other cannot be exercised, unless the charter is amended or the law prohibits it. Administrations change, and frequently with such changes entirely new ideas are introduced. Or new conditions may require or suggest changes. But this case shows the dangers of such evidence, as the appellants contend that ordinances of the city show that the witness was mistaken. At any rate, the evidence ought not to have been admitted. It is proper to add that we think the jury would be entitled to know, in cases where the cost of grading and paving is involved, the width of the driveway and sidewalks to be adopted, if the benefits are attempted to be shown in advance of the paving and curbing. How can a jury tell whether in the particular case the driveway is to be 40, 60, 66 or other number of feet when the street condemned is 100 feet wide and it is left to the city authorities to determine the width. Such evidence as that in the thirty-first, thirty-second, and thirty-third exceptions was therefore inadmissible even under the appellee's theory of the case as to the measure of benefits. Without further pursuing this question, we are of the opinion that under these proceedings the city was limited to benefits as the result of the opening of the street, and such benefits as grading, paving, and curbing cannot be con-

sidered. There was therefore error in granting the city's third and seventh prayers. The petitioner's first was properly rejected, as it was entirely too broad. Attorneys can, and frequently do, explain to juries what the law is if not in conflict with the granted instructions, or no instructions are given by the court on the particular subject. Their second was granted. The third was properly rejected for reasons stated above in passing on the exceptions to evidence. The fourth was properly rejected. The fifth and sixth ought to have been granted. The seventh was not necessary. The eighth and ninth were calculated to mislead. The tenth could not have been granted under the theory which prevailed in the lower court, as it would have been in conflict with the prayers granted, but if at the new trial evidence is introduced in reference to the grading, etc., as authorized in *Baltimore v. Smith*, 80 Md. on page 471, 31 Atl. 423, an instruction as to its effect will be proper. The eleventh was granted. The twelfth and thirteenth are immaterial in view of what we have said.

In the above discussion we think we have sufficiently referred to the questions involved in the exceptions to evidence not already passed on to relieve us of discussing them further.

Rulings reversed, and new trial awarded, the appellee to pay the costs.

(181 Md. 80)

BONAPARTE v. MAYOR & CITY COUNCIL OF BALTIMORE et al. (No. 25.)

(Court of Appeals of Maryland. June 27, 1917.)

1. EMINENT DOMAIN §134—COMPENSATION—VALUE OF PROPERTY.

The measure of compensation for property taken for a public use is the actual market value of the property, depending upon the uses for which it is available and any special utility tending to enhance its value in the market.

2. EMINENT DOMAIN §134—COMPENSATION—VALUE OF PROPERTY.

In assessing compensation for property taken for a public use, the availability of the property for a particular use contributing to its market value is not to be ignored merely because the property has not, in fact, been applied to that use.

3. EMINENT DOMAIN §131—COMPENSATION—VALUE OF PROPERTY.

In assessing compensation for property taken for a public use, the effect of the public project for which the property is acquired on the value of property must be disregarded.

4. EMINENT DOMAIN §134—COMPENSATION—VALUE OF PROPERTY.

Where property taken by a city in connection with the widening of a street had been so altered as to be adapted to use as an apartment house, though not actually devoted to that purpose, and the availability for such use added to its rental and market value, and this was the most profitable use to which it was adapted, the property owner was entitled to its value for such use.

5. EMINENT DOMAIN §222(4)—ASSESSMENT OF COMPENSATION—INSTRUCTIONS.

In a proceeding to assess the compensation for property taken in connection with the widening of a street, an instruction that the jury were to consider the value of the property as though no such opening were to take place and the surroundings immediately preceding such opening were to continue indefinitely did not exclude a use to which the property was adapted from the consideration of the jury, though the property had not been devoted to such use, but merely emphasized the rule that the jury must not regard any change of value resulting from the street improvement.

6. EMINENT DOMAIN §262(5)—ASSESSMENT OF COMPENSATION—APPEAL—HARMLESS ERROR.

In a proceeding to assess compensation for property taken for a public use, an exception to the exclusion of evidence was rendered immaterial by the subsequent admission of the same proof.

7. EVIDENCE §142(1)—VALUE OF PROPERTY—SELLING PRICE OF OTHER PROPERTY.

In a proceeding to assess the compensation for property taken in connection with the widening of a street, though the prices realized from voluntary sales of similar land in the vicinity might be proved, evidence as to the price paid by the city for neighboring property bought for the purposes of the street improvement was not admissible, as such a sale is not voluntary, but is in the nature of a compromise.

8. JURY §34(2)—JURY TRIAL—DENIAL OR INFRINGEMENT OF RIGHT.

Baltimore City Charter, § 175c, as added by *Acts 1914, c. 125*, providing that, on appeal from the action of the commissioners for opening streets in awarding damages or assessing benefits in the matter of opening or widening any public highway, the return of the commissioners shall be prima facie evidence of the correctness of the damages awarded and the burden of proof shall be on the party attacking such award, does not prejudice a property owner's right to a jury trial given him by *Const. art. 3, § 40*, requiring the payment of just compensation to be agreed upon by the parties or awarded by a jury, especially in view of section 179 of the charter (*Code Pub. Loc. Laws*, art. 4, as amended by *Acts 1912, c. 32*), specifically securing the right to a jury trial.

Appeal from *Baltimore City Court*; Chas. W. Heulsler, Judge.

"To be officially reported."

Proceedings by the City of Baltimore and others to acquire land of Charles J. Bonaparte for the widening of a street. From an inadequate award the property owner appeals. Reversed and remanded.

Argued before **BOYD, C. J.**, and **BRISCOE, BURKE, THOMAS, PATTISON, JURNER, STOCKBRIDGE**, and **CONSTABLE, JR.**

Paul M. Burnett and **Charles J. Bonaparte**, both of Baltimore, for appellant. **George Arnold Frick**, of Baltimore (**S. S. Field**, of Baltimore, on the brief), for appellees.

JURNER, J. The property of the appellant, known as No. 407 St. Paul street in the city of Baltimore, is required by the city for the widening of the street in pursuance of ordinances providing for that improvement. In the proceeding for the condemnation of the property, which consists of a lot of ground,

owned by the appellant in fee simple and improved with a building used for residence purposes, the commissioners for opening streets awarded to the owner, as full compensation for the property taken, the sum of \$5,335.85. On appeal by the owner to the Baltimore city court, the award was increased to \$6,700 by the verdict of a jury. Believing this revised valuation to be still inadequate, the owner has brought the case to this court for the review of certain rulings to which he excepted on the theory that they had the effect of unduly restricting the award.

It was proved that the appellant has expended in the purchase and permanent improvement of the property at least the sum of \$11,000. The building has been rented as a whole to successive tenants. Extensive alterations and additions made by the appellant have adapted the building to use as an apartment house, though it has not actually been devoted to that purpose. The real estate experts who testified in the case based their valuations partly upon the capitalization of the rent currently received from the property. The estimates of the city's experts varied from \$5,990 to \$6,075, while the experts produced by the appellant valued the property at amounts ranging from \$7,500 to \$8,600. One of the latter testified that the building was well adapted to apartment house uses, and that, if thus employed, it would yield rentals indicating a property value of \$9,200. In view of this testimony the appellant, by his second prayer, requested an instruction to the jury that:

"In estimating the value of the property and the amount to be awarded to the appellant as its owner, they must consider all the uses to which the said property could have been applied had no such public improvement as that for which it is taken been determined upon by the mayor and city council, and must award the appellant what they believe would have been its value under the circumstances mentioned, if employed for the most profitable use for which they may find it could have been applied, whether it has in fact been applied to such use or not."

This prayer was refused.

[1-3] The measure of the compensation to which the appellant is entitled in this proceeding is the actual market value of the property condemned. Its market value depends upon the uses for which it is available, and any special utility which may tend to enhance its value in the market is a proper element to be considered. The availability of the property for a particular use, contributing to its market value, is not to be ignored merely because it has not in fact been applied to that use. The valuation for condemnation purposes must disregard the effect of the public project, for which the property is acquired, but must take into consideration all the uses to which it is capable of being applied at the time of the appropriation and which affect its marketability. Consolidated G., E. L. & P. Co. v. Baltimore, 130 Md. 20, 99 Atl. 968; Baltimore v. Carroll, 128 Md. 73, 96 Atl. 1076; Brack v. Baltimore, 125 Md.

378, 93 Atl. 994, Ann. Cas. 1916E, 880; Id., 128 Md. 437, 97 Atl. 548; Baltimore v. Garrett, 120 Md. 613, 87 Atl. 1057; Callaway v. Hubner, 99 Md. 529, 58 Atl. 362; Baltimore v. Smith, 80 Md. 458, 31 Atl. 423; Patterson v. Baltimore, 101 Atl. 589.

[4] Applying the principles just stated to the present case, we think the prayer we have quoted should have been granted. There is uncontradicted evidence that the appellant's building, as now constructed, is specially adapted for use as an apartment house, and that its availability for such use adds to the present rental and market value of the property. This element of value arises from the existing plan and structure of the building. It is not contingent upon any material change of conditions with respect to the land or the improvements. It is based upon a practical and present utility which, as the evidence tends to show, directly and immediately affects the value of the property in the open market. The fact that the building has been devoted to a less profitable use than the one for which it is shown to be specially designed does not preclude the owner from being paid for his property upon the basis of its actual market value for the most profitable use to which it is now adapted. This was the theory of the proposed instruction, and we think the appellant was entitled to have it distinctly stated to the jury. It was not so presented by any of the granted prayers.

[6] There were eight prayers offered on behalf of the appellant, three of which were refused, including the one to which we have referred. We find no error in the rulings on the other rejected prayers. The instructions proposed by the city were properly granted. The first was the only one subjected to criticism as to its form. It instructed the jury that the market value of the property condemned should be estimated as of the time of this proceeding, and without reference to any change in the value of the property which may have been occasioned by the fact that St. Paul street is to be widened and opened, and that—

"in other words, the jury are to consider its value as though no such opening were to take place, and the surroundings immediately preceding such opening were to continue indefinitely."

The latter part of the prayer, which we have quoted, is objected to on the theory that the word "surroundings," as therein employed, had reference to the existing utilization of the building, and that the prayer had the effect of instructing the jury that no other use of which it was susceptible could enter into their appraisal. This is not our understanding of the purpose and meaning of the prayer. Its object was to emphasize the rule that the jury were not to regard any change of value resulting from the street improvement for which the property is being condemned, but that they were to estimate the value as though the street were not to be

widened and its pre-existing situation in reference to the property were to continue. As thus understood, the prayer is not objectionable.

[6, 7] Two exceptions were reserved to the exclusion of evidence offered by the appellant. One was rendered immaterial by the admission of the same proof at a later stage of the case. The other exception was taken to the refusal of the court to allow the appellant to prove the price at which a neighboring property had been bought by the city for the purposes of the street improvement for which the appellant's property is being acquired. This proffer was made as part of the cross-examination of a witness for the city who had testified to a former sale of the other property mentioned as reflecting upon the value of the property involved in this proceeding. Objection was made to the proposed inquiry on the ground that the sale to which it referred was not voluntary, but was made with a view to obviating the impending condemnation, and was therefore not a reliable indication of the real value of the property. It is a settled rule that in an investigation as to the market value of land, the prices realized from voluntary sales of similar land in the vicinity may be proven either on direct or cross examination of witnesses conversant with the facts. *Patterson v. Baltimore*, 127 Md. 241, 96 Atl. 458; *Baltimore v. Smith*, 80 Md. 473, 31 Atl. 423. The sale to which the exception refers was evidently not a voluntary sale within the meaning of the rule just stated. The reasons for the exclusion of such a sale, as evidence of value, are well stated in a discussion of the question in *Lewis on Eminent Domain* (2d Ed.) § 447, as follows:

"What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property."

The view that such sales are not competent evidence of value is well supported by adjudications. *Cobb v. Boston*, 112 Mass. 181; *Providence, etc., R. Co. v. Worcester*, 155 Mass. 40, 29 N. E. 56; *Peoria Gas Light Co. v. Peoria Term. Ry. Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Chicago & Alton R. R. Co. v. Scott*, 225 Ill. 352, 80 N. E. 404; *Howard v. Providence*, 6 R. I. 516.

[8] The city's third prayer refers to the provision of section 175C of the city charter, as enacted by chapter 125 of the Acts of

1914, to the effect that the return of the commissioners for opening streets is prima facie evidence in the case of the correctness of the amount of damages awarded, and the burden of proof is on the party asserting that the amount should be less or more than that reported by the commissioners. It is suggested that this provision is in violation of section 40, art. 3, of the Constitution of the state, which requires the payment of "just compensation" in such cases "to be agreed upon by the parties, or awarded by a jury." The appellant's right to a jury trial, upon the question as to the compensation to be awarded him for the property condemned, is specifically secured by section 179 of the city charter (Code Pub. Loc. Laws, art. 4, as amended by Acts 1912, c. 32), and in our judgment that right is not prejudiced by the section first cited. The purpose of section 175C is simply to attach the presumption of correctness to the report of the commissioners, as against an appeal by either the city or the property owner. This regulation is entirely consistent with the right afforded the owner to prove, and with the duty imposed upon the jury to determine, the true amount of the just compensation to be awarded.

The rulings are all approved except as to the refusal of the appellant's second prayer.

Ruling reversed, with costs, and case remanded for a new trial.

(21 Md. 17)

BAER v. KAHN et al. (No. 24.)

(Court of Appeals of Maryland. June 27, 1917.)

1. TRUSTS §177—ASSUMPTION OF JURISDICTION BY COURT—POWERS OF TRUSTEE.

Whatever the powers of a trustee may be, under the will, after the court has assumed jurisdiction of the trust, the trustee's powers are so far changed that the sanction of the court must be secured for all acts.

2. TRUSTS §177—ASSUMPTION OF JURISDICTION BY COURT.

Where the court not only assumed jurisdiction of the trust, but directed the trustee to report annually the securities in which the trust estate was invested for approval, the discretionary power given the trustee to invest in such securities as he saw fit was abrogated.

3. TRUSTS §177—DISCRETIONARY POWERS—INTERFERENCE BY COURT.

Where the discretionary power conferred upon a trustee is honestly and reasonably exercised, a court of equity has no right to interfere.

4. TRUSTS §177—ABUSE OF DISCRETION BY TRUSTEE—EVIDENCE—SUFFICIENCY.

The alleged refusal of a trustee to disclose to the beneficiary the securities in which the estate was invested failed to disclose such want of good faith, or arbitrary exercise of discretionary powers given trustee under the will, as would justify the court in assuming supervisory jurisdiction, where the record disclosed that the estate was invested in securities which received the approval of the court.

5. TRUSTS §217(1)—GIVING INFORMATION TO BENEFICIARY—DUTY OF TRUSTEE.

The request of the beneficiary that he be informed of the security in which the estate was

invested was reasonable, and the information should have been given, if at no other time, when the trustee accounted for and paid over to the beneficiary the interest, profits, and income from the trust estate.

6. TRUSTS §177—ABUSE OF DISCRETION BY TRUSTEE—EVIDENCE—SUFFICIENCY.

If information as to securities in which the estate is invested be necessary to ascertain whether the trustee is executing the trust properly, a court of equity should, upon application, order the information to be given; but until this is done, and it is found that the trustee is not administering the trust in good faith, or is abusing the discretionary power granted him under the will, the court should not, against his wishes, assume supervisory jurisdiction of the trustee's discretionary powers.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Bill by Lena Kahn and another against Lewis Baer, trustee. From an order of the court, assuming jurisdiction of the trust estate, and from an order directing the trustee to pay solicitor's fees, the trustee appeals. Orders reversed, and bill dismissed, with costs to appellant.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Chester F. Morrow and Alfred S. Niles, both of Baltimore (Carlyle Barton, of Baltimore, on the brief), for appellant. Allan H. Fisher, of Baltimore (Samuel J. Fisher and Fisher & Fisher, all of Baltimore, on the brief), for appellees.

PATTISON, J. The appeal in this case is from two orders of the circuit court No. 2 of Baltimore City. By the first of these orders the court assumed jurisdiction of the trust estate of Lena Kahn. The second directed the trustee to pay to her solicitor for his services the sum of \$100, \$75 of it to be paid out of the corpus of the estate, and \$25 out of the income. The facts alleged in the bill filed by the appellees are substantially as follows:

Lewis, Moses, and Solomon Baer for a number of years successfully conducted the hide, fur, and wool business in the city of Baltimore under the firm name of Lewis Baer & Co. In 1905 the firm purchased about \$9,000 of the capital stock of B. Kahn & Bros. Company, a corporation of which Benjamin Kahn, husband of Lena Kahn, was manager. This corporation was not prosperous, and as a result of said investment Lewis Baer & Co. lost about \$3,000. This loss, it is alleged, produced an unfriendly feeling on the part of Lewis Baer for both his sister and her husband, Benjamin Kahn, in consequence of which, he wrongfully contended that the said \$9,000, although in the nature of an investment, was in fact a loan to his sister and her husband, and he unreasonably demanded and received from them their note for the payment of said sum of \$3,000, the amount so lost

by the firm. Solomon Baer died in 1913. In his will be bequeathed certain sums of money in trust to Lewis and Rebecca Baer, for the benefit of Lena Kahn and her minor children. A petition was filed by those named as trustees, asking to be relieved of the administration of the trust; but thereafter Lewis Baer consented to serve, and Samuel J. Fisher, the appellees' solicitor in this case, was appointed to serve with him as cotrustee. Lewis Baer afterward withdrew as trustee, and Fisher thereafter acted as sole trustee. In March, 1915, Moses Baer died, and by his will, dated May 27, 1914, he bequeathed \$2,000 to Arthur Kahn, \$2,000 to Lewis Kahn, and \$8,000 to Rosanna Kahn, children of Lena Kahn, and \$24,000 to Lewis Baer, in trust for Lena Kahn. The provision creating said trust is found in the fourth item of his will, which is as follows:

"I give and bequeath unto my brother, Lewis Baer, the sum of twenty-four thousand dollars (\$24,000.00) in trust and confidence, to hold the same, *make such investments or reinvestments thereof as he, in his discretion, may see fit*, defray all necessary expenses thereon, and pay the net income arising therefrom, quarterly, unto my sister, Lena Kahn, for and during the term of her natural life. * * * Upon the death of my said sister, Lena Kahn, this trust shall cease, and said property and estate held in trust at the time of her death under this paragraph of my last will and testament, shall then vest absolutely, free and clear of all trusts, in her children then living, and the then living descendants of any deceased child of my said sister, Lena Kahn, per stirpes but not per capita share and share alike, absolutely."

In the further disposition of his property, one-third of his estate was devised to his wife, Mamye Baer, and after making smaller bequests to another sister and several nieces and a nephew he gave the residue of his estate to his brother Lewis, absolutely. In the seventh clause of his will is found the following provisions:

"I empower my said trustee * * * to invest all moneys or funds held in trust under this, my last will and testament, *in such securities as he * * * may see fit, and to change the investment thereof, when, as often and in such manner as my said trustee * * * may deem advisable*. I also authorize and empower my said trustee * * * at any time, during the existence of the trust set forth in this, my last will and testament, to sell, assign and convey any of the trust property, original or substituted held under this, my last will and testament, for the purpose of investment, reinvestment, distribution, division, or any other purpose whatsoever, and to execute, acknowledge and deliver any deeds or instruments of writing that may be necessary to carry these powers into effect, and no one dealing with my said trustee or any successor, appointed by a court of competent jurisdiction, shall be required to see to the application of any purchase money."

Several days after the death of Moses Baer his will was read, and immediately thereafter, as the bill alleges, Lewis Baer "burst into tears," and told his sister Lena Kahn "that the sudden death of his two brothers within so short a time necessitated

the withdrawal of an unusually large amount of cash from the firm of Lewis Baer & Co., which he feared would cause financial disaster to him," and "that if he had the amount which he had lost in the B. Kahn Bros. Company that it would to some extent help him out of his difficulty." It was then that Lewis Baer informed his sister that, in addition to the bequest made to her in his will, Moses Baer had a policy of insurance on his life for the sum of \$5,000, which upon his death was payable to her and her daughter, Rosanna, in equal shares, "and begged her to assign that to him in part payment of the alleged indebtedness." She finally agreed, over the protest of her husband, to pay \$1,500 out of the proceeds of the policy upon the note previously given by her and her husband. It was then charged that, notwithstanding the alleged need of money to save the firm from financial difficulties, Lewis Baer shortly thereafter purchased an automobile for his own pleasure, for which he paid about \$1,400. The further charge was made against Lewis Baer that, in order to increase the residue of the estate that was devised to him, he delayed stating his final account as executor, which resulted in financial loss and injury to Lena Kahn. The bill then alleges that on April 18, 1916, she requested her attorney, Mr. Fisher, to write Judge Niles, attorney for the defendant, for information regarding the manner in which the corpus of her trust estate would be invested, suggesting that as much as possible of it be invested in ground rents, yielding a net income of from 5 to 3 per cent., and that the estate be administered under the supervision, direction, and control of a court of equity. Mr. Fisher wrote Judge Niles, as requested, and received in response thereto two letters. In the first Judge Niles stated "that his letter had been referred to Mr. Baer"; and in the second "that he did not represent Mr. Baer in the matter of the trust estate of Lena Kahn, and suggested that Mr. Fisher write Mr. Baer direct," which he did. "Several days thereafter, Mr. Baer called to see Mr. Fisher, and informed him that he had procured a safe deposit box exclusively for the securities of this trust estate; but he refused to divulge the securities in which the corpus of the estate had been invested, and declined to ask one of the equity courts of the city to assume jurisdiction of the trust." On July 5, 1916, Mrs. Kahn received from Lewis Baer, as trustee, his check for the amount then due and owing to her as income from the trust estate, and accompanying said check was a statement showing how a part of said funds was at that time invested. Thereafter, on the same day, Mr. Fisher, at the request of his client, again wrote the trustee, Mr. Baer, asking how the remainder of the trust fund had been invested, and asking him to petition to a court of equity to assume jurisdiction of said trust,

to which letter no answer was received, either by her or her attorney. The bill concludes with a prayer, asking the court to assume jurisdiction of the trust, and that the trustee be directed to administer said trust under the supervision, direction, and control of the equity court.

Lewis Baer admitted many of the allegations of the bill, but denied that he had lost his affection for his sister or that he had ever treated her with rudeness or incivility, or had by undue pressure induced her to sign the note alluded to, or to make payments thereon, or that he had ever refused to give her or her counsel any information "that she was entitled to receive," or that he had ever made untruthful statements to her or to her counsel, or that in his actions as trustee he had shown or that he would show any spirit of vindictiveness. The answer then avers that he is not impressed with the safety or desirability of such ground rents as can now be had which will yield 5 or 6 per cent. net upon the money invested. He then, in his answer, gives a full statement showing how and in what securities the entire trust estate was at such time invested. The answer further avers his unwillingness to retire voluntarily from said trusteeship, as it was his brother's will that he should serve as trustee, and that in his opinion the provisions found in the will of his brother were made for the express purpose of confiding the management of the estate and the investment of the funds solely to his judgment, and, because of the wishes of his brother, expressed not only in the will, but to him personally, and because of the expense that would necessarily be involved if the estate was administered under the supervision of the court, he "does not feel justified in giving his assent to the administration of the trust under the direction of this court."

To the answer a general replication was filed, and thereafter an order of the court was passed, at the instance of the plaintiff, granting leave to take testimony orally in open court. Upon the call of the case, on the day set for hearing, counsel for the plaintiff read the bill filed; counsel for the defendant thereupon read the answer, and, having finished reading the answer, said to the court that it might serve to explain the case and somewhat clarify the issues if he made a brief statement. His statement, as requested, was then made, and it, with what followed at such time, was, at the request of the counsel in the case, certified to by the court. This certificate, as found in the record, is as follows:

"Counsel for the defendant thereupon stated that many of the statements contained in the bill of complaint were, in his opinion, irrelevant, but that it was true that the three brothers named in said bill, viz., Lewis Baer, Moses Baer, and Solomon Baer, had engaged in business together; that Solomon Baer died about the year 1913, leaving Lewis Baer, one of his trustees; and that Lewis Baer afterwards resigned

from said trust. The counsel further stated that the defendant expected to prove that Mr. Moses Baer, at the time when Mr. Lewis Baer resigned the trusteeship as aforesaid, said to Lewis Baer that he hoped that Lewis would not resign from the trust which would be imposed upon him by the will of said Moses. The counsel further stated that he expected to prove that Moses Baer had told Lewis Baer that he did not wish his estate to be administered in court, but desired that the expense of a court administration should be saved." After the counsel for the defendant had made these statements, the court stated that "he was not impressed by anything contained in them as being sufficient to prevent the court from assuming jurisdiction." The securities belonging to the said trust estate as set out in the answer were shown to the court, and "certain authorities were then read to the court, after which the court (while approving of the investments made by the trustee) stated that he would sign an order assuming jurisdiction of the trust. The court further stated that all trustees, where it can be reasonably done, should be required to administer their trusts under the jurisdiction of the court, and to report under the thirty-first equity rule. No evidence was taken."

Thereafter, on February 2, 1917, the court passed an order assuming jurisdiction of the trust estate, and requiring the trustee to report to it, in accordance with its thirty-first equity rule; and on the 5th day of the same month the court passed its second order, ordering and directing Lewis Baer to pay to Mr. Fisher, counsel for the appellees, the sum of \$100 for his services, and that \$75 of said fee should be paid out of the corpus of said estate and \$25 out of the income. It was from the action of the court in granting these orders that this appeal is taken.

[1] We will first consider the action of the court in passing the order of February 2d. Under it the court assumed jurisdiction of the trust, and required the trustee to report to it under its thirty-first rule. In *Abell v. Abell*, 75 Md. 64, 23 Atl. 74, this court, in speaking of the powers of the trustees, after the court has assumed jurisdiction of the trust, said:

"Whatever their powers may be under the will, if the trusts created thereby are before such a court, and a decree has been made, the powers of the trustees are thenceforth so far changed that they must have the sanction of the court for all their acts." 2 *Perry on Trusts*, § 474, and authorities there cited."

In the later case of *Gottschalk v. Mercantile Trust Co.*, 102 Md. 526, 62 Atl. 812, this court said:

"If trustees undertake to administer their trust without seeking the aid and protection of any court, they may exercise the discretion, and execute the powers conferred on them by the instrument creating the trust, and equity will not generally interfere with them, so long as they act in good faith and with fair discretion. But if, upon their application or that of their cestui que trust, with their consent, a court of equity by an appropriate decree assumes jurisdiction of the trusts, and directs them to be executed under its direction and supervision, the authorities agree that the situation of the trustees is thereby so far changed that they must thereafter secure the sanction or ratification of the supervising court for the successive steps of their administration of the trust. *Perry on*

Trusts, 474; *Lewin on Trusts* (11th Ed.) p. 753."

[2] The court in this case not only assumed a general jurisdiction of the trust estate, but it directed the trustee to report to it annually, under its thirty-first rule. By this rule the defendant, as trustee, was required to report specifically the securities in which the trust estate was invested, that the same might receive the sanction and approval of the court. The court by said order abridged the discretionary powers of the trustee, conferred upon him by the will creating the trust, and consequently interfered with him in the exercise of such powers. As to the right of courts to interfere with the exercise of discretionary powers vested in trustees, in the administration of trust estates, it is said, in 39 *Cyc.* 316:

"The court will neither enlarge nor restrict the powers given the trustee by the instrument creating the trust. * * * nor, except where an intention of the settlor that the execution of the trust shall be under the supervisory control of the court is manifest in the instrument creating the trust, will it, of its own motion or at the instance of interested parties, interfere with the performance of the duties of the trustee, and exercise the discretionary powers conferred upon him, unless there is shown bad faith on his part, or a gross and arbitrary use of discretion, or a complete refusal to act in the premises."

The same principle is laid down in *Shelton v. King*, 229 U. S. 94, 33 Sup. Ct. 687, 57 L. Ed. 1086, where it is said:

"It is a settled principle that trustees having the power to exercise discretion will not be interfered with, so long as they are acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee."

See, also, the cases of *Sharon v. Simons*, 30 Vt. 458; *Larkin v. Wikoff*, 75 N. J. Eq. 480, 72 Atl. 98, 79 Atl. 365; *Browning v. Stiles* (N. J. Ch.) 65 Atl. 457; *Dillard v. Dillard's Ex'rs* (Va.) 21 S. E. 669; *In re Naglee's Estate*, 52 Pa. 154, and other cases in appellant's brief.

[3] The law as stated in these cases is also the law of this state. In *Pole v. Pietsch & Thiede*, 61 Md. 572, this court said:

"In the exercise of the discretionary power thus conferred on the trustees, a court of equity has no right to interfere, provided it is honestly and reasonably exercised. They must, however, act in good faith, having a proper regard to the wishes of the testator, and the nature and character of the trust imposed in them." *Clarke v. Parker*, 19 Ves. 1; *French v. Davidson*, 3 Madd. 396; *Kemp v. Kemp*, 5 Ves. 849.

And it is said in the later case of *Levi v. Bergman*, 94 Md. 209, 50 Atl. 516, that:

"It must be conceded that, if the trustees act in the attempted exercise of their discretion within the limitations imposed upon them by the will itself, a court of equity cannot interfere, provided such discretion is reasonably and honestly exercised."

And we said in *Gottschalk v. Mercantile Trust Co.*, supra:

"Equity will not generally interfere with them [trustees] so long as they act in good faith and with fair discretion."

The hearing in this case was upon bill, answer, and replication, without proof, and the question, therefore, is whether the court, upon the application of the principles here stated, was authorized to interfere with the trustee in the exercise of the discretion conferred upon him by the will of his brother. The bill alleges certain acts of the trustee, that were in no way connected with the execution of the trust, as tending to show a hostile feeling towards his sister, Mrs. Kahn; but he in his answer denies, in substance, any such feeling, and alleges that he still has a fraternal affection for her, and, although the bill alleges that she suffered financial loss and injury because of his delay in stating his final account as executor of his said deceased brother, it is conceded that in doing so he acted within the law, and as he had a right to do.

[4] Under the will of Moses Baer, the defendant, as trustee, is given broad discretionary powers in the management of the trust estate. He is given the power to invest all money or funds of the trust estate in such securities as he may see fit, and to change the investment when, as often, and in such manner * * * as he may deem advisable, and yet, notwithstanding these powers so vested in him, we find his sister, the plaintiff, a short while after the death of the testator, suggesting, through her counsel, not only the securities in which he should invest the trust estate, but that he apply to a court of equity to assume jurisdiction of the administration of the trust, whereby the sole discretionary power would no longer be lodged in him. It is disclosed by the answer that he, in the exercise of his judgment, did not deem it advisable to invest the estate in the securities suggested by the cestui que trust; and he refused to apply, as requested, to the equity court to assume jurisdiction of the trust. It is also alleged that he thereafter refused to disclose to her, or to her counsel, the securities in which the estate was at such time invested. In answer to this he states that he did not refuse "to give her or her counsel any information that she was entitled to receive." It may be said of this answer that it is not a sufficient or direct answer to the charges against him that he had refused to give to the plaintiff the information sought by her. But, nevertheless, it is disclosed by the record that at such time the estate was invested by him in securities that in these proceedings received the sanction and approval of the court. The alleged refusal of the defendant to inform the plaintiff as to the securities in which the estate was invested is practically the only act of the defendant to be considered by us in determining whether he has, as alleged, acted in bad faith and has abused the discretionary power lodged in him under the

will, justifying a court of equity to assume jurisdiction of the trust, and direct the trustee to report to it under its thirty-first equity rule; and it, we think, fails to disclose such want of good faith or arbitrary action on the part of the trustee in the exercise of his discretionary powers as to warrant such action of the court.

[5, 6] We may add, however, that the request of a cestui que trust that he be informed by the trustee of the securities in which the estate is invested is a reasonable one, and one that should be granted, and the information given, if at no other time, when the trustee accounts for and pays over to the cestui que trust the interest, profits and incomes from the trust estate, to which he may be entitled; and if such information be necessary in order to ascertain whether the trustee is executing the trust fairly and without abuse of the discretionary power reposed in him, a court of equity, upon being applied to, should order such information to be given; but until that is done, and it is found that the trustee is not administering the trust in good faith, or is abusing the discretionary power granted him under the will, the court should not, against his wishes, assume supervisory jurisdiction of the trustee's discretionary powers.

The other order, as we have said, directed the trustee to pay to Samuel J. Fisher the sum of \$100 for his services as counsel for the plaintiff in these proceedings, \$75 of which was ordered to be paid out of the corpus of the estate, and the balance, \$25, out of the income of said estate. As we hold in this case that the court was not authorized to assume supervisory jurisdiction of the administration of the trust estate upon the facts presented by the bill, answer, and replication, the order directing the plaintiff's counsel to be paid out of the trust estate was erroneously passed.

There is a motion in this case to dismiss the appeal upon several grounds therein stated; but none of them, in our opinion, justify a dismissal of the appeal. It follows, therefore, from what we have said, that the two orders appealed from will be reversed.

Orders reversed, and bill dismissed, with costs to the appellant.

(121 Md. 96)

POSTAL TELEGRAPH CABLE CO. v. HARTFORD COUNTY COM'RS. (No. 28.)

(Court of Appeals of Maryland. June 27, 1917.)

1. TAXATION ~~6~~493(8)—APPEALS—REVIEW.

The Court of Appeals, on appeal in tax proceedings, is confined to an examination of the legal principles upon which the assessing body acted, and in the absence of errors is without power to disturb the assessment or revise the valuation.

2. TAXATION ~~491~~—APPEALS TO STATE TAX COMMISSION — AUTHORITY TO INCREASE ASSESSMENT.

The state tax commission, under Acts 1914, c. 841, on appeal from an order of the county commissioners denying abatement has jurisdiction to increase the assessment.

3. TAXATION ~~493~~(7)—ABATEMENT PROCEEDINGS—APPEAL—RECORD.

The state tax commission is under no obligation to preserve the evidence taken at a hearing on appeal from the action of the county commissioners in abatement proceedings, and appellant, failing to take steps to have the evidence preserved, cannot predicate error upon the absence of such evidence.

4. TAXATION ~~47~~(7)—CORPORATIONS—GROSS EARNINGS—DOUBLE TAXATION.

The fact that a telegraph company pays a gross earnings tax under Code Pub. Civ. Laws, art. 81, § 167, does not make an assessment on its easements in public highways void as double taxation, prohibited by Bill of Rights, since such gross earnings tax is not a tax imposed upon the property of a corporation.

5. TAXATION ~~396~~—CORPORATIONS—GROSS EARNINGS—DOUBLE TAXATION.

The validity of an assessment of the easement of a telegraph company in public highways is not affected by the validity or invalidity of any gross earnings tax which it may be required to pay.

Appeal from Circuit Court, Harford County; Wm. H. Harlan, Judge.

"To be officially reported."

Proceedings by the Postal Telegraph Cable Company for the reduction of a tax assessment. The application for abatement was refused by the county commissioners, and on appeal to the State Tax Commission the assessment was increased, from which order an appeal was taken to the circuit court. From an order dismissing the appeal, this appeal is taken. Order affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

H. Ralph Cover, of Baltimore (H. Webster Smith, of Baltimore, on the brief), for appellant. Walter W. Preston, of Bel Air, for appellees.

BURKE, J. The Postal Telegraph Cable Company, the appellant, is a corporation organized under the laws of Delaware. It accepted the advantages and obligations of the act of Congress approved July 24, 1866 (14 Stat. 221, c. 230 [U. S. Comp. St. 1916, §§ 10072-10077]), entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." It has been held that, whilst the companies accepting the provisions of that act may use the post roads of the country, the act was not intended to interfere with state sovereignty under the Constitution. In *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708, the court said that the grant under this act—

"evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the

dominion of the national government to the extent of the national powers, and are therefore subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

The appellant in this case owned certain property located in Harford county, Md. This property was assessed for purposes of taxation for the year 1916 to the amount of \$20,690. The property consisted of poles, erected in the public highways of the county, and copper and iron wires strung upon the poles. It applied to the county commissioners for Harford county for an abatement of the assessment, which the commissioners refused to grant. It thereupon appealed to the state tax commission to reduce the assessment, and a hearing of the subject-matter of the appeal was had before that body, which on October 20, 1916, reversed the assessment of the property of the appellant located in Harford county, and assessed the same as follows for the year 1916, and ordered and directed the county commissioners of Harford county to enter on the assessment books of Harford county for the purpose of taxation for the year 1916:

First District.

Telegraph line commencing at Little Falls, Baltimore county line, to Buck, to Cresswell, to Third district line, 9 miles 30 feet pole line, 40 poles to the mile, and cross-arm and easements. 360 poles at \$7.80..... \$2,808 00
9 miles of copper wire at \$20.00..... 180 00
99 miles of iron wire at \$10.00..... 990 00

\$3,978 00

Third District.

Telegraph line from First district line at Cresswell via Schucks Corner to Priestford Bridge at Deercreek, Fifth district line, 10 miles 30 feet pole line, 40 poles to the mile, and cross-arms and easements.

400 poles at \$7.80..... \$3,120 00
10 miles of copper wire at \$20..... 200 00
120 miles of iron wire at \$10..... 1,200 00

\$4,520 00

Fourth District.

Sixteen miles 30 feet pole line, 40 poles to the mile, and cross-arms and easements.

640 poles at \$7.80..... \$4,992 00
256 miles of copper wire at \$20..... 5,120 00
82 miles of iron wire at \$10..... 820 00

\$10,432 00

Fifth District.

Two lines—one line from Pennsylvania line near Constitution to Fourth district line. No. 2 line from Priestford Bridge on Deercreek via Darlington and Berkley to Susquehanna river at Conowingo, 15 miles 30 feet pole line, 40 poles to the mile, and cross-arms and easements.

600 poles at \$7.80..... \$4,680 00
75 miles of copper wire at \$20..... 1,500 00
118 miles of iron wire at \$10..... 1,180 00

\$7,360 00

The total valuation placed upon the property by the state tax commission was \$26,290. It therefore appears from this order of the state tax commission that the assessment was increased \$5,600. The appellant appealed from this order to the circuit court for Harford county, and that court, on the 27th of December, 1916, dismissed the appeal, with costs. From that order the appeal in this case was taken.

The act of 1914 (chapter 841), being the act by which the state tax commission was created, allows an "appeal to court on [all] questions of law only from decisions of the state tax commission to the court of that county, where the property is situated, if real estate or tangible personal property," etc., and section 244 provides that all "appeals from any action of the state tax commission to court, as authorized by section 238 hereof, shall be taken within thirty days of such action by petition setting forth the question or questions of law which it is desired by the appellant to review." All appeals in Baltimore City must be to the Baltimore city court, and a further right of appeal to this court is given from any decision of the Baltimore city court or of the circuit courts of the several counties. Such appeals are required to be taken within ten days from the final judgment or determination of the lower court.

In its petition for appeal, the appellant, as required by the act, set out as follows the questions of law which it desired the circuit court for Harford county to review:

First. That the said state tax commission of Maryland was without jurisdiction to increase the assessment levied by the county commissioners of Harford county in the proceedings which were then pending before it.

Second. The admissibility in evidence, as proof of the value of your petitioner's easements, of testimony that the Bankers' & Traders' Telegraph Company had paid \$3 per pole for their right of way 20 years ago.

Third. The arbitrary method pursued by the state tax commission of Maryland in valuing the alleged easements of your petitioner at \$6,000; no legally sufficient evidence having been produced at said hearing that your petitioner was the owner of easements in Harford county, and no legally sufficient evidence having been produced at said hearing as to the value of such alleged easements.

Fourth. The manner and form of said order or action of the state tax commission of Maryland, dated October 20, 1916, reversing the assessments of the county commissioners of Harford county, and reassessing said property at an increased valuation.

Fifth. The method of computing the deterioration in value of the property involved in said appeal.

Sixth. The valuation of the easements of your petitioner for purposes of taxation, which said easements have been and are now taxed under the provisions of article 81, sections 167 to 186, inclusive, of the Annotated Code of the Public General Laws of Maryland (Bagby).

Seventh. That the state tax commission of Maryland is in error in this case in its construction, interpretation, and application of the laws of Maryland relating to the assessment and taxation of the easements of your petitioner; and contrary to said law said commission ruled

that the law permitted, directed, and authorized the consideration and valuation of the easements of your petitioner in arriving at the proper assessment of said property for purpose of state and county taxation; and

Eighth. The method of conserving the record of the proceedings at the hearing of this appeal before the state tax commission of Maryland, and such other questions of law involved in this appeal as may be raised at the hearing thereof.

[1] It was held in *Mayor v. Bonaparte*, 93 Md. 159, 48 Atl. 735, that this court cannot be required or allowed to sit as a board of review to revise the amount of the valuation placed by tax officials upon property for purposes of taxation. *Consolidated Gas Co. v. Baltimore City*, 101 Md. 542, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584. It is confined to an examination of the legal principles upon which the assessing body acted, and if there found no error of law applied by it to the injury of the complaining taxpayer this court is without power to disturb the assessment. *Consolidated Gas Co. v. Baltimore City*, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553. In this case no testimony was taken in the lower court, and the evidence taken before the state tax commission was not preserved, and therefore we have very little information as to what legal questions were raised and decided by that board. As stated in the opinion of Judge Harlan, who decided the case in the lower court:

"The record sent up contained the docket entries, the petition of the taxpayer upon which the matter was brought upon appeal from the county commissioners, together with certain exhibits, the answer and motion to dismiss of the county commissioners, together with a copy of the assessment as it stood on the county's books, the order of the commission complained of here, and the appellant's petition to have the record sent to this court."

[2] As to the first and fourth reasons assigned in the petition for appeal, viz. that the state tax commission was without jurisdiction to increase the assessment, little need be said. This was not pressed, either in the court below or in this court, and in view of the broad powers as to assessment conferred upon the state tax commission by the act of 1914 (chapter 841), as construed by this court in *Leser et al. v. Lowenstein*, 129 Md. 244, 98 Atl. 712, these objections cannot be sustained.

There is no evidence to support the second, third, and fifth reasons assigned.

[3] The ground of complaint in the eighth paragraph of the petition relates merely to alleged irregularities or omissions of the state tax commission in methods of procedure, etc. None of the things complained of affected the jurisdiction of the commission to hear and decide the case, and there was no obligation upon the commission to have taken and preserved the evidence taken at the hearing. If the appellant thought this desirable, it was at liberty to have had a stenographic copy of the evidence taken. It was certainly not the duty of the state tax com-

mission, any more than it is the duty of a court of record, to cause to be prepared and filed as a part of its records a copy of the evidence taken upon the hearing. The act does not require this.

[4] The record shows that, in placing a valuation upon the appellant's poles and cross-arms, the state tax commission took into consideration and assessed its easements in the public highways. This action of the commission is assigned as error of law in the remaining paragraphs of the petition, viz., the sixth and seventh. The appellant is one of the class of corporations upon which a gross receipts tax is imposed by this state. It paid this tax for the year 1916, and it is argued that this tax, imposed by section 167, art. 81, of the Code, is a tax in "lieu of and in substitution for any other tax that might be levied on its intangible property, whether it be termed franchise or easement," and that the assessment of its easements in the public highways of Harford county by the state tax commission is a second assessment for purposes of taxation of the same value, and is void, because it is double taxation and prohibited by the Bill of Rights of this state. We do not agree with this contention. It would introduce a principle into the general law of taxation of this state that might, and probably would, result in serious injury to the public. It is settled in this state that gross receipts taxes imposed by the section of the Code mentioned are not taxes imposed upon the property of the corporation. *State v. Phila., Wil. & Balto. R. R. Co.*, 45 Md. 361, 24 Am. Rep. 511. These taxes have been repeatedly defined and sustained as constitutional, both by this court and the Supreme Court of the United States. *Cumb. & Pa. R. R. Co. v. State*, 92 Md. 668, 48 Atl. 503, 52 L. R. A. 764; *State v. United States Fidelity Co.*, 93 Md. 314, 48 Atl. 918; *State v. Central Trust Co.*, 106 Md. 268, 67 Atl. 267. It was held in *State v. United States Fidelity Co.*, supra, that the gross receipts tax is imposed only upon gross receipts from the business of the corporation done in this state, and not upon the gross receipts from its business done beyond this state. In *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229, as to a corporation which had accepted the provisions, as this appellant did, of the act of Congress of July 24, 1866, it was held—

"that so far as a tax was levied upon receipts properly appurtenant to interstate commerce it was void, and that so far as it was only upon commerce wholly within the state it was valid. The commerce here mentioned was telegraph business, and the receipts were receipts for telegraph messages. This case arose upon a certificate of division of the judges who presided at the trial, and in remanding the case the court said: 'We answer the question, in regard to which the judges of the circuit court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were de-

rived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce'; and, concurring with the circuit judge in his action enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the state, the decree was affirmed."

[5] But if it were held that the gross receipts tax, as applied to this corporation, were invalid, as appears to be intimated in the brief of the appellant, that would not impair the validity of the assessment of these easements, which are taxable under the law of this state. *Consolidated Gas Co. v. Balto.*, supra.

Order affirmed, with costs.

(131 Md. 10)
WILSON v. HILLIARD et al. (No. 23.)

(Court of Appeals of Maryland. June 27, 1917.)
EXECUTORS AND ADMINISTRATORS \Rightarrow 509(4)—
SETTLEMENT OF ACCOUNT—REOPENING.

Where petitioner acknowledged in writing under seal that he had received from his grandfather \$10,000, which, if not returned, should be deducted from his share in his grandfather's estate, he would not, in the absence of fraud, on proof that he did not read all of the writing, and in fact receive bonds worth only \$1,000, instead of \$10,000, be entitled to have the account of the executor, charging him with \$10,000, reopened and reinstated, and petitioner charged in the new account with the present market value of the bonds.

Appeal from the Orphans' Court, Washington County.

"To be officially reported."

Petition by L. Roy Wilson against Charles Edward Hilliard, executor and others. From an order of the orphans' court dismissing the petition, with costs to petitioner, he appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Edgar Allan Poe, of Baltimore (Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellant. Levin Stonebraker and J. A. Mason, both of Hagerstown (A. S. Mason, of Hagerstown, on the brief), for appellees.

THOMAS, J. The appellant, on the 13th of February, 1917, filed in the orphans' court of Washington county a petition in which he alleged that he was a grandson and legatee of John L. Nicodemus, deceased; that Charles Edward Hilliard, executor of the deceased, had filed his fourth account, which the orphans' court had approved on the 6th of February, 1917, in which the petitioner was charged with the sum of \$10,000 "by virtue of" the following paper executed by him:

"I, Roy Wilson, of Baltimore, Md., hereby acknowledge that I have this day received of

my grandfather, John L. Nicodemus, the sum of ten thousand dollars, which said sum of \$10,000 I hereby promise to pay to him if at any time he should demand payment thereof, and in case no such demand be made by my said grandfather in his lifetime, I consent and agree that the said \$10,000 shall be charged against me in the distribution of his estate, and I hereby authorize and direct the person or persons legally authorized to administer the estate of my said grandfather to charge and deduct the said sum from any legacy or distributive share of said estate to which I may in any way be entitled, either as legatee or heir at law.

"Witness my hand and seal this 6th day of October, 1912.

"[Signed] L. Roy Wilson. [Seal.]

"Test: J. L. Nicodemus."

The petitioner further alleged:

"That he never received the sum of ten thousand dollars (\$10,000.00) mentioned in said paper, but that he did receive from his grandfather, at the time of the execution thereof, five (5) five per cent. (5%) O'Gara Coal Company bonds, numbered 1797, 1798, 1799, 1800, and 461, and five (5) six per cent. (6%) Mobile Terminal & Railway Company bonds, numbered 151, 152, 153, 160, and 161. That at that time the O'Gara Coal Company bonds had a market value somewhere between seventy-nine (79) and eighty-five (85), and Mobile Terminal & Railway Company bonds had a market value somewhere between ninety-six (96) and one hundred (100). At the time of the death of the said John L. Nicodemus both the O'Gara Coal Company and the Mobile Terminal & Railroad Company were in the hands of receivers, and the value of the said bonds had therefore greatly diminished; the O'Gara Coal Company bonds being worth about twenty-five (25), and the Mobile Terminal & Railway Company about thirty (30).

"(3) That during the lifetime of his grandfather he was not at liberty, under the terms of the receipt above set forth, to dispose of said bonds, because the said receipt obligated him to return the said bonds to his grandfather if at any time he should demand their return. That by the true construction of said paper, dated October 6, 1912, signed by your petitioner and delivered to his grandfather at the time of the receipt of the bonds above mentioned, the said John L. Nicodemus only intended to charge your petitioner with the receipt of said bonds, and only intended, in case he failed during his lifetime to demand of your petitioner a surrender of said bonds, that the executor of his will should only charge against and deduct from the legacies to your petitioner, under said will, the actual value of the bonds as of the time of the payment of the said legacies."

The petition then prayed that the account be "reopened and restated," and that the petitioner be charged in the new account with the present market value of the bonds. The petition was answered by the executor, and by Edwin M. Connor, one of the grandchildren and legatees of the deceased, denying the allegations of the third paragraph thereof, and the matter was set down for a hearing by the orphans' court.

At the hearing counsel for the petitioner made the following offers of proof:

"We offer to prove by Mr. Wilson (the petitioner): That in October, 1912, the time these bonds were delivered to him by his grandfather, the O'Gara bonds had a market value of about 70 to 80, and the Mobile bonds a market value from 96 to 100. That at the time of the death of Mr. Nicodemus, the testator, the O'Gara bonds had a market value of about 42, and the Mobile bonds had a possible market value of

70 to 85, although no bonds were actually sold at that time. That the present market value of the O'Gara bonds is between 20 and 30, and the present market value of the Mobile bonds about 35. That the receipt that he signed on October 6, 1912, was shown him just shortly before he started for the train. That he did not read the entire receipt, and only read down to the part where * * * he promised to pay to his grandfather if at any time he should demand payment thereof. That the first time that he ever read the receipt in its entirety was when he received a copy of it from the executor, inclosed in a letter from the executor dated May 22, 1916. That until his grandfather's will was read he had no knowledge that any legacy or devise was left to him."

"We offer to prove by Mrs. Nicodemus, widow of the testator: That she was present at the time of signing this receipt. That \$10,000 in cash was not given to Roy Wilson at that time, but that there was delivered to him five 5 per cent. bonds of the O'Gara Coal Company, Nos. 1797, 1798, 1799, 1800, and 461, and five 6 per cent. Mobile Terminal & Railway Company bonds, Nos. 151, 152, 153, 160 and 161, said bonds being of the par value of \$1,000. That a receipt was signed by the petitioner, Roy Wilson, just as he was leaving for the train on Sunday, the 6th of October, 1912, and was hurriedly read over by him. That subsequent to the delivery to Roy Wilson of the above-mentioned bonds, and prior to the death of John L. Nicodemus, the O'Gara Coal Company went into the hands of receivers, and also the Mobile Terminal & Railway Company. That Roy Wilson, shortly after the O'Gara Coal Company went into the hands of receivers, wrote to John L. Nicodemus, asking what he was to do with the O'Gara Coal Company bonds, and at the instance of John L. Nicodemus, Mrs. Nicodemus wrote to Roy Wilson, to wit, on September 24, 1913, 'Send bonds at once.'"

The orphans' court sustained objections to this evidence, and the petitioner excepted to the rulings, and, the "petitioner not desiring to offer other testimony," the orphans' court, on the 24th of February, 1917, passed the order, from which this appeal was taken, dismissing the petition and requiring the petitioner to pay the costs.

The argument of counsel for the appellant in his brief is devoted to the questions of the admissibility of the evidence offered by the petitioner and the jurisdiction of the orphans' court to construe the paper executed by him. But, even if the jurisdiction of the orphans' court be conceded, and the evidence offered be treated as admissible and allowed full effect, it is quite clear that it would not warrant a reversal of the order dismissing the petition. Assuming that the petitioner actually received five O'Gara Coal Company bonds and five Mobile Terminal & Railway Company bonds, each of the par value of \$1,000, instead of \$10,000, what would be the effect of the paper or agreement executed by him? If we write into the acknowledgment of having received \$10,000 the bonds referred to in the evidence, in the place of the \$10,000, we would still have the promise of the petitioner, under seal, in consideration of having received said bonds, to pay to his grandfather \$10,000 if at any time he demanded payment of that sum, and, in case no such demand was made, his agreement that \$10,000 should be

charged against him in the distribution of his grandfather's estate. There is no intimation here of any fraud or mistake, and the only question involved is the proper construction of the paper. The petitioner and his grandfather knew what was delivered to and received by the petitioner, and in view of that fact the only reasonable and possible construction of the paper is that they treated the bonds as equivalent to \$10,000 and agreed that they should be so regarded. To hold that the promise of the petitioner was to deliver the bonds to his grandfather if he demanded them, and that his agreement was that he was only to be charged with the value of the bonds in the distribution of his grandfather's estate, would require us to disregard the terms of the paper, which are too plain to admit of any doubt as to their meaning, and to substitute for the written promise and agreement of the petitioner another and altogether different obligation. In *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635, the court said:

"The law is well settled that contracts are to be interpreted and enforced according to the fair import of their terms, without reference to the hardships that may fall on the parties. *Wagner v. White*, 4 Har. & J. 566; *Barney v. Insurance Co.*, 5 Har. & J. 143; *Dorsey v. Smith*, 7 Har. & J. 345. If persons voluntarily express themselves in writing, they must be bound by the language employed. *McElderry v. Shipley*, 2 Md. 25. The law presumes that they understand the import of their own contracts, and to have entered into them with knowledge of their mutual rights and obligations."

In *Taylor v. Turley*, 83 Md. 500, Judge Stewart said:

"It is certainly not the duty of courts to shape the contracts of parties, but to enforce such as the parties make. The contract must be construed by the natural and fair import of its terms, without reference to the hardship it may visit on the parties. If persons voluntarily express themselves in writing, they are bound by the language employed, interpreted by all the evidence admissible for that purpose."

And in the case of *Dixon v. Clayville*, 44 Md. 573, Chief Judge Bartol said:

"It has been well observed that 'there is no general rule better settled, or more just in itself, than that parties who enter into contracts, and especially contracts in writing, must be governed by them as made, according to their true intent and meaning, and must submit to the legal consequences arising from them.' It is a familiar principle that 'the intention of the parties contracting must govern, where that can be discovered, unless that is in contravention of some rule of law.' *Chew v. Buchanan*, 30 Md. 367. This intention must, however, be ascertained from the terms of the contract itself, where this is in writing and free from ambiguity."

The evidence offered, to the effect that the petitioner did not read the whole instrument, cannot aid in the construction of the paper, or relieve him from the consequences of having executed it. *McGrath v. Peterson*, 127 Md. 412, 98 Atl. 551. Nor does the fact that the petitioner, in reply to his letter to

John L. Nicodemus, was notified to "Send bonds at once," point to the conclusion that the intention of the parties was other than that plainly expressed in the paper. What John L. Nicodemus' purpose was in directing the bonds to be sent to him is not shown, and is not material to the inquiry here; nor does it appear that the O'Gara Coal Company bonds were ever sent to him in compliance with the letter from Mrs. Nicodemus.

It follows, from what has been said, that the order of the orphans' court must be affirmed.

Order affirmed, with costs.

(130 Md. 678)

BALTIMORE & O. R. CO. v. OWENS.
(No. 18.)

(Court of Appeals of Maryland. June 27, 1917.)

1. JUSTICES OF THE PEACE §36(1)—JURISDICTION—DETERMINATION.

Under Code Pub. Gen. Laws 1904, art. 52, § 7, providing that no justice of the peace shall have jurisdiction in actions where the title to land is involved, it must appear to the court, from the nature of the action itself, that it is one in which the title to land is necessarily and directly involved, in order to oust and defeat the jurisdiction of the justice of the peace, and of the circuit court on appeal.

2. JUSTICES OF THE PEACE §36(1)—JURISDICTION—DETERMINATION.

The statement by defendant that the title to land is involved is not conclusive, and cannot govern or control the action of the court, or determine its jurisdiction.

3. JUSTICES OF THE PEACE §36(1)—JURISDICTION—TITLE TO LAND.

An action for injury to plaintiff's possession merely did not involve the title to land, so as to defeat the jurisdiction of the justice of the peace.

4. APPEAL AND ERROR §493—DECISIONS OF JUSTICES OF THE PEACE—REVIEW.

Where it does not affirmatively appear from the record that the title to land was a question directly or necessarily in issue, so that the justice had no jurisdiction, there is no right of review by the Court of Appeals of judgment of circuit court on appeal.

Appeal from Circuit Court, Prince George's County; Killmore Beall, Judge.

"To be officially reported."

Action in justice's court by Clarence J. Owens against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appealed to the circuit court; and from a judgment of affirmance, defendant appeals. Appeal dismissed, with costs.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

John D. Nock and Carville D. Benson, both of Baltimore (Benson & Karr and Stanley & Boss, all of Baltimore, on the brief), for appellant. T. Howard Duckett, of Washington, D. C. (Marion Duckett, of Washington, D. C., on the brief), for appellee.

BRISCOE, J. This is an appeal from an order of the circuit court for Prince George's county, overruling a motion to quash the proceedings in a magistrate's appeal case, and from a judgment in favor of the plaintiff against the defendant for the sum of \$100. The record presents a single question, and that relates to the jurisdiction of justices of the peace in civil cases, under article 52, § 7, Code of P. G. Laws of the state.

The motions to dismiss the appeal and to quash the proceedings in the court below were based upon the ground that neither the justice of the peace nor the circuit court for Prince George's county on the trial had jurisdiction, because the suit was one where the title to land was involved, and therefore they were without jurisdiction to hear and determine the case. Section 7 of article 52 of the Code reads as follows:

"But no justice of the peace shall have any jurisdiction in actions where the title to land is involved, nor in actions for slander, for breach of promise to marry or to enforce any lien for work done or materials furnished."

[1, 2] This section (7) of the Code has repeatedly been before this court for construction, and it has been distinctly held that in such cases it must appear to the court from the nature of the action itself that it is one in which the title to land is necessarily and directly in issue, in order to oust and defeat the jurisdiction of the justice of the peace, and of the circuit court on appeal from the justice of the peace. In *Randle v. Sutton*, 43 Md. 64, it is said:

"The statement by the defendant that the title to land is involved, is not conclusive, and cannot govern or control the action of the court, or determine its jurisdiction. It must appear to the court, from the nature of the action itself, that it was one in which the title to land is necessarily and directly in issue between the parties."

See *Cole v. Hynes*, 46 Md. 181; *Deitrich v. Swartz*, 41 Md. 196; *Shippler v. Broom*, 62 Md. 318.

These earlier cases are considered and reviewed in a number of more recent decisions, and the construction of the statute as announced by them has been approved and adopted by this court as the law applicable in similar cases. *Legum v. Blank*, 105 Md. 128, 65 Atl. 1071; *Josselson v. Sonneborn*, 110 Md. 548, 73 Atl. 650; *Whittington v. Hall*, 116 Md. 468, 82 Atl. 163; *Wilmer v. Mitchell*, 122 Md. 300, 89 Atl. 612.

It appears from the docket entries in the case that on the 10th of December, 1914, the appellee obtained a judgment against the appellant company, before Wm. J. Neale, a justice of the peace of the state of Maryland, in and for Prince George's county, for the sum of \$100 and costs. The defendant was summoned to answer an action on the case for \$100 damages at the suit of the plaintiff, and the cause of action and the particulars of the plaintiff's claim for damages are based upon an alleged improper and negligent

construction and operation of the defendant's trains on its tracks at and near the plaintiff's residence in Riverdale, Prince George's county, to the injury and damage of the plaintiff. The bill of particulars, filed with the justice of the peace and set out in the record, alleges in part the plaintiff's claim for damages, as follows:

"That the freight trains on the track are there mostly at night, and throughout the night, and they recklessly and negligently are operated by the defendant's employes, and because of such emit a great quantity of steam, soot, smoke, ashes, and cinders, all four of the latter being wafted over the plaintiff's property, in and upon his dwelling house and his porches, requiring him to keep the blinds of the house facing the railroad, when the wind blows that direction, shut, to prevent his bedding, linen, and furniture from being ruined; that he can use his telephone only with much inconvenience by reason of the interminable noises made by the operation of these freight trains; that the passenger trains between Washington and Baltimore pass Riverdale Station, both night and day, with great speed, and these freight trains are warned of their approach by automatic bells and dynamite caps, which requires them to hurry and scurry into the switch to avoid collision; that the jamming and ramming of the cars, loud and boisterous calls to the crews of the freight trains, prevent conversation in the plaintiff's yard or on his porches, and especially musical performances and literary entertainments, both of which his premises are often devoted to; that his rest and quiet at night is destroyed by the operation of these freight trains; that the trains are often loaded with live stock and stand immediately opposite the plaintiff's house, squeaking and bleating, and they are loaded with manure and fertilizer, by which obnoxious odors are driven all over the plaintiff's premises."

From the judgment rendered by the justice of the peace an appeal was taken to the circuit court for Prince George's county, and upon trial the judgment was affirmed. The evidence produced at the trial is incorporated in the record, and the proceedings are certified to by the judge before whom the case was heard and tried, and the pending appeal to this court is taken from the judgment in that court in favor of the plaintiff.

[3] We find nothing, from an examination of the record now before us, that tends in any way to disclose a want of jurisdiction in the justice of the peace or in the court below. There is nothing on the face of the proceedings, properly before us, or from the nature of the action itself, that shows that it is a suit in which the title to land is necessarily and directly in issue between the parties. The nature of the injury complained of and the suit itself was to recover damages for an injury to the plaintiff's possession merely, and the title to the land was not directly and necessarily involved, so as to defeat and oust the jurisdiction of the justice of the peace or of the circuit court. In *Shippler v. Broom*, 62 Md. 318, it is said:

"The only ground on which an exercise of the revisory powers of this court can be successfully invoked, in a case where the judgment was rendered by an appellate tribunal, reviewing the decision of a justice of the peace, is the want of jurisdiction to consider and determine the ques-

tions involved in litigation. The principle is too well settled to be controverted, that in an appeal from the decision of a justice of the peace the judgment of the appellate court is a finality, unless such court transcends the limits of its jurisdiction."

[4] As it does not affirmatively appear from the record that the title to land was a question directly or necessarily in issue or involved in the case, and that the justice rendering the judgment, and the circuit court affirming it upon appeal, were without jurisdiction to hear and determine the case, it follows, there being no right of review by this court, that the motion to dismiss the appeal must prevail. *Wilmer v. Mitchell*, 122 Md. 301, 89 Atl. 612; *Whittington v. Hall*, 116 Md. 468, 82 Atl. 163.

Appeal dismissed, with costs.

(130 Md. 630)

BARTON v. SWAINSON. (No. 14.)

(Court of Appeals of Maryland. June 26, 1917.)

1. PUBLIC LANDS §154—SURVEYS AND CERTIFICATES—"CAVEAT."

Under Code Pub. Civ. Laws, art. 54, §§ 41, 42, regulating the survey of vacant lands, certificates thereto, and caveats, a caveat is but an objection to the issuance of the patent, and, if it is not heard and determined within the 12 months allowed by section 42, the certificate by operation of law is released from the effect of the caveat, and the patent should issue upon the caveatee complying with the other provisions of the law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Caveat.]

2. PUBLIC LANDS §154—SURVEYS AND CERTIFICATES—CAVEAT.

Under Code Pub. Civ. Laws, art. 54, §§ 41, 42, failure to hear and determine a caveat within the statutory time affects only the caveat, and does not impair the rights of the caveatee to have certificate issued to him.

3. PUBLIC LANDS §154—SURVEYS AND CERTIFICATES—CAVEAT.

Where caveatee was informed by chief clerk to the land office commissioner that all the caveat cases affecting the lands involved were "out by law," and any proceedings affecting such lands must be begun de novo, such statements held a mere expression of the views of the chief clerk, and not the judicial determination of the commissioner.

4. PUBLIC LANDS §154—SURVEYS AND CERTIFICATES—CAVEAT.

Caveatee held not bound or concluded by statements of the chief clerk to the land commissioner, made to caveatee, to the effect that the caveatees were "out by law," and that proceedings affecting the lands should be started de novo.

5. PUBLIC LANDS §154—SURVEYS AND CERTIFICATES—CAVEAT.

Payment of caution or composition money in land office caveat proceedings does not, as between the applicant for a warrant and the state, establish the relations of contracting parties; but such payment is necessary before the question whether a patent should be granted can be considered.

Appeals from Commissioner of Land Office.

In the matter of the application of William Edward Swainson for a warrant of

survey for certain vacant lands, in which Leland Barton filed caveats. From orders of the Commissioner of the Land Office dismissing the caveats, caveator appeals. Orders affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

John Riddout, of Washington, D. C., for appellant. Daniel W. Baker, of Washington, D. C., for appellee.

PATTISON, J. The appeals in this case are from three orders of the commissioner of the land office, dismissing the caveats of the appellant. In each of these cases Swainson, the appellee, on July 16, 1914, filed his application for a warrant of survey for certain vacant lands in Montgomery county, Md. A warrant thereon was issued on the 16th day of July following, and said lands were thereafter surveyed, and certificates of such surveys were filed with the commissioner.

On February 16, 1915, the Chesapeake & Ohio Canal Company's trustees filed caveats against the issuance of patents upon said applications of the appellee. On May 3, 1916, the appellant filed applications for special warrants to survey said vacant lands, that patents therefor might be issued to him. It appears that a warrant in each case was issued in response to his application, but it is not shown by the record that any return thereon was made to the commissioner. Thereafter the commissioner, who had recently been inducted into office, issued notices in forms of orders nisi without discrimination to all caveators, including the Chesapeake & Ohio Canal Company's trustees, to show cause why their pending caveats should not be dismissed by a certain day named in the order, and on the 24th day of June, 1916, the appellant, who had heard of the issuance of said notice, also filed caveats against the applications of the appellee, Swainson, for patents for said vacant lands. These caveats were dismissed on the 4th day of October, 1916.

After service of the aforesaid order or notice on the Chesapeake & Ohio Canal Company's trustees, the caveats against them were heard upon a day agreed upon by the caveators and caveatees and on the 5th day of October, 1916, the caveats were dismissed, and on the 4th day of December following, patents were ordered to issue to the appellee. The appeals in this case, as we have said, are from the three orders of October 4, 1916, dismissing the caveats of the appellant.

The record disclosed that the caveats of the Chesapeake & Ohio Canal Company were not heard and determined within 12 months from the entering of the same, and this fact is the chief ground of the appellant's caveats to the issuance of patents to the appellee.

Section 42 of article 54 of the Code of 1912 provides that:

"Every caveat shall be heard and determined by the commissioner of the land office within twelve months from the entering of the same unless he shall under special circumstances give further time to the parties."

It is contended by the appellant that under a proper construction of this section the commissioner, without special circumstances authorizing extension of time, was not only without authority to hear and determine the caveats, but that the appellee, because of the failure to hear and determine them within the statutory period, had lost his right to have the patents issued to him, even though he should comply with all other requisites of the statute.

Section 41 of article 54 of the Code provides that if a certificate of survey shall be returned within the time herein prescribed, and shall be found to be correct, and the whole composition or purchase money has been paid, and such certificate has lain 6 months in the land office, and no caveat has been entered thereto the person having such certificate returned, his assigns, devisees, or heirs shall be entitled to a patent thereon, or if the certificate is released by adjudication or by the operation of law from the effect of the caveat, a patent shall issue thereon as if no caveat had been filed. The aforesaid section 42 deals with the caveat, and provides that it shall be heard and determined within 12 months from the entering of the same, unless under special circumstances the time be extended.

[1, 2] The caveat is but an objection to the issuance of the patent, and if it is not heard and determined within the statutory period, without extension of time, the certificate is released from the effect of the caveat by operation of law, and upon the caveatee complying with all other provisions of the law the patent should issue. The failure to hear and determine the caveat within the required time affects only the caveat, and does not affect the certificate, or the rights of the caveatee to have issued to him thereafter his patent, if the certificate be correct, and he complies with the law in all other respects. It appears from the record that on the 2d day of May, 1916, the chief clerk in the commissioner's office, in response to a letter from the appellant, dated the 26th day of April, 1916, which is not in the record, wrote appellant, saying:

"In reference to the different caveat cases you have cited, in which Mr. Swainson is the caveatee, namely, 'Swainson's Island,' 'Wade's Island,' and 'Wade's Discovery,' beg to advise that these cases are all out by law, * * * which states that 'every caveat must be heard and determined within twelve months from the date of entering same.' * * * As to Swainson's right in the matter of these caveats, we stated above that they are out by law, and any proceedings affecting this land or lands must necessarily be started de novo."

On the next day, May 3d, the appellant filed his application for a special warrant to survey said vacant lands and paid the caution money therefor. The fact that he was told by the chief clerk in the letter received by him that these caveat cases and Swainson's right in the matter of the caveats were "out by law" is made an additional objection to the issuance of the patents.

[3, 4] It is claimed by the appellant that the aforesaid statements of the chief clerk, found in his letter of May 3d, induced him to make his application for special warrant and to pay the caution money, and that the payment of said money created contractual relations between him and the state, which were wrongfully disregarded in the dismissal of his caveats. The statements referred to were the mere expressions of the views of the chief clerk, and were not the judicial determination of the commissioner; but, even should said statements be regarded as the judicial determination of the commissioner, they certainly would not be binding upon the appellee in the sense that his rights would be concluded thereby. It is not clear just what was meant by the clerk in the expressions used by him in his letter, but such expressions could not have had the effect and meaning that is given them by the appellant.

[5] The payment of caution or composition money does not, as between the applicant for a warrant and the state, establish the relations of contracting parties. Its payment is necessary before the question whether a patent should be granted can be considered. *Day v. Day*, 22 Md. 538. The record discloses no error in the action of the commissioner in passing said orders, and they will therefore be affirmed.

Orders affirmed, with costs to the appellee.

(120 Md. 623)

METROPOLITAN LIFE INS. CO. v. JENNINGS. (No. 12.)

(Court of Appeals of Maryland. June 26, 1917.)

1. INSURANCE \Leftrightarrow 668(6) — ACTIONS ON POLICIES—QUESTIONS FOR JURY.

Ordinarily the falsity and materiality of representations in an insurance application are questions for the jury; but where such falsity and materiality are shown by clear, convincing, and uncontradicted evidence, the court may so rule as a matter of law.

2. INSURANCE \Leftrightarrow 646(3)—ACTIONS ON POLICIES—BURDEN OF PROOF.

The burden is on an insurer to satisfy the jury of the falsity and materiality of representations in the application for insurance.

3. INSURANCE \Leftrightarrow 291(3)—FALSE REPRESENTATIONS—HEALTH AND PHYSICAL CONDITION.

In an insurance application, made in September, 1912, the applicant represented that he was in sound health, had never had any disease of the lungs, had not been attended by a physician for 12 years, that the complaint, when attended, was for lumbago, and that he had never been under treatment in any hospital, etc. In fact, the applicant had pulmonary tuberculosis in the spring of 1911, was under treatment in a

state sanatorium from March to July of that year, and from November, 1911, to August, 1912, was under treatment in a tuberculosis camp connected with the penitentiary, in which he was undergoing sentence. *Held*, that the representations were false, and the facts indicated that insured was not ignorant of their falsity.

4. INSURANCE §291(4)—FALSE REPRESENTATIONS—HEALTH AND PHYSICAL CONDITION.

The representations were not only material, but were vital to the risk, as it was irrational to suppose that the insurer would have issued the policy, if apprised of the true state of facts.

Appeal from Baltimore City Court; Chas. W. Heuisler, Judge.

Action by Helen B. Freeburger Jennings against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, without new trial.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOOKBRIDGE, JJ.

W. Hall Harris, of Baltimore (W. Hall Harris, Jr., of Baltimore, on the brief), for appellant. Julius H. Wyman and Jacob S. New, both of Baltimore (M. Maurice Meyer, of Baltimore, on the brief), for appellee.

PATTISON, J. This is an appeal from a judgment of the Baltimore city court, recovered by the appellee against the appellant company upon a policy of insurance issued by it upon the life of Edward J. Freeburger, brother of the appellee. The policy, the amount of which was \$500, with the appellee named as beneficiary therein, was issued on October 18, 1912, and the insured died on January 10, 1914. The sole defense made to this suit was that the insured had induced the appellant company to issue the policy to him by false representations material to the risk.

In his written application to the appellant company, the insured stated, among other things, that he was of sound health; that he had never had any disease of the lungs; that the physician who last attended him was Dr. Billingslea, the date of such attendance being 12 years prior to his application, and that his complaint at such time was lumbago; that he had not been under the care of any physician within 2 years prior to his said application, and had "never been under treatment in any dispensary, hospital, or asylum, nor been an inmate of any almshouse or other institution." The application in which these statements are found was by the insurance agreement made part of the policy of insurance, and it was further agreed that said statements were "correct and wholly true," and were to form the basis of the contract of insurance upon the issuance of the policy. In the proofs of death, which were signed by the plaintiff, the cause of death as given is pulmonary tuberculosis.

The uncontradicted evidence in this case, as disclosed by the record, shows that the

insured in the spring of 1911 was suffering from pulmonary tuberculosis, and that on March 29, 1911, he entered the State Sanatorium at Sabillasville, and remained there until July 29, 1911, under treatment of Dr. Cullen, superintendent of said institution, and during the whole of said time he suffered from pulmonary tuberculosis. He left that institution to attend the United States District Court of Maryland, in which court he had been indicted for the violation of the Oleomargarine Law. The trial of his case had been postponed at the request of Dr. Cullen, because of the advanced tubercular condition of the insured in the spring of 1911. On June 6th Dr. Cullen wrote Hon. John Philip Hill, the United States district attorney, saying:

"Mr. Freeburger has a pretty far advanced tuberculosis throughout both lungs, and if it were possible for his case to be postponed until the weather is cooler, it would be very much better for him."

He was tried in October, and was convicted and sentenced to 13 months in the Atlanta Penitentiary. His actual term of imprisonment in that institution commenced on October 16, 1911, and expired on August 16, 1912. While so imprisoned he was on November 4, 1911, transferred to the tuberculosis camp within the prison, and there he remained until the end of the term of his sentence under the treatment of the prison physician for pulmonary consumption, and while in the camp "he received open air treatment within the tent colony, with appropriate nourishing tuberculosis diet." Upon his discharge from the Atlanta prison on August 16, 1912, he returned to Baltimore, and on September 10th following made and signed the written application containing the above-mentioned statements and representations.

At the conclusion of the evidence the defendant offered a prayer asking the court to instruct the jury:

"That the uncontradicted evidence in this case shows that statements made at the time of the signing the application for insurance by the insured, as contained in said application, were untrue, and that those statements being material to the risk, their verdict must be for the defendant."

This prayer was refused, and prayers submitting the case to the consideration of the jury were granted to both the plaintiff and defendant. It is contended by the appellant that its prayer directing a verdict for the defendant should have been granted, and because of the court's refusal to do so the judgment of the court below should be reversed.

[1, 2] This court has said a number of times that ordinarily it is the province of the jury to determine the falsity and materiality of the representations made in an application for insurance policy, and the burden is upon the defendant to satisfy the jury of the truth of these defenses; but where the

falsity and materiality of the representations are shown by clear, convincing, and uncontradicted evidence the court may so rule as a matter of law. *Fidelity Mutual Life Insurance Association v. Ficklin*, 74 Md. 173, 21 Atl. 680, 23 Atl. 197; *Dulany v. Fidelity & Casualty Co.*, 106 Md. 17, 66 Atl. 614; *Mutual Life Insurance Co. v. Rain*, 108 Md. 353, 70 Atl. 87; *Bankers' Life Insurance Co. v. Miller*, 100 Md. 1, 59 Atl. 116; *Maryland Casualty Co. v. Gehrmann*, 96 Md. 634, 54 Atl. 678; *Aetna Life Insurance Co. v. Millar*, 113 Md. 693, 78 Atl. 483; *Mutual Life Insurance Co. v. Mullan*, 107 Md. 463, 69 Atl. 385; *Forwood v. Prudential Insurance Co.*, 117 Md. 259, 83 Atl. 169.

[3, 4] The uncontradicted evidence that Freeburger, so early as March, 1911, was suffering from pulmonary tuberculosis, because of which he was sent to the State Sanatorium at Sabillasville, Md., where he was under the treatment of Dr. Oullen, and where he remained for several months, until his trial in the fall of that year, which resulted in his conviction and sentence to the Atlanta prison, where he was again treated by the physician in charge for tuberculosis of the lungs until his discharge, less than a month before the date of the application, shows the falsity of the representations made by him that he was last attended by Dr. Billingslea for lumbago 12 years prior to his application; that he had never suffered from any lung disease; that he had not been under treatment in any dispensary, hospital, or asylum or other institution; and we may further add that the existence of these facts, disclosed by such uncontradicted evidence, makes it impossible to believe that the insured, in making such representations, was ignorant of their falsity. The representations made were not only material, but were vital to the risk, and of such a character as to make it irrational to suppose that the appellant would have issued the policy if it had been apprised of the true state of facts to which the representations were made.

The prayer directing a verdict for the defendant should have been granted, for which reason the judgment of the court below will be reversed, and as there should, in our opinion, be no recovery in this case, the judgment will be reversed without awarding a new trial.

Judgment reversed, without new trial, with costs to the appellant.

(130 Md. 617)

MORGAN v. CLEAVER. (No. 11.)

(Court of Appeals of Maryland. June 26, 1917.)

1. BILLS AND NOTES §452(3) — ACTIONS — DEFENSES—FAILURE OF CONSIDERATION.

As between the immediate parties to a negotiable instrument, it is competent to show that the consideration has failed.

2. BILLS AND NOTES §489(5)—ACTIONS—ISSUES.

In assumpsit between the original parties to a negotiable instrument, the defense of failure of consideration may be shown under the general issues.

3. BILLS AND NOTES §490(5)—ASSUMPSIT—PLEADING — SPECIAL PLEA ON EQUITABLE GROUNDS.

In assumpsit on defendant's check, payment of which was refused, the defense that check was given pursuant to a contract with plaintiff, as administrator, for the sale of land belonging to the estate, and that the contract was void because the administrator acted without authority, is a defense in the nature of failure of consideration, available to defendant under the general issue, and a plea on equitable grounds, under Code Pub. Civ. Laws, art. 75, § 86, is bad on demurrer.

4. ACTION §24—PLEADING—DEFENSES.

Code Pub. Civ. Laws, art. 75, § 86, which allows defenses on equitable grounds, was intended to permit a defendant to plead defense valid in equity, but not previously available at law, and does not permit defenses good at law to be pleaded on equitable grounds.

Appeal from Circuit Court, Kent County.
"To be officially reported."

Assumpsit by Henry Cleaver against Robert H. Morgan. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

L. Wethered Barroll, of Baltimore (Barroll & Gill, of Baltimore, Hope H. Barroll, of Chestertown, and John S. Gittings, Jr., on the brief), for appellant. Harrison W. Vickers, of Chestertown, and Richard S. Rodney, of Wilmington, Del., for appellee.

BURKE, J. This appeal presents for consideration the propriety of the action of the circuit court for Kent county in sustaining a demurrer to the defendant's third amended plea. The plea was filed on equitable grounds under section 86, art. 75, of the Code. The suit was in assumpsit. The declaration contained the common counts and one special count, which is here inserted:

"And for that on the 6th day of May, 1916, the defendant, Robert H. Morgan, made his check in writing, dated on that day, and directed the same to the Third National Bank of Chestertown, Maryland, and there required the said bank to pay to the plaintiff, Henry Cleaver, Admin., the sum of five hundred dollars (\$500), who indorsed the same, which was thereafter duly presented by him to the said bank for payment, but was not paid, being returned by said bank as protested and marked 'payment stopped' by written request, all of which notice was given to the defendant, and that the check still remains unpaid."

To this declaration the defendant pleaded. first, that he never was indebted as alleged; secondly, that he never promised as alleged; and, thirdly, a plea on equitable grounds which the court held bad on demurrer. The case went to trial on the general issue pleas. The docket entries incorporated in the record show that the trial

began on the 18th and was concluded on the 19th of October, 1916, by a verdict for the plaintiff for \$515.65, and that judgment for that sum was entered against the defendant on October 23, 1916. They also show that prayers were submitted by the respective parties and passed upon by the court. The evidence and prayers are not in the record, but it will be assumed that all defenses which were available to the defendant under the general issue were presented to the court and jury.

Th record shows that the plaintiffs are the heirs at law of Sarah B. Cleaver, deceased, who was a resident of New Castle County, Del.; that at the time of her death she owned a farm, containing 152 acres, more or less situated in that county; and that Henry Cleaver, her son and one of the plaintiffs, was appointed administrator of her estate. The equitable plea is quite lengthy, and sets out in full an agreement entered into on the 6th day of May, 1916, between Henry Cleaver, administrator of Sarah B. Cleaver, and Robert H. Morgan, the defendant, for the sale to and purchase by the defendant of the Delaware farm for the sum of \$15,000, upon the following terms and conditions, viz.:

"Five hundred (\$500.00) dollars upon the execution of this agreement, and the balance upon the delivery of a deed to him for said premises. It is agreed that possession of said property shall be delivered to the purchaser on the 1st day of March, A. D. 1917, and the said party of the first part agrees to execute and deliver to the said party of the second part, on or before the 1st day of July, A. D. 1916, a good and lawful deed in fee simple for said premises, clear of all incumbrances."

It is then alleged:

"That said pretended contract was made and entered into in the state of Delaware, where said land lay; that prior to and at the time of the execution of this pretended agreement Henry Cleaver, administrator, who was in reality and fact administrator in the state of Delaware, in New Castle county, of Sarah Cleaver, who in her lifetime owned the farm mentioned in said pretended contract of sale, which farm upon her death intestate descended to the plaintiffs, as her heirs at law, as tenants in common, subject to a mortgage thereon for a large sum of money then, on May 6, 1916, an outstanding valid lien against said farm, and the said Henry Cleaver, administrator, had no power or authority under the laws of the state of Delaware to sell said farm, and had obtained no authority or order from the orphans' court of New Castle county, Delaware, to sell any of the real estate of Sarah Cleaver, deceased; that section 3417 of the Revised Code of Delaware, in force at the time of the execution of this pretended agreement, sets forth the prerequisite conditions for the sale of real estate such as was attempted to be sold by this administrator, none of which conditions have been complied with, nor had been complied with by Henry Cleaver, administrator, at the time of the execution of this pretended contract; that therefore the same was utterly void and of no effect under the laws of the state of Delaware; that the defendant should not in any wise be compelled to pay the said alleged check so obtained from him under a pretended contract which could not have been enforced by any of the parties to the attempted

execution of the same, nor could this defendant have compelled all the owners of the fee in said farm to execute to him a deed in fee simple, clear of all liens (including said mortgage) for said farm, and the attempted performance of which by Henry Cleaver, administrator, would have been and would be an illegal and void act on his part, and in no wise would have bound or would bind the persons who held the legal and equitable title to the said farm to convey a good title to this defendant; that the check sued on in this case was executed and delivered to Henry Cleaver, administrator, in New Castle county, in the state of Delaware, under the facts, conditions, and circumstances above recited and set forth, and no consideration for the said check passed from the defendants, nor any of them, for the said check to the defendant."

[1, 2] The plaintiffs in this suit are the heirs at law of Sarah B. Cleaver and the owners of the farm, and there is no allegation in the plea that a deed of the character mentioned in the contract had not been tendered the defendant. The whole defense set up in the plea is the total failure of the consideration for the check, by reason of the failure of Henry Cleaver, the administrator, to obtain from the orphans' court of New Castle county, Del., an order for the sale of the farm under section 3417 of the Revised Code of that state. That section provides for the sale of a decedent's real estate, where his personal estate is insufficient to pay his debts. This section does not appear to have any application to this case, because it is not alleged that the personal estate of Sarah B. Cleaver was not sufficient to pay her debts. If, however, such were the fact, or because of that, or for any other reason, Henry Cleaver, the administrator, did not or could not deliver to the defendant a fee-simple title to said farm, clear of all incumbrances, that defense was open under the general issue, and it is reasonable to presume was attempted to be proved at the trial. It is the settled law of this state that as between the immediate parties to a negotiable instrument, as in this case, the question of consideration is always open, and it is competent to show that the consideration had failed, and this defense can be shown under the general issue. *Ingersoll v. Martin*, 58 Md. 68, 42 Am. Rep. 322; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Williams v. Huntingdon*, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

[3, 4] The defense relied on in the equitable plea being open and available to the defendant under the pleas already in the case, the court committed no error in sustaining the demurrer. The statute (Code, art. 75, § 80), "which allows defenses on equitable grounds, was intended to permit a defendant to plead many defenses valid in equity, but not previously available at law. *Taylor v. State*, 78 Md. 222, 20 Atl. 914, 11 L. R. A. 852. A defense which is good at law cannot be pleaded on equitable grounds, because it is only such a defense as could not formerly have been pleaded at law that is

now let in on equitable grounds." *Robey v. State, Use of Mallory*, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 406; *Albert v. Freas*, 103 Md. 591, 64 Atl. 282.
Judgment affirmed.

(131 Md. 116)

HAMMOND v. DU BOIS. (No. 29.)

(Court of Appeals of Maryland. June 27, 1917.)

1. TROVER AND CONVERSION §1—EVIDENCE—SUFFICIENCY.

The action of trover cannot be maintained, without a conversion.

2. TROVER AND CONVERSION §1, 40(4)—DIRECT OR CONSTRUCTIVE CONVERSION.

A conversion may be either direct or constructive, and may be proved directly or by inference.

3. TROVER AND CONVERSION §35—ACTIONS—DEMAND AND REFUSAL.

When plaintiff fails to prove an actual conversion, it will be necessary for him to prove a demand and refusal at the time when defendant had the power to give up the goods.

4. TROVER AND CONVERSION §40(4) — DEMAND AND REFUSAL—REBUTTAL.

A demand and refusal are only evidence of a prior conversion, which may be explained and rebutted by evidence to the contrary.

5. TROVER AND CONVERSION §3—INTENT TO CONVERT—NECESSITY.

To entitle plaintiff to recover in trover, there must be evidence of an intention of defendant either to take to himself the property in the goods or to deprive the plaintiff of them.

6. CORPORATIONS §133 — TRANSFER OF STOCK—DEMAND AND REFUSAL—EVIDENCE—SUFFICIENCY.

In an action for the conversion of certificates of stock, evidence held insufficient to show a demand upon defendant and a refusal by him to make the transfer desired.

7. PRINCIPAL AND AGENT §164(1) — ACTS NOT AS AGENT—RATIFICATION.

A principal, by his subsequent ratification or acquiescence, may become liable for the unauthorized acts of his agent; but this principle presupposes that the act complained of was the act of the one as agent or on behalf of the principal.

8. EQUITY §423 — DECREE — PERSONS NOT PARTIES.

Where a company was not a party to the suit, no decree could have been passed affecting its interests.

Appeal from Superior Court of Baltimore City; James P. Gorter, Judge.

Suit by Addison G. Du Bois against John Hays Hammond. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, JERNER, STOCKBRIDGE, and CONSTABLE, JJ.

Edward N. Rich and Joseph C. France, both of Baltimore, for appellant. John C. Gittings, of Washington, D. C., and William Pepper Constable, of Baltimore (George Winship Taylor, of Baltimore, on the brief), for appellee.

THOMAS, J. On the 6th of June, 1907, Willard D. Doremus, Addison G. Du Bois, and others of Washington, D. C., parties of the first part, entered into a contract with

John P. Miller, of Virginia, party of the second part, which recites:

"That whereas, the said parties of the first part are the owners for the United States of the entire right, title, and interest in a certain invention of said Doremus, being an improvement in cotton ginning machinery for which application for letters patent of the United States was filed in the United States Patent Office May 17, 1907, by said Doremus; and whereas, said party of the second part is desirous of securing said entire right, title, and interest in and to said invention, and in and to the letters patent which may be granted for said invention by the United States of America."

The agreement then provided that in consideration of the sum of \$50,000, to be paid by Miller as therein specified, the parties of the first part did thereby grant, bargain, and sell unto him, his heirs and assigns, "all the right, title, and interest in and to said invention, and in and to any improvements thereon that may be made by said Doremus, and in and to the letters patent for said invention, and for said improvements thereon that may be hereafter granted by the United States."

On the 27th day of June, 1907, Doremus assigned and transferred to Miller "the entire right and interest in and to any and all patents which may be attained in accordance with this agreement in countries foreign to the United States on said cotton gin and on any and all improvements thereon," in consideration of the agreement that he was to receive one-half of the profit, in bonds, stocks, or money, realized from the sale of letters patent in the United States or in foreign countries; and on the 1st day of July, 1907, Miller, in consideration of \$10, "and other valuable consideration," sold to Addison G. Du Bois "one-fourth part of the entire net proceeds from said invention derived from either United States or foreign patents on said invention, whether the proceeds shall be in money, stocks, bonds, or other thing or things of value."

Thereafter the National Cotton Improvement Company was organized under the laws of Maine, and its entire capital stock of \$1,500,000, except a few organization shares, was issued to Miller for the American rights to the Doremus invention, and the Doremus patents were assigned to that company by Miller and by Doremus. There was also formed a corporation, called the Doremus Holding Company, to which Doremus assigned his application for the foreign rights, and the stock of the latter company was held by Doremus, Miller, and Daniel J. Sully. Miller gave to one John J. Welch an option on the majority of the stock of the National Cotton Improvement Company, and through Welch the Doremus invention was brought to the attention of the appellant in this case, John Hays Hammond. Mr. Hammond referred the matter to Mr. Sully, with whom he was interested in a plan for warehousing cotton, for investigation and a report as to the value

of the invention, and Mr. Sully reported that in his opinion the Doremus invention was very valuable, and "would revolutionize the whole cotton industry."

Welch failed to make the payments under his option, and his rights became forfeited, and on the 28th of December, 1909, John P. Miller, John Hays Hammond, and Daniel J. Sully entered into the following agreement:

"Agreement made this 28th day of December, 1909, between John P. Miller, party of the first part, and John Hays Hammond and Daniel J. Sully, acting for a syndicate to be composed of themselves and one or more other persons, parties of the second part, witnesseth:

"Whereas, the party of the first part is the owner of \$471,200 at par of the preferred stock and \$967,200 at par of the common stock of the National Cotton Improvement Company; and whereas, the parties of the second part are about to incorporate, or cause to be incorporated, a corporation to be known as the General Cotton Securities Company, or some other suitable name, for the purpose of promoting the incorporation and organization of and holding the stock and other securities of corporation engaged in the ginning, warehousing, and general development of the cotton business, which said corporation is to have a capital of \$7,000,000 common and \$3,000,000 preferred stock, which preferred stock is to be 7 per cent. cumulative, with a preference as to assets upon dissolution, without participation in profits beyond 7 per cent., and without voting power as long as the 7 per cent. dividend is paid; and whereas, the party of the first part desires to sell his stock to the said corporation to be formed, and to take in payment therefor cash and common stock, and the parties of the second part desire to obtain the same for the new corporation, and also propose to finance the said corporation by the sale of this preferred stock:

"Now, therefore, this agreement witnesseth that in consideration of the premises and of the mutual covenants and agreements herein contained the parties hereto agree to and with each other as follows, to wit:

"1. The party of the first part agrees to deliver to the parties of the second part \$471,200 at par of the preferred stock, and \$967,200 at par of the common stock of the National Cotton Improvement Company, the certificates for the same duly indorsed for transfer to be lodged with John Hays Hammond forthwith.

"2. The party of the first part agrees to accept in payment for the said stock \$37,500 in cash to be paid upon the delivery of the certificates as hereinbefore provided, \$1,000,000 in full-paid common capital stock of the new corporation, and \$1,000,000 in full preferred stock thereof; it being understood and agreed, however, that the common capital stock of the new corporation may be transferred upon the issuance thereof into the names of John Hays Hammond, D. J. Sully, and Frank S. Bright, as voting trustees, to be held by them for a period not exceeding five years, which voting trust is to be established for the purpose of maintaining a continuous and efficient administration of the new corporation during the period of its formation, promotion, and commencement of its operations, and in the event that such voting trust is formed the party of the first part agrees that the \$1,000,000 of common stock be paid and delivered in the shape of certificates of beneficial interest in that amount of stock, subject to a voting trust. The parties of the second part may, if necessary to effect the sale of the preferred, withdraw or omit from the voting trust so much of the common stock as may be used as bonus on such sales: Provided, that at all times at least a majority of the common stock shall be subject to said trust.

"3. Party of the first part agrees that the parties of the second part may transfer the said stock of the National Cotton Improvement Company to the new corporation upon such terms and conditions as will provide for the issuance by the new corporation to the parties of the second part of \$3,000,000 at par of its common stock and \$3,000,000 at par of its preferred stock, the balance of the common stock to remain unissued, to be issued hereafter at the discretion of the board of directors for cash or property, in accordance with the needs of the corporation: Provided, however, that in addition to receiving from parties of the second part the stock of the National Cotton Improvement Company the new corporation shall also receive from the sale by parties of the second part of the stock to be transferred to them \$1,600,000, which sum is to be paid into the treasury of the new corporation by the parties of the second part as the same is derived from the sale of the preferred and common stock of the new corporation issued by it to the parties of the second part.

"4. The party of the first part agrees that the \$1,000,000 of preferred stock to be issued to him as aforesaid shall be lodged with the syndicate, of which parties of the second part are members, and for which they are acting in executing this agreement for sale by them, so as to net to party of the first part the sum of \$400,000.

"5. The parties of the second part agree upon the deposit of the said certificates of stock of the National Cotton Improvement Company with John Hays Hammond aforesaid, to pay to the party of the first part \$37,500 in cash, and to proceed forthwith to incorporate the new corporation and to procure the issuance of its stock to them as hereinbefore provided, and when and as soon as the same is issued to establish a voting trust as above provided, and deliver to party of the first part certificates of beneficial interest, subject to the voting trust, in \$1,000,000 par of the common stock of the new corporation, and to receive and hold for the account of the party of the first part \$1,000,000 at par of the preferred stock of the new corporation. They further agree to transfer the said stock of the National Cotton Improvement Company to the new corporation, and to enter into an agreement with it to use their best endeavors to sell \$2,000,000 of its preferred stock and so much as may be necessary of the common stock which they receive, so as to net to its treasury the sum of \$1,600,000. For the purposes of sale, the \$2,000,000 of preferred stock to be sold for the new corporation and the \$1,000,000 preferred stock to be sold for the party of the first part shall be taken and considered as one block, and the parties of the second part shall use their best endeavors in every respect to sell and market the same. Upon the sale of each share of said preferred stock there shall be paid out of the proceeds of such sale by the parties of the second part to the party of the first part the sum of \$14 in cash until the sum of \$400,000 has been paid in full as herein provided for, and a proportionate amount shall be paid into the treasury of the new corporation until the \$1,600,000 herein provided for has been paid in full. Any sum or sums of money received by parties of the second part from the sale of the \$1,000,000 preferred stock in excess of the sum of \$400,000 shall belong to parties of the second part as and for their compensation for carrying out this agreement. The parties of the second part shall be under no personal liability by virtue of this agreement, except to transfer the stock received by them from the party of the first part to the new corporation, to pay the sum of \$37,500 in cash, to deliver to party of the first part \$1,000,000 in common stock or voting trust certificates, to receive for the account of party of the first part \$1,000,000

preferred stock, to use their best endeavors to sell said \$1,000,000 of preferred for the party of the first part and \$2,000,000 preferred for the new corporation, and to account to party of the first part and to the new corporation for their respective proportions of the moneys received from the said sales.

"6. It is understood and agreed by and between the parties hereto that all deliveries of stock and all payments of moneys herein provided to be made to party of the first part may be made to Frank S. Bright, as his representative, and the parties of the second part shall not be accountable or responsible for the distribution by him of the securities or moneys among the other parties if any entitled thereto.

"In witness whereof the parties hereto have hereunto set their hands the day and year first above.

Jno. P. Miller.

"John Hays Hammond.

"D. J. Sully.

"Ralph Polk Buell."

In pursuance of the above agreement, the General Cotton Securities Company was incorporated under the laws of Delaware, and the "first meeting of the corporation" was held at its office in Wilmington, Del., on the 5th day of January, 1910. On the 7th of January, 1910, the General Cotton Securities Company entered into the following contract with Daniel J. Sully:

"This agreement, made the 7th day of January, 1910, between Daniel J. Sully, party of the first part, and General Cotton Securities Company, a corporation of the state of Delaware, party of the second part:

"Whereas, Daniel J. Sully, party of the first part, has offered to deliver to this company \$471,200 at par of the preferred stock and \$967,200 at par of the common stock of the National Cotton Improvement Company, a corporation of the state of New Jersey, with a total authorized and outstanding issue of \$500,000 preferred stock and \$1,000,000 common stock, and to pay into the treasury of the party of the second part \$1,000,000 as and when payment thereof is demanded, in consideration of the issuance to him by the party of the second part of \$3,000,000 at par of the preferred and \$3,000,000 at par of the common stock, full paid and nonassessable, of this company; and whereas, the said National Cotton Improvement Company is the owner of valuable patents and patent rights in an improved cotton gin known as the 'Doremus gin,' and by virtue of said ownership the stock which said party of the first part has offered to convey is in the estimation of the board of directors of party of the second part worth not less than \$5,000,000, and is necessary for the purposes and objects of the incorporation of party of the second part:

"Now, therefore, this agreement witnesseth that, in consideration of the premises and of the mutualities of this agreement, the parties hereto covenant to and with each other as follows, to wit:

"First. Party of the first part hereby agrees to deliver or cause to be delivered to party of the second part, on one certificate of the preferred and one or more certificates of the common stock of the National Cotton Improvement Company, aggregating 4,712 shares of the said preferred stock and 9,672 shares of the common stock thereof, properly executed and indorsed for transfer, the said delivery to be made to the treasurer of the party of the second part.

"Second. Party of the first part agrees to pay to the party of the second part from time to time, upon its demand, the sum of \$1,800,000 in cash, without interest, and agrees to make the said payments at such times and in such amounts as the party of the second part may nominate.

"Third. Party of the second part agrees to execute and deliver to the party of the first part, upon the delivery to it of the certificates of stock hereinbefore provided for of the National Cotton Improvement Company, one or more certificates of the preferred stock and of the common stock of party of the second part, aggregating \$3,000,000 at par of the preferred and \$3,000,000 at par of the common, which stock is hereby declared to be and is full-paid and nonassessable.

"In witness whereof, the party of the first part has signed and sealed this agreement, and the party of the second part has caused the same to be executed by its president and its corporate seal to be hereunto affixed, duly attested by its secretary the day and year first above written.

"Daniel J. Sully. [Seal]

"General Cotton Securities Company,

"By Ralph Polk Buell, President.

"Attest: O. H. Stanton, Secretary."

On the 7th of January, 1910, an agreement was entered into between John Hays Hammond, Daniel J. Sully, and Frank S. Bright, as constituting voting trustees, and the stockholders of the General Cotton Securities Company, by which the common stock of the company was placed in the hands of the voting trustees for the period of five years, upon the trustees issuing therefor to the stockholders common stock trust certificates. This agreement was signed by Daniel J. Sully as the holder of 29,965 shares of the common stock. On the same day a syndicate composed of Daniel J. Sully, John Hays Hammond, Harris Hammond, Mont D. Rogers, and D. B. Atherton was formed for the purpose of selling \$3,000,000 of preferred stock and \$750,000 of the common stock of the General Cotton Securities Company. This syndicate agreement recited that Mr. Sully had acquired from the General Cotton Securities Company \$3,000,000 of its preferred stock and \$3,000,000 of its common stock, and provided that each member of the syndicate was to use his best endeavors to sell the \$3,000,000 of preferred and \$750,000 of the common stock; that the preferred stock was to be offered for sale at the "price of \$100 for each \$100 par value of preferred stock and \$25 par value of common stock, if payments therefor be made in one sum, but for the price of \$105 for like amount of preferred and common stock if payment be made in installments"; that Daniel J. Sully should be syndicate manager, for the purposes therein specified; and that the \$3,000,000 of preferred and \$750,000 of common stock should be transferred by Daniel J. Sully into his hands as syndicate manager, and the certificates therefor deposited in some trust company, to be selected by him, under an agreement by which the purchasers of the stock were to make payments therefor to the trust company. On the 9th of February, 1910, Daniel J. Sully delivered to the United States Trust Company of Washington, D. C., certificate No. 1 for 30,000 shares of the preferred stock of the General Cotton Securities Company, and certificate No. 3 for 7,500 shares of the common stock voting trust certificates of the

company, both certificates being in his name as syndicate manager, which the trust company agreed to hold in accordance with the terms of his letter of that date, and in accordance with the provisions of the syndicate agreement. On the 3d of February, 1910, John P. Miller executed the following declaration of trust:

"Declaration of Trust.

"Whereas, I, John P. Miller, have this day received the following described common stock trust certificates of the General Cotton Securities Company:

No. 4.....	2,550 shares.....	John P. Miller, Trustee.
No. 5.....	1,550 shares.....	John P. Miller, Trustee.
No. 6.....	100 shares.....	John P. Miller, Trustee.
No. 7.....	100 shares.....	John P. Miller, Trustee.
No. 8.....	100 shares.....	John P. Miller, Trustee.
No. 9.....	100 shares.....	John P. Miller, Trustee.
No. 10.....	100 shares.....	John P. Miller, Trustee.
No. 11.....	2,275 shares.....	John P. Miller, Trustee.
No. 12.....	1,500 shares.....	John P. Miller, Trustee.
No. 13.....	500 shares.....	John P. Miller, Trustee.
No. 14.....	500 shares.....	John P. Miller, Trustee.
No. 15.....	400 shares.....	John P. Miller, Trustee.
No. 16.....	110 shares.....	John P. Miller, Trustee.
No. 17.....	165 shares.....	John P. Miller, Trustee.

"And whereas, I have redelivered said certificates for deposit in escrow for the period of 18 months, and said certificates have been deposited in a safe deposit box, rented in the names of Daniel J. Sully and F. S. Bright; and whereas, said certificates are deposited under an agreement that they shall not be sold for said period; and whereas, I am the owner of certificate No. 11 for 2,275 shares of said common stock; and whereas, I hold the others in trust:

"Now, therefore, I, John P. Miller, trustee, do hereby declare that upon the termination of said escrow Willard D. Doremus will be entitled to receive said certificates Nos. 4, 5, 6, 7, 8, 9, and 10, Addison G. Du Bois will be entitled to receive certificates Nos. 12, 13, 16, and 17, F. S. Bright will be entitled to receive certificate No. 14, and Wm. Muerling will be entitled to receive certificate No. 15; and said voting trustees are hereby authorized and directed to transfer said common stock trust certificates to the individuals thereto entitled as above indicated. This declaration of trust is to be deposited with said certificates and is to be irrevocable, without the consent in writing of the beneficiaries hereto.

"In testimony whereof I hereunto set my hand and seal this 3d day of February, A. D. 1910, at the city of Washington, District of Columbia.

"John P. Miller, Trustee. [Seal]"

On the 4th of March, 1910, Mr. Sully, Mr. Hammond, Mr. Miller, Mr. Harris Hammond, Mr. Bright, Mr. Atherton, treasurer of the General Cotton Securities Company, and Mr. Baldwin met at the office of the National Cotton Improvement Company in the Union Trust Building in Washington. Mr. Sully gave Mr. Bright an order on the United States Trust Company of Washington for certificate A-3 for 30,000 shares of preferred stock of the General Cotton Securities Company, and Mr. Bright got the certificate of stock from the trust company and brought it back to the meeting. Certificate A-3 was then canceled, and certificate No. 5-A was issued to John P. Miller for 10,000 shares, and certificate No. 6-A for 4,000 shares was issued to Daniel J. Sully, syndicate manager.

The 10,000 shares were transferred by Miller to Daniel J. Sully, syndicate manager, and a certificate therefor, being certificate 7-A, was issued to him. Certificates 6-A and 7-A were then returned to the United States Trust Company by Mr. Bright and receipted for by that company, and the remaining 16,000 shares were turned into the treasury of the General Cotton Securities Company.

It thus appears from the evidence referred to that the American patents for the Doremus invention were purchased by Miller in 1907 from Doremus and others interested therein for \$50,000. The National Cotton Improvement Company, which will hereafter be referred to as the Improvement Company, was then organized, with a capital stock of \$1,500,000, and the American patents were transferred by Miller to that company in consideration of 93 per cent. of its entire capital stock, and the patents were assigned by Miller and by Doremus to the company. Upon the organization of the General Cotton Securities Company, Miller transferred to that company the stock of the Improvement company, in consideration of the payment of \$37,500 in cash and \$1,000,000 of the common stock and \$1,000,000 of the preferred stock of the latter company. It also appears from the evidence that the \$37,500 was paid by Mr. John Hays Hammond to Mr. Bright, who paid the same to Mr. Miller, Mr. Du Bois, Mr. Doremus, and others interested therein, and that Mr. Hammond had previously paid the \$12,500, being the balance of the \$50,000 which Mr. Miller had agreed to pay for the American rights.

From the organization of the General Cotton Securities Company in January, 1910, until the fall of 1910, Mr. Sully was actively engaged in trying to sell the stock of the Securities Company, and to dispose of the foreign rights in the Doremus invention. To that end he made several trips to England, and a number of tests were made of cotton gins constructed in accordance with the Doremus patent. The cost of these tests, as well as the personal expenses of Mr. Sully, were borne by Mr. Hammond. In September and October, 1910, serious differences arose between Mr. Hammond and Mr. Sully, which resulted in Mr. Hammond telling Mr. Sully that he would not make any further advances to him for his personal use, but that he would make further efforts himself to sell the stock of the company and would pay the cost of any further tests of the Doremus gin. Mr. Sully then threatened to issue a prospectus and to sell the stock of the company, and Mr. Hammond told him that if he did he would "repudiate" the prospectus in every paper in the country; the attitude of Mr. Hammond being, according to his own testimony, that it would not be honest to sell the stock of the company until the value of the Doremus invention could be fully demonstrated by further tests of the gin. Follow-

ing this interview Mr. Sully wrote Mr. Hammond as follows:

"Office of Vice President and General Manager.

"Washington, D. C., October 12, 1910.

"Mr. John Hays Hammond, 71 Broadway, New York, N. Y.—Dear Sir: I inclose you herewith a copy of a letter which I have tendered to Mr. John P. Miller to-day.

"Yours truly, Daniel J. Sully.
"P. S.—I have informed Mr. Miller and his associates that you yesterday absolutely refused to furnish any more money, which you were obliged to do under our contract, for the further protection of the General Cotton Securities Company, and that you notified me that you would repudiate in every newspaper in the country any prospectus that I might issue.

"D. J. S."

The letter inclosed to Mr. Hammond was as follows:

"Washington, D. C., October 12, 1910.

"Mr. John P. Miller, Washington, D. C.—Dear Sir: Under a contract made with you the 28th day of December, 1909, between John Hays Hammond and myself jointly, acting as a syndicate, which was to be composed of John Hays Hammond and myself and one or more other parties, wherein we entered into a contract with you whereby we were to organize a corporation with the capital stock of \$7,000,000 common and \$3,000,000 preferred stock, which preferred stock was to be 7 per cent. cumulative with a preferment as to assets upon dissolution without participation in profits beyond 7 per cent.; and also we desired to obtain from you your interest in the National Cotton Improvement Company, for the General Cotton Securities Company, and also obligated ourselves to finance the said General Cotton Securities Company by the sale of the preferred stock of the General Cotton Securities Company, and to use our best endeavors to sell the preferred stock to meet the obligations which we entered into with you. Under that contract, now, therefore, please take notice that the General Cotton Securities Company was formed, under the requirements of that contract the syndicate was formed; also under the requirements of that contract I have used my best endeavors to get the consent of my copartner (John Hays Hammond) to co-operate with me in placing this stock where it could be sold. I have been unable to so do. Therefore, to absolve myself from any liability, financially or morally, respecting the contract, I herewith inform you that I will on your demand proceed as far as I can to turn back to you legally all and any of the right or interests that I may have under this contract.

"Yours truly, Daniel J. Sully."

On the 12th of October Mr. Sully also wrote Mr. Hammond, tendering his resignation as a director of the General Cotton Securities Company, to take effect when the board of directors accepted the same. Mr. Hammond and Mr. Sully met again on the 6th of November, when, according to the testimony of Mr. Hammond, friendly relations between him and Mr. Sully were partially restored, with the understanding that Mr. Hammond would take up active measures to establish the value of the Doremus invention, with the view of selling the stock of the company, and arrangements were made for a meeting of the directors. On the 16th of November the directors met at the office of the company in Washington, and the meeting resulted in a further breach between Mr.

Hammond and Mr. Sully, and no action on the part of the directors. Following this meeting W. D. Doremus and A. G. Du Bois wrote to Mr. Hammond, Mr. Sully, and Mr. Bright, as the board of trustees, advising them that they were interested to the extent of three-fourths in the trust certificate issued by them to John P. Miller, and stating:

"Our information is to the effect that at an alleged meeting of the board of directors held at the office of the company on Wednesday, the 16th inst., the previous minutes of the board of directors, or what was supposed to be the previous minutes of the board of directors (which were, in fact, made by a board differently constituted from those who were present the 16th inst.), were physically altered in an attempt to release the gentlemen interested in the syndicate, for whom Daniel J. Sully was acting, from the obligation to pay into the treasury of the company, upon demand made therefor, the sum of \$1,600,000, as provided for under the contract made by the former president of the company with said Sully, acting for said syndicate, under date of January 7, 1910."

The letter also demanded that the board of trustees request the president of the company to call a special meeting of the stockholders for the purpose of removing the then board of directors. On the same day Messrs. Du Bois and Doremus wrote to Mr. Atherton, the treasurer of the General Cotton Securities Company, calling his attention to the fact that there was in his possession the preferred and common stock of the improvement company, stating that they had been informed of certain illegal action taken by the board of directors of the Securities Company on the 16th of November, which was greatly to their detriment as the beneficial owners of three-fourths of the trust certificates issued to John P. Miller, and demanding that he retain in his possession the stock of the National Cotton Improvement Company until a proper board of directors could be elected by the stockholders of the Securities Company. They also wrote to Mr. Hammond, informing him that they were interested in the stock held by Mr. Miller, and that "among the conditions on which the delivery of the stock of the General Cotton Securities Company by it to Mr. Sully was the agreement that he made on behalf of the syndicate to pay in the treasury of the said company the sum of \$1,600,000"; that they had been informed that an attempt had been made to alter the contract made by Mr. Sully with the company, so as to relieve the syndicate of the payment to the company of said sum of \$1,600,000; and that they were advised that such action was absolutely illegal. The letter concluded by stating that they would hold him personally responsible for any injury suffered by them by reason of any change or transfer of the stock then standing in the name of John P. Miller. Mr. Du Bois and Mr. Doremus also wrote to Mr. Miller, on the 18th of November, 1910, as follows:

"Dear Sir: Under the several agreements in existence between us, you have been authorized to act in our behalf and interests in relation to

the stock in the National Cotton Improvement Company, which stood in your name alone, and, as you know, we acquiesced in the agreement made by you in December, 1909, with the syndicate represented by John Hays Hammond and Daniel J. Sully. In carrying out the agreement in behalf of the syndicate, we are all aware of the fact that the General Cotton Securities Company, through its president and secretary, secured a contract from Mr. Sully, made in behalf of the syndicate, that was greatly to the advantage of all of us, as under its terms the syndicate is required to pay into the treasury of that company upon demand \$1,600,000. Through our consent you have been the representative member for our joint interests on the board of directors of the General Cotton Securities Company; we assuming, of course, that you would in every way protect our mutual interests. If we have been correctly informed, you have failed to appreciate that the recent action taken by the board of directors of the General Cotton Securities Company, or what is supposed to be a board of directors, at a meeting held in this city on Wednesday, the 16th inst., has jeopardized our rights. We feel sure that you must appreciate that agreeing that the minutes of the previous meeting held by the board of directors in New York on January 7, 1910, should be physically changed, so as to relieve the syndicate from its obligation to pay into the treasury of the company \$1,600,000 upon demand, practically places us in the position of being at the mercy of the syndicate. Consequently, we demand that you take necessary steps to at once protect the interests of all of us in the stock of the National Cotton Improvement Company, which was turned over by you through the syndicate to the General Cotton Securities Company, by such appropriate action in the premises that will impress that stock with the trust that you represent in our behalf.

"Yours respectfully, W. D. Doremus,
"A. G. Du Bois."

It is apparent that the theory upon which Mr. Doremus and Mr. Du Bois acted in writing these letters was that Mr. Hammond was personally liable for the \$1,600,000 which Mr. Sully agreed to pay to the Securities Company, and that the course they pursued was based upon the assumption that there had been a formal meeting of the board of directors of the Securities Company on the 16th of November, 1910. There are no minutes of such a meeting in the record, and there are no grounds upon which Mr. Hammond could be held liable for the sum named. After receiving the letter from Mr. Du Bois and Mr. Doremus, Mr. Hammond tried to arrange for a meeting between himself and Mr. Du Bois and Mr. Doremus, and went to Washington on November 19th to meet Mr. Doremus, for the purpose of explaining to him that he was not liable for the \$1,600,000 referred to in Mr. Sully's contract with the company, and that the directors had not attempted on November 16th to do anything that would prejudice his interest. While in Washington on the 19th of November Mr. Hammond learned from Mr. Bright that Mr. Sully had executed a contract on behalf of the Securities Company with the Fordyce Company, which involved the stock of the Securities Company. Mr. Bright would not explain to him the exact terms of the contract, and Mr. Hammond immediately tele-

graphed to Mr. Atherton, the treasurer of the Securities Company, who was then in Little Rock, Ark., that he had just learned of an "attempted contract" between Mr. Sully, on behalf of the Securities Company, and the Fordyce Company, but that he was not acquainted with the details, and directing him to wire Mr. Fordyce, Sr., in St. Louis, that Mr. Sully had no authority to make the contract, that it was in violation of the syndicate agreement, and absolutely void.

A special meeting of the board of directors of the General Cotton Securities Company was called, and was held at the New York office of the company on the 23d day of November, 1910. The minutes of that meeting show that the return of the \$1,600,000 of the preferred stock of the company to the treasurer of the company was approved; that the letter of Daniel J. Sully to John P. Miller of October 12, 1910, a copy of which was sent by Mr. Sully to Mr. Hammond, was presented to the board, and with it the following communication from Mr. Hammond to Mr. Miller, referring to Mr. Sully's letter:

"Since the receipt of that letter I have made great efforts to carry out the contract of December 28, 1909, which is referred to in Mr. Sully's letter to you. I find I also am entirely unable to carry out the contract of December 28, 1909, which is referred to in Mr. Sully's letter to you. I find I also am entirely unable to carry out the unfulfilled provisions of that contract, and I therefore join with Mr. Sully in informing you that I will, on your demand, proceed as far as I can to turn back to you legally all and any of the rights or interests that I may have under that contract.

"Yours truly, John Hays Hammond.

"P. S.—I made this proposal to you by word of mouth on Saturday, November 19, 1910, and I am writing this to formally confirm my verbal proposal. J. H. H.

"We hereby assent to the above proposal as members of said syndicate.

"Harris Hammond.
"D. B. Atherton."

Mr. John Hays Hammond then offered, "on behalf of the vendors (the members of the syndicate), those members present assenting thereto," to return the stock of the company received by them upon the acceptance by the company of the proposal, except the 49 shares held by the directors and officers of the company, to permit the cancellation of the certificates for the same. Mr. Miller stated that he had written a letter to Mr. Sully, accepting the proposal contained in his letter of October 12, 1910, "and demanded the redelivery to him of the capital stock of the National Cotton Improvement Company as on the terms set forth in Mr. Sully's letter." Thereupon the board of directors adopted the following resolution:

"Whereas, heretofore this company entered into an agreement with Daniel J. Sully as set forth in the minutes of the first meeting of the board of directors whereby there was transferred to this company 4,712 shares of the preferred and 9,072 shares of the common stock of the National Cotton Improvement Company for certain considerations moving from this company, to wit, \$3,000,000 at par of common stock

of this company, and \$1,400,000 of preferred stock of said company; and

"Whereas, thereby and thereunder Daniel J. Sully obligated himself personally to pay on demand for the additional \$1,000,000 of the preferred stock of this company issued to him and his associates; and

"Whereas, the aforesaid agreement was entered into on or about the 7th day of January, 1910, and it appears from the statements of the vendors to this company (other than Mr. Sully and Mr. Rogers) of the said National Cotton Improvement Company's stock, who were present at this meeting, that no sales of this company's stock have been effected, and that all efforts put forth by said vendors to effect such sales have thus far failed; and

"Whereas, the said vendors present heretofore are unable to state definitely when any sales can be effected by them under said agreement; and

"Whereas, the said John P. Miller has received the offers made by each of the vendors aforesaid embodied in letters read to this board:

"Resolved, that it is to the interest of the General Cotton Securities Company that it accede to the request of the said vendors, and thus enable the said vendors to meet the demand of the said John P. Miller for the return of the National Cotton Improvement Company's stock aforesaid, and that a refusal on their part in their opinion will inevitably precipitate a long and expensive litigation, and otherwise complicate and disastrously affect the affairs of this company.

"Resolved, further, that this company hereby accepts the offer of the vendors to rescind the contract aforesaid and to return to it the balance of this company's capital stock, available for this purpose, to wit, \$2,995,100 of common stock of said company and \$1,400,000 par value of its preferred stock, which, together with the preferred stock already returned, constitutes the entire stock outstanding under said contract, less 49 shares held by the directors and officers of the company, and that the certificates for all of said shares of this company, except the directors' shares, be and they are hereby called in and canceled.

"Resolved, further, that the treasurer and secretary of this company be and they are hereby authorized and directed to return the shares of the capital stock of the National Cotton Improvement Company and the certificates therefor in accordance herewith, and to cancel on the books of this company the aforesaid shares of this company, except the 49 shares of common stock which are not available for this purpose, and to take such other and further action in the premises as may be necessary or proper.

"Resolved, further, that this company execute by its proper officers an assignment of all of its right, title, and interest in and to any applications of John R. Fordyce for claimed improvements upon the Doremus gin to National Cotton Improvement Company, the owner of the said original patents, to whom same under the circumstances and in equity and good faith belong: Provided, the said National Cotton Improvement Company pays to this company, by way of reimbursement, the expenses incurred by it or its officers incident to the preparation, filing, and assignment of said applications, not, however, to exceed the sum of \$165.

"Resolved, that in addition to any other notice that may be required by the foregoing action, that notice of the cancellation of the certificates of the capital stock of this company be given by the treasurer to the United States Trust Company, Washington, D. C., being certificates A-6 for 4,000 shares of the preferred stock of said company, and A-7 for 10,000 shares."

On the day following the meeting of the directors just referred to Mr. Hammond left New York on a trip to Russia. After his return to America, Willard D. Doremus and

Addison G. Du Bois filed a bill of complaint against him, the National Cotton Improvement Company, Daniel J. Sully, Frank S. Bright, John P. Miller, and the United States Trust Company, on the 3d of March, 1911, in the Supreme Court of the District of Columbia. The bill is a lengthy one, covering 16 pages of the printed record, and it is only necessary in this case to set out the prayers for relief, which were as follows:

"2. That the court pass a decree herein directing the defendants Daniel J. Sully and Frank S. Bright to deliver to the plaintiff Willard D. Doremus trust certificates Nos. 4, 5, 6, 7, 8, 9, and 10, representing the shares of common stock of the General Cotton Securities Company, and deliver to Addison G. Du Bois trust certificates Nos. 12, 13, 16, and 17, representing the shares of common stock of the General Cotton Securities Company.

"3. That the court pass a decree herein directing the defendants John Hays Hammond, Daniel J. Sully, and Frank S. Bright, upon the presentation and delivery to them of the trust certificates of beneficial interests Nos. 4 to 10, inclusive, and 12, 13, 16, and 17 by the plaintiff, to deliver to said plaintiffs the common stock represented thereby.

"4. That the court pass a decree herein authorizing and directing the United States Trust Company to forthwith deliver to the plaintiff Doremus, out of the 10,000 shares of preferred stock now in its possession, 5,000 shares, and to the plaintiff Du Bois 2,500 shares.

"5. That the defendant the National Cotton Improvement Company be enjoined pendente lite and permanently from entering into any contract of any kind or description with any one in relation to the Doremus patents or any improvements thereon, or transferring upon its books any stock that now stands in the name of John P. Miller, trustee.

"6. That the defendant John P. Miller be enjoined pendente lite and permanently from entering into any contract of any kind or description with any one in relation to the stock now in his possession and standing on the books of the National Cotton Improvement Company in the name of John P. Miller, or John P. Miller, trustee, and that the court pass a mandatory order in this cause demanding that John P. Miller forthwith return to the lawful treasurer of the General Cotton Securities Company all the stock, or the certificates for shares of stock, of the National Improvement Company, received by him from the treasurer, or any other officer, of the General Cotton Securities Company, either previous to or subsequent to the 23d day of November, 1910, and to assign or reassign any patents or applications for patents in relation to any improvements made upon the cotton gin conceived by the Thomas Fordyce Manufacturing Company or John R. Fordyce, and assigned by Fordyce, or the Fordyce Manufacturing Company, to the General Cotton Securities Company."

Daniel J. Sully answered the bill on behalf of the National Cotton Improvement Company as its first vice president, in which all of the allegations of the bill were admitted. The Supreme Court held that Mr. Sully "was the instigator of the suit, that he was made a party defendant to conceal the same, and to make use of whatever advantage the act afforded the plaintiff by his position as defendant," and on the 27th of November, 1911, entered a decree dismissing the bill. The plaintiffs appealed to the Court of Appeals of the District of Columbia, and ob-

tained a reversal of the decree of the Supreme Court. In disposing of the case on appeal, Chief Judge Shepard said:

"The court below was right in holding that no jurisdiction had been acquired of the National Cotton Improvement Company by the service of the process in this case. * * * The answer for said corporation, purporting to have been filed by Daniel J. Sully as vice president, did not have the effect to bring the corporation before the court. The corporation had a president, as well as a vice president; and, without pausing to consider whether Sully was actually its vice president at the time, it does not appear that he had any authority as such officer to enter its appearance, or answer for it in this suit. *Ambler v. Archer*, 1 App. D. C. 94-106. It does not seem that it was to its interest to appear voluntarily. On the contrary, its answer would seem to have been filed by Sully in the interest of the plaintiffs. The entire record of the case furnishes an example of corporate formation, stock watering, and manipulation that is made possible by the character of the corporation laws in force in many of the states, as well as by the absence of restraining legislation in the District of Columbia. Assuming, what may reasonably be inferred from the circumstances in evidence, that Sully stimulated this litigation, desiring thereby to accomplish some purposes of his own, it does not follow that plaintiffs shall lose any substantial rights they may be entitled to under the allegations of their bill. It remains to be inquired what these are, if any, and if they may be adjudicated in the present proceeding with the parties properly before the court. So far as inquiry into the corporate proceedings of the General Cotton Securities Company, looking to the correction of its minutes, and the legality of its election of directors and other officers, is involved, that corporation is a necessary party. But, being a foreign corporation, if it were a party, the courts of this jurisdiction would have no power to control its internal affairs and the administration of its corporate functions. *Clark v. Mutual Reserve Fund Life Ass'n*, 14 App. D. C. 154-175, 43 L. R. A. 390; *Barley v. Gittings*, 15 App. D. C. 427-443. It does not appear that the administration of the internal corporate affairs of the National Cotton Improvement Company is necessarily involved, nor would it be a necessary party to a mere determination of the right to the ownership of its capital stock as between rival claimants thereof, if such were the object of this suit. * * *

Whatever rights the plaintiffs may have are narrowed to the ownership of the shares of the General Cotton Securities Company held in trust by the United States Trust Company, as against John P. Miller. Said Miller is a necessary party to this determination; and whether as against him the plaintiffs are entitled to a decree determining the question of ownership is a question that cannot be considered because Miller is not before the court. It was error to dismiss the bill because of the belief that Sully had instigated it against the other defendants. The decree will therefore be reversed, and the cause remanded, whereupon the plaintiffs may have it retained for a reasonable time for an opportunity to obtain service of process upon John P. Miller, and to amend their bill, if so advised."

After the case was remanded to the Supreme Court, Mr. Justice Anderson, in disposing of it, said:

"This is a suit by Willard D. Doremus and Addison G. Du Bois, seeking certain injunctive relief against John P. Miller, and further seeking to have delivered to the plaintiffs by the other defendants certain certificates for shares of common stock and preferred stock in the General Cotton Securities Company, which cer-

tificates are located within this district and are claimed to belong to the plaintiffs. The case came on for final hearing before Mr. Justice Wright, and a decree was entered dismissing the bill. An appeal was prosecuted from such decree, and the Court of Appeals reversed the same, remanding the case for further proceedings upon the sole question of the ownership of said certificates of stock as against John P. Miller. The Court of Appeals said: 'Whatever rights the plaintiffs may have are narrowed to the ownership of the shares of the General Cotton Securities Company held in trust by the United States Trust Company, as against John P. Miller. Said Miller is a necessary party to this determination, and whether as against him the plaintiffs are entitled to a decree determining the question of ownership is a question that cannot be considered because Miller is not before the court.' 41 W. L. R. 8. The Court of Appeals further said, in overruling the motion for rehearing: 'Whatever may be the concession regarding the ownership of this stock by the other defendants, who moreover have no interest therein, there is and could be no concession by Miller who was never a party to this case.' At that time Miller had not been brought into the case, either by personal service or publication. Since the case was remanded, service by publication has been obtained against Miller, and a decree pro confesso entered, and subsequently made absolute, against him. The case is now submitted to the court for the entry of a final decree directing the delivery of the certificates claimed by the plaintiffs. In this situation, the Court of Appeals having held that the other defendants have 'no interest therein,' and having remanded the case for the sole purpose of determining the ownership of said shares 'as against John P. Miller,' this court, in view of Miller's default and the pro confesso against him, must necessarily enter a decree directing the defendants to deliver to the plaintiffs the certificates for common and preferred stock in the General Cotton Securities Company as claimed by them. Whether the General Cotton Securities Company will recognize them when presented for transfer, in view of their supposed cancellation, is a question with which this court can have no concern, and can only be determined in the proper forum in a proceeding in which said company may be made a party. A decree will accordingly be entered, directing the defendants to deliver to the plaintiffs the certificates for stock in the General Cotton Securities Company as claimed."

In accordance with this opinion the Supreme Court on the 2d day of June, 1913, passed the following decree:

"This cause came on for final hearing this term and was duly argued by counsel, and it appearing to the court that the complainants are entitled to the relief sought by the bill of complaint filed in this cause, and thereupon, and upon consideration thereof, it is this 2d day of June, 1913, adjudged, ordered, and decreed that the defendants Daniel J. Sully and Frank S. Bright be and they hereby are jointly and severally commanded to deliver to the complainant William D. Doremus, or to his attorney, trust certificates Nos. 4, 5, 6, 7, 8, 9, and 10, representing respectively shares of common stock of the General Cotton Securities Company, and to Addison G. Du Bois trust certificates Nos. 12, 13, 16, and 17, representing respectively shares of the common stock of the General Cotton Securities Company, such delivery to be made by said defendants to said complainants, or to their attorneys of record, within 10 days from the date of the execution of this decree. And it is hereby further adjudged, ordered, and decreed that the defendants John Hays Hammond, Daniel J. Sully, and Frank S. Bright be and they hereby are commanded to deliver to the complainants re-

spectively, or to their attorneys of record, the number of shares of common stock of the General Cotton Securities Company held by them as voting trustees, as are represented by trust certificates Nos. 4, 5, 6, 7, 8, 9, and 10, and trust certificates Nos. 12, 13, 16, and 17, or, if all of the common stock in said defendants' hands are embraced in one certificate, then and in that event said defendants, and each of them, are hereby commanded to execute a proper assignment to each of the plaintiffs for the number of shares of common stock of said General Cotton Securities Company as are represented by the trust certificates aforesaid, and attach to said assignment the certificates of stock held by them, and a certified copy of this decree, and deliver the said assignment and decree to the attorneys of record for the complainants, with a letter addressed to the General Cotton Securities Company, duly signed by said defendants, authorizing and directing said company to transfer on its books the number of shares represented by the assignment and shown by this decree that the complainants are respectively entitled to, and to issue and deliver to said complainants, or their assigns, new stock certificates therefor, said delivery to be made within 10 days after the presentation to said defendants, or to their attorneys of record in this cause, by the complainants, respectively, of the trust certificates herein mentioned. It is hereby further adjudged, ordered, and decreed that the defendant the United States Trust Company deliver to the said complainant Willard D. Doremus five thousand (5,000) shares, and to the said complainant Addison G. Du Bois twenty-five hundred (2,500) shares of the preferred stock of the General Cotton Securities Company heretofore placed in its possession as trustee by the defendant Daniel J. Sully, or, should the shares of preferred stock of the General Cotton Securities Company held by it be embraced in a certificate or certificates of such denominations that it is impracticable to perform this command, then and in that event said defendant be and it is hereby commanded to execute a proper assignment to the complainants, respectively, for the number of shares of said stock as they by this decree are respectively entitled to, and said defendant is hereby further commanded to attach thereto such certificates of said preferred stock as may be necessary, and to accompany same by a letter addressed to the General Cotton Securities Company, such letter to be signed by its proper officers, with the request, authorization, and direction that said General Cotton Securities Company transfer on its books five thousand (5,000) shares of said preferred stock to Willard D. Doremus and twenty-five hundred (2,500) shares to Addison G. Du Bois, or their assigns, and to issue and deliver to them, or their assigns, new certificates therefor, and return to it (the defendant the United States Trust Company) a certificate for the shares remaining after making such transfer. And said defendant is hereby directed to deliver such assignment or assignments, together with the necessary certificates of stock and the letter herein provided for, to the complainants' attorneys of record, such delivery to be made within 10 days from the date of the execution of this decree. The costs in this court will be taxed, one-half against the plaintiffs, and one-half against defendants Hammond, Sully, and Bright."

On the 16th of June, 1913, Mr. Gittings, counsel for Mr. Du Bois and Mr. Doremus, delivered to John L. Lordan, a member of the bar of New York City, a certificate issued by Ralph Polk Buell, president of the General Cotton Securities Company, to John Hays Hammond, Daniel J. Sully, and F. S. Bright, voting trustees, for 29,965 shares of

the common capital stock of said company, and the following letter:

"Washington, D. C., June 4, 1913.

"Transfer Officers, General Cotton Securities Company, a Delaware Corporation: Under and by virtue of a decree passed on the 2d day of June, 1913, by the Supreme Court of the District of Columbia, in cause Equity No. 30,002, entitled Willard D. Doremus and Addison G. Du Bois against National Cotton Improvement Company and others, a certified copy of which decree is hereunto attached, we, the undersigned, as voting trustees, out of the 29,965 shares of the common stock represented by certificate No. 14, General Cotton Securities Company, in the name of John Hays Hammond, Daniel J. Sully, and F. S. Bright, voting trustees, which certificate is hereunto attached, assign and transfer unto Willard D. Doremus, or his assigns, four thousand five hundred and fifty (4,550) shares, and unto Addison G. Du Bois, or his assigns, two thousand two hundred and seventy-five (2,275) shares, and we do hereby irrevocably constitute and appoint attorney, to transfer the said stock on the books of the said company, with full power of substitution in the premises; and we do hereby authorize and direct the said General Cotton Securities Company to transfer the aforesaid shares on the books of the company to the persons above named, and to issue and deliver to them, or their assigns, new stock certificates therefor.

"John Hays Hammond,

"Frank S. Bright,

"D. J. Sully, Voting Trustees."

He also delivered to Mr. Lordan a copy of the decree of the Supreme Court of the District of Columbia, a certificate issued by John Hays Hammond, president of the General Cotton Securities Company, March 4, 1910, to Daniel J. Sully, syndicate manager, for 10,000 shares of the preferred stock of the said company, and the following letter from the secretary of the United States Trust Company of Washington:

"United States Trust Company.

"Washington, D. C., June 13, 1913.

"General Cotton Securities Company, 71 Broad Street, New York City—Gentlemen: Pursuant to the terms of a decree of the Supreme Court of the District of Columbia, passed on June 2, 1913, in the case of Willard D. Doremus et al. v. John Hays Hammond and others, Equity 30002, we are inclosing you herewith certificate A-7 for 10,000 shares of the preferred capital stock of the General Cotton Securities Company, with a request, authorization, and direction, as provided in said decree, that you transfer on your books 5,000 shares of the said preferred stock called for by said certificate to Willard D. Doremus, and 2,500 shares to Addison G. Du Bois, or their assigns, and to issue and deliver to them, or their assigns, new certificates therefor, and return to this company a new certificate for 2,500 shares, to be issued in the name of Daniel J. Sully, syndicate manager. We are advised by the attorneys in the case that Mr. Sully, in whose name this certificate is made, will indorse inclosed certificate, so as to enable you to make the transfer hereinbefore requested. "Very truly yours, J. H. Borden, Secretary."

Mr. Lordan took the certificates, letters, and copy of the decree to Mr. Campbell, secretary of the General Cotton Securities Company, who was in the office of Mr. John Hays Hammond, and asked him to transfer the stock in accordance with the letters annexed to the certificates. Mr. Campbell told him

that the books of the company were not in the office, but had been sent to the resident agent in Wilmington, Del., and that he could not, therefore, make the transfer, and declined to take the certificates. Mr. Lordan then went to see Mr. Atherton, treasurer of the General Cotton Securities Company, on the 17th of June, and presented the certificates, letters, and copy of the decree, and requested him to make the transfer of the stock. Mr. Atherton, according to Mr. Lordan's testimony, told him that he had no authority to do so, that the books were in the office of Mr. Baldwin, the attorney for the company, and that he would not make the transfer, unless he received instructions to that effect from the attorney. Mr. Atherton testified that, when Mr. Lordan presented the certificates of stock, etc., some time in July, he told Mr. Lordan that he could not transfer the stock; that, in the first place, he did not have the stockbooks in his possession, and did not know where they were, and, in the second place, the certificates would necessarily have to be signed by Mr. Hammond, and that Mr. Hammond was out of the city, and in the third place, that he would not transfer the stock without the advice of counsel. He further testified as follows:

"Have you had any experience in corporation affairs? A. Yes, sir. Q. And you say you told him that you would not transfer the stock, even if the certificates were signed by the president, without the advice of counsel? A. Yes, sir. Q. What, if anything, did Mr. Hammond do or say to you along about that time to prevent or influence your action in the transferring or nontransferring of that stock? A. Nothing whatever. I had not seen Mr. Hammond."

After his interview with Mr. Atherton, Mr. Lordan received the following letter from Mr. Baldwin, dated July 31, 1913:

"John J. Lordan, Esq., 115 Broadway, New York City—Dear Sir: I have been unable so far to get any instructions as to the transfer of the certificates of the General Cotton Securities Company, but have advised the company that, in my opinion the stock having been lawfully canceled, the certificates therefor are void. Regretting the delay, which I trust has not inconvenienced you, in replying to your correspondent, I remain,

"Very truly yours,

"Wm. Woodward Baldwin."

Mr. Hammond stated in his testimony that the certificate had never been presented to him and that he had not been requested to transfer the stock. At the time of the demand made upon Mr. Campbell and Mr. Atherton, he was at his home in Gloucester, Mass., and he did not hear anything of it until some time thereafter, when he heard of it through Mr. Baldwin; that he never gave Mr. Baldwin any instructions in reference to the matter, and, when he heard of Mr. Lordan's request through Mr. Baldwin, he said to Mr. Baldwin, "Well, now, Baldwin, this is a legal question, and it is up to you as attorney of the company." When he was asked what he meant by saying that it was a legal question, he said that on November 23, 1910, the stock had been called in

and canceled at the meeting of the board of directors of that date; that he knew, as a business man that it would be dishonest for him to sign certificates of fully paid up stock when the consideration for that stock had been returned to Mr. Miller, and when the stock represented no assets. "In other words, I would be committing fraud, and certainly should not have done it, unless I had the very best legal advice, or possibly even an order of the court, to protect myself." It further appears that there had never been any meeting of the directors of the General Cotton Securities Company after the meeting of November 23, 1910. At that time all of the stock of the National Cotton Improvement Company, which represented the patent rights to the Doremus invention of the cotton gin and improvements thereon, and which represented the only assets of the General Cotton Securities Company, was turned over to Mr. Miller, and the stock of the latter company had been declared canceled by the board of directors. Mr. Hammond, in 1913, had no interest in the National Cotton Improvement Company, and had upon his return from Russia in the early part of 1911 resigned as the president of that company.

On the 21st of May, 1915, Addison G. Du Bois brought this suit in the superior court of Baltimore City against John Hays Hammond. The declaration alleges:

That the plaintiff was, on the 23d day of November, 1910, lawfully in possession of a certain certificate or certificates representing 2,500 shares of the preferred stock of the General Cotton Securities Company and 2,275 shares of the common stock of said company. That he on said day lost said stock, and that the same came into possession of the defendant by finding. "Yet, defendant, well knowing the said certificates to be the property of the said plaintiff and rightfully to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff in this behalf, has not as yet delivered said certificates to the plaintiff, although often so requested to do, and has hitherto wholly refused so to do; and afterwards, to wit, on or about the 23d day of June, 1913, at the place aforesaid, converted and disposed of said certificates of stock to his own use. Wherefore the plaintiff says he is injured and has sustained damages to the amount of \$477,500. Wherefore the plaintiff brings this suit and claims damages in the sum of \$477,500, exclusive of all interest and costs of this suit."

The second count of the declaration, which was filed on the 21st of November, 1916, is substantially the same as the first. The defendant pleaded that he did not commit the wrong alleged, and also filed a special plea, to which reference need not here be made. To the second count the defendant pleaded the general issue plea, the plea of limitations, and a further plea to which it is unnecessary to refer. The trial of the case in the superior court, which apparently extended over a period of several weeks, and the record of which contains between 1,500 and 1,600 printed pages, resulted in a verdict for the plaintiff for \$238,750, which

was reduced by the court to \$123,775, for which amount the judgment from which this appeal is taken was entered in favor of the plaintiff.

The record contains 15 exceptions, the last one of which relates to the ruling of the court on the prayers. The court below granted the plaintiff's second prayer, as follows:

"The jury are instructed as a matter of law that the plaintiff's title to the stock mentioned in the declaration is settled by the decree of the Supreme Court of the District of Columbia in Equity cause 80002, and when the plaintiff presented the decree of said court, defendant's letter, and said stock to the proper officers of the corporation for transfer (if the jury so find), then he had the right to have it transferred on the corporation books to his name, and certificates for his shares issued to him, and if the jury find, from the whole evidence, the defendant personally, or by his agents or attorney, prevented that being done, defendant was guilty of a conversion of said stock, and their verdict should be for plaintiff."

The court rejected the prayers of the defendant, asserting that the plaintiff had offered no legally sufficient evidence, under the pleadings of any conversion by the defendant of the certificates of stock or shares of stock of the General Cotton Securities Company mentioned in the declaration, and that the verdict of the jury should therefore be for the defendant.

[1-4] The primary and important question to be determined is, therefore, whether the record contains any legally sufficient evidence of a conversion by the defendant of the stock mentioned in the declaration. In considering this question it is necessary to keep in view the precise nature of the inquiry. In the case of *Dietus v. Fuss*, 8 Md. 148, the court used this language:

"Before expressing an opinion in reference to the plaintiff's third prayer, it is proper to notice some of the principles relating to the subject of conversion, for the action of trover cannot be maintained without a conversion. It may be either direct or constructive, and therefore may be proved directly or by inference. When the plaintiff fails in proving an actual conversion, it will be necessary for him to give evidence of a demand and refusal having been made at a time when the defendant had the power to give up the goods. A demand and refusal are only evidence of a prior conversion, which may be explained and rebutted by evidence to the contrary. 2 Greenl. Ev. §§ 642, 644; *Edwards v. Hooper*, 11 Mees. & Wels. 363."

[5] In the case of *Manning v. Brown*, 47 Md. 506, Judge Alvey said:

"There is nothing in the facts stated, and which have been found by the jury, that would, in the least, justify a pretension that there had been any such conversion of the personal effects of the plaintiff as would entitle him to recover under the first count of his declaration. There was no evidence whatever of any intention on the part of the defendants either to take to themselves the property in the goods, or in any manner to deprive the plaintiff of them. To entitle him to recover on the count in trover, such proof would have been required. *Dietus v. Fuss*, 8 Md. 148; *Simmons v. Lillystone*, 8 Exch. 431, 442; *Burroughes v. Bayne*, 5 H. & N. 296; *Pilot v. Wilkinson*, 2 H. & Colt. 72."

In the case of *Balto. Marine Ins. Co. v. Dalrymple*, 25 Md. 269, the court said:

"In the case last cited [*Edwards v. Hooper*, 11 M. & W. 362] the plaintiff's assignee in bankruptcy relied on a demand and refusal as the ground of their action, the conversion having taken place before the fiat in bankruptcy, it was held the suit could not be maintained. Parke, Baron, said: 'If the goods were in possession of the defendants, a demand and refusal would be evidence of a conversion. But it is not so in a case where the goods have been previously parted with by sale. There cannot be an effectual demand and refusal unless the party has at the time possession of the goods and has the means of delivering them up.' In 2 Greenl. Ev. § 644, the effect of a demand and refusal is correctly stated, and many cases cited. In *Dietus v. Fuss*, 8 Md. 148, the case in 11 M. & W. 362, and the sections of Greenleaf on this subject were cited and approved. It follows from these authorities that the demand and refusal in this case could have no effect either in giving to the plaintiff a right of action, or to fix the measure of damages."

In a more recent case of *Merchants' Bank v. Williams*, 110 Md. 334, 72 Atl. 1114, Judge Burke, speaking for this court, said:

"Conversion, in the sense of the law of trover, consists either in the appropriation of the property of another, or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding the possession from him under an adverse claim of title, and all who aid, command, assist, or participate in the commission of such unlawful acts are liable. In this case the bank, accepting for its own benefit, the stock from Wilson Colston & Co., with notice of their want of authority to hypothecate, became by that act jointly liable with that firm for the conversion of the plaintiff's goods, which took place on the 17th of September, 1907."

In the case of *Smith v. Young*, 1 Camp. 439, Lord Ellenborough said:

"The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the articles demanded."

[6] Applying these principles to the facts in this case, it is apparent that there is not the slightest evidence of the conversion of the stocks in question by Mr. Hammond on the 23d day of June, 1913. So far as the evidence discloses, the books of the General Cotton Securities Company were not in his possession or in the possession of his agents. No demand was made upon him to transfer the stock, and according to the uncontradicted evidence he had no knowledge of the demand upon Mr. Atherton and Mr. Campbell until long after it was made, and he had never given them any instructions in reference thereto. There is evidence tending to show that Mr. Campbell was also employed by Mr. Hammond; but the demand made upon him was made upon him as the secretary of the General Cotton Securities Company, and he declined to make the transfer, except under advice of counsel for the company. Mr. Baldwin, to whom Mr. Hammond had given no instructions in reference to the matter, wrote Mr. Lordan that he had been unable to get any instructions as to the trans-

fer of the stock, but that he had advised the company that in his opinion, the stock having been lawfully canceled, the certificates therefor were void. The fact that Mr. Campbell was also employed by Mr. Hammond, and that Mr. Baldwin was also counsel for Mr. Hammond, would not justify an inference that in what they did and said they acted as the agents of Mr. Hammond, and not as the secretary and counsel of the company, when the evidence is to the effect that they were not approached as the agents of Mr. Hammond, and that Mr. Hammond had no knowledge of the alleged demand, and gave no instructions to either of them in reference to the transfer of the stock.

[7] It is true a principal may, by his subsequent ratification or acquiescence, become liable for the unauthorized acts of his agents; but this principle presupposes that the act complained of was the act of one as the agent, or on behalf of the principal. In this case there is no proof to warrant the view that, in what Mr. Baldwin, Mr. Campbell, and Mr. Atherton did, or refused to do, they acted as the agents of Mr. Hammond, because, as we have said, the evidence shows that he had given them no instructions in reference to the matter, and they were only called upon to act as the officers of the company.

[8] The court below, in granting the plaintiff's prayer, proceeded upon the theory, and the learned counsel for the appellee contend in this court, that the decree of the Supreme Court of the District of Columbia determined the plaintiff's right to a transfer of the stock on the books of the General Cotton Securities Company. But it is obvious that the decree could not have that effect, and that the learned judge of that court did not intend so to decree. The General Cotton Securities Company was not a party to that suit, and no decree could have been passed affecting its interests. It is not necessary in this case to determine whether this court can properly pass upon the legality of the proceedings of the board of directors of the General Cotton Securities Company on the 23d of November, 1910. The only question here involved is whether the conduct of Mr. Baldwin, Mr. Campbell, and Mr. Atherton amounted to a conversion of the stock by Mr. Hammond. If the demand had been made upon Mr. Hammond, as the president of the company, to transfer the stock, it might be questioned whether, in view of the resolution of the board of directors of the company, he would have been authorized to make the transfer without some previous action of or authority from the board of directors.

Among other cases cited and relied on by the appellee is the case of *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387.

It may be noted, however, that in that case that the defendants Rogers and Skinner, who were the president and treasurer of the corporation, joined with the defendant company in a formal refusal to transfer the stock. In this case there was no demand made upon Mr. Hammond, and no refusal on his part to make the transfer desired.

It follows, from what has been said, that the plaintiff below failed to make out a case of a conversion of the stock in question by Mr. Hammond, and the judgment of the court below must therefore be reversed, without awarding a new trial.

Judgment reversed, with costs, without awarding a new trial.

(121 Md. 105)

CROMWELL v. CHANCE MARINE CONST. CO. (No. 30.)

(Court of Appeals of Maryland. June 27, 1917.)

1. SALES \S 398 — REMEDIES OF BUYER — RECOVERY OF PURCHASE PRICE — QUESTION FOR JURY.

In action by buyer to recover the purchase price of a motor boat alleged to be of no use or value, evidence held to present a jury question.

2. TRIAL \S 143 — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE.

The comparative weight of evidence is exclusively a jury question.

3. TRIAL \S 139(1) — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE.

Where there is any evidence competent, or of sufficient probative force, to support plaintiff's case, the weight and sufficiency of such evidence should be left to the jury.

4. MONEY RECEIVED \S 1 — ASSUMPSIT — RIGHT OF ACTION.

In assumpsit for money had and received, plaintiff may recover from defendant any money belonging to him obtained from him through mistake, fraud, or deceit; and such action lies to recover money in possession of defendant which in justice and good conscience belongs to plaintiff.

5. MONEY RECEIVED \S 17(3) — ASSUMPSIT — ISSUES.

In assumpsit to recover money had and received, the defendant, under the general issue, may rely upon any just ground of defense that tends to show he was not bound to pay it.

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

"To be officially reported."

Assumpsit by James P. Cromwell against the Chance Marine Construction Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Eugene P. Childs, of Annapolis, for appellant. Robert Moss, of Annapolis, for appellee.

BRISCOE, J. The controversy in this case is over the sale of a motorboat. The declaration is in assumpsit, upon the usual common counts. The defendant pleaded the general

issue pleas, and, the trial in the court below resulting in a judgment for the defendant, the plaintiff brings this appeal.

At the trial a single exception was taken, and that was to the ruling of the court, at the close of the plaintiff's testimony, in granting the defendant's prayer, withdrawing the case from the consideration of the jury, and directing a verdict for the defendant. The sole question presented, on the appeal, is whether the court below committed an error in granting the defendant's prayer, and this requires a review of the evidence disclosed by the record. The record is a short one, and there were only two witnesses examined in the case. The testimony is somewhat brief, and the plaintiff's testimony is the only material evidence in the case.

It appears that the plaintiff, who resides upon the Severn river, in Anne Arundel county, some time in the year 1916, purchased of the defendant a motorboat for the sum of \$375. Prior to the contract of sale, it was agreed that a small engine, which was then in the boat, should be removed, and what was called a Hubbard engine was to be installed in its place. It further appears that on the 25th of February, 1916, the plaintiff paid the sum of \$210 on account of the boat and engine, but with the understanding that, if a Hubbard engine was not put in it, he did not want it. The following letter, introduced as evidence in the case, shows the contract and understanding between the parties:

The Chance Marine Construction Company,
Designers and Builders of Boats.
Office and Shipyard, Severn Avenue, Eastport,
Md.

Annapolis, Md., Feb. 23, 1916.

Mr. J. H. Cromwell, Forrest and Front St.,
Balto., Md.—Dear Herbert: Confirming telephone conversation with you regarding the Caughy boat, will say that we will let you have the boat at \$375 as per your request. As you understand, the hull does not belong to us. We will ask you for your check for \$210. We will then take the engine out and put in the 12 H. P. Victor motor in its place. The balance payable when the boat is delivered. You will understand that we could not make any change in the boat until it is paid for, as the money has to be turned into the estate of the owner.

Yours very truly, Caryl H. Bryan.

On the 25th of February, 1916, the plaintiff replied to the foregoing letter, as follows:

Homestead Park Product Company, Forrest and
Front Streets.

Baltimore, Feb. 25, 1916.

The Chance Marine Construction Co., Annapolis, Md.—Gentlemen: I am inclosing herewith my check for \$210 to apply on account of the Seabury boat and engine. Your attention is called to the fact that before I agreed to purchase this outfit, or even before I made an offer for same in your office last week, your Capt. Baker represented this engine to be one manufactured by the Hubbard Motor Company, and it was on the strength of this representation that I made the above offer and finally agreed to purchase. In the meantime I have been familiarizing myself with the different parts of the Hubbard motor, and after talking with your

Mr. Bryan this afternoon I ran across some information that led me to believe that it was possible that your motor was not a Hubbard machine, but one manufactured for the Fairbanks Company by another concern, and with which they have experienced a large amount of trouble. I have just finished talking with your Capt. Baker on the phone, and he assured me that the motor is a Hubbard, and if such is the case all is well and good, and I want you to go ahead with the work as promptly as you can; but, on the other hand, I want you to be sure of this fact before you do go to work on it, because, if it is not a Hubbard engine, I don't want it, as I do not care to experiment with any engine that you or I don't know anything about.

Yours very respectfully,

O. K.

J. H. Cromwell.

The plaintiff also testified that he got the boat on Thursday and returned it on Saturday of the same week; that when he went after the boat there were two or three hours' work on the engine before it was ready to be taken away; that the boat leaked; that it broke down on its way home before they got to the railroad bridge; "we had to anchor and spend an hour, and then came back with one cylinder, and they repaired it and we started out again." He further testified that the defendant stated that it was a Hubbard engine which had been put in and installed in the boat, when it was turned over to him. Upon redirect examination he was asked the following question: "Then you did not find out it was not a Hubbard motor until after you took the boat back?" Answer: "Yes, sir." That he told the defendant, when he carried the boat back, that if he could prove to him that a Hubbard engine had been installed in the boat he would take it, but this was not done. That he made demand for the return of the \$210 before bringing the suit, but the defendant refused to answer any correspondence, or to return the money, even upon a personal appeal.

[1-3] From this outline and statement of the testimony, and it embraces all of the material and substantial facts disclosed by the record, it will be seen that the question here presented is a narrow one, and that is whether the court below committed an error in withdrawing the case from the jury by the instruction granted. We think the testimony, as disclosed by the record, was legally sufficient to take the case to the jury, and the court committed an error in granting the defendant's prayer. It is well settled by a long line of decisions of this court that the court has no power or authority to decide upon the comparative weight of evidence, but that is exclusively for the jury. If there is any evidence competent, or of a sufficient probative force, to sustain the proposition sought to be maintained, or to support the plaintiff's case, the weight and value of this evidence should be left for the consideration of the jury. *Baltimore v. Neal*, 65 Md. 438, 5 Atl. 338; *Jones v. Jones*, 45 Md. 154; *Burke v. M. & C. of Balto.*, 127 Md. 590, 96 Atl. 693.

[4, 5] The theory of the plaintiff's case is that he purchased from the defendant a

motorboat, in which there should have been installed a Hubbard engine, of the kind agreed upon between the parties, and that he paid the sum of \$210 on account of the purchase price, and that through the fraud of the defendant he did not get what he bargained for, but, on the contrary, the defendant delivered to him a boat and engine of no use and value, and that upon this discovery he returned it to the defendant and demanded the money which he had paid, but the defendant refused to return or to pay it back. The law is well established that in an action of assumpsit for money had and received the plaintiff can recover from the defendant any money belonging to the plaintiff, obtained from him through mistake, fraud, or deceit. It lies to recover money in the possession of the defendant, which in justice and good conscience belongs to the plaintiff, and the defendant, under the general issue, may rely upon any just ground of defense that may show he was not bound to pay it. *Penn v. Flack*, 3 Gill & J. 370; *Blair v. Blair*, 39 Md. 556; *Mills v. Bailey*, 88 Md. 320, 41 Atl. 780; 1 *Poe's Pleading*, 117-124.

In this case we are not prepared to hold that there was no evidence legally sufficient to require the case to be submitted to the jury, under the undisputed evidence set out in the record, and, for the reasons stated, the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, and a new trial awarded; the appellee to pay the costs.

(131 Md. 254)

WORTHINGTON v. LIPSITZ et al. (No. 44.)

(Court of Appeals of Maryland. June 28, 1917.)

1. EVIDENCE — 473 — IMPRESSION EVIDENCE — ADMISSIBILITY.

An objection was properly sustained to a question relating to a certain conversation, "What was the impression they left you under?" as it was not the impression of the witness, but the facts and circumstances and the conduct of the parties, which were material.

2. FRAUDS, STATUTE OF — 158(4) — SALES — VERBAL CONTRACT — ACCEPTANCE AND RECEIPT — EVIDENCE — SUFFICIENCY.

In assumpsit for the purchase price of cider, under a verbal contract of sale, evidence held insufficient to show an actual acceptance and receipt of the cider sold, as required by Code Pub. Civ. Laws, art. 83, § 25, providing that a sale of goods of the value of \$50 or upward will not be enforceable by action unless the buyer accepts and actually receives the goods sold.

Appeal from Baltimore Court of Common Pleas; Carroll T. Bond, Judge.

"To be officially reported."

Suit by Bruce Worthington, trading as Interstate Fruit Product Company, against Harry Lipsitz and others, trading as H. Lipsitz & Sons. Judgment for defendants and plaintiff appeals. Affirmed with costs.

Argued before BOYD, C. J., and BRISCOE,

BURKE, THOMAS, URNER, STOCK-BRIDGE, and CONSTABLE, JJ.

Lewis W. Lake, of Baltimore, for appellant. Louis S. Ashman, of Baltimore, for appellees.

BRISCOE, J. This suit was brought, in the court of common pleas of Baltimore city to recover for a carload of cider, containing 70 barrels, valued at \$476.84. The plaintiff is a manufacturer and broker of ciders, vinegars and fruit products, trading under the name of the Interstate Fruit Product Company, with business offices in Baltimore city. The defendants are copartners trading as H. Lipsitz & Co., and engaged in business in Baltimore city. The suit is in assumpsit on an oral contract for the purchase price of the cider, and the declaration contains the common counts. The case was tried upon issues joined on the pleas of never indebted and never promised as alleged, and from a judgment in favor of the defendants, the plaintiff has appealed.

In the course of the trial, the plaintiff reserved two exceptions, one to the ruling of the court upon testimony, and the second to the granting, at the conclusion of the plaintiff's evidence, of the defendants' prayers marked "A," "B," and "C."

[1] There was clearly no error in the ruling of the court upon the first exception. The witness Nowlin testified that he saw the bill of lading, at the plaintiff's office on Tuesday the 19th of December, 1916, and that he had seen the defendants on a number of occasions, that nothing was said to indicate that they desired to repudiate the sale, and that one of the brothers made the remark:

"That cider is a long time getting here. The cider season will be over by the time it gets here, or something of that kind."

He was then asked:

"What was the impression they left you under, if any?"

The question was objected to by the defendants and the objection was sustained. The question was not a proper one, and the impression of the witness was clearly inadmissible. It was not the opinion or impression of the witness, but the facts and circumstances and the conduct of the parties, that he was called upon to give in evidence and of which he was competent to speak.

[2] The principal and second question presented by the record for review is whether the rulings of the court upon the defendants' prayers were correct, and that is whether there was any evidence legally sufficient, under the pleadings, of any valid contract between the plaintiff and the defendants for the purchase of the goods alleged to have been sold. There can be no great difficulty, we think, in regard to the well-settled principles of law by which the several questions presented by the prayers are to be determined. The controverted question in the case is

whether there was a sufficient receipt and acceptance of the goods sold under the verbal contract as to constitute a valid and binding sale, under the statute, and this, of course, must depend upon the facts and circumstances disclosed by the record in the case. By section 25, art. 83, of the Code (1910, c. 346) it is provided that:

"A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upward shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. * * *

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

And by section 68 of the same article it is further provided:

"(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

What will constitute an acceptance and receipt so as to gratify the statute has been frequently considered and determined by this court in cases under the seventeenth section of the statute of frauds, where the words of the statute are, in substance, the same. In *Belt v. Marriott*, 9 Gill, 335, it is said:

"In order to satisfy the statute there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession."

In *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533, Judge Miller said:

"The statute does not speak of delivery, but superadds to the delivery which the common law requires acceptance of the goods, or some part of them by the purchaser. It confers upon the buyer alone the privilege to prevent a consummation of the contract by refusing to accept and receive the goods. While there can be no acceptance under the statute without delivery by the seller, yet there must be both delivery and acceptance in order to sustain an action upon the contract." *Belt v. Marriott*, 9 Gill, 335; *Hewes v. Jordan*, 39 Md. 480, 17 Am. Rep. 578; *Richardson v. Smith*, 101 Md. 20, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552, 4 Ann. Cas. 184; *Cooney & Co. v. Hax & Co.*, 92 Md. 137, 48 Atl. 58; *Jarrell v. Young*, 105 Md. 282, 66 Atl. 50, 23 L. R. A. (N. S.) 387, 12 Ann. Cas. 1.

The facts of the case, as presented by the record, are these: On or about the 21st day of November, 1916, the defendants verbally agreed to buy from the plaintiff 70 barrels of cider, containing 3,406 gallons, at 14 cents per gallon, valued at \$476.84. On the 9th of December, 1916, the factory delivered it to the Cumberland Valley Railroad, at Winchester, Va., consigned to the defendants. The bill of lading was mailed to the plaintiff, who received it in Baltimore on the 11th of

December, 1916, and was mailed with an invoice to the defendants on the same day. The bill of lading is as follows:

"Cumberland Valley Railroad Company. Straight Bill of Lading—Original—Not Negotiable. Consigned to H. Lipsitz & Sons, Baltimore, Maryland." Car initial, P. L.; car number 535951; 70 bbls. pure apple cider; dated December 9, 1916; signed "H. W. Hamberger, Agent."

The witness Kirk, an employé in the general agent's department of the Pennsylvania Railroad, at Bolton Station, Baltimore, testified: That the bill of lading on its face shows a certain car, which car arrived at 3:50 o'clock a. m. in the Bolton yard on the 18th of December, 1916, and that the witness had a personal recollection of that car and of telephoning to H. Lipsitz & Sons on the same date at 11 o'clock a. m., advising them that the car had arrived. That the car came from Winchester over the Cumberland Valley Railroad to Le Moyne, a station just this side of the river crossing at Harrisburg, where it is placed in a yard and turned over to the Pennsylvania Railroad, where it is there picked up by them and brought to Baltimore. That the time taken by the car from Winchester, Va., to the Bolton yards was normal. The witness stated that it is necessary to produce the bill of lading and arrival notice properly indorsed on the back, as per instructions on arrival notice to obtain goods from railroad. The following is an abstract from notice received by defendants:

"The articles described below have been received consigned to you, and are now ready for delivery on payment of charges due thereon. Please send for same immediately and present this notice and bill of lading, when freight is called for. If not called for in person, fill out order for delivery on back thereof. No packages, 170. Description of articles and special remarks. Brls. Vinegar."

That the car containing the cider or vinegar was eventually sent to the terminal warehouse. That when he called up the defendants, he gave them vinegar as the lading of the car.

The witness Nowlin testified that he called upon the defendants on December 16th, to collect the bill for the cider, and was informed by a member of the firm that the car had not arrived, and it would be too late to sell cider at the time the car got to Baltimore. The bill of lading was returned to the plaintiff, and received by him on the 18th of December, 1916.

While the proof shows that the defendants in this case verbally agreed to purchase the cider, upon certain terms and conditions disclosed by the record, there is no evidence whatever from which a jury would be warranted to find an actual acceptance and a receipt of the cider sold by the verbal contract, as would gratify the plain provisions of the statute, and would constitute a valid and enforceable contract of sale. On the contrary, the proof tends to show that

the defendants refused to accept and to receive the goods, and the carload was sent to the terminal warehouse of the railroad company. *Cooney & Co. v. Hax & Co.*, 92 Md. 136, 48 Atl. 58.

It follows, for the reasons stated, that the court committed no error in granting the defendants' prayers withdrawing the case from the consideration of the jury, and the judgment will be affirmed.

Judgment affirmed, with costs.

(78 N. H. 470)

KING et al. v. BROWN et al.

(Supreme Court of New Hampshire. Coos. June 30, 1917.)

1. REFORMATION OF INSTRUMENTS ¶11—**NATURE AND SCOPE OF REMEDY.**

Equity will not reform a bond for restoration to debtor of attached property, given pursuant to Pub. St. c. 220, § 26, by correcting name of plaintiff in original attachment, since that is immaterial in action on bond.

2. ATTACHMENT ¶833—**LIABILITY ON BOND TO DISCHARGE.**

Since obligors on bond for restoration to debtor of attached property, given pursuant to Pub. St. 1901, c. 220, § 26, are liable for so much of value of property as is necessary to satisfy any executions for payment of which it is held, the only material question in sheriff's action on such bond is whether property is held for satisfaction of any execution, and it is immaterial in whose favor original writ of attachment was issued.

Exceptions from Superior Court, Coos County; Chamberlin, Judge.

Bill by Charles C. King and another against Ernest P. Brown and others. Decree for defendants, subject to exceptions, and order dismissing bill. Exceptions sustained, and judgment for plaintiffs.

Bill in equity, alleging that upon a writ in favor of Charles C. King against Thomas Karney a yoke of oxen was attached as the property of Karney; the defendants, Brown Bros., gave bond to the plaintiff Davis, sheriff of the county, and took possession of the oxen claiming them by virtue of a mortgage to them by the firm of Karney & Lloyd, and sold them at auction; that subsequently judgment and execution was obtained against Karney in the suit of *King v. Karney*, and the same is now unpaid; that in drafting the bond the writ upon which the attachment was made was by mistake described as sued out by King Bros., instead of by Charles C. King. The prayer of the bill is for a reformation of the bond, by substituting the name of the actual plaintiff, Charles C. King, for King Bros., and for judgment against the defendants for the amount of the execution, which was less than the penalty of the bond. The condition of the bond was as follows:

"Whereas, one pair of oxen and one horse, which were attached by Henry Cotton, a deputy sheriff for said county of Grafton, on the 1st day of February, 1909, upon a writ in favor of King Bros., of Whitefield, in the county of Coos, and state of New Hampshire, against Thomas Kar-

ney, as the property of said Thomas Karney, have been restored to the said Brown Bros., who claim said property by virtue of a default of the condition of certain mortgages upon the said property given by said Karney and one William R. Lloyd to the said Brown Bros. and one Sheri Lang, of Lyndon, in said county of Caledonia, at their request: Now, if the said Brown Bros. shall well and truly pay to the said sheriff the sum of \$300, being the appraised value of said goods and chattels, or so much thereof as may be necessary to pay and satisfy any execution for the payment of which the said property or its proceeds is or may be by law holden, then this obligation shall be void."

The case was heard by a master, who found that Brown Bros. claimed the oxen by virtue of a blanket mortgage covering all the property of Karney & Lloyd then in or about their camps, but that the oxen in question were owned by Thomas Karney, and not by the partnership of Karney & Lloyd, and that their value was \$110. The facts as to the attachment and giving of the bond are found as alleged in the bill, with the additional finding that Brown Bros., though in no way misled by the plaintiffs, honestly believed that the suit in question had been brought by King Bros., and that they would not have executed the bond, had they supposed Charles C. King was individually plaintiff in the suit. The master found the plaintiffs not entitled to a reformation of the bond, and the court, subject to exception, ruled that there should be a decree for the defendants and ordered the bill dismissed.

Edgar M. Bowker, of Whitefield, for plaintiffs. Goss & James, of Berlin, and Simonds, Searles & Graves, of St. Johnsbury, Vt., for defendants.

PARSONS, C. J. Upon the facts establishing the validity of the sheriff's title, and that the defendants, Brown Bros., have the property or its proceeds, the bond might be disregarded, and judgment rendered against these defendants in trover or assumpsit by amendment for all the plaintiff claims. But it seems to be considered of importance that judgment should also run against the surety upon the bond.

[1, 2] Counsel for the plaintiff appear to have assumed that the true construction of the bond merely required the payment of any execution issued in a suit in favor of King Bros. against Thomas Karney, and that, as no execution has issued in favor of King Bros., there had been no breach of the condition of the bond. Hence this bill has been brought for the correction of the written evidence of the contract relied upon. But equity does not interfere to correct an immaterial error, which does not affect the rights of the parties. Hence the first question is whether the error in describing the plaintiffs in the suit in which the attachment was made prevents a recovery upon the bond. The error is an immaterial one. The parties adopted the procedure authorized

for the restoration to the debtor of personal property held under attachment. P. S. c. 220, § 26. Property so restored is still attachable upon subsequent writs, as though it remained in the sheriff's possession. For that purpose it is deemed still in the custody of the officer. P. S. c. 220, § 27. Hence the provision of the bond to pay to the sheriff the appraised value of the property, or so much thereof as may be necessary to pay and satisfy any execution for the payment of which said property or its proceeds is or may be by law holden. The material question is whether the goods for which the defendants gave bond are holden for the payment of a particular execution. The suit in which the original attachment is made is immaterial. The recital in this case by way of inducement sets out the claims of the parties. The Browns claimed the right of possession. Whether upon trial they proved such right by a prior mortgage from Thomas Karney, or established the title in Karney & Lloyd, from whom they had a mortgage, would be of no importance. It is equally immaterial to the sheriff's claim to hold the property under attachment against Thomas Karney, in whose favor the writ of attachment was issued, now that the title of Brown Bros. has failed. The facts entitling the plaintiff sheriff to recover upon the bond have been found, and there should be judgment for him for the amount of the execution, with interest.

Exception sustained. Judgment for the plaintiff. All concurred.

(78 N. H. 440)

CARPENTER v. CARPENTER.

(Supreme Court of New Hampshire. Carroll. June 30, 1917.)

1. APPEAL AND ERROR \S 501(1)—EXCEPTIONS—QUESTION OF FACT.

Whether an exception was taken is a question of fact for the trial court to find and report, and argument upon the transfer of a case that an exception was intended to be taken is irrelevant and futile.

2. DIVORCE \S 179 — TRANSFER OF CAUSE — GROUNDS OF REVIEW — PRESENTATION OR PRESERVATION.

That the libellant objected to the granting of a motion for a rehearing and to the taking of a view and the proceedings thereunder is of no materiality here, since it appears from the bill of exceptions that no exceptions were interposed or allowed.

3. DIVORCE \S 170—DECREES—WHEN FINAL—TIME.

Under the practice prevailing in the superior court, a decree for divorce does not become res judicata and final until the end of the term, or until a special order is made for judgment on a specified date during term time.

4. DIVORCE \S 165(4) — DECREE — POWER TO VACATE.

On July 11th, the court granted libellant a divorce. At libelee's request, the court suspended the decree for 30 days, and on August 7th she filed a motion for a withdrawal of the order of divorce and a rehearing. A preliminary hear-

ing on this motion was had before the court on August 26th. A reargument was had, and on October 23d and 24th the case was submitted. On November 6th, the court ordered that the decree of divorce be vacated, and the libel dismissed. *Held*, that as no special day had been appointed when the decree entered should become effective, the case remained open until the rehearing had been had, and that therefore the court had jurisdiction to vacate the decree.

5. DIVORCE \S 151—CORRECTION OF ERRORS—NEW TRIAL.

The grant of a motion for further proceedings after the first decree was entered on the ground that some of the witnesses had testified falsely did not require a hearing of the case *de novo*, where the court stated that if he was satisfied that libellant had not made out his case, he would dismiss it.

6. DIVORCE \S 179 — GROUNDS OF REVIEW — PRESERVATION.

The question whether the evidence warranted the court in vacating the decree will not be considered, where no exception was taken before the case was submitted.

7. COURTS \S 29—VIEW IN ANOTHER STATE—JURISDICTION.

The court in suit for divorce did not exceed his jurisdiction in taking a view of the premises in which defendant was charged with having committed adultery, though situated in another state.

8. TRIAL \S 309—VIEW.

The information gained from a view is evidence which the trier of the facts is authorized to use in reaching a verdict.

9. TRIAL \S 375—TRIAL BY COURT—VIEW.

The judge, when trying a case without a jury, may take a view, as he is *pro hac vice* the jury.

10. WORDS AND PHRASES—"VIEW."

A "view" is a method of procedure conducted in the absence of the court as an aid in the ascertainment of the truth from the physical act of inspection, which does not require the exercise of the judicial powers of a court at the time for its proper performance.

11. TRIAL \S 375—IRREGULARITIES—WAIVER.

If for any reason the taking of a view in another state was an irregularity, it was waived by the absence of an objection thereto.

12. APPEAL AND ERROR \S 201(1), 259—IRREGULARITIES—WAIVER.

Whether there were irregularities at the view cannot be considered on appeal, in the absence of any objection and exception thereto.

13. DIVORCE \S 111 — STRICT RULES OF EVIDENCE.

Strict rules of evidence are not applicable to divorce trials.

Exceptions from Superior Court, Carroll County; Klvel, Judge.

Libel for divorce by Ralph G. Carpenter against Marguerite Paul Carpenter. Libellant's motion to set aside the decree ordering the decree of divorce vacated and the libel dismissed denied, and he excepts. Exceptions overruled, and libel dismissed.

The libel alleges adultery as a ground for divorce, committed at Magnolia, Mass. Several witnesses for the libellant testified that about the times alleged in the libel they saw the libelee in compromising relations with one or more men at Magnolia. In reliance upon this evidence the court, on July 11, 1916, granted the libellant a divorce. At the

libelee's request seasonably filed the court suspended the decree for 30 days, and on August 7, 1916, she filed a motion for a withdrawal of the order of divorce and a reargument or rehearing of the question of adultery and other matters. The ground of the motion was that the witnesses who testified to the alleged acts of adultery could not see what they said they saw, on account of the physical situation as it existed at Magnolia, and a view was suggested. A preliminary hearing on this motion was had before the court on August 26th. Subsequently the libelee submitted affidavits of several persons in support of her motion. Thereupon the court ordered a view at Magnolia, which was taken in the presence of counsel for both sides, on September 10th and September 23d, when experiments or tests were made to determine the truth of the statements made by the libelant's witnesses. Afterwards the court ordered the case reargued upon the question of the ability of the witnesses to observe what transpired at Magnolia as they testified, and upon the question whether if their testimony were stricken out the remaining evidence is sufficient to support the finding of adultery. The reargument was had October 23d and 24th, and the case was submitted. On October 30th a further view was taken and experiments made. November 6th the court ordered that the decree of divorce be vacated and the libel dismissed. The libelant's bill of exceptions was filed December 12th, and on the 20th he filed a motion to set aside the decree of November 6th, which was denied, and the libelant excepted. No other exception was noted to any of the above-described proceedings, previous to the filing of the bill of exceptions. Other facts are stated in the opinion.

Martin P. Howe, of Concord, and W. H. Smart, Michael J. Sughrue, and Henry F. Hurlburt, all of Boston, Mass., for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord, and Walter I. Badger, of Boston, Mass., for defendant.

WALKER, J. Many of the questions argued by the libelant are not properly before the court. It is ordinarily essential, under our practice, that parties desiring to litigate questions of law in this court, which were involved in the trial of the case, should unequivocally take an exception to the ruling of which they complain, and that the record should show they did so. A mere objection, not followed by an exception, is unavailing. "Under the well-established practice of this state, unless exception is taken and noted, it is conclusively understood that the ruling is accepted as the law of the case." *Lee v. Dow*, 73 N. H. 101, 105, 59 Atl. 374, 376; *Story v. Railroad*, 70 N. H. 364, 380, 48 Atl. 288; *Chesbrough v. Mfg. Co.*, 77 N. H. 387, 92 Atl. 332.

[1, 2] Whether an exception was taken is

a question of fact for the trial court to find and report, and argument upon the transfer of a case that an exception was intended to be taken is irrelevant and futile. Consequently the fact that the libelant objected to the granting of the motion for a rehearing and to the taking of a view and to the proceedings thereunder is of no materiality here, since it appears from the bill of exceptions that no exceptions were interposed or allowed to any of the matters now complained of, until the filing of the bill of exceptions December 12, 1916.

[3, 4] But it is argued that although the libelant took no exception to the action of the court in entertaining the libelee's motion for a rehearing of the case, after the decree of July 11, 1916, granting a divorce to the libelant, it is still permissible for him to take the position that upon the filing of that decree the court's jurisdiction of the case was at an end, and hence that the decree of November 11, 1916, vacating the first decree and ordering a dismissal of the bill, was a nullity. One sufficient reason why this position is unsound, even if there were no others, is that under the practice prevailing in the superior court a decree for divorce, like other decrees or verdicts, does not become *res adjudicata* and final until the end of the term when the parties are entitled to judgment if the litigation is at an end, or until a special order is made for judgment on a specified date during term time. In Hillsborough county the practice is to regard the first day of each month as judgment day. Whatever the ancient practice may have been in this respect, by which the enrollment of a decree was regarded as a final act, it is not of binding effect when a different practice prevails. As no special day had been appointed when the decree should become effective as a judgment, the case had not been finally disposed of when the rehearing was had and the order made annulling the first decree and dismissing the libel. The case had not been fully disposed of (*Haynes v. Thom*, 28 N. H. 386, 399), but was still before the court and subject to such orders as justice might require (*Adams v. Adams*, 51 N. H. 388, 396, 12 Am. Rep. 134). It is not true, therefore, as suggested in argument that the status of the parties as husband and wife was finally changed the instant the decree of divorce was entered. The court having found that justice required that the decree of divorce should be vacated, its power to make the last decree cannot be doubted.

The distinction between this case and *Folsom v. Folsom*, 55 N. H. 78, is obvious. That was an application for a retrial of a divorce case, which had been heard and determined at a former term of court, upon the ground of perjury; and upon the allegations of the petition it was held that as a matter of law the petition could not be granted. It would hardly be regarded as commendable practice

In this state to hold that the court, after having technically entered a decree of divorce, could not revoke it during the term upon being convinced that he had been grossly imposed upon by the libelant and his witnesses. Such practice would be useful for no apparent purpose other than that of promoting injustice and for that reason it does not prevail in this state. "The notion that when judgment had been given and enrolled no amendment could be made at a subsequent term (3 Bl. Com. 407) was long ago abandoned." *Owen v. Weston*, 63 N. H. 599, 603, 4 Atl. 801, 803 (56 Am. Rep. 547).

It appears, moreover, that the decree of divorce was suspended on July 13th for 30 days from July 11th, the day it was entered, in order to permit the libelee to file her motion for a rehearing. While this motion was pending and while the case was being reconsidered and reheard, no suggestion was made by any one that the power of the court came to an end when the 30-day limitation expired, as is now argued by the libelant. Until the questions raised on the rehearing were determined the case remained open, in accordance with the understanding of the parties, the undoubted intention of the court, and the recognized practice in this state. *Eastman v. Concord*, 64 N. H. 263, 8 Atl. 822. No question of jurisdiction is involved in this contention, requiring further discussion.

[5] But it is claimed that the libelee's motion for further proceedings after the first decree was entered was in legal effect an application for a new trial, and that by granting the motion the court could only proceed upon that theory and hear the case *de novo*. If it is conceded that a retrial of the whole case might have been ordered by the court after it was convinced that a serious error of fact had been introduced at the first trial, it is clear that such an order was not the only method by which the error could be corrected. *Lisbon v. Lyman*, 49 N. H. 553. That no misunderstanding might be indulged as to what the court intended to do, if he found that some of the libelant's witnesses had testified falsely at the first trial, upon whose testimony he had relied in concluding that the libelee had committed adultery, the court stated expressly at a hearing as to the scope of the questions presented by the motion, that:

"I shall vacate my decree and order the libel dismissed if I am satisfied that by the balance of probabilities the libelant has not made out his case."

Other remarks by the court were made at the same time of similar import, and no exception or objection was made, on the theory now suggested that the court could only order a new trial. It is difficult to understand how counsel could have been misled in this respect or have been taken by surprise, when the court ordered the first decree vacated and the libel dismissed. It

is certain that this court can draw no such inference. If the exception which the libelant took to the last decree might be held to cover the objection, it must be overruled.

[6] Nor can the question whether the evidence warranted the court in vacating the decree and ordering the bill dismissed be now considered, since it appears that there was not "any claim as to the insufficiency of evidence to warrant a reconsideration of the first decree and dismissal of the bill made, until December 20, 1916," several days after the last decree was entered. To have the benefit of an exception upon that ground it must be taken before the case is submitted; otherwise the objection is deemed to be waived. *Head & Dowst Co. v. Breeders' Club*, 75 N. H. 449, 75 Atl. 982; *Moynihan v. Brennan*, 77 N. H. 273, 90 Atl. 984.

[7] Perhaps the principal contention of the libelant is in support of the proposition that the court in taking a view in Massachusetts attempted to perform judicial acts which for want of territorial jurisdiction were absolutely void, and that it is immaterial whether the libelant excepted to that procedure or not, since absolute want of power is not remedied by consent, and may be taken advantage of at any time during the trial or subsequently by collateral attack. While it is true that when it appears a court has no jurisdiction of the subject-matter of a suit, the proceeding will be dismissed, even if no objection is made (*Burgess v. Burgess*, 71 N. H. 293, 51 Atl. 1074), the question is whether the taking of a view in another state is so far beyond the jurisdiction of the court that it renders all subsequent proceedings in the case, including the verdict and judgment, absolutely void, or whether it is at most merely an irregularity in the trial, which is obviated by the consent of the parties, or by the absence of objection thereto. The solution of this question depends very materially upon the object or purpose of a view. If it is to transfer the trial with all its incidents to the place to be inspected, little doubt would arise that it could not, for many reasons, take place outside the state; but, if it is merely to enable the jury or the trier of the facts to acquire some special information material to the case by inspection alone that could not be conveniently or satisfactorily presented in the courtroom, the fact that the inspection in the absence of the court occurred in another state would seem to have little legitimate bearing on the power of the court to try the merits of the case. Whether a referee or master or a judge may conduct a trial, in whole or in part, outside the state it is unnecessary to decide. Many instances of such procedure have occurred, apparently by consent of the parties.

[8] In some sense the purpose of a view is the acquisition by the jury of a special and restricted kind of evidence, which the trial court in its discretion finds may be of use to the jury in reaching a verdict. The jury

are not sent out to get evidence generally, or to examine physical facts not authorized in the order. They do not hear oral testimony; no witnesses are examined; no arguments are made. They merely see such physical objects as are properly shown to them, and receive impressions therefrom. They get a mental picture of the locality, which as sensible men they carry back to the courtroom and use in their deliberations as evidence. It would therefore be senseless to say that in this restricted sense the information thus gained by actual inspection is not evidence which the trier of the fact is authorized to use in reaching a verdict, and which counsel are entitled to comment upon in argument. The acquisition of such evidence does not depend upon the oaths of witnesses, is not tested by cross-examination, and presents no questions of law calling for a ruling of the court on the grounds of admissibility or relevancy. The court as such has no function to perform when such evidence is presented, for it depends entirely upon the jury's ability to observe what is pointed out to them. No trial is had while the view is in progress, and the court is not in session at the place of the view for the trial of the case.

The procedure by which special evidence of the character indicated becomes available is in fact based upon a useful rule of necessity, without which much valuable information clearly bearing upon the trial of cases would be withheld from the tribunal charged with the duty of deciding the facts. It provides a method by which evidence of a peculiar and restricted character may be obtained in the absence of the court and without the observance of the rules deemed essential in the production of evidence given in court. It may not be inaccurate to say that this procedure is anomalous, but is justified in fact as a necessary exception to the general rule that evidence must be produced in court subject to numerous judicial restrictions and directions.

There is much apparent conflict in the language used by courts in defining the object or purpose of ordering or permitting views to be taken. In some of the authorities it is said that a view is, in no proper sense, intended to furnish evidence, but to afford a means by which the jury can better understand and apply the strictly legal evidence already in the case or to be thereafter submitted. This restrictive language is derived from *St. 4 & 5 Anne, c. 16, § 8*, where in the discretion of the court jurors may be ordered to take a view of the "place in question, in order to their better understanding the evidence that will be given upon the trials of such issues." Similar expressions occur in the statute law of many of the states. In this state the statute provides that:

"In the trial of actions involving questions of right to real estate, or in which the examina-

tion of places or objects may aid the jury in understanding the testimony, the court, on motion of either party may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe." P. S. c. 227, § 19.

It is not clear how this distinction proves the proposition that the information derived from a view is not for all practical purposes evidence, or that it is not as much evidence as similar information conveyed by an inspection of a physical object exhibited to the jury in court.

Other authorities hold that the information obtained by the jury upon a view is as much evidentiary in its character as the sworn testimony of witnesses regularly received in court, while still other courts regard it as evidence to be considered like sworn testimony, subject to the qualification that alone it is not sufficient to support a verdict. For cases in support of these differing opinions see note in 42 L. R. A. 385. While the purpose of a view is not to obtain "evidence" in the broad sense of that term or to permit the jury to use their power of observation while taking a view to discover material facts not apparent from the actual situation of the things under observation, it is difficult to understand why the impressions made upon their minds by an inspection of a physical object regularly pointed out to them should not be permitted, in a legal sense, to have the force of evidence, when as a matter of simple mental reasoning honest jurymen could reach no other result. If the object is black when seen by the jury it would be absurd to expect them to find that it was white, in the absence of evidence indicating that they had been imposed upon. An instruction that although they knew from an authorized observation of it that it was black, they could not, as a matter of law, find it was of that color, because they had no legal evidence of it, would strike the ordinary mind as a strange and unreasonable doctrine, based upon a refinement in legal reasoning subversive of the just and practical administration of justice. "There is no sense in the conclusion that the knowledge which the jurors acquired by the view is not evidence in the case." 1 *Thomp. Trials*, § 693; 2 *Wig. Ev.* § 1168; *Tully v. Railroad*, 134 *Mass.* 499; 7 *Enc. Pl. & Pr.* 581. There is little merit in the contention that the libellant had no means of knowing what impressions the evidence produced by the view had upon the justice, and hence that no way was open to meet or explain them; for this is equally true when a jury takes a view.

A more extended discussion of this subject or a critical examination of the cases outside this jurisdiction which seem to be germane is unnecessary, because the unquestioned practice in this state shown by the cases is determinative of the question. A view is one means of obtaining a certain class of evidence. Information thus acquir-

ed by the jury, which is material to the issue and necessarily involved in the subject-matter of the view, has been recognized as evidence in the following cases, among others, without a suggestion that its use as such was open to doubt: *Cook v. New Durham*, 64 N. H. 419, 420, 13 Atl. 650; *Concord Land & Water Power Co. v. Clough*, 70 N. H. 627, 47 Atl. 704; *Flint v. Company*, 73 N. H. 483, 485, 62 Atl. 788; *Lane v. Manchester Mills*, 75 N. H. 102, 106, 71 Atl. 629; *City Bowling Alleys v. Berlin*, 78 N. H. 169, 170, 97 Atl. 976; *Osman v. Company*, 99 Atl. 287.

Nor is it important to inquire whether the power of the court to order an inspection of objects located at a distance from where the trial is had is an inherent and necessary power of the court under the common law, or whether it is derived from the statute, or whether it may be justified on both grounds in conjunction, since whatever theory is adopted as a matter of historical investigation, no one can question the existence of the power in this state, or successfully contend that it does not afford a reasonably convenient method of securing essential and material evidence. "If the established practical construction is theoretically wrong, the case is one of a class in which it is proper to act upon the maxim that common opinion and common practice may be accepted as conclusive evidence of what the law is." *Tyler v. Flanders*, 58 N. H. 371, 373; *Gleason v. Emerson*, 51 N. H. 406.

[9] The argument is presented that the statute does not authorize a judge, when trying a case without a jury, to take a view, and that the common law does not permit such procedure. In short the position is that he has no jurisdiction to take a view, however important such procedure may be in the particular case. But the discussion of that proposition, which is in direct conflict with the uniform practice in the courts of this state since the foundation of the government, under the statute, or under the common law, would be of no practical use. The trier of facts, whether the court, referees, or masters, as well as juries, have been permitted in accordance with the principle of utilizing the best inventible procedure, to view material objects in order to ascertain the truth. See *Adams v. Bushey*, 60 N. H. 290, where a referee took a view in the absence of the parties, and the report was sustained. A contrary doctrine would seem to rest upon the most technical and unsatisfactory reasoning. A judge when taking a view acts simply as a trier of facts; he is pro hac vice the jury. See *Fowler v. Towle*, 49 N. H. 507, 523; P. S. c. 204, §§ 8, 9.

But it is argued, with great apparent confidence, that the judge exceeded his territorial jurisdiction when he took the view in Massachusetts. It must be borne in mind that he did not hold court or try the case in that state. When he was there the court was in recess. And so far as the argument

is based upon that assumption it is clearly fallacious, as shown above. It cannot be supported upon that ground, unless when a view is taken by the jury it is correct to say that the trial is transferred to the locality inspected, although the presiding justice is not present, no testimony is taken, and none of the usual and necessary methods incident to a trial are observed. A legal trial in common-law countries presupposes and is predicated upon the presence of a presiding justice under whose directions the case is tried. If no such person is present it would be a clear misnomer to say that there could be a legal trial. *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368. There was no attempted trial of the case in Massachusetts.

All that the judge did was to go to Magnolia without the objection of the libellant, as the record shows, and in the presence of the parties or their attorneys observe the situation of the premises in its bearing upon the disputed question, whether witnesses who had testified for the libellant could see the libelee in certain locations about the hotel from the positions they said they occupied. This act, it is urged, he had no jurisdictional power to do, and authority to do it could not be conferred by the consent, waiver, or express request of the parties, and hence that the fatal effect of such an act may be taken advantage of without a formal exception. While it is true that the jurisdiction of a court of the subject-matter of a suit when it exists is alone conferred by the law and its absence may be taken advantage of at any stage of the proceedings, and if it is conceded that a court cannot exercise its judicial functions outside the prescribed limits of its jurisdiction, the inquiry is whether the justice, when he made the inspection at Magnolia, was exercising a judicial power that he could only exercise in New Hampshire. Did the prescribed territorial limits of the superior court of Carroll county in the trial of causes preclude him as the trier of the facts in this case from taking a view at a point beyond those limits?

It cannot be successfully maintained that this doctrine of jurisdiction is so inelastic as to render a view, ordered by the court of one county to be taken within the limits of another, void for want of territorial jurisdiction. Where both parties were residents of Grafton county and the suit was brought in Belknap county, the trial in the latter county was not arrested when the jurisdictional irregularity was shown on defendant's motion for a change of venue. The decisive question in that case was what justice required under the circumstances. It was not treated as a fundamental question of jurisdiction. *Whitcher v. Association*, 77 N. H. 405, 92 Atl. 735. In *Wheeler & Wilson Mfg. Co. v. Whitcomb*, 62 N. H. 411, and in *Bishop v. Company*, 62 N. H. 455, the bringing of an action in a wrong county was not regarded as such a serious defect that it could not be transfer-

red to the proper county. The irregularity was capable of being obviated. Reasonable procedure justified such action. *St. Louis, etc., Railroad v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. If the case of *Little v. Dickinson*, 29 N. H. 56, is in conflict with these cases, it must be regarded as overruled by them. Indeed, in the present case the trial which lasted many days was held in Merrimack county for the convenience of all parties concerned, without objection or dissent by any one.

In *Kimball v. Flisk*, 39 N. H. 110, 122, 123, 75 Am. Dec. 213, proceedings for the appointment of a guardian of an insane person were held by the judge of probate upon days other than those specified by the statute for the holding of the probate court, and in holding that the acts of the judge were legal, the court said:

"If it should be regarded as irregular that business should be done by the judge of probate on days not appointed by the law, still this is hardly to be regarded as a matter affecting the jurisdiction of the court over the subject-matter. If the proceedings would be set aside on motion, seasonably made in the probate court, or in this court on appeal, still the court has not acted beyond its jurisdiction. The defect is not one necessarily fatal, since it may be waived, or released; and consequently, so long as the proceedings remain, and are not set aside on motion or appeal, all parties are bound by them, and they cannot be treated as nullities, when they are incidentally brought in question."

The question was not one of the power of the court to act upon the subject presented, but of its power to act at a particular time. It was a question of procedure and not of jurisdiction. A similar illustration is furnished by *Harris v. Parker*, 66 N. H. 324, 23 Atl. 81, where it was claimed that the appointment of a commissioner in insolvency was unauthorized; but the appellants, having submitted their claims to him with a full knowledge of the facts, were held to have waived their right to object to the appointment made by a court having jurisdiction of the subject-matter. See, also, *State v. Richmond*, 26 N. H. 232, 243; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111; *Rowe v. Page*, 54 N. H. 190, 196; *White v. White*, 60 N. H. 210; *Lombard v. Company*, 99 Atl. 295; *Sanderson v. Nashua*, 44 N. H. 492.

It may be said that these cases are not directly in point and do not establish the rule that a view may be properly taken in another state. They show, however, that many defects of a jurisdictional character are not fundamental, since they may be obviated by the consent or the waiver of the parties, and that it is not true in an unqualified sense that jurisdiction may not be acquired by consent, or that when jurisdiction of the subject-matter and the parties is once acquired, it may be lost by methods of procedure in the trial, which justice clearly requires. If, in order to ascertain the truth upon a material issue, the judge deemed it important that, as the trier of the fact, he should personally inspect the relative position of houses and oth-

er physical objects located in Massachusetts, it is not perceived why it should be held that he was absolutely precluded from doing so, because the case was pending within the territorial limits of New Hampshire. If, while trying a case in one county he can order the jury to take a view in another county, or take a view himself in another county in a case tried without a jury—a well-recognized practice—why is he or the jury entirely disqualified to perform the same act across the geographical boundary line in another state? The only suggested answer is that it is inherently impossible for a court to try cases beyond the territorial limits of its jurisdiction. This argument is based upon the false assumption that a view is equivalent to a judicial trial, while it is apparent that the trial is in fact suspended in order that a view may be taken. The presiding justice does not often accompany the jury on a view; no sworn evidence is received, and no arguments are made.

[18] A view, therefore, is a method of procedure conducted in the absence of the court as an aid in the ascertainment of the truth from the physical act of inspection, which does not require the exercise of the judicial powers of a court at the time for its proper performance. If such is a correct exposition of a view when taken within the state, its essential character remains when it occurs without the state. The territorial jurisdiction of the court is as fully preserved as it is when the court admits the testimony of a civil engineer as to physical conditions observed by him in another state, or where maps, plans, and photographs are introduced for the inspection of the jury. If for any reason such a view is an irregularity, it may be waived, and was waived in this case. See authorities *supra*.

The numerous cases referred to by the libellant, which it is claimed sustain his contention, are not of convincing importance. The most of them relate to orders made beyond the limits of the jurisdiction which it was held were of a judicial character, and many of which, upon that question even, are open to serious doubt; as, for instance, the case of *Dunlap v. Rumph*, 43 Okl. 491, 143 Pac. 329, where it was held that a judge could not approve and sign a "case-made" while he was in Chicago, although the parties agreed that it was correct, and that it should be approved by him in that city; in *Price v. Bayless*, 131 Ind. 437, 31 N. E. 88, it was held that a judge cannot issue a restraining order while he is in Michigan; in *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383, that a judge cannot hear a motion for a new trial in another county; in *Buchanan v. Jones*, 12 Ga. 612, that the granting of a writ of certiorari outside the state is a void act; in *Adams v. Kyzer*, 61 Miss. 407, that the chancellor for one district has no power to hear and determine a motion to dissolve an injunction in another; in *Share v. Anderson*,

7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421, that a justice of the peace cannot take the acknowledgment of a deed in a county for which he was not appointed, but see *Odiorne v. Mason*, 9 N. H. 24; in *Rainey v. Ridgeway*, 151 Ala. 532, 43 South. 843, that an order of a judge of probate extending the time for signing a bill of exceptions is void when made outside the limits of his jurisdiction; and in *Lee v. Wells*, 15 Gray (Mass.) 459, that a judge of probate cannot issue a warrant of insolvency while in another county. Some of the cases depend upon a construction of special statutes. *Ex parte Parker*, 6 S. C. 472; *Phillips v. Thralls*, 26 Kan. 780; *Rockford v. Copplinger*, 66 Ill. 510. The case of *State v. Hawthorn*, 134 La. 979, 64 South. 873, was an indictment for stealing a bull, and it was deemed important by both parties that the jury should see the animal, which at the time of the trial was across the river in the state of Mississippi. The court denied the request of both parties for a view, and upon appeal it was held that no error appeared, the court saying:

"The jury, as such, could not have exercised its functions in another state, where also it would have been beyond the supervision and control of the court."

While the case might have been put upon the ground that the trial court properly exercised its discretion in denying the request, the reason given in the opinion is not convincing, since the only function the jury could exercise in Mississippi was that of seeing the bull, and whether, while performing that simple act, the immediate supervision of the court would be necessary is not apparent. It is evidence that the foregoing cases have little bearing upon the present case, in which the trial court did not make any judicial orders or conduct any part of the trial in another jurisdiction.

It might be interesting to compare the cases above referred to with other cases where a more liberal practice seems to prevail, as, for instance, *Bate Refrigerating Co. v. Gilette* (C. C.) 28 Fed. 673, where it was held to be the universal practice to permit a master to act outside the territorial jurisdiction of the court and to take testimony in foreign countries. This was followed in *Consolidated Fastener Co. v. Company* (C. C.) 85 Fed. 54. In *People v. Thorn*, 156 N. Y. 296, 50 N. E. 947, 42 L. R. A. 368, it was held that a view by a jury of the premises where the crime was committed is not a part of the trial in such a sense; that it could not be taken in the absence of the respondent. If an action is brought in a wrong county, the error is not fatal. With the consent of the parties the trial may proceed. *Bishop v. Company*, 62 N. H. 455. But see *Malins v. Dunreven* (1845) 9 Jur. 690, which is not a satisfactory or convincing decision.

If it were determined that for some jurisdictional reason a New Hampshire jury is disqualified to take a view outside the state,

and that all subsequent proceedings in the case before the same jury are absolutely void, though no one raises an objection on that ground, much surprise would undoubtedly be created among the resident members of the profession; for the practice has prevailed in this state by common consent and approval for many years. And the fact that the question has not been raised or discussed in any of our reported cases is cogent evidence that it has not been deemed to be debatable. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, was an indictment for murder in the first degree, in which the respondent was convicted and sentenced to be hanged. Able counsel defended him and took and argued various exceptions which were overruled. The trial was presided over by Chief Justice Doe and Associate Justice Bingham, and during its progress the jury were sent into the state of Maine to view localities, which it was claimed were material to the issue on trial. No one seemed to have entertained a doubt of the propriety or legality of the proceeding; no objections were interposed to it. If it had been understood that the fundamental jurisdiction of the court was lost or suspended in consequence of the view, it is unaccountable that in a case of such importance that objection was not suggested or entertained by any one connected with the trial. Numerous other instances have been called to our attention where juries have taken views outside the state with the consent of the parties; in fact, it is not inaccurate to say that it is the general practice in this state, whenever the court deems it useful and no objection is interposed. Whether it is an irregularity in procedure for the reason that the court has no extraterritorial power and may not be able to compel the parties and the officers in charge of the jury to go outside the state is not a question determinative of its power to try the case and render judgment therein; often an extraterritorial view has been taken with the consent of the parties.

"Where a court has jurisdiction of the cause and the parties, and proceeds erroneously, the judgment, notwithstanding the error, is binding until it is vacated or reversed. This distinction is well settled." *Smith v. Knowlton*, 11 N. H. 191.

"When it is once made to appear that a court has jurisdiction of both the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law of the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void." *Cool. Con. Lim.* 587.

"Irregularities, which is but another word for illegalities, in the proceedings in an action, furnish everywhere ground of exception to the party whose rights are affected by them, and the irregular proceedings are at once set aside, on motion of the proper party. But it is a general rule that if a party who has ground to move the court to set aside any process or proceeding of any kind neglects to make his application in a reasonable time, after the facts have come to his knowledge, he is deemed to waive the

exception by the delay, and will be forever precluded to make the objection afterwards." *State v. Richmond*, 26 N. H. 232, 243.

See, also, *Sanderson v. Nashua*, 44 N. H. 492; *Kimball v. Flisk*, 39 N. H. 110, 75 Am. Dec. 213; *State v. Buzzell*, 59 N. H. 65; *State v. Albee*, 61 N. H. 423, 428, 60 Am. Rep. 325; *State v. Almy*, 67 N. H. 274, 280, 28 Atl. 372, 22 L. R. A. 744.

"But when the court does not possess the legal power to decide the question involved, then jurisdiction cannot be acquired by consent." *Brown, Juris.* § 47; *Hobart v. Frost*, 5 Duer (N. Y.) 672; *Smith v. Knowlton*, 11 N. H. 191; *Morse v. Presby*, 25 N. H. 299; *Crowell v. Londonderry*, 63 N. H. 42; *Warren v. Glynn*, 37 N. H. 340; *Bickford v. Franconia*, 73 N. H. 194, 60 Atl. 98; *Hutchinson v. Railway*, 73 N. H. 271, 276, 60 Atl. 1011; *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425; *State v. Shattuck*, 45 N. H. 205; *Voorhees v. Bank*, 10 Pet. 449, 473, 9 L. Ed. 490; 1 Black, *Judg.*, § 244.

[11] As it appears from the bill of exceptions that the libelant took no exception to the granting of the libelee's motion that the court take a view of the premises in Massachusetts, he waived his right to object to such procedure, even if it is conceded that it was what is termed an "irregularity." And as the territorial jurisdiction of the court was not lost or impaired by the view in such a sense that no exception would be necessary to bring the matter to the attention of the court, the contention of the libelant upon this point is unavailing.

[12] Whether there were irregularities at the view cannot be considered at this stage of the case, in the absence of any objection and the exception thereto. It has been argued that certain experiments were resorted to at the view which were improper and ought not to have been made. As no objection was made to that practice until after the decree was entered, the argument is superfluous. But upon the question of the legality of experiments made while a view is being taken, see *Flint v. Company*, 73 N. H. 483, 485, 62 Atl. 788; *Concord Land, etc., Co. v. Clough*, 70 N. H. 627, 47 Atl. 704. The claim that the libelant had no opportunity to take the necessary exceptions except while the court was in Massachusetts and without power to act judicially is without merit, since he could have applied to the court in this state within a reasonable time for the allowance of his exception. He was not prevented from making the attempt.

Several affidavits of persons who had examined the premises at Magnolia, to the effect it was physically impossible that witnesses for the libelant could have seen what they testified they saw, were introduced in support of the libelee's motion for a rehearing, and it appears from the bill of exceptions that the court considered them in connection with the experiments made at the view. But it does not appear that they were considered as independent evidence. So far as the view

demonstrated that the statements were true, it is not apparent what substantial error was committed. Moreover, it is to be noted that:

In the trial of divorce cases "the court has never been governed by strict rules of evidence or practice, and has always exercised a broad discretion, as well in the admission of evidence as in other respects." *Warner v. Warner*, 69 N. H. 137, 138, 44 Atl. 908.

In accordance with this principle, if for no other reason, the exception to the use made of the affidavits by the court must be overruled.

[13] Several exceptions to the evidence were regularly taken at the original trial, and are now insisted upon. But they do not appear to be of sufficient importance to warrant extended discussion, especially in view of the fact that the strict rules of evidence are not applicable to divorce trials. *Warner v. Warner*, *supra*.

It appears that petitions to the probate court for Carroll county have been filed asking for the appointment of a guardian of the minor son of the parties, and that subsequently the libelee filed in the superior court a petition for legal separation and maintenance, and for the custody of her minor son. By agreement of the parties the question is transferred in this case whether the probate court has authority to appoint a guardian over the minor son pending a decision upon the petition filed in the superior court. No orders upon these petitions have been made in either court. The probate court has not appointed a guardian, nor has the superior court appointed a custodian. That the probate court has power generally to appoint a guardian of a minor "whenever there is occasion," of both his person and estate (P. S. c. 178, §§ 1, 6) is not denied; nor is it denied that the superior court in a divorce proceeding may appoint a temporary or permanent custodian of the child of the parties (P. S. c. 178, § 4; *Laws* 1907, c. 31). Whatever distinction there may be between the powers and duties of a guardian and those of a custodian, under the statutes, it is clear that it was the purpose of the Legislature to authorize the superior court to appoint the latter in a divorce proceeding. If the probate court should, as it probably would, appoint the same person as guardian, the contentions of the parties upon this subject would doubtless be ended; and the same result would be reached if the probate court should appoint a guardian deemed by the libelee to be unfit for the trust, since upon appeal to the superior court the matter of guardianship would be finally determined as well as the question of custody. In this view of the matter it is not advisable to decide at this time the question, which is somewhat irregularly presented, as it may become of no practical importance to the parties.

Exceptions overruled; libel dismissed. All concurred.

(78 N. H. 437)

THRASHER v. LAWRENCE et al.

(Supreme Court of New Hampshire. Sullivan. June 5, 1917.)

PARTNERSHIP \S 68(1), 325(1) — **DISSOLUTION—RIGHTS OF PARTNERS.**

Where a partner had acquired the right to buy land at about half its value, and his copartners contributed the money and plaintiff such right, and title was taken in defendants' names, they held it as trustees for the partnership, and, if they refused to sell it for the benefit of the firm, on a dissolution of the partnership, a trustee would be appointed to do so.

Exception from Superior Court, Sullivan County; Branch, Judge.

Bill by Benjamin F. Thrasher against Summer Lawrence and another. Judgment for plaintiff, and defendants except. Exception overruled.

Bill in equity to wind up a partnership. Hearing by a master, who found that the plaintiff had acquired the right to purchase two adjoining tracts of timber land for about half their value, and entered into an oral agreement of partnership with the defendants, "the terms of which were that in consideration that the plaintiff would share with the defendants the benefit of his efforts in securing the lots, and would look after and see to selling the same, the defendants were to furnish the money to pay for the lots, to pay all taxes assessed thereon, and other expense, if any, not included in what plaintiff was to do, and, when the lots were sold, defendants were to receive the amounts advanced in payment by them for the lots, taxes and other expenses not included in plaintiff's undertaking, together with 6 per cent. interest thereon from the date of said purchase to the date of sale or other disposition of the lots, and then any amount of money received from the sale of the lots after taking out the foregoing items of payments and expenses on the part of the defendants was to be divided equally between the plaintiff and the defendants. * * *

The conveyances were made to said defendants respectively, because they advanced the purchase money, and to secure them for so doing." The court ordered judgment for the plaintiff on the master's report, and the defendants excepted. Transferred from the November term, 1916, of the superior court.

Frank H. Brown and Hurd & Kinney, all of Claremont, for plaintiff. Martin & Howe, of Concord, for defendants.

YOUNG, J. The only conclusion that can be drawn from the findings of the master is that the plaintiff bought the land with the assets of the partnership, which consisted of his right to buy it for one-half its actual value and the money contributed by the defendants. There is nothing that can be construed as a finding that the defendants paid for the land, or that their money paid for it. Since the land was

bought with partnership assets, the defendants hold it as trustees for the partnership (Parker v. Bowles, 57 N. H. 491, 495; Messer v. Messer, 59 N. H. 375; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423); and, as they have refused to dispose of it for the benefit of the partnership, the plaintiff is entitled to have a trustee appointed, who will dispose of it and distribute the assets in accordance with the order of the court.

Exception overruled.

(78 N. H. 456)

ROLLINS v. BROCK.

(Supreme Court of New Hampshire. Carroll. June 30, 1917.)

1. FRAUDS, STATUTE OF \S 158(2) — **REMEDY UNDER CONTRACT—PAROL EVIDENCE.**

In suit for specific performance of a parol agreement whereby plaintiff took a deed to land, to be reconveyed by him to defendant on defendant giving plaintiff his note secured by mortgage for a sum advanced by plaintiff, though defendant could not be compelled to accept a deed and reconvey it to plaintiff in mortgage, plaintiff having paid the owners the balance of the purchase price and tendered defendant a deed in accordance with the agreement, and defendant having refused to perform, parol testimony of the agreement was admissible to show how plaintiff held the farm.

2. FRAUDS, STATUTE OF \S 119(1)—**REMEDIES OF PARTIES—REPUTATION OF AGREEMENT.**

The fact that defendant in a suit in equity for specific performance of a parol agreement has repudiated his agreement does not give him any greater rights than he would have had if he were trying to enforce it.

3. SPECIFIC PERFORMANCE \S 127(2) — **RELIEF—STRICT FORECLOSURE OR SALE.**

In suit for specific performance of a parol agreement, whereby on conveyance of a farm to defendant, reserving the standing timber, defendant was to give plaintiff a note for \$1,500 secured by mortgage on the farm, if there should be a strict foreclosure, the court will fix a reasonable time within which defendant must pay plaintiff what is due him, but if there should be a sale, it will appoint a commissioner to sell the farm and distribute the proceeds; the decree in either form fixing the exact amount due plaintiff.

Exceptions from Superior Court, Carroll County; Chamberlain, Judge.

Suit by Ellsworth H. Rollins against Stephen Brock. From a decree for plaintiff, defendant excepts. Case discharged.

Bill in equity for the specific performance of an oral agreement. The defendant having bargained with the Gilman heirs for a farm for which he was to pay \$4,400, and having but \$1,000, made an arrangement with the plaintiff by which he was to buy the timber on the farm for \$1,900 and loan the defendant the further sum of \$1,500, which he needed to pay for the farm, the loan to be secured by a mortgage of the farm. It was agreed that the defendant should pay the Gilman heirs \$1,000 and direct them to convey it to the plaintiff, who should pay them \$3,400, the balance of the purchase price, and, reserving the standing timber, should convey the farm to the defendant, who should give the plaintiff

his note for \$1,500, secured by a mortgage of the farm. The defendant paid the Gilman heirs \$1,000 and directed them to convey the farm to the plaintiff. The conveyance was made to the plaintiff, who thereupon paid the balance of the purchase price, and tendered a deed of the farm to the defendant in accordance with the terms of the agreement; but he refused to accept it, and to give the plaintiff the note and mortgage for \$1,500 as agreed. The court entered up a decree by the terms of which a writ of possession was to issue unless the defendant elected to comply with the terms of the agreement on or before September 30, 1916, and the defendant excepted. He also excepted to the admission of oral testimony to show the agreement under which the plaintiff holds the farm. A bill of exceptions was allowed at the May term, 1916, of the superior court.

Leslie P. Snow, of Rochester, and Burt R. Cooper, of Concord, for plaintiff. William Wright, of Rochester, and Henry D. Yeaton, for defendant.

YOUNG, J. [1] Notwithstanding the defendant cannot be compelled to accept a deed of the farm and reconvey it to the plaintiff in mortgage to secure the payment of his note for \$1,500, the evidence excepted to was properly admitted for the purpose of showing how the plaintiff holds the farm. In other words, if this were a writ of entry and the plaintiff introduced the deed conveying the farm to him, and rested, it would be competent for the defendant to introduce this evidence for the purpose of showing that the plaintiff held the farm (not including the timber) as security for a loan of \$1,500.

[2] The fact the defendant has repudiated his agreement does not give him any greater rights than he would have had if he were trying to enforce it; consequently the plaintiff is entitled to a decree in his favor. Whether it should take the form of a strict foreclosure or of a sale depends on which the court finds would be equitable.

[3] If the court finds there should be a strict foreclosure, it will fix a reasonable time within which the defendant must pay the plaintiff what is due him. If, however, it finds that there should be a sale of the property, it will appoint a commissioner to sell the farm and distribute the proceeds. Whichever form the decree takes, it should fix the exact amount due the plaintiff.

Case discharged. All concurred.

(257 Pa. 286)

COMMONWEALTH v. LAPRIESTA.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. HOMICIDE §340(1)—APPEAL—HARMLESS ERROR.

In a murder case, the fact that the court mistakenly charged that the indictment contained a count for manslaughter is not reversi-

ble error, where accused could have been convicted of that offense on a count charging murder, and the trial court correctly defined manslaughter.

2. HOMICIDE §300(3) — OFFENSE — INSTRUCTION.

Where the accused relied on self-defense, requested instructions that, if assault on him was so fierce as to warrant a belief that he could not retreat without opening himself to the gravest danger, he was warranted in killing, were properly qualified by statements that killing should be the last resort, and that, if there was no other way of resisting, accused was warranted in killing his assailant.

Appeal from Court of Oyer and Terminer, Lackawanna County.

Anthony Lapriesta was convicted of murder in the second degree, and he appeals. Affirmed.

The defendant was indicted for the murder of Tony Romeo on January 1, 1916. The jury found him guilty of murder of the second degree, for which he was sentenced to a term of 8 years minimum and 12 years maximum in the state penitentiary for the Eastern district of Pennsylvania. Defendant appealed.

Errors assigned were (1) stating to the jury that the defendant was charged in the indictment with a count for manslaughter, and the second, third, and fourth assignments, which follow:

Second. The learned court erred in its answer to the fourth request of defendant for instruction. The request and the answer thereto are as follows:

"If the attack on Lapriesta was so sudden and violent that a retreat would not diminish his danger, he could kill Romeo, if from the nature of the attack there was reasonable ground to believe that there was a design to take his life, or do him great bodily harm; and in so doing he would be guilty of no crime and should be acquitted.

"Answer: We affirm that point, gentlemen of the jury, if you find from the evidence that there was no other way of resisting, and the killing came from the resisting."

Third. The learned court erred in its answer to the fifth request for instruction by defendant. The request and the answer thereto are as follows, to wit:

"If the assault upon Lapriesta was so fierce as to justify him in the belief that he could not retreat without manifest danger of his life or grievous bodily harm, then, in his defense, he could kill Romeo instantly, and in so doing he would be guilty of no crime and should be acquitted.

"Answer: We affirm that point, if there were no other way by resisting or escaping. Killing is the last resort, and, if there were any other way, it was the duty of the defendant to take that way; but, if there were no other way, then he would be justified, even if it resulted in the killing of Romeo."

Fourth. The learned court erred in its answer to the seventh request for instruction by defendant. The request and the answer thereto are as follows, to wit:

"The law of self-defense is pre-eminent, and by virtue of this inherent right a man assaulted by another, under circumstances manifesting an intention to take life or do some great bodily

harm, may immediately resist the assailant, even unto death. He may even, under circumstances of urgent and manifest necessity, anticipate the blow of an assailant threatening such an attack, and kill him before his deadly intention is followed by an actual assault.

"Answer: That is rather academic, gentlemen of the jury, because there lacks in this case that which would sustain such facts; but as a general proposition we affirm it."

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Clarence Balentine and E. T. Philbin, both of Scranton, for appellant. Frank P. Benjamin, First Asst. Dist. Atty., and George W. Maxey, Dist. Atty., both of Scranton, for the Commonwealth.

PER CURIAM. [1] This appeal is from the judgment on a verdict finding appellant guilty of murder of the second degree. His first complaint is that the court erred in charging the jury that the indictment contained a count for manslaughter. This did him no harm, for he could have been found guilty of that offense on the count charging murder, and it is admitted that the learned trial judge correctly defined manslaughter in his instructions to the jury.

[2] The second, third, and fourth assignments charge errors in answers to points submitted by the defendant. Each was affirmed with a qualification free from error.

Judgment affirmed.

(257 Pa. 306)

POLUSKIEWICZ v. PHILADELPHIA & READING COAL & IRON CO.

(Supreme Court of Pennsylvania. March 23, 1917.)

MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION ACT—BOARD—FINDINGS OF.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736) § 409, declaring that findings of fact shall be final unless the board shall allow an appeal therefrom as hereinafter provided, and that the board's findings of fact shall be in all cases final, findings of fact by the referee, approved by the board, cannot be disturbed on appeal.

Appeal from Court of Common Pleas, Schuylkill County.

Proceedings by Frances Poluskiewicz against the Philadelphia & Reading Coal & Iron Company, for compensation under the Workmen's Compensation Act. The referee allowed compensation, which on appeal was sustained by the Compensation Board. From an order dismissing the appeal from the board, defendant appeals. Appeal dismissed.

Bechtel, P. J., filed the following opinion in the court of common pleas:

This case comes before us on an appeal taken from the Workmen's Compensation Board by the defendant. The appellant files six exceptions to the decision of the board. These six exceptions involve but one question, whether or not the facts warranted the findings by the referee and the compensation board.

The referee found the facts against the defendant and allowed compensation. The defendant thereupon appealed to the compensation board, which sustained the findings of the referee. It thereupon took an appeal to this court. The plaintiff claims that the court has no jurisdiction to reverse the findings of fact made by the referee and the compensation board. Even if we had jurisdiction to revise the findings as made in this case, we feel, in the absence of any express provision in the act of assembly, that our actions should be governed by the rules laid down by our higher courts relative to the findings of fact in equity cases. It is a well-settled doctrine that in the absence of fraud or a gross abuse of discretion the appellate court will not reverse the findings of fact by a chancellor, and it has been held that these findings should be sustained if there be any evidence to justify such action. We would hesitate to go that far with this record.

Section 409 of the Compensation Act of June 2, 1915, P. L. 736, provides: "A referee's finding of fact shall be final unless the board shall allow an appeal therefrom as hereinafter provided. The board's findings of fact shall in all cases be final. From the referee's decision on any question of law an appeal may be taken to the board and from any decision of the board on a question of law an appeal may be taken to the courts as herein provided."

Section 419 provides for an appeal by the aggrieved party to the board on two grounds, the second of which is "that the findings of fact and ruling or disallowance of compensation were unwarranted by the evidence," and section 421 defines the powers of the board relative to such appeals. Section 425 provides for the method of hearing appeals taken from the board to the courts, but distinctly limits such appeals to questions on matters of law. We nowhere in the act find any express provision authorizing the courts to reverse the findings of fact of the compensation board. It is very significant that the act provides that the board's findings shall be final in all cases, and that in the section providing for an appeal to the courts distinctly states on questions involving matters of law. We do not think that it was the intention of the Legislature, nor do we think that the plain language of the act gives to the courts the right to reverse the findings of fact of the compensation board. That is the one question involved in this case.

The court dismissed the appeal. Defendant appealed.

Argued before BROWN, C. J., and MES- TREZAT, POTTER, FRAZER, and WALLING, JJ.

George Gowen Parry, of Philadelphia, and John F. Whalen and George Ellis, both of Pottsville, for appellant. M. A. Kilker, of Girardville, for appellee.

PER CURIAM. Section 409 of the act of June 2, 1915 (P. L. 736), is as follows:

"A referee's findings of fact shall be final, unless the board shall allow an appeal therefrom as hereinafter provided. The board's findings of fact shall in all cases be final. From the referee's decision on any question of law an appeal may be taken to the board, and from any decision of the board on a question of law an appeal may be taken to the courts as hereinafter provided."

Referees and the Workmen's Compensation Board must realize the great responsibility imposed upon them by the provision that

their findings of fact are final. If they err in this respect, courts can grant no relief to parties who may be wronged. In the light of the plain words of the statute, the learned court below was of the correct opinion that it could not disturb the facts found by the compensation board.

Appeal dismissed at appellant's costs.

(257 Pa. 232)

RUGER v. COATESVILLE BOILER WORKS.

(Supreme Court of Pennsylvania. March 19, 1917.)

MASTER AND SERVANT §=105(1)—INJURIES TO SERVANT—NEGLIGENCE.

While a master who requires a servant to labor with improper tools is necessarily liable unless the danger was so imminent that a reasonably prudent person would have refused, a servant engaged in putting a head on a steel boiler cannot recover for injuries resulting from being struck with a splinter of steel from the pin, though the foreman, over objection, required him to use a heavier hammer than ordinarily used; it not appearing that the hammer or pin was defective.

Appeal from Court of Common Pleas, Chester County.

Action by Tony D. Ruger against the Coatesville Boiler Works. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Hause, J., filed the following opinion sur plaintiff's motion to take off the nonsuit in the court of common pleas:

On July 2, 1915, plaintiff, an employé of the defendant, was injured while engaged in putting a head in a large steel boiler. To accomplish this work he was required to use steel pins and hammers of different weights. On the day named, while performing the work assigned to him and finding the boiler head slightly large for the boiler in which it was to be placed, one Crouse, his foreman, directed him to drive steel pins between the rim of the boiler head and the boiler, and, as this could not be accomplished by the use of a small hammer, he directed him to use, and he did use, a larger one. This was the usual and customary manner of performing this work; the plaintiff was entirely familiar with the method and the operation, and had headed many boilers, prior to the day of the accident, in the same manner, except that he had not theretofore used a hammer so heavy as the one he was using when the accident happened. When instructed to use a larger hammer, he demurred, for some reason which did not appear at the trial, whereupon the foreman told him, in substance, that if he did not propose to do the work with the tool he suggested, he should go home. While striking one of the steel pins with the larger hammer, a small splinter from the pin struck him in the eye, and later the eye was removed. He seeks to recover damages for his injury and bases his right to recover on two grounds: First, because the defendant was negligent "in coercing and requiring him" to do the work on pain of being discharged; second, because the defendant furnished for the work improper tools and pins, the latter being defective and were liable to splinter when struck with a hammer.

An employer is not guilty of negligence merely because he insists that his employé shall work. If, however, he or his foreman for him requires the employé to labor with improper and defec-

tive tools and appliances or in unsafe places and injury results, liability necessarily follows, unless the danger was so imminent that a reasonably prudent person would have avoided it. *Lee v. Dobson*, 217 Pa. 349, 66 Atl. 567; *Porter v. Wilson*, 62 Pa. Super. Ct. 339; *Ignash v. Murphy, Cook & Co.*, 249 Pa. 223, 84 Atl. 1068; *Broski v. Phoenix Iron Co.*, 62 Pa. Super. Ct. 305.

The difficulty with the plaintiff's case, however, was that there was not a scintilla of testimony to show that either the steel pin or the hammer was imperfect. Nor was there a suggestion that the use of a heavier hammer to accomplish the object sought was not entirely proper. The plaintiff lost his eye as the result of an accident wholly unforeseen and against which, so far as the testimony shows, no human foresight could have provided.

The trial judge entered a compulsory nonsuit which the court in banc subsequently refused to take off.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

W. S. Harris, of West Chester, for appellant. A. M. Holding, of West Chester, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the learned court below denying the motion to take off the nonsuit.

(257 Pa. 284)

LEBANON VALLEY CONSOL. WATER SUPPLY CO. et al. v. COMMONWEALTH TRUST CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

EQUITY §=322—SERVICE OF PROCESS—EXTRATERRITORIAL SERVICE.

Act April 6, 1859 (P. L. 387), providing for extraterritorial service where suit concerns any charge, lien, judgment, mortgage, or incumbrance on lands within the jurisdiction of the court, does not, in an action to compel delivery of bonds secured by a mortgage on lands in the county where instituted, warrant service on defendant in a different county.

Appeal from Court of Common Pleas, Lebanon County.

Bill by the Lebanon Valley Consolidated Water Supply Company, with D. Gring, as intervening bondholder, against the Commonwealth Trust Company. From an order setting aside service, complainants appeal. Dismissed.

The facts appear in the following opinion by Henry, P. J., setting aside the service of the bill:

The defendant in the above-entitled case has moved to set aside the service of the bill and vacate the order upon which the service was made, for the reason that service was made upon the defendant in Dauphin county. The bill in equity filed in this case asks that the defendant be ordered and directed to deliver certain bonds in its hands to the plaintiff. These bonds are secured by a mortgage upon lands in Lebanon county, under which the defendant is the trustee.

It is conceded by the plaintiff that, unless the service as made is authorized by that part of

the act of April 6, 1859 (P. L. 387), which provides for extraterritorial service where the suit concerns "any charge, lien, judgment, mortgage, or incumbrance" upon lands, tenements, or hereditaments within the jurisdiction of the court directing the service, the motion of the defendant must prevail. The simple question is then raised whether the suit concerns any charge, lien, judgment, mortgage, or incumbrance upon land in Lebanon county. The purpose of the bill is to compel the defendant to certify and deliver to plaintiffs certain bonds in its hands secured by a mortgage given by the plaintiff to the defendant as trustee. Unless there is some reason to the contrary, the plaintiff is entitled to the bonds. Should there be some good reason for the withholding of the bonds, it must be owing to some default upon the part of the plaintiff. The lien of the mortgage stands unaffected by the determination of this question, except in as far as the other bondholders under the mortgage may have an increased value attaching to their bonds as long as a part of the bonds are unissued; but to say that because the bonds are secured by a mortgage, or because the value of outstanding bonds may be affected as long as a part of the bonds are unissued, their delivery or nondelivery concerns the lien of the mortgage which is given to secure the bonds, is placing a strained construction upon the plain language of the said act of assembly. The suit concerns the bonds alone and not the mortgage or the lien of the mortgage. We can only conclude that the service is not good under the provisions of the act of assembly of April 6, 1859.

The lower court set aside the service of the bill. Plaintiffs appealed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

William H. Sponsler, of New Bloomfield, E. E. McCurdy, of Lebanon, and Geo. R. Heisey, of Harrisburg, for appellant. C. H. Bergner, of Harrisburg, and Howard C. Shirk, of Lebanon, for appellee.

PER CURIAM. This appeal is dismissed, at appellants' costs, on the opinion of the court below setting aside the service of the bill.

(257 Pa. 286)

HANIGAN v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

RAILROADS — 327(8) — CROSSING COLLISION — NEGLIGENCE — FAILURE TO LOOK AND LISTEN.

Where plaintiff's decedent, had he stopped, looked, and listened at a point 20 feet from the railroad track, would have had an unobstructed view from 900 to 1,800 feet in the direction from which the train approached, but proceeded to cross the track with his team, in consequence of which he was struck, he was guilty of contributory negligence, justifying a compulsory nonsuit.

Appeal from Court of Common Pleas, Bucks County.

Trespass by Lydia A. Hanigan against the Philadelphia & Reading Railway Company to recover damages for the death of her husband. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The facts appear in the following opinion of Ryan, P. J., sur plaintiff's motion to take off the nonsuit:

The plaintiff brings this action to recover damages for the death of her husband, who was killed at a grade crossing at Shelly, in this county, by a train of the defendant company. At the place of the accident the double track of the defendant runs approximately north and south and the highway crosses it nearly at right angles. The accident occurred about 7:40 in the evening of July 4, 1913. The deceased at the time was driving two horses geared to a market wagon, the side curtains of which were down. With a boarder at his house named Gillick, he occupied the only seat in the conveyance. Back of them, on the floor of the vehicle, were seated his sister, Mrs. Hannah Costello, with her daughters, Gertrude, Frances, and Kitty, her little son, Edmund, and a child named Ed. Kane. The party was coming to Shelly from the deceased's farm, which was about a mile distant to the eastward of the point of accident. The deceased had lived on the farm nearly seven years. Approaching the crossing from this direction the highway descends a steep hill, but from the foot of the hill to the crossing it is a level road. About 40 feet from the crossing on the right is a cigar factory, just beyond which, toward the crossing, the deceased stopped the team, leaned forward, and looked and listened. At this point, however, he could not see the track to the north, as the view was obscured by a growth of bushes along the top of the bank of the cut of 4 or 5 feet in depth, through which the railroad is constructed. From that point to a point beyond the bank of the cut, about 20 feet from the first track, the view from the highway to the north is obstructed. At that point a clear and unobstructed view of the track northward to a curve to the east could be had. The distance to this curve and the extent of the unobstructed view was estimated by witnesses at from 400 to 500 yards to a quarter of a mile. Whether the deceased stopped a second time at the point where he had an unobstructed view of the track is not clear.

Gertrude Costello testified in chief that he stopped, and looked up and down the tracks, "right before he came to the crossing, right below the cigar factory, * * * 40 feet from the tracks." She said (Testimony, p. 39): "He looked up and down the track with the team and nothing came, so we went on and we were just past the first track when we were hit, about in the middle of the other track." Mrs. Adeline Bauck stated that she was seated upon a hotel porch opposite the station, near the crossing, and saw the team come down the hill. In chief she testified (page 64): "I was sitting in my rocking chair on the porch, and all at once I saw the wagon coming down this hill, and I saw a man holding his line back, and stop, and look up and down. Of course, where I sat, you can see everybody that comes down that hill, and I saw him until he got to the station, and I heard the train come and 'toot toot,' and when the accident happened I heard no bell, no whistle." On cross-examination (page 73) she testified inter alia as follows: "Q. When did he stop? A. When he got down the hill. Q. At the bottom of the hill? A. Yes. Q. As soon as he struck the level? A. Yes, sir. Q. He didn't stop again, did he? A. He stopped, you know; he looked up and down. Q. Was he sitting on the seat of the wagon? A. Yes. Q. He didn't stop again after stopping at the bottom of the hill? A. He stopped right there at the station. Q. You say he stopped at the bottom of the hill? A. That is near there. * * * Q. Did he stop again—stop his horse? That is the last time he stopped un-

til he was struck. Is that it? A. Yes. Q. About a quarter of a square away. A. Yes. Q. Away from the track? A. Yes; then he stopped, and just held his lines, and looked up and down the tracks, and they were clear, and he went over. Q. But he only stopped one time altogether? A. Yes; it is just as good as stopped. Q. He stopped once? A. If you say so. Q. Do you say so? A. I can't say it over again. By the Court: Did he stop more than once? A. He stopped once, his horses; then right near the train he stopped again, just a second, and he looked up and down to see if the tracks were clear; then he went across the tracks, and the train came around the bend."

Whether the deceased did stop a second time or not, the fact is clear that there was a point 20 feet from the first or north-bound track where there was an unobstructed view of both tracks up to the curve. If the deceased had stopped and looked here, he could have seen a train approaching from the north for a distance of from about 900 to about 1,780 feet. He drove across the first and upon the second track, when the team was struck by a south-bound train. The wagon was demolished, and the deceased and some of the other occupants of the conveyance were killed. The horses also were killed. The deceased's duty under the circumstances is thus stated in *Haas v. Northern Central Ry. Co.*, 49 Pa. Super. Ct. 107, 109, following a long line of decisions of the Supreme Court of this state: "The rule that the traveler about to cross a railroad track must stop, look, and listen is an absolute and unbending rule of law, founded on public policy, for the protection of passengers in railroad trains as much as travelers on the common highway, and such stopping, looking, and listening must not be merely nominal or perfunctory, but substantial, careful, and performed in good faith, with the accomplishment of the end in view. He must stop and look where he can see, and will not be allowed to say that he did so, when the circumstances make it plain that by the proper using of his common sense he must have seen his danger."

There is no question in the case at bar of what was the proper place to stop. It is clear from the testimony of the plaintiff's witnesses that the deceased stopped where he could not see. It is also clear that there was a point, about 20 feet from the first track, beyond the bank of the cut, which was surmounted by bushes, where an unobstructed view in the direction from which the train came could be had. In *Carroll v. Penna. Railroad Co.*, 12 Wkly. Notes Cas. 348, 349, the Supreme Court says: "It is in vain for a man to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive." It is equally vain for others to say so, where his actions indicate that he did not see the approaching train. If, in the case at bar, the deceased had looked and listened at the point 20 feet from the track, where the view was unobstructed, he could have both seen and heard the approach of the train that collided with his team. To drive in front of an approaching train, which could have been seen and heard from a place of safety in time to avoid a collision, is negligence per se. In *Pennsylvania R. R. Co. v. Beale*, 73 Pa. 504, 509, 13 Am. Rep. 753, *Sharswood, J.*, declared: "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se and a question for the court. *North Pennsylvania R. R. Co. v. Helleman*, 49 Pa. 60 [88 Am. Dec. 482]." "Where there is a doubt as to the proper place to stop, look, and listen, as a general rule such question will be referred to the jury. But where there is no such doubt, where the deceased stop-

ped at a point where he could not see, it is for the court to determine whether it was a proper place." *Urias v. Penna. R. R. Co.*, 152 Pa. 326, 25 Atl. 566. This rule is quoted and applied in *Kinter v. R. R. Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795. While it is said that the rule laid down in *Carroll v. Penna. Railroad Company*, supra, applies to clear cases only, we consider this such a case, and conclude that the nonsuit was properly entered.

The trial judge entered a compulsory nonsuit, which the court subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

Hugh Roberts, of Philadelphia, for appellant. Harman Yerkes, of Philadelphia, for appellee.

PER OURIAM. This judgment is affirmed, on the opinion of the court below refusing to take off the nonsuit.

(257 Pa. 289)

COMMONWEALTH v. HAINES.

(Supreme Court of Pennsylvania. March 18, 1917.)

1. CRIMINAL LAW §372(4)—EVIDENCE—OTHER OFFENSES.

In a prosecution for murder, where it was claimed that defendant, though he did not fire the shot which killed deceased, was a principal in the crime, evidence that defendant and the actual murderer had previously committed burglaries which were not shown to be in any way connected with the murder is inadmissible; the murder not being one of a series of mutually dependent crimes.

2. CRIMINAL LAW §790(1)—TRIAL—INSTRUCTIONS—ACCOMPLICES.

Where the commonwealth relies on accomplice's testimony, the court should in its general charge clearly state the law applicable to testimony of accomplice and make specific application of it to the particular case, pointing out wherein such testimony was claimed to be contradicted or corroborated, and directing the jury to closely scrutinize such testimony and accept it with caution.

3. CRIMINAL LAW §1129(3)—APPEAL—ASSIGNMENT OF ERROR.

It is improper to assign as error certain excerpts from the charge, so disconnected from the context as to carry an erroneous meaning of the language used.

Appeal from Court of Oyer and Terminer, Jefferson County.

Ernest Haines was convicted of murder in the first degree, and he appeals. Reversed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

William L. McCracken and William T. Darr, both of Brookville, for appellant. Jesse C. Long, of Punxsutawney, and John W. Reed, of Brookville, for appellee.

MESTREZAT, J. William S. Haines, a farmer, resided on his farm in Oliver township, Jefferson county, in a house located

near the Pittsburgh, Shawmut & Northern Railroad. His family consisted of himself, his wife, his son, Ernest, and his daughter, Floy. He left his home shortly after 12 o'clock, noon, Wednesday, March 22, 1916, and walked west on the track of the railroad in the direction of the village of Sprankles Mills, which is about one mile distant, and consists of a schoolhouse, two stores, a blacksmith shop, a gas pump station and a half dozen dwelling houses. The railroad station is about one-third of a mile southeast of the village, and about one mile west of Mr. Haines' residence, and between the residence and the station there is a railroad cut which is on a curve. While Haines was walking on the railroad track in the cut, and 1,200 feet east of the railroad station, Henry Ward Mottorn, the son of a farmer residing in the neighborhood, fired two shots at him from a shotgun; the first taking effect in Haines' breast, and the second striking him in the head, resulting in almost immediate death. When he fired the shots, Mottorn stood on the north embankment of the cut, which is about 13 feet above the track. Within a short time after Haines was killed, his body was found by two neighbors on the railroad in the cut. They reported their discovery to the agent at the railroad station and the news was telephoned to the pump station, where Mottorn and Ernest Haines, the son of the deceased, were at the time the message was received.

The evening of the day of the homicide Mottorn and Ernest Haines, the defendant in this case, were arrested and charged with the crime. They were jointly indicted as principals, but the court granted a severance, and they were tried separately. Mottorn was tried first, and, after the jury had retired, Haines was put on trial. Before the jury in the Mottorn case had returned a verdict, and while it was deliberating, Mottorn was called as a witness by the commonwealth to testify in the Haines case. The defendant objected to his testimony, but the objection was overruled, and the testimony was received. Mottorn was the principal witness on behalf of the commonwealth. The jury found a verdict of guilty of murder in the first degree in both cases.

It is unnecessary in the consideration of this appeal to refer in detail to Mottorn's testimony given on the trial of Ernest Haines. He admitted, on the witness stand, that he had shot and killed the elder Haines after a prior unsuccessful attempt to do so, and testified that it was done in pursuance of a plan or arrangement formed by him and the defendant to rob the deceased of \$250, which they knew the latter to have in his possession. He further testified that, on Monday evening prior to Wednesday, the day of the homicide, he entered the home of the deceased for the purpose of robbing him, but was frightened away; that, in the village store, he and the defendant had again plan-

ned on Tuesday that he should procure a shotgun and shoot the deceased as he passed through the railroad cut going from his home to the village, and the defendant was to be on hand to take the money from the body of the deceased, and they would subsequently meet at the pump station and divide it; that on the day of the shooting the defendant and his sister preceded their father along the railroad to the railroad station, where his sister left him and went to her school in the village; that the defendant saw his father coming, and notified Mottorn, who was stationed on top of the embankment and shot the deceased after he entered the railroad cut; that the defendant secured the money from his father's body, and shortly thereafter they met at the pump station and he gave it to Mottorn. After the latter's arrest, the money was found under the carpet in his room. The defendant testified in his own behalf, alleged that the relations between his father and himself were friendly, denied that he had ever been a party to planning his father's death, or that he had any prior knowledge of, or anything to do with, the crime, and introduced witnesses, including his mother and sister, to corroborate his testimony.

The first assignment, if we understand the question intended to be raised, complains that the court erred in permitting Mottorn to testify before a verdict was rendered in his case and he was sentenced. As Mottorn was thereafter convicted of murder in the first degree and sentenced, the question, if in fact it be one, becomes unimportant, and cannot be raised in the next trial.

[1] The second assignment complains that the court erred in permitting Mottorn, against the objection of the defendant, to testify to an alleged separate and distinct offense committed previously by him and the defendant. Mottorn was asked:

"State whether or not this defendant, Ernest Haines, was with you at any other place that you broke into."

An objection to the question being overruled, the witness testified that he and the defendant were together in Seyler's store. The purpose of the evidence, as stated by counsel, was to show that the witness and the defendant were associated together in the commission of other criminal offenses about the time the elder Haines was murdered. The time of the occurrence was not shown; whether it was of recent date, or several years prior to the shooting of Haines, did not appear. The record also falls to disclose any offer made by the commonwealth to show other instances in which Mottorn and the defendant were associated in the commission of crime.

We think it was reversible error to permit the witness to testify to the occurrences at Seyler's store, and that, therefore, the second assignment must be sustained. It was distinctly stated by counsel for the common-

wealth that the evidence was offered for the purpose of showing that the witness and the defendant were, about the time Haines was killed, associated together in the commission of other crimes. The testimony failed to establish that they had been associated in the commission of any other offense when the alleged offense of statutory burglary was committed, or that the burglary was, proximately or remotely, connected with the crime laid in the indictment, or was one of a series of mutually dependent crimes connected with, and resulting or terminating in, the murder of Haines. These requisites for the admission of proof of collateral crimes are entirely wanting in this record. The commonwealth made no attempt to show, nor did it appear by proof in the case, that the alleged burglary was other than an independent offense participated in by the parties, having no connection whatever with the crime charged in the indictment against the defendant. The two offenses are dissimilar in kind and purpose, and could not have been laid in the same indictment. It was proper for the commonwealth to show the extent of the prior intimacy and association between Mottorn and the defendant, and whether or not it was criminal; but the evidence in the case falls entirely to show any prior criminal concert of action between them which, in the remotest degree, could have any bearing on the issue in the present case. The evidence, as well as the offer of counsel made in the presence of the jury, was clearly prejudicial to the defendant, as the jury might readily conclude that, if the defendant had recently been associated with Mottorn in the commission of another crime, it was a logical presumption, under the evidence, that he was not ignorant of Mottorn's last offense.

It is fundamental that a defendant cannot be convicted of an offense with which he is charged, because he had committed another offense unconnected with that for which he was indicted; and hence, as a general rule, evidence of his participation in another and distinct crime is not admissible on his trial to prove the crime laid in the indictment. There are, however, circumstances under which evidence of the commission of another offense may be received in the trial of a criminal case. The exceptions to the general rule excluding such testimony have frequently been the subject of adjudication by this court, and we have uniformly held that such a connection must be shown between the two offenses as tends to establish that, if the defendant were guilty of the one, he was also guilty of the other. The doctrine is well stated by Mr. Justice Clark in *Swan v. Commonwealth*, 104 Pa. 218. There the defendants were jointly indicted for burglary and larceny. It appeared that in the same township and on the same day another house had been burglarized, to which one of the defendants had pleaded guilty in

another indictment. This fact was given in evidence, on the theory that defendants were members of an organization banded together for the commission of burglary. The defendants were seen together in the locality of the crime on the day it was committed. We reversed the judgment of conviction, and held that the evidence should have been excluded. In the opinion it is said:

"To make one criminal act evidence of another, some connection must exist between them; that connection must be traced in the general design, purpose, or plan of the defendant, or it may be shown by such circumstances of identification as necessarily tends to establish that the person who committed one must have been guilty of the other. The collateral or extraneous offense must form a link in the chain of circumstances or proofs relied upon for conviction; as an isolated or disconnected fact it is of no consequence; a defendant cannot be convicted of the offense charged simply because he is guilty of another offense."

The counsel for the appellant misapprehended the purpose of the testimony covered by the third assignment of error. It was offered for the purpose of showing by the defendant's acts and declarations his connection with the crime, and was entirely competent.

[2, 3] The fourth to the ninth assignments complain of certain parts of the charge in which the trial judge outlined the evidence produced by the parties at the trial. These excerpts are separated from the general context of the charge, and, standing alone, are in some instances obscure and fail to indicate the meaning of the trial judge, but when read, as they should be, in their proper connection are free from error. The judge, told the jury that he had given them a mere outline of the contentions of the parties, and not a recapitulation of the testimony or a statement of the facts, told them that it was their duty to remember all the evidence and give it the credence it was entitled to, and that the credibility of the witnesses was for them, including that of Henry Ward Mottorn, the accomplice. We have time and again condemned and held to be reprehensible the practice of assigning as error excerpts from the charge so disconnected from the context as to convey an erroneous meaning of the language used.

The tenth and eleventh assignments are without merit. We are not disposed to sustain the twelfth, thirteenth, and fourteenth assignments, alleging error in answers to certain requests for instructions which deal with the extent of the corroboration sufficient to warrant conviction on the testimony of an accomplice, in view of the instructions on the subject contained in the general charge covering the questions raised, and to which no error is assigned. We suggest, however, that on the next trial of the cause the court in its general charge state clearly the law applicable to the testimony of an accomplice, and make a more specific application of it to the particular facts of

the case. The court should point out, in a general way, not only the testimony, of the accomplice, but wherein it is claimed to be contradicted and corroborated, and the jury should be told that they must closely scrutinize such testimony, and accept it with caution.

The second assignment of error is sustained; the judgment is reversed, and a venire facias de novo is awarded.

(257 Pa. 273)

BLACK et al. v. EASTERN PENNSYLVANIA RYS. CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

LIMITATION OF ACTIONS §31—HUSBAND'S SUIT FOR INJURY TO WIFE.

A husband's right to maintain a suit for personal injury to his wife is barred after two years by Act June 24, 1895 (P. L. 236), relating to suits for damages for injury wrongfully done to the person which does not result in death.

Appeal from Court of Common Pleas, Schuylkill County.

Trespass by Eliza J. Black and Edward Black against the Eastern Pennsylvania Railways Company, to recover damages for personal injuries. Judgment for defendant, entered upon a compulsory nonsuit, and plaintiffs appeal. Affirmed.

The facts appear in the following opinion by Bechtel, P. J., in the common pleas:

This case was argued before the court in banc on a rule to strike off the nonsuit entered by the trial judge. It presents but one question, which is rather unique. The suit was an action of trespass brought by Eliza J. Black and Edward Black, her husband, against the defendant for injuries sustained by Eliza Black, on the 28th day of July, 1908. The suit was brought in September, 1913. It is admitted by counsel for the plaintiff that the right of Eliza J. Black to sue has been barred by the statute of limitation of June 24, 1895 (P. L. 236), but contended that the right of the husband to maintain the suit is not barred, by reason of the fact that he has six years in which to bring his action, in accordance with the provisions of the act of March 27, 1713 (1 Smith's Laws, p. 76).

The act of 1895 (P. L. 236, § 2) provides, *inter alia*: "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in cases where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law."

We have been unable to find any decision of the higher courts in this state in which this question has been definitely decided. The act of 1895, *supra*, has, however, been construed a number of times. In the case of Peterson et al. v. Delaware River Ferry Co. of New Jersey, 190 Pa. 364, 365, 42 Atl. 965, the court say: "The act of 1895, as held in the case referred to, is a general act in the nature of a statute of limitations. Its terms are general, and make no exceptions in favor of persons under disability. The settled rule is that infants as well as all others are bound by the provisions of such statutes." In Rodebaugh v. Philadelphia Traction Co., 190 Pa. 358, 362, 42 Atl. 953, 954, it was said: "The words of the act of 1895 are

general, and there is nothing to indicate that they were not intended to establish a general rule, applicable to all cases within their terms, to wit, 'every suit to recover damages for injury wrongfully done to the person.' There are a number of other decisions to the same effect.

The act of May 8, 1895 (P. L. 54), provides that the right of action in case of injury done to the person of the wife shall be tried both for the husband and the wife in one suit, and provides for the rendition of verdicts for each of them, and also contemplates a verdict in favor of one and against the other; and it is therefore contended by counsel for the plaintiff that the husband's rights are not affected by the statute of limitations of 1895, *supra*. The contention of counsel for the plaintiff is that the husband's right of action is not for injuries to his person, and that therefore it is not governed by the act of 1895. We cannot agree with this contention. The act does not say for injuries wrongfully done to his person, but for injuries wrongfully done to the person. The suit in question is certainly based upon injuries wrongfully done to the person, the person of plaintiff's wife. It is difficult to understand how one suit should be maintained by both of these plaintiffs, founded on the one cause of action, and that cause of action be barred by the statute of limitations, and yet the one plaintiff be permitted to recover.

We feel that it was the evident intention of the Legislature to bar all actions for injuries done to the person after two years. This is the plain language of the act. We are therefore of the opinion that the nonsuit was properly entered.

The trial judge entered a compulsory nonsuit, which the court in banc subsequently refused to take off.

Argued before BROWN, C. J., and MES- TREZAT, POTTER, FRAZER, and WALL- ING, JJ.

John O. Ulrich, of Tamaqua, for appellants. Otto E. Farquhar and C. M. Berger, both of Pottsville, for appellee.

PER CURIAM. The act of 1895 clearly barred the right of either of the plaintiffs to recover in this action, brought more than five years after the injuries to the wife were sustained, and the judgment is affirmed, on the opinion of the learned court below refusing to take off the nonsuit.

Judgment affirmed.

(257 Pa. 297)

In re IVISON'S ESTATE.

(Supreme Court of Pennsylvania. March 19, 1917.)

LIFE ESTATES §6—SECURITY—ENTERING OF SECURITY.

Where a testatrix left to her husband, the executor of her estate, all her interest in property, with the provision that he should pay the interest on a sum of money for the maintenance of the testatrix's grandson, such sum to revert at the death of the husband to the estate for the use of the grandson, the husband was properly required to give bond to secure payment of the interest and principal.

Appeal from Orphans' Court, Franklin County.

In the matter of the estate of Kate Keyser Ivison, deceased. On petition to require life tenant of personal property to enter security. From decree requiring life tenant, I. D. Ivison, to enter security, he appeals. Affirmed.

Petition to require a life tenant of personal property to enter security. Kate Keyser Ivison died testate, June 1, 1912. Her will consisted of a formal paper and a letter of instructions to her executor, and was duly probated before the register of wills of Franklin county, and letters testamentary granted to I. D. Ivison, one of her executors; the other renouncing. The formal will gave to her executors the residuary estate in trust, with power to convert the same into money and to invest and reinvest the same in lawful securities, the income to be paid to the guardian of her grandson, George W. Brodhead, the principal of the said fund to be paid to George W. Brodhead absolutely, when he became 21 years of age. In case of his death before he became 21 years of age without child or children surviving, the residuary estate was given to certain other persons.

The letter of instructions, probated as part of the will, gave to I. D. Ivison, the husband of the testatrix, all her interest in the Hotel Washington, "he to pay the interest on five thousand (5,000) dollars at the rate of five (5) per cent. to my estate, the same for (interest) maintenance of my grandson, George Wills Brodhead; interest not to begin for one year after my death, and at the death of my husband, I. D. Ivison, the five thousand (5,000) dollars to revert to my estate for the use of my grandson, George Wills Brodhead, if of age. If not, to be invested to the best advantage by the trustees, interest only to be used. In case my grandson before reaching the age of twenty-one (21) years should die without issue, I give and bequeath to my husband, I. D. Ivison, all money, bonds, mortgages"—the remainder of the estate being given to certain legatees.

I. D. Ivison elected to take under his wife's will. He filed his account as executor, which was excepted to, and the exceptions in part sustained. On February 7, 1916, the Philadelphia Trust Company, guardian of George Wills Brodhead, the minor grandson of the testatrix, presented its petition to the orphans' court of Franklin county for a rule on I. D. Ivison to turn over the certain articles given to him for life or until he should remarry, and to require him to give security in the sum of \$10,000 for the payment of \$250 to the guardian of George Wills Brodhead annually, and to pay the principal sum to the said George Wills Brodhead, as provided by the will of the testatrix.

I. D. Ivison, in his answer to said petition, expressed his willingness to turn over the articles of personal property valued at about \$400, but denied the right of the guardian to

require him to give security, on the ground that the money was payable by him as legatee, not to the guardian, but to himself as trustee under the will of his deceased wife, and that as trustee he had active duties to perform, and therefore should not be required to give security.

The court decided that the case was ruled by *Kemerer's Estate*, 251 Pa. 282, 96 Atl. 654, and directed I. D. Ivison to enter security in the sum of \$8,000. I. D. Ivison appealed. Error assigned was the order of the court.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Charles Walter and Arthur W. Gillan, both of Chambersburg, for appellant. Irvin C. Elder, of Chambersburg, John Stockburger and James F. Hagen, both of Philadelphia, and Walter K. Sharpe, of Chambersburg, for appellee.

PER CURIAM. We agree with the learned judge of the orphans' court that this case is ruled by *Kemerer's Estate*, 251 Pa. 282, 96 Atl. 654, and therefore the decree is affirmed.

(257 Pa. 312)

PRICE v. LITTLE.

(Supreme Court of Pennsylvania. March 23, 1917.)

TRIAL ~~6~~196—INSTRUCTIONS.

In an action for an alleged libelous newspaper publication, charging misconduct in office on the part of plaintiff, an alderman who sat as a magistrate, it was not error for the trial judge to comment on the ethics which should be observed by a magistrate, and to state that the magistrate should not sit where relations between him and the suitors were so close as to cast a suspicion upon him, and that it was improper for a magistrate to institute suit in his own court.

Appeal from Court of Common Pleas, Lackawanna County.

Action by Thomas J. Price against Richard Little. From a judgment on verdict for defendant, plaintiff appeals. Affirmed.

The following is the opinion of Staples, P. J., in the court of common pleas:

From the record it appeared that the alleged libelous article complained of consisted of an account of a proceeding brought before the plaintiff as alderman of the thirteenth ward of the city of Scranton. Defendant offered evidence to prove that the publication was true.

The court charged the jury in part as follows: "You will remember, likely, the details of the evidence with regard to these charges of arbitrary conduct upon his part. We preface our remarks upon this subject with this, gentlemen of the jury: A magistrate is an officer of the law, his office is established largely for the convenience of the people, and especially of the poorer class of people. It is not the rich as a rule who are called into a magistrate's court; it is the poor who get there. As a rule, the amounts that are sued for and the offenses charged against persons are small amounts and minor offenses. Of course, in the process of the

criminal side of the court and the law, all kinds of charges against persons for crimes and felonies must be instituted in the magistrate's court, but, as a rule, persons who are well to do, or have money at hand, retain counsel or attorneys at law, who take charge of their affairs and who go before the magistrates and look carefully after the rights of their clients, and this, therefore, puts a guard upon the magistrate, and he is more inclined, I think it would be fair to say, to strictly obey the law and do his duty where there are counsel able and fitted to take care of the business which is brought before the magistrate, but a poor person, a person not well to do, is not in the same class, and he is at least entitled to information from a magistrate as to what he should do; and, if the magistrate neglects to give that information to the person who is brought into his court and permits him to go on and neglect something that he ought to do until he is caught and then unable to do it and protect his right, that would be a matter of criticism, we take it, by a newspaper, if made in proper manner. It is a part, or should be a part, of the ethics in a magistrate's office the same as a part of the ethics in the common pleas court. No judge in the court of common pleas who had any regard to the proprieties of life and of his office should sit in a case in which he had the least interest. He would call in another judge. He ought not to sit in a case where the relations between himself and some suitor were so close as even to cast suspicion upon him, and a magistrate who brought a suit in his own court for a claim in which he was personally interested in the mind of the court would be guilty of misconduct, to say nothing further about it."

Verdict for defendant, and judgment thereon. Plaintiff appealed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Charles H. Soper, of Scranton, for appellant. John F. Scragg, Robert E. Scragg and Harold A. Scragg, all of Scranton, for appellee.

PER CURIAM. In this action for libel the verdict was for the defendant, and from the judgment on it the plaintiff has appealed. What is termed the "first assignment of error" is but a legal conclusion of counsel, and is therefore dismissed. By the second assignment error is charged in the quoted portion of the instructions to the jury. While the learned trial judge might properly have omitted from his charge what is complained of, no legal error is discoverable in it, and the judgment is therefore affirmed.

(257 Pa. 320)

In re **PENNSYLVANIA COAL COMPANY'S ASSESSMENT.**

(Supreme Court of Pennsylvania. March 23, 1917.)

TAXATION ⇨493(8)—**REVIEW**—**FINDING.**

Where it appeared that the board of revision and appeal in making findings of fact as to the value of coal lands assessed considered the evidence and weighed it, their findings will not be disturbed on appeal.

Appeal from Court of Common Pleas, Lackawanna County.

In the matter of the assessment and valuation of coal land of the Pennsylvania Coal Company. From an order of the board of revision and appeal fixing the value of coal lands, the owner appeals. Affirmed.

Appeal from valuation of coal lands at triennial assessment by the board of revision and appeal. The opinion of the Supreme Court states the facts. The court in banc assessed the Pennsylvania Coal Company's property at \$300 per foot acre. Pennsylvania Coal Company appealed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Frank W. Wheaton, of Wilkes-Barre, and John P. Kelly, Henry A. Knapp, James H. Torrey, James E. Burr, M. J. Martin, D. R. Reese, and John R. Wilson, all of Scranton, for appellant. H. C. Reynolds and H. L. Taylor, Co. Sol., both of Scranton, for appellee.

PER CURIAM. The appeal of the Pennsylvania Coal Company from the valuation and assessment of its coal lands in Dunmore borough by the board of revision and appeal for the county of Lackawanna was heard by the court below in banc, and the finding of its judges was that the value of those lands on January 1, 1916, was \$400 per foot acre. Following a rule of uniformity, they reduced it to \$300 per foot acre for assessment purposes, or \$25 less than the valuation for the purposes of taxation fixed by the board of revision and appeal. What we are asked to change on this appeal is the finding of fact by the judges of the court below in fixing the valuation of the lands. It was for them to fix this after the consideration of the evidence in the case and giving due regard to the weight thereof. *Lehigh Valley Coal Co. v. Northumberland County Commissioners*, 250 Pa. 515, 95 Atl. 712. They seem to have followed this rule, and, after duly considering what was submitted to them, we cannot say their finding was erroneous.

This appeal is therefore dismissed without costs to either party.

(257 Pa. 321)

In re **McMURRAY'S ESTATE.**

(Supreme Court of Pennsylvania. March 23, 1917.)

Appeal from Orphans' Court, Allegheny County.

On reargument. Former decision (256 Pa. 233, 100 Atl. 798) adhered to.

Argued before BROWN, C. J., and MES- TREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

Charles K. Robinson and Frank H. Kennedy, both of Pittsburgh, for appellant. John S. Robb, Jr., and John Rebman, Jr., both of Pittsburgh, for appellee.

PER CURIAM. After the re-argument of this appeal, ordered upon the application of the appellee, we are still quite clear that the learned court below erred in substituting its discretion for that of the register, which had not been improperly exercised.

Our decree of January 8, 1917 (McMurray's Estate, 256 Pa. 233, 100 Atl. 798), will therefore not be disturbed.

(257 Pa. 300)

BIXLER et al. v. SWARTZ.

(Supreme Court of Pennsylvania. March 19, 1917.)

APPEAL AND ERROR — 954(4) — REVIEW — INJUNCTION.

An order continuing a preliminary injunction against interference with plaintiff's possession of a storeroom and against any summary action at law to recover its possession will not be disturbed on appeal, where plaintiffs were in lawful occupancy under a lease and defendant was threatening to oust them.

Appeal from Court of Common Pleas, Northampton County.

Bill in equity for an injunction by Fannie T. Bixler and Arthur B. Bixler, individually and as partners trading as A. B. Bixler & Co., against Mark T. Swartz. From a decree continuing a preliminary injunction, defendant appeals. Appeal dismissed.

The facts appear in the following opinion by McKeen, J., in the common pleas:

The defendant moved to dismiss the bill and the preliminary injunction granted thereon in the above-stated case for the reason that there are no injunction affidavits such as are required by the equity rules, the injunction affidavits having been made by the parties to the bill, and for the further reason that the bill does not disclose any averment or allegation which would entitle the plaintiff to equitable relief and to an injunction, preliminary or otherwise. On the 6th day of July, 1911, Fannie T. Bixler, Arthur B. Bixler, and Samuel P. Ludwig, copartners doing business as "the C. W. Bixler Company," entered into a written lease of the premises in question with the Northampton Trust Company, trustee, duly appointed by the orphans' court of Northampton county under the will of Charles Pomp, deceased, for the term and period of 10 years from the 1st day of August, 1911, upon the terms and covenants therein set forth, which said lease was signed by the said copartners as follows: "The C. W. Bixler Company, by Samuel P. Ludwig, Samuel P. Ludwig, Arthur B. Bixler, Fannie T. Bixler." The firm, instead of using the name "the C. W. Bixler Company," set forth in the lease, used the name of C. W. Bixler & Co. There was never any written partnership agreement between the copartners until the 14th day of September, 1914, when a written agreement was entered into between the parties, to wit, the estate of C. Willis Bixler, by the executors, Fannie T. Bixler and Arthur B. Bixler, Arthur B. Bixler, individually, and Samuel P. Ludwig. The estate of C. Willis Bixler owned a one-fifth interest in said partnership, Arthur B. Bixler a two-fifths interest, and Samuel P. Ludwig a two-fifths interest. These interests were the same when the original partnership was entered into by the parties. Samuel P. Ludwig, one of the partners, died on the 15th day of June, 1916, and his interest, under the terms of the partnership agreement, was acquired by Arthur B.

Bixler, and the firm name was changed to Arthur B. Bixler & Co., composed of Arthur B. Bixler, now owning a four-fifths interest in said partnership, and Fannie T. Bixler, representing the estate of C. W. Bixler, a one-fifth interest; the partnership being carried on in the same manner and under the terms of the partnership agreement by the surviving partners with the exception of the change in the firm name. The lease contains a clause which reads, "This agreement shall be binding upon the executors, administrators, successors, or assigns of the parties hereof;" also a clause which provides, "And the parties of the second part also agree not to sublet the said demised premises, or any portion thereof, or to assign this lease either by themselves, judicial sale, operation of law, or otherwise, without permission in writing to that effect first had and obtained from the said party of the first part." On May 18th, during the tenancy of plaintiff, the real estate, a part of which was occupied by plaintiff by virtue of the lease, was sold to Stanley D. Howell and Paul M. Thomas, who on the same day conveyed the same to Mark T. Swartz, the defendant. On August 1, 1916, the quarter's rent then due was paid to and accepted by defendant; the check was signed, "C. W. Bixler & Co., per A. B. Bixler." On November 1, 1916, the rent then due was tendered defendant by check signed "A. B. Bixler & Co., per A. B." On the face of the check appeared the words, "A. B. Bixler & Co., successors to C. W. Bixler & Co." This check was refused by defendant, and tender in gold for amount of rent due was afterwards made by plaintiff to defendant, and also refused. On November 29, 1916, plaintiff received a quit notice from the defendant, notifying and requiring plaintiff to quit and deliver up possession of the premises in question on the 1st day of January, 1917.

The plaintiff, under the terms of the written lease, is in the lawful occupancy and possession of the demised premises, and under the facts presented to the court, there having been no breach of any of the covenants therein expressed, cannot be disturbed in the enjoyment of the occupancy and possession of said premises. Taking up the question of the sufficiency of the injunction affidavits, it is contended that these affidavits were made by complainants, and under the equity rules must fall. Defendant has submitted authority to the effect that a bill and preliminary injunction must be sustained by at least two injunction affidavits, separate and apart from the affidavit to the bill, and that these affidavits must be made by different persons, neither of whom is a party to the proceedings, and must each contain the substance of every material allegation contained in the bill. This is correct as a general proposition, but cannot be rigidly adhered to, where the enforcement of such a rule would work injustice. It can reasonably be concluded, and it was so stated at the hearing, that complainants were the only parties having knowledge of the facts alleged and averred in the bill, and, under these conditions, equity would not demand the strict enforcement of a rule which would bar complainants from obtaining equitable relief. In *Hinnershitz v. United Traction Co.*, 206 Pa. 91, 97, 55 Atl. 841, Mr. Justice Mitchell, in passing upon an equity rule, said: "The equity rules were promulgated by this court under the authority of an act of assembly, and it has been said that they have 'all the force and effect of a positive enactment.' By this was meant that they were established as rules of equity practice in all the courts of the commonwealth, and must be followed and enforced as such. * * * But it was not intended to say that they were inexorable under all possible circumstances, or to take them out of the ordinary equitable control of a chancellor in the application of chan-

very rules to exceptional cases. Such a construction might easily make them more oppressive than mandatory statutes. * * * They are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience. But, on the other hand, they are, like all other rules of practice, subject to the judicial discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship." This doctrine was also approved by Mr. Justice Moschzisker, in *Sunbury Borough v. Sunbury & Susquehanna Ry. Co.*, 241 Pa. 357, 360, 88 Atl. 543, and by Mr. Justice Potter, in *Crennell v. Fulton*, 241 Pa. 572, 579, 88 Atl. 783.

The other reason advanced by defendant, that the bill does not disclose any averment or allegation which would entitle plaintiff to equitable relief and to an injunction, preliminary or otherwise, in view of the lawful occupancy and possession of plaintiff of the premises under the terms of the written lease, cannot be sustained. In *Denny v. Fronheiser*, 207 Pa. 174, 56 Atl. 406, approved in *Kaufmann v. Liggett*, 209 Pa. 87, 92, 58 Atl. 129, 87 L. R. A. 353, 103 Am. St. Rep. 988, it was held: "That a court of equity has jurisdiction in a proper case to restrain proceedings under the landlord and tenant acts of 1772 and 1863." In the case at bar, under the facts presented at the hearing on the motion to continue preliminary injunction, the plaintiff is entitled to a continuance of the same, and a refusal to grant such relief would be contrary to the principles governing equity practice.

The court continued a preliminary injunction which it had granted. Defendant appealed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

W. S. Kirkpatrick and Smith, Paff & Laub, all of Easton, for appellant. P. C. Evans and Clarence Beck, both of Easton, and Edward P. Stout, of Jersey City, N. J., for appellees.

PER CURIAM. This is an appeal from an order of the court below, continuing a preliminary injunction restraining the defendant from interfering with the plaintiffs' possession of a storeroom in the city of Easton and from instituting or proceeding with any summary action at law for that purpose. We have carefully considered the facts disclosed by the record, and think there were reasonable grounds for the action of the court below, and therefore, in accordance with our established practice, we will not, on this appeal, further consider the merits of the case.

The appeal is dismissed at the costs of the appellant.

(257 Pa. 338)

GEISSLER et al. v. LAUTHER.

(Supreme Court of Pennsylvania. March 23, 1917.)

WILLS — **CONSTRUCTION** — **ESTATE DE- VISED** — **FEE.**

Under a will which, after providing for the erection of a monument and the payment of testator's debts and for a trust estate, suggested that the residue of the realty be taken by his children at the appraisalment therewith inclosed, the children took an estate in fee simple in the real estate.

Appeal from Court of Common Pleas, Berks County.

Assumpsit by Harry C. Geissler and Annie L. Geissler, his wife, and others, against Louis G. Lauther, for balance due as purchase money under an agreement for the sale of real estate. Judgment for plaintiffs for want of a sufficient affidavit of defense, and defendant appeals. Affirmed.

The following is the opinion below of Wagner, J.:

The plaintiffs in this case claim from defendant the sum of \$1,990, the balance due as purchase money upon an agreement entered into by the plaintiffs with the defendant for the sale to him of 1335 North Tenth street, Reading, Pa. The only defense is that the plaintiffs are not the owners of said property in fee simple, for the reason that under the will of Henry C. Geissler, deceased, they did not take an estate in fee simple.

In the case of Henry C. Geissler, Jr., Marie L. Geissler et al. v. Reading Trust Company, Trustee, etc. (opinion just filed), we have considered the effect of the clauses in the will of Henry C. Geissler, deceased, in which he attempted to create a trust estate for his children and grandchildren. The property in question in this suit is no part of the estate of the said Henry C. Geissler, deceased, attempted to be placed in trust, but belongs to that designated in his will as the "rest, residue, and remainder of my estate." The only clause in the will that refers to this residue of the estate is item 11, which is: "As to the rest, residue and remainder of my estate, I suggest that the real estate be taken by my children at the appraisalment as herewith inclosed and hereinbefore referred to, also the securities, at the then market values."

The claim of the plaintiffs is that the testator, having out of his estate made provision for the erection of a monument, the payment of his debts and a trust estate, by this item 11 recognizes that, without a specific bequest of the residue of his property, it, upon his death, would pass to his four children in equal shares, under the intestate laws; that the only purpose of this clause is to give a suggestion of a valuation of the real estate to facilitate an equitable distribution thereof. The only two constructions that can be placed upon this item 11 are that it merely fixes the price at which the children are to take the residue of his estate under the intestate laws, as contended for by the plaintiffs; or, second, that it is broad enough to give to the children the real estate at the price fixed. For the purposes of this case it is immaterial which of these is correct, as under either of them the children of Henry Geissler, deceased, have an estate in fee simple in the property described in plaintiff's declaration.

The lower court entered judgment in favor of the plaintiffs for want of a sufficient affidavit of defense for the sum of \$1,990. Defendant appealed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

Walter B. Craig and Jefferson Snyder, both of Reading, for appellant. H. Robert Mays, of Reading, for appellees.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned court below in directing it to be entered.

(287 Pa. 322)

COMMONWEALTH v. MATTER.

(Supreme Court of Pennsylvania. March 23, 1917.)

1. STATUTES \S 94(2) — "LOCAL OR SPECIAL LAW"—CONSTITUTIONAL PROVISIONS.

Act June 16, 1911 (P. L. 1027), providing for the appointment of a capitol park commission to obtain for the commonwealth for park purposes such land as the commission might wish within certain boundaries, is not a local and special law in violation of Const. art. 3, § 7, prohibiting any local or special legislation relating to the affairs of counties, cities, towns, wards, boroughs, or school districts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Law; Special Law.]

2. STATUTES \S 8½(1)—ENACTMENT—ADVERTISEMENT.

The validity of Act June 16, 1911 (P. L. 1027), appointing a capitol park commission to obtain land for the commonwealth for park purposes, which had been duly passed by both branches of the Legislature and approved by the Governor, could not be impeached by a statement in an affidavit of defense in the commonwealth's action of ejectment for land appropriated by the commission that the act was invalid for the reason that it had not been advertised.

3. EMINENT DOMAIN \S 71—COMPENSATION—CONSTITUTIONALITY OF STATUTE.

Such act appropriating \$2,000,000 to carry out its provisions, and providing that a writ of mandamus might issue for paying any judgment which the owner might recover against the commonwealth for the taking of his land, in the absence of any averment that the appropriation was insufficient to cover the value of lands taken, and in view of the owner's appearance before the capitol park commission in regard to the value of the land taken, and his pending appeal from the valuation fixed by the commission, did not violate Const. art. 1, § 10, on the ground that no compensation had either been paid or secured for the land taken.

Appeal from Court of Common Pleas, Dauphin County.

Ejectment by the Commonwealth of Pennsylvania against H. Homer Matter. Judgment for plaintiff for want of a sufficient affidavit of defense, and defendant appeals. Affirmed.

The following is the opinion of McCarrell, J., in the court of common pleas, sur plaintiff's rule for judgment for want of a sufficient affidavit of defense:

This action is brought to obtain possession of certain real estate in the Eighth ward of the city of Harrisburg, known as No. 135 North Fourth street. This land lies within the park extension zone as defined in the act of June 16, 1911 (P. L. 1027). This act provides for the appointment of a capitol park commission for the purpose of obtaining for the commonwealth for park purposes such land as the commission may desire to take for the commonwealth within the boundaries mentioned in the act. The commission is authorized as far as practicable to acquire by purchase the lands included within said boundaries upon such terms, price, or consideration as may be considered by it to be reasonable and can be agreed upon between it and the owners of lands. If unable to agree the commission is authorized to determine what land within said boundaries it will take for the use of the commonwealth, to give notice to the owners or reputed owners of their intention to take the lands belonging to such owners, for at least

60 days, and then provides that after the giving of said notice for said time the commission shall enter upon and take possession of the lands, and declares that such entry and possession "shall vest in the commonwealth the absolute title to the lands so entered upon."

[1, 2] The declaration in this case avers that under this act of assembly the commission, being unable to agree with the defendant upon the price of the lands in question here, gave notice of its intention to take the said lands on December 28, 1915, and 60 days thereafter made entry of possession thereon. According to the terms of the act the title to the premises was vested absolutely in the commonwealth when this action was taken. The affidavit of defense and the supplement thereto do not deny that this proceeding was had by the capitol park extension commission as stated, but contends that the act under which the commission has proceeded is local and special, and invalid because not advertised. It was duly passed by both branches of the Legislature and approved by the Governor, and according to a long line of decisions in this state its validity cannot now be impeached because of any statement contained in the affidavits of defense. It must be conclusively presumed that everything was done that the law required to be done. Besides, we are not satisfied that the act is local or special legislation within the meaning of the constitutional provision. Const. art. 3, § 7. It expresses the determination of the commonwealth to provide lands for the extension of its capitol park within certain boundaries, and appoints a commission to make purchases, if the same can be done, and to obtain title otherwise in case an agreement as to price cannot be reached. The right of the commonwealth to take land for this purpose cannot be questioned, and the method of obtaining title is not in violation of any constitutional provision. The affidavits of defense are quite voluminous, and refer to many matters touching occurrences in connection with the passage of the act and concerning the conduct of individuals with respect thereto, but none of these matters, in our opinion, can be considered now. The act must be regarded as a valid statute of the commonwealth, binding upon all its citizens and the commonwealth as well.

[3] In the original affidavit of defense in support of defendant's allegation that the taking of this land is in violation of article I, § 10, of the Constitution, it is alleged that no compensation has either been made or secured for the lands in question here, and that "to-day there is no fund in the state treasury to pay." The act, however, makes an appropriation of \$2,000,000 for the purpose of carrying into effect its provisions and making payment for the lands directed to be acquired. In the present case the defendant had a hearing before the commission in regard to the value of the land described in this writ, and the commission fixed a valuation, from which an appeal has been taken in due course by the defendant, and which appeal is now awaiting trial and should be promptly heard. The second section of the act provides that in all cases where the value of property is fixed by judgment upon an appeal taken from the award of the commission, the court is authorized and empowered to issue a writ of mandamus to the proper officer to secure the payment of such judgment. There is no averment in the affidavit of defense that the amount appropriated as aforesaid is insufficient to cover the value of the land described in the writ when the same is ascertained upon the pending appeal, and we regard the provisions contained in the act appropriating the money and empowering the issuing of a writ of mandamus for paying any judgment recovered as a sufficient security for just compensation for the taking of defendant's lands within the meaning of the con-

stitutional provision referred to. The affidavits of defense allege that the dimensions of the land taken by the commonwealth are greater than are set out in this writ. If upon the trial of the pending appeal it is shown that the dimensions of the property are not correctly stated, proof will be heard as to the exact dimensions, and the jury will be instructed to ascertain the fair market value of all the lands owned by the defendant which are taken by the commission for the use of the commonwealth.

We have carefully considered all the allegations of the affidavits of defense. As already stated, there is no denial of the procedure taken by the commission for the purpose of obtaining title for the commonwealth to the lands described in the writ, and these proceedings according to the statute vest the absolute title to the lands in the commonwealth of Pennsylvania. We are therefore of opinion that neither the original nor supplemental affidavit of defense discloses any sufficient answer to the plaintiff's claim of title, and the commonwealth is at liberty to enter judgment in favor of the commonwealth and against the defendant for the lands described in the writ. To this conclusion the defendant excepts, and at his request an exception is now sealed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHISKER, and FRAZER, JJ.

H. Homer Matter, of Harrisburg, in pro. per. Joseph L. Kun, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth.

PER CURIAM. This appeal ought to be quashed for flagrant disregard of our rules relating to the statement of questions involved and assignments of error, but, that there may be an end to the litigation, the judgment is affirmed on the opinion of the learned court below, in pursuance of which it was entered.

(257 Pa. 264)

SEITZINGER et al. v. BECKER et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. EQUITY \S 97—ACTION FOR ACCOUNTING—PARTIES.

Under rule 22 of the Equity Rules of the Supreme Court providing that where parties on either side are very numerous, and cannot readily be brought before it, the court may dispense with making all of them parties, etc., the grantees or heirs of grantees of certain lots sold them by the trustees of an unincorporated charitable association holding land for the sole purpose of a general cemetery for the use of the people of the vicinity, and to manage and improve it, were proper parties to a bill in equity for an accounting of the proceeds received from the sale of lots, and for the removal of the trustees.

2. CHARITIES \S 43—CHARITABLE USE—APPLICATION OF INCOME—ACCOUNTING.

Such trustees who had appropriated part of the amount received from the sale of lots and other income arising therefrom to the erection of halls and other buildings for the purposes of the association were liable, at the suit of the holders of certain of the cemetery lots, to an accounting of the funds received, and subject to an injunction against applying income to other purposes than that stated in the deed.

Appeal from Court of Common Pleas, Schuylkill County.

Bill in equity by Jacob R. Seitzinger and others for an accounting and for the removal of Edward Becker and others, trustees of Harmony Lodge No. 86, of the Borough of Tamaqua, of the Independent Order of Odd Fellows of Pennsylvania, and others. Decree for complainants, and defendants appeal. Appeal dismissed, and decree affirmed.

After a hearing on bill and answer Brumm, J., in the court of common pleas, found the following facts and conclusions of law:

Facts.

On February 10, 1913, the deed from the Little Schuylkill Navigation, Railroad & Coal Company to James M. Hadeisty et al., trustees of Harmony Lodge, etc., as set forth in complainants' pleadings, was introduced, and its contents not disputed by respondents.

On same day was introduced the deed from the Odd Fellows Cemetery of Tamaqua, to John F. Boyer, one of the complainants, dated the 10th day of February, 1913, for lots Nos. 111 and 110 (with description), being a part of the tract of land which the Little Schuylkill Navigation, Railroad & Coal Company above mentioned, granted and conveyed to James M. Hadeisty and others. This deed and other testimony showed that the complainants as originally named in this bill, had a special, individual interest in said cemetery as purchasers or heirs of purchasers of burial lots. The acceptance of the trust under the deed was shown and admitted by respondents. The said trustees of said Harmony Lodge have held, improved, and managed said tract of land, for the purpose of a general cemetery for the use of the people of the borough of Tamaqua and vicinity, but have acquired more money by the sale of lots, etc., than was necessary for that purpose, and have appropriated a large amount of money thus acquired, for the benefit of said Harmony Lodge of Odd Fellows, in the erection of buildings and other purposes wholly disconnected from and forming no part of said cemetery. The complainants have withdrawn their claim as to any alleged discrimination in favor of Gen. Doubleday Post; there is no other discrimination in favor of any portion of the inhabitants of the borough of Tamaqua and vicinity, claimed.

While the respondents admit that they have applied certain moneys received from the sale of lots, to the cost of the erection of a building belonging to and used in connection with the charitable purposes of the respondents, they also alleged that they purchased five acres of land adjacent to the cemetery, for which they paid over \$4,000, and expended several sums in clearing and improving the same, and that they have taken up bonds amounting to \$7,000, which were used by said Harmony Lodge to secure a loan for the erection of its hall on Broad street, Tamaqua; that they have invested \$9,000 in first-class bonds, which are now in the possession of the treasurer of the respondent trustees, and that \$2,000 of said surplus is in cash, which is now in the possession of said treasurer; that they raised a large sum of money by a fair held by said Harmony Lodge, and which money was exclusively devoted in improving said cemetery, etc., and sundry other financial transactions; all showing, or tending to show, that the money, or part of the money derived from the sale of the lots of the cemetery, in charge of the respondent trustees, under the deed from the Little Schuylkill Navigation Railroad & Coal Company, was appropriated to other purposes than to improve, manage, and hold for the sole purpose of a gen-

eral cemetery for the use of the people of the borough of Tamaqua and vicinity.

Assuming for argument's sake, that the deed from the Schuylkill Navigation Railroad & Coal Company to James M. Hadesty et al., trustees, passed title in fee simple, yet the condition subsequently attached to said grant involves two main features: First, that the land shall be improved, managed and held for the sole purpose of a general cemetery; second, this purpose is limited, "for the use of the people of the borough of Tamaqua and vicinity, and no discrimination shall be made for or against any portion of the inhabitants, but the rules and regulations of said cemetery shall be so formed as to secure equal rights and privileges to all," etc.

The first feature of this condition has been carried out. There is no dispute. Therefore the whole matter of contention is involved in the second feature as to whether the trustees have managed and held the property for the use of the people of the borough of Tamaqua and vicinity, so as to secure equal rights and privileges to all.

[1] The persons for whose use and benefit this right of sepulcher was granted being the people of the borough of Tamaqua and vicinity, the respondents claim that the complainants are not the proper parties to maintain the bill in any event, because they are only a part of the beneficiaries named in the grant, and that the grant to the people of Tamaqua means either: (A) The corporation of the borough of Tamaqua; or (B) the people as a unit; and that therefore the only authority to bring this action would be the borough council of Tamaqua, or the action by the majority of the people of Tamaqua, acting as a body. Rule 22 of the Equity Rules of the Supreme Court provides: "That where parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be brought before it, the court in its discretion, may dispense with making all of them parties," etc. This rule in addition to the fact that the complainants are the grantees or heirs of grantees of certain lots sold to them by the respondents, gives them such interest and rights in the premises as to make them proper parties to maintain the bill.

[2] This brings us to the main issue, which is as to whether the respondents had a right to charge more money for the lots and the right of sepulcher than was necessary for the improvement and maintenance of the cemetery, and to use any or all of the surplus money so received, for the benefit of Harmony Lodge in the erection of buildings and other purposes wholly disconnected from and forming no part of said cemetery.

While it is true that the deed sets forth that the consideration for the land was \$226.88 for their right, title, and interest in said land, yet it also states, "Except as is hereinafter provided," which proviso is as follows: "Reserving out of and from the same, all mineral, coal and iron, etc. * * * It is further provided, that the true intent and meaning of this indenture is that the tract or piece of land above described is accepted on the express condition that the same shall be improved and managed and held for the sole purpose of a general cemetery for the use of the people of the borough of Tamaqua and vicinity, and no discrimination shall be made for or against any portion of the inhabitants, but the rules and regulations of said cemetery shall be so formed as to secure equal rights and privileges to all of whatever sect, denomination, society, association or name. In case the managers of said cemetery shall attempt to violate or evade this express provision and condition the said lands herein mentioned and intended, shall immediately become vested in the said people themselves as fully and effectually as if they had been the original grantees herein named." This reservation includes not only the usual mineral

rights incident to lands in that locality, but also states specifically the purpose of the grant, and the use to which every particle of said land shall be put, limiting that purpose and use, to the people of the borough of Tamaqua and vicinity.

While the persons for whose use and in whose interest this grant was made may be somewhat indefinite by reason of the geographical limits stated, yet the intent, object and purpose of the grantor, as to what use shall be made of said lot is very clearly and specifically stated, and positively limited, and does in no way include Harmony Lodge as a beneficiary for the use, occupancy, or enjoyment of any of the land, or any proceeds, increments or benefits arising out of or from said land, inconsistent with the provisions and purposes of the grant. They might as well disregard the coal and mineral reservation with the right to mine, etc., as to repudiate the exception or covenant running with the land, concerning its use, etc.

The evidence does not clearly establish the fact that any money received from the proceeds of this lot has been appropriated to any other use than the improvement and maintenance of the cemetery, as the testimony shows that another tract of land was purchased, lots sold, etc., certain sums of money received from a fair held by said lodge and other sources, and no account rendered to show how much, if any, of the moneys received from the joint tracts and other incomes, was appropriated to the sole benefit of Harmony Lodge. An account, therefore, should be rendered of all moneys received from and expended on the lot granted by the Little Schuylkill Navigation Railroad & Coal Company, for the uses set forth in said grant, exclusive of any and all moneys received from any other source, so that proper disposition may be made of all moneys if any, that may have been improperly appropriated.

The plaintiffs contended: "That the defendants have abused their trust; that the deed above referred to only created a determinable fee, and that, upon the happening of the event named in the said deed, namely, the actual failure on the part of the grantees named in the deed to carry out the purposes of the trust, or the evincing of an intention to evade the trust having arrived, the fee would revert to the grantor, which was a corporation, and is presumably still in existence, but for the express provision in the clause creating the trust that upon the misfeasance or malfeasance of the trustee, the title to the same should immediately vest as fully in the people of Tamaqua and vicinity as though they had been the original grantees in the deed. Thus it evidences the intention of the grantor that all the people of the borough of Tamaqua and vicinity were to share in the benefits of this ground, and that if the trustees selected by the grantor to carry out the purposes of this tract should fail in the discharge of their duty, title to the property should not vest absolutely in such errant trustees, but that the same interest reverting to the grantor should immediately vest in the people themselves. We take it that the only way in which the people can get the benefit of this alternative provision is by means of the appointment of other trustees by this court, who will, instead of diverting the property from its proper uses, hereafter devote it to the proper execution of the trust created by the said deed."

We do not think the testimony is sufficient to sustain the claim "that the defendants have abused their trust," even assuming that the defendants appropriated some of the proceeds from the sale of these lots, believing that they had such title in fee simple, as made them the absolute owners to appropriate the proceeds over and above the amount necessary to carry out the purpose of sepulcher as stated in the will. It was at most an error that can be rectified by rendering a full account of their transactions, and refunding all moneys, if any have been erroneously misappropriated.

We therefore find the following facts:

First. That the Little Schuylkill Navigation Railroad & Coal Company, by a deed dated the 10th day of April, A. D. 1865, granted and conveyed in fee simple to James M. Hadesty, Henry Enterline, Benneville L. Fetherolf, Francis X. Bender, and William A. Shoemaker, then trustees of Harmony Lodge No. 86, a certain piece of land containing 15 acres more or less, situate in Schuylkill township, with the usual mineral and coal reservation incident to lands in that locality, and with the further proviso that the true intent and meaning of this indenture is that the tract or piece of land above described is accepted on the express condition that the same shall be improved and managed and held for the sole purpose of a general cemetery for the use of the people of the borough of Tamaqua and vicinity, and no discrimination shall be made for or against any portion of the inhabitants, but the rules and regulations of said cemetery shall be so formed as to secure equal rights and privileges to all of whatever sect, denomination, society, association, or name. In case the managers of said cemetery shall attempt to violate or evade this express provision and condition, the said lands herein mentioned and intended shall immediately become vested in the said people themselves as fully and effectually as if they had been the original grantees herein named.

Second. The Odd Fellows' cemetery of Tamaqua, by deed dated the 10th day of February, 1913, granted and conveyed to John F. Boyer, one of the plaintiffs aforesaid, two lots of ground, Nos. 111 and 110, being part of the land conveyed to the trustees of said Harmony Lodge for cemetery purposes.

Third. That the trustees of Harmony Lodge have bought additional, adjoining ground for cemetery purposes, and from the sale of lots from both these said pieces of ground and the proceeds of a fair and other sources of income have improved and managed said tract of land for the purpose of a general cemetery, for the use of the people of the borough of Tamaqua and vicinity.

Fourth. That they have appropriated part of the income from these various sources to the erection of a hall and other buildings, and have not made or filed separate or itemized accounts of their receipts and expenditures for the various purposes stated.

Fifth. That under the evidence, we are unable to ascertain how much, if any, of the money received for the sale of lots purchased from the Little Schuylkill Navigation Railroad & Coal Company was appropriated for any other purpose than the improvement and management of said tract of land, for the purpose of a general cemetery for the use of the people of the borough of Tamaqua and vicinity.

Law.

First. We find that the complainants are proper parties to maintain this bill.

Second. That the doctrine of laches is not applicable under the facts shown in this case.

Third. That Charles Hodgkins et al. have not forfeited their right to hold the property under the terms of the deed from the Little Schuylkill Navigation Railroad & Coal Company to James M. Hadesty et al., trustees of Harmony Lodge.

Fourth. That said trustees should give an account of all moneys, if any, received by them as trustees, not appropriated for the use and maintenance of a general cemetery; also all moneys so received, if any, which they have appropriated to the use of said lodge for its own purpose.

Fifth. That the receipts from the sale of lots of any of the ground deeded to them in the alleged will, as trustees, must be used for the

care and management of the cemetery, and invested and kept as a fund for the purpose of perpetually preserving and keeping the lots in proper condition.

Exceptions were subsequently dismissed by the court in banc and the following decree entered: Now, the 8th day of November, 1915, it is ordered, adjudged, and decreed, that the defendants be restrained from appropriating any money received from the sale of lots, or any source, income or increment, from the 15½ acres of land deeded by the Little Schuylkill Navigation Railroad & Coal Company, to Edward Becker et al., as trustees of Harmony Lodge, for any other use than the maintenance of said lot or any part thereof, for the purpose of sepulcher, and as a cemetery under the provisions of said deed.

That the defendants render a complete, itemized account of all moneys so received, or that may hereafter be received from said lots, as stated, over and above the amount necessary for the repair and maintenance of said piece of ground; and said moneys, with the accruing interest, shall be invested and appropriated from time to time, for the perpetual maintenance and proper care of said piece of ground, for the purpose of sepulcher, under the provisions set forth in said deed.

Argued before, BROWN, C. J., and MES- TREZAT, POTTER, FRAZER, and WAL- LING, JJ.

George M. Roads and R. J. Graeff, both of Pottsville, for appellants. Otto E. Farquhar and C. E. Berger, both of Pottsville, for appellees.

PER CURIAM. The five legal conclusions of the learned chancellor below logically followed his five findings of fact, and, upon these findings and conclusions the appeal is dismissed, and the decree affirmed, at appellants' costs.

(257 Pa. 314)

In re CONWAY'S ESTATE.

Appeal of GILROY.

(Supreme Court of Pennsylvania. March 23, 1917.)

1. WILLS ⇐316(3) — UNDUE INFLUENCE — QUESTION FOR JURY.

An opportunity for the exercise of undue influence is insufficient to require the submission of the question of undue influence to a jury.

2. WILLS ⇐316(1) — ISSUE DEVISAVIT VEL NON—QUESTION FOR JURY.

An issue devisavit vel non is a matter of right, where the existence of a substantial dispute upon a material question of fact is shown by competent evidence, and where a verdict against a will could be properly sustained by a trial judge the issue should be submitted to the jury; but where the trial judge would feel constrained to set aside a verdict against the will as against the weight of the evidence, there would be no substantial dispute, and the issue of devisavit vel non should be refused.

Appeal from Orphans' Court, Lackawanna County.

Elizabeth Gilroy, administratrix of the estate of Mary McAndrew, deceased, appeals from an order of the register of wills refusing an issue of devisavit vel non in the estate of Patrick J. Conway, deceased. Appeal dismissed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

Joseph O'Brien, James J. Powell, and Charles P. O'Malley, all of Scranton, for appellant. M. J. Martin, Charles H. Welles, J. H. Torrey, David J. Reedy, and Thomas P. Hoban, all of Scranton, for appellee.

PER CURIAM. [1] This is an appeal from the refusal of an issue devisavit vel non. One of the reasons given in asking for it was that a fraud had been practiced upon the testator by substituting the paper in controversy at the time he signed it for another which had been drawn for him as his last will and testament. We have not been convinced that the learned court below erred in holding that the testimony was "wholly insufficient to support any such finding." Nor have we been convinced that error was committed in disposing of the other two branches of the case, as to which the learned court said:

"Some ten or more witnesses were called by the proponent to establish testamentary capacity of the decedent. They were men who had business dealings with him, friends and his neighbors, many of whom had known him for years. They were in a position to hear him talk, to observe his actions and conduct, and note any change in him. Before expressing an opinion as to his mental capacity, they qualified themselves by stating facts upon which it was based. The evidence adduced by the contestant in our opinion does not show any impairment of the decedent's mental faculties, and there can be no question under all the evidence that there was any. Therefore the burden of proof is upon the contestant to show undue influence. * * * On this branch of the case it is enough to say that the testimony is wholly insufficient to support a finding that Mrs. Conway exercised any influence over the mind of the decedent at the time of the making of the will. The most that can be found from the testimony is that there was an opportunity for the exercise of influence, and this is held insufficient to submit to a jury in *Tyson's Estate*, 223 Pa. 596 [72 Atl. 1065]."

[2] "An issue devisavit vel non is a matter of right, where the existence of a substantial dispute upon a material question of fact is demonstrated to the court by competent evidence which, under the circumstances of the case, measures in probative force up to the requirements of the law; or, in other words, as the rule has heretofore most often been put, when, upon a review of all the proofs, a verdict against the will could be properly sustained by a trial judge, the controversy must be submitted to a jury, even though the judge should feel that, were he sitting as a juror, he would not draw the inferences or reach the conclusions contended for by the contestants. But if the testimony is such that the judge would feel constrained to set aside a verdict against the will as contrary to the manifest weight of the evidence, determined according to relevant legal standards, it cannot be said that a substantial dis-

pute has arisen." *Phillips' Est.*, 244 Pa. 35, 90 Atl. 457. "This simple and only safe test is supported alike by reason and authority." *Appeal of Knauss et al.*, 114 Pa. 10, 20, 6 Atl. 391, 395.

Appeal dismissed, at appellant's costs.

(257 Pa. 317)

EDELMAN et al. v. CONNELL

(Supreme Court of Pennsylvania. March 23, 1917.)

1. MUNICIPAL CORPORATIONS ~~§~~706(5)—COLLISION IN STREET—NEGLIGENCE—EVIDENCE.

Evidence in an action for damages for injury to an 11 year old boy, struck by an automobile while coasting on a bobsled, held to sustain a judgment for defendant.

2. NEGLIGENCE ~~§~~85(2)—CONTRIBUTORY NEGLIGENCE—CHILD.

The measure of a child's standard for contributory negligence is his capacity to understand and avoid danger, and he is required to exercise only that degree of care which persons of like age, capacity, and experience might be reasonably expected to naturally and ordinarily use under like circumstances.

Appeal from Court of Common Pleas, Lackawanna County.

Trespass by Louis Edelman, by his next friend, George Edelman, and George Edelman, against James L. Connell, to recover damages for personal injury. Verdict for defendant, and judgment thereon, and plaintiffs appeal. Affirmed.

From the record it appeared that the street on which defendant was driving was in an icy and slippery condition. The evidence was conflicting as to the speed of defendant's automobile.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

R. L. Levy, C. P. O'Malley, and Leon M. Levy, all of Scranton, for appellants. Frank R. Stocker, O. H. Welles, Sr., and David J. Reedy, all of Scranton, for appellee.

PER CURIAM. [1] The injuries for which compensation is sought in this action were sustained by a boy when he was 11 years and 4 months of age. With several companions he was coasting on a bobsled, which was struck by an automobile of defendant driven along a street intersecting the one down which the boys were sledding. The contention of appellant that the court below ought to have declared the defendant guilty of negligence as a matter of law is utterly untenable. That was a question of fact, to be determined from the oral testimony in the case, in the light of which learned counsel for appellee contended below, and insist here, that the trial judge would have been justified in directing a nonsuit or a verdict for defendant. Whether the verdict was in his favor for this reason, or on account of the contributory negligence of the boy, does not appear.

[2] As to the standard by which the conduct of the boy was to be measured on the question of contributory negligence, the learned trial judge instructed the jury, *inter alia*, as follows:

"The measure of a child's standard for contributory negligence is his capacity to understand and avoid danger. * * * The law as to negligence of children is that they are required to exercise only that degree of care and caution which persons of like age, capacity, and experience might be reasonably expected to naturally and ordinarily use in the same situation and under like circumstances. * * * If you should find that the boy, Louis Edelman, although 11 years and 4½ months of age, was not of sufficient intelligence and capacity to appreciate the danger and risks of his act, in order to avoid the danger, then and in that case he would not be guilty of contributory negligence. * * * He was only required to exercise that degree of judgment which boys of that age and of the same intelligence and observation would be required to exercise, under the same circumstances and conditions."

These correct instructions are all the plaintiff could have asked for, and they followed what we have repeatedly said. *Kehler v. Schwenk*, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633; *Di Meglio v. Philadelphia & Reading Railway Co.*, 252 Pa. 391, 97 Atl. 476; *Gerg v. Penna. R. R. Co.*, 254 Pa. 316, 98 Atl. 960. The assignments of error need not be considered *seriatim*. It is sufficient to say that nothing is to be found in any one of them calling for a resubmission of the case to the jury.

Judgment affirmed.

(257 Pa. 369)

BICKLEY v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 16, 1917.)

1. CARRIERS ⇨320(4) — PERSONAL INJURY — QUESTION FOR JURY.

In an action for injury to a passenger on the steps of a railroad car from the falling of some object where a workman standing on the car platform was working at the ceiling of the car, *held*, on the evidence, that whether such workman was defendant's employé was for the jury.

2. CARRIERS ⇨316(1) — PERSONAL INJURY — NEGLIGENCE—EVIDENCE.

Evidence in such action *held* to raise a presumption of negligence on the part of the defendant carrier which it was required to rebut.

3. CARRIERS ⇨280(1), 316(1)—PASSENGERS—PERSONAL INJURY—PRESUMPTION OF NEGLIGENCE.

A carrier must exercise the highest degree of care and an injury to a passenger caused by a defect in the road, car, or other appliance or by want of care on the part of the carrier or its employés raises a presumption of negligence which the carrier has the burden of disproving.

4. CARRIERS ⇨280(1)—PASSENGERS—ENTERING CAR—CARE REQUIRED.

A carrier of passengers, impliedly inviting the public to enter its cars, must exercise the highest degree of care in protecting them while ascending the steps and going into the cars.

5. CARRIERS ⇨302(2)—INJURY TO PASSENGER — NEGLIGENCE.

Where the circumstances of an injury to a passenger entering a car showed that it resulted

from carrier's failure to exercise proper care to protect the passenger, it was immaterial that the injury was caused by an unidentified falling object.

6. CARRIERS ⇨347(4) — PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injury to a passenger while ascending the steps of the car on the platform of which a workman was working on the ceiling, by being struck by unknown falling object, *held* on the evidence that passenger's contributory negligence was for the jury.

7. CARRIERS ⇨328(1)—INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE.

A passenger entering a car may assume that the carrier has performed its duty in making the approach to the car safe.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Mary M. Bickley against the Philadelphia & Reading Railway Company, to recover damages for personal injury. From an order refusing to take off a compulsory nonsuit plaintiff appeals. Reversed, with a *procedendo*.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKE, and FRAZER, JJ.

Eugene Raymond and John Martin Doyle, both of Philadelphia, for appellant. Wm. Clarke Mason, of Philadelphia, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for injuries which the plaintiff alleges were caused by the negligence of the defendant carrier when she was entering one of its coaches at the Reading Terminal station in the city of Philadelphia. The learned trial judge granted a nonsuit which the court refused to remove, and the plaintiff has appealed.

The plaintiff was the only witness examined, and from her testimony it appears that on the morning of February 5, 1914, she went to the Reading Terminal to take the 10:15 train for Quakertown. She had a mileage book, and on her arrival at the station went directly from the first to the second or train-shed story of the building. The gates in the iron grating separating the train shed from the station proper had been opened to admit passengers to the train, and the plaintiff entered the gate on the east side and passed along the station platform until she reached the rear end of the third car from the engine, other cars of the train standing in the rear of it. As she approached the car, she saw the lower part of the legs of a man standing on the car platform. On ascending the steps, she looked up and saw that the man was dressed in overalls, with a cap on, and was reaching up and doing work on the ceiling of the car. When she reached the first step below the platform, she was "struck with a heavy blow" on the right side of her head, and the workman said, "Oh, excuse me. I didn't see you coming up the steps," and took hold of her arm and put her in the

first seat of the car. She was stunned by the blow, and her head was cut; "everything became black in front of me;" her hat pins were bent and broken, her hair pins and a great deal of her hair were torn out. She reported the accident to the conductor when he came for her fare near Wayne Junction. She suffered intensely from the blow, which resulted in her permanent injury. This, in brief, is substantially how the accident occurred and its effect on the plaintiff.

While admitting that, at the time she was injured, the plaintiff was lawfully on the premises of the defendant company by its invitation and as its passenger, and entitled to the highest degree of care and foresight which the law requires of a carrier for protection of its passengers, the learned court below held that the burden of proving negligence was upon the plaintiff, and that negligence would not be presumed from the happening of the accident, and, further, that the plaintiff was guilty of contributory negligence in proceeding up the steps of the car in spite of the fact that she saw some one above her, apparently engaged in work in such a position that something might happen to her if she proceeded further.

The plaintiff contends that she was a passenger; that if an accident resulted to her from the instrumentalities of the defendant, a presumption of its negligence arose; that the blow received could not have had any other presumptive origin than in the operations of the defendant within its train shed; that the workman, by his remark, assumed the blame for the accident, and he was presumptively an employé of the defendant; that the circumstances of the injury bring it within the rule that when injury results from the means and appliances of transportation, the carrier is presumed to be negligent; and that the plaintiff was not guilty of contributory negligence.

The defendant's counsel claims that there are no facts upon the record, as disclosed by the evidence, to show what it was that hit the plaintiff, where it came from, who had control over it, or that the man on the car platform was in the employ of the defendant, and that the plaintiff was guilty of contributory negligence.

[1] It is conceded by the court below, as well as by counsel for the appellee, as will be observed, that the plaintiff stood in the relation of passenger to the carrier when she was injured. At the time of the accident the plaintiff had a mileage book, and the defendant had invited her to enter its train by announcing it and opening the gates for her and other passengers to pass into the train shed. We do not agree with the defendant's contention that the evidence was not sufficient to warrant the jury in finding that the man at work on the car platform was engaged in the company's service. The testimony of the plaintiff shows that persons could not

enter the train shed from the station until the gates in the iron grating were opened for that purpose. It is therefore a reasonable inference that any one within the train shed is there by permission of or on business for the defendant. The man on the car platform was wearing overalls and a cap, and was engaged in doing work on the ceiling of the platform. In addition to these facts, the remark made by the workman to the plaintiff when the accident occurred tends also to show that he was an employé of the defendant, and, further, that his act while engaged at the work on the platform ceiling caused the injury to the plaintiff. We think, therefore, that this evidence was sufficient, not only to justify its submission to the jury, but also to warrant the conclusion that the man engaged at work on the platform ceiling was an employé of the defendant. The train was awaiting its early departure, and we must assume that the trainmen, operating and in charge of it, knew of the presence of the man who was doing the work on the platform ceiling. No other reasonable inference can be drawn from the facts. It is not conceivable that they would have permitted the man to do the work unless they knew it was being done by direction of the company. It is common knowledge that car cleaners and other workmen are frequently engaged about the cars immediately before the departure of the train. We think, therefore, that the learned court below should have submitted the evidence, bearing on this question, to the jury to determine whether or not the man working on the platform was an employé of the defendant. He was there apparently by the authority of the company, and if he was a mere intruder or was there without authority and was not an employé of the defendant, the latter knew the fact, and could have readily shown it. The evidence of the plaintiff was sufficient to raise a presumption that the workman was in the service of the company, and defendant should have been required to rebut it. The case of *Madara et ux. v. Shamokin & Mt. Carmel Electric Ry. Co.*, 192 Pa. 542, 43 Atl. 905, is in point. The plaintiff was a passenger on a stalled electric street car, and another car, being brought to its relief, got beyond control and collided with the stalled car. The defense was that the man in charge of the relief car which caused the accident was a mere intermeddler and not an employé of the defendant. This court held that the evidence of the plaintiff was sufficient to require the defendant to rebut the presumption of employment. The court, speaking by Mr. Justice Dean, said (192 Pa. 547, 43 Atl. 906):

"The burden is on it [the carrier] to rebut the presumption by showing that Visick [who was operating the relief car] was a mere intruder upon the relieving car, acting wholly without authority. The burden is not upon the passenger to prove that one apparently in authority, having access to the car barn, and the power to

assume control of a car and run it on the road to the relief of the stalled car, was a servant of the company."

A like question was presented in *Dunne v. Penna. R. R. Co.*, 249 Pa. 76, 94 Atl. 479, and, under facts not as favorable to the plaintiff as in the case at bar, it was held that there was sufficient evidence to send the question to the jury and to support a finding that the person was an employé of the carrier company.

[2] The plaintiff being a passenger, and assuming that the jury would have found that the workman was employed by the defendant, we think the circumstances raised a presumption of negligence on the part of the defendant company which it was required to rebut.

[3, 4] A common carrier must exercise the highest degree of care, vigilance, and precaution in the transportation of passengers, and a legal presumption of negligence arises, casting upon the carrier the onus of disproving it, when an injury to a passenger is caused by a defect in the road, cars, or any other appliance, or by a want of diligence or care in the carrier or its employés, or by any other thing which the carrier can and ought to control as a part of its duty to carry passengers safely. This is the rule established by our decisions. *Meier v. Penna. R. R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Niebalski v. Penna. R. R. Co.*, 249 Pa. 530, 94 Atl. 1097; *Fern v. Penna. R. R. Co.*, 250 Pa. 487, 95 Atl. 590. Safe means and appliances which are required to be furnished for the transportation of passengers include the steps, doors, platform, and seats which constitute a part of the vehicle, and a failure to keep and maintain them in safe condition, resulting in injury to a passenger, raises a legal presumption of negligence which the carrier must rebut.

Applying this rule to the case in hand, the plaintiff's proof showed such an injury as raised a presumption of negligence on the part of the carrier. The injury resulted from the failure of the carrier or its employés to provide safe access to the body of the car. This was a failure of duty, and therefore a negligent act. The matter was entirely under the control of the carrier, and the failure to protect the plaintiff, while entering the car, was a failure to carry safely which

the law requires. It is immaterial whether the injury was caused by a fall of some part of the ceiling or by a tool or other object being used by the workman in doing his work on the ceiling. The carrier, having impliedly invited the plaintiff to enter the car, was required to exercise the highest degree of care and diligence in protecting her while she was in the act of ascending the steps and going into the body of the car. The act which resulted in the plaintiff's injury was not disconnected with her transportation, and therefore is not within the class of cases which hold that the carrier is not responsible.

[5] It is immaterial that the injury was caused by an unidentified object, as the place and circumstances of the accident show that it resulted from the failure to exercise the care required of the carrier to protect the passenger. There is no ground for a suspicion even that the blow received by the plaintiff was from an object cast from outside the car; on the other hand, it is obvious that the object which caused the plaintiff's injury fell from the ceiling of the car platform, or that the injury was inflicted by a tool or other object in the hands of the man while engaged at his work. His apologetic remark also shows that fact, and that he knew what did strike and cause the injury to the plaintiff. The evidence in the case shows that the injury was due either to a defect in the car or some appliance thereof or to something done or omitted in the conduct and management of the business, and therefore raises a presumption of negligence on the part of the defendant carrier.

[6, 7] Whether or not the plaintiff was guilty of contributory negligence was clearly for the jury. As she approached the car she saw the legs of the man standing on the car platform, but, as she testifies, she did not see that he was at work until she had reached the second step where she received her injury. She had the right to assume that the carrier had performed its duty in making the approach to the car safe, but whether the workman's presence on the car platform was an indication of danger and she should have entered another car were questions to be determined by the jury.

The judgment is reversed, with a *procedendo*.

(92 Conn. 154)

MILLS v. DAVIS et al.

(Supreme Court of Errors of Connecticut. Aug. 2, 1917.)

1. APPEAL AND ERROR §656(3)—RECORD—CORRECTION OF FINDING.

On the refusal of the trial judge to change the finding in a case tried before a jury, the proper procedure was an application to the Supreme Court of Errors to rectify the appeal, under Gen. St. 1902, § 801, authorizing such an application, and providing that it shall be heard on depositions.

2. APPEAL AND ERROR §576 — FINDINGS — MATTERS TO BE INCLUDED.

Under the rules of practice of the Supreme Court of Errors, specifying forms for findings, the court in cases tried without a jury is required to state the facts proved by the evidence, and in cases tried by a jury the facts which the parties offered evidence to prove, and claim to have proved.

3. APPEAL AND ERROR §656(3) — RECORD — CORRECTION OF FINDING.

In causes tried to a jury, if the trial judge on an appeal fails to insert in the record a statement of the facts either party offered evidence to prove, and claimed to have proved, or includes a fact as claimed to have been proved, when there was no evidence offered to prove it, the proper procedure is an application to the Supreme Court of Errors to rectify the appeal, by inserting the statement in the one case or striking it out in the other.

4. APPEAL AND ERROR §656(3) — RECORD — CORRECTION OF FINDING.

If a party desires to have any fact admitted by the adverse party appear upon the record as admitted, and which the trial judge has omitted, he should move to insert it, and, upon the refusal of the judge to grant the motion, apply to the Supreme Court of Errors, under Gen. St. 1902, § 801.

5. APPEAL AND ERROR §576 — FINDING—FORM.

Where statements of fact in the appellant's draft finding were not admitted facts, and were not proved by uncontradicted evidence, and the trial judge stated in the finding that appellant offered evidence to prove facts, this was all appellant could properly claim.

6. FRAUD §49—ACTIONS FOR FRAUD—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Defendants were attorneys for plaintiff in a suit to foreclose a mortgage, and effected a settlement. They furnished the funds to consummate the settlement, and took a conveyance from plaintiff of the mortgaged property and property on A. street. Plaintiff sued for deceit, alleging that defendants falsely represented that, if she did not convey the land on A. street, the holder of the mortgage would take a deficiency judgment, and take that property and her homestead also, when in fact the holder of the mortgage never intended to take a deficiency judgment. *Held*, that evidence as to whether the foreclosure could have been defeated by making a defense was immaterial, unless it was part of a plan to cheat and defraud, and under the pleadings it was irrelevant for that purpose.

7. APPEAL AND ERROR §1056(4)—HARMLESS ERROR—EFFECT OF VERDICT.

In an action for deceit, the exclusion of a question asked plaintiff as to expenditures by her in the prosecution of the action was harmless, where the jury found for defendants, and never passed on the question of damages.

8. JUDGMENT §708 — ADMISSIBILITY AGAINST PERSONS NOT PARTIES.

In an action against plaintiff's former attorneys in a foreclosure suit for deceit in con-

nection with a settlement of such suit, the record of an action to which defendants were not parties, and of which they had no knowledge, was not admissible to show the value of the mortgaged property as found in such former action.

9. TRIAL §280(1)—INSTRUCTIONS—REFUSAL OF REQUESTS COVERED BY THE CHARGE.

Requests to charge were properly refused, where they were covered by the charge, so far as they could be lawfully.

10. TRIAL §317—MISCONDUCT OF JUROR—WAIVER OF OBJECTIONS.

An objection to the misbehavior of a juror was waived, when not called to the attention of the court at the time.

Appeal from Court of Common Pleas, Fairfield County; John R. Booth, Acting Judge.

Action by Elizabeth F. Mills against Leo Davis and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Joseph A. Gray, of South Norwalk, for appellant. Carl Foster, of Bridgeport, for appellees.

SHUMWAY, J. The defendants are lawyers. Beers was first engaged by the plaintiff to represent her in an action brought to recover the sum due on a note given by the plaintiff to one Hoyt. The note was secured by a mortgage upon a piece of real estate called Sound View Terrace. The note and mortgage were held by one Hubbell, he taking title to same by assignment. Later Hubbell brought an action to foreclose the mortgage, and the defendants appeared as counsel for Mrs. Mills, this plaintiff. The latter action was pending in the court of common pleas in Fairfield county, and on March 7, 1913, judgment was rendered in the foreclosure action; the court finding the sum of \$1,600.42 due, including costs. On the day before the judgment was rendered a written stipulation was made between counsel for Hubbell and Mrs. Mills that three appraisers should be appointed to appraise the property as required by statute preliminary to the rendition of a deficiency judgment. Before the appraisal was had, the parties through their counsel made a settlement, whereby the sum of \$772.80 was to be paid to Hubbell, and he was to release Mrs. Mills from all obligation on the note and mortgage. Mrs. Mills was not able to furnish the money to pay Hubbell. The defendants supplied the funds to make the payment, and thereupon Mrs. Mills conveyed to the defendants the Sound View Terrace property and a piece of land called the Aiken street property. The defendants offered evidence that the value of Sound View Terrace was \$2,000, subject to a mortgage for \$1,400. The Aiken street property was controlled by Mrs. Mills, though she did not hold the legal title, and she procured the necessary conveyance to vest the legal title in the defendants. The plaintiff's case is, in sub-

stance, that the defendants by fraud and deceit induced the plaintiff to make the settlement above mentioned to their profit.

The particular acts as alleged, which the plaintiff claims constitute fraud, are substantially these: The plaintiff met the defendants on the 15th day of April, 1913, when the defendants insisted that the plaintiff convey to Hubbell the Aiken street lot. The plaintiff refused, but the defendants falsely represented that, if she did not convey the land to Hubbell, he would take a deficiency judgment against her, and take that lot and her homestead also. In fact, Hubbell never intended to take a deficiency judgment, and was content to take the Sound View Terrace in satisfaction of the mortgage. The defendants denied these allegations, and alleged affirmatively that the plaintiff agreed to the settlement and conveyed the property to them, to pay them for the money advanced to pay Hubbell, as well as for their fees and disbursements in the action mentioned. The case was tried to the jury, and the court instructed them that, if they found the allegations of the plaintiff to be true, their verdict should be in her favor. The jury rendered a verdict for the defendants. On appeal the plaintiff assigns numerous errors relating to rulings on evidence, the charge of the court, the court's refusal to correct the finding, and the court's refusal to take the case away from the jury for misconduct of one of the jurymen.

[1, 2] The plaintiff made a motion to the trial judge, which was entitled "a motion to correct the finding." On the refusal of the trial judge to change the finding, the proper procedure was an application to this court to rectify the appeal, if the judge had not correctly stated the events of the trial. Section 801 of the General Statutes provides how an issue of fact may be raised as to the corrections of a statement in a finding of what occurred upon the trial, and a way is provided for determining that issue of fact. *Bernier v. Woodstock Agricultural Society*, 88 Conn. 562, 92 Atl. 160. The draft finding accompanying the plaintiff's request for finding began as follows:

"The following are admissions and undisputed evidence made and produced upon the trial."

In the rules of practice of the Supreme Court of Errors are given forms for findings in cases tried by the jury and in cases tried by the court. In the former the court is required to state the facts which the parties offered evidence to prove, and claimed to have proved, and in the latter the facts proved by the evidence. "In making up the record the services of the trial judge will be clerical rather than judicial. His object will be to state for the record such facts and events as may have led up to the judgment, and as are necessary to show whether the appellant is right or wrong in claiming that the law has been transgressed, to his injury," during the trial of the cause. He acts as an

historian. *State v. Hunter*, 73 Conn. 444, 47 Atl. 665.

[3] In causes tried to the jury, if the trial judge on an appeal fails to insert in the record a statement of the facts either party offered evidence to prove, and claimed to have proved, or if he includes in the finding a fact as claimed to have been proved, when there was no evidence offered to prove it, the proper procedure is an application to this court to rectify the appeal by inserting the statement in the one case or by striking it out in the other. *McKusker v. Spier*, 72 Conn. 630, 45 Atl. 1011.

[4, 5] If the plaintiff desired to have any fact admitted by the defendants appear upon the record as such, and which the trial judge had omitted, he should have made a motion to insert it, and upon the refusal of the judge to grant the motion section 801 points out the manner by which the desired change may be accomplished in this court. Some of the statements of fact in the plaintiff's draft finding were not admitted facts, nor were they proved by uncontradicted evidence. The trial judge had stated in the finding that the plaintiff offered evidence to prove them, which is all the plaintiff can properly claim, unless they were facts admitted by the defendants. The plaintiff is not entitled to a rectification of the appeal in this court.

[6] The rulings of the court upon the evidence, so far as appears upon the record, were not erroneous, so as to justify a reversal or setting aside of the judgment. The fact to be proved in the plaintiff's case, whereby to test the relevancy of the evidence, was the fraud and deceit, or as it is called the *quo animo*, of the defendants, whereby the plaintiff suffered injury. It appeared in evidence, not uncontradicted, to be sure, that the settlement made with Hubbell was a fair and reasonable one, consented to and approved by the plaintiff. The plaintiff, in the cross-examination of Davis, asked him if he did not know that Mrs. Mills had a valid defense to the foreclosure suit brought by Hubbell. The purpose of the question does not appear. It may have been intended to elicit from Davis an admission that by making a defense to Hubbell's action it could have been defeated. This was immaterial, unless it was in fact a part of a plan to cheat and defraud; but under the pleadings in the case it was irrelevant for that purpose.

[7] The ruling of the court in excluding the questions put to Mrs. Mills was not injurious to her case. She was asked: "What expenditures have you made in the prosecution of this case?" Upon objection by the defendants, counsel stated the purpose was to prove damage. It does not appear that the plaintiff was attempting to prove exemplary damages, or that the ruling of the court was that the evidence was not admissible for that purpose; but it is left to conjecture that such was its purpose, as the plaintiff cites on the brief *Noyes v. Ward*, 19 Conn. 250. As the verdict

of the jury was in favor of the defendants, they were not required to consider the question of damages.

[8] The plaintiff offered in evidence the record of an action brought by Hoyt, the person to whom the note and mortgage on Sound View Terrace was given. The action was brought by Hoyt against Hubbell and one Stuart, alleging the note had been wrongfully converted by them. Among other facts found in that action was that the Sound View Terrace property was not worth more than \$2,200, and the plaintiff claimed this finding of value, if not conclusive, was evidence of the value of Hubbell's claim. It is sufficient, to support the ruling of the court in excluding the record, that neither of these defendants were parties to that action, and so far as appears had no knowledge whatever of the pendency of the cause.

[9] All the requests of the plaintiff to charge were covered by the charge, so far as could be lawfully, and the real and decisive issues in the case were fairly stated to the jury, and the controverted facts left for their determination.

[10] The plaintiff also complains that the court erred in refusing to dismiss the jury from further consideration of the case after the conclusion of the argument, because during the argument of plaintiff's counsel one of the jurymen was offensive and insolent. The violation of propriety could not have been open and flagrant, to have passed unnoticed by the court. The behavior of the juror did not necessarily imply hostility to the plaintiff or her cause. The court could probably see that no harm could result to the plaintiff's case. The occurrences noticed by counsel earlier in the trial should have been called to the attention of the court at the time they were observed; otherwise a waiver of objection will be presumed.

There is no error. The other Judges concurred.

(92 Conn. 161)

COHN & ROTH ELECTRIC CO. v. BRICKLAYERS', MASONS' & PLASTERERS' LOCAL UNION NO. 1 et al.

(Supreme Court of Errors of Connecticut.
Aug. 2, 1917.)

1. TORTS \Leftrightarrow 10 — INTERFERENCE WITH EMPLOYMENT—RIGHT TO STRIKE.

Individuals may work for whom they please, and quit work when they please, providing they do not violate their contract of employment.

2. TORTS \Leftrightarrow 10 — COMBINATION — RIGHT TO COMBINE.

Members of unions may, by agreement, refuse to work with nonunion labor, providing they do so for their own interest, and not for the primary purpose of injuring others, and the means used are not prohibited, nor contrary to public policy.

3. INJUNCTION \Leftrightarrow 101(1) — INTERFERENCE WITH EMPLOYMENT—PRIMA FACIE CASE.

Where an employer of nonunion labor is injured by refusal of union workmen to work on the job where nonunion men are employed,

such injury being contemplated and intended by defendants, he is entitled to an injunction against such action on their part, unless they can show justification.

4. TORTS \Leftrightarrow 10 — COMBINATIONS — RIGHT TO COMBINE.

Members of unions may, by agreement, refuse to work with nonunion labor, where object is strengthening of their union, and not to injure the plaintiff, or nonunion men it employs, though they are incidentally injured thereby.

5. TORTS \Leftrightarrow 10—RIGHT TO STRIKE—COMPULSION.

Members of unions do not, by refusing to work with nonunion labor, exercise compulsion on employer of such labor, where over one-third of the men in that locality in all trades to which defendants belong are nonunion men.

6. TORTS \Leftrightarrow 10—RIGHT TO STRIKE—STATUTE—INTIMIDATION.

Notification by union men to building contractors and owners that they will strike in case nonunion labor is employed on any job on which they are engaged is lawful, if strike would be lawful, and not within intimidation statute (Gen. St. 1902, § 1296).

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Cohn & Roth Electric Company against the Bricklayers', Masons' & Plasterers' Local Union No. 1 and others. From judgment for defendants, plaintiff appeals. Affirmed.

Suit for an injunction to restrain the defendants from intimidating by strikes, threats of strikes, boycotts, or otherwise any property owner, builder, or contractor, for the purpose of inducing the latter to cancel contracts with the plaintiff, which conducted an open shop, or for the purpose of inducing them to refrain from thereafter employing, or from entering into contracts with, the plaintiff.

Ralph O. Wells, of Hartford, for appellant. Thomas J. Spellacy, William M. Maltbie, and Hugh M. Alcorn, all of Hartford, for appellees.

WHEELER, J. The plaintiff has waived its claim for damages, and relies upon its claim for injunctive relief, alleging that the defendant labor unions and the members thereof have combined for the purpose of obtaining a monopoly of all the employment for the members of these local unions in the several building trades in which they are engaged, and for the purpose of excluding from such employment all who are not members. In furtherance of this purpose and to establish this monopoly, the defendants have agreed: (1) That no nonunion member shall be employed on any building in Hartford or its vicinity; (2) that no open shop employer shall be permitted to supply any labor or materials for any such building; (3) that they will compel all owners, employers, and other persons to refuse to purchase supplies from open shop employers; (4) that they will refuse to work for any owner or employer who

shall purchase supplies from any open shop employer; (5) that they will boycott all non-union members and open shop employers, and all persons doing business with them. In furtherance of said boycott the defendants have agreed: (6) To cause all members of defendant unions to refuse to work on every building owned by any person who owns any building on which any nonunion member is employed, or on which any open shop employer is furnishing, or has contracted to furnish, labor or materials; (7) to refuse to work on each and every job on which a general contractor may be engaged, if any non-union member is working for such general contractor, or if any open shop contractor is furnishing or has contracted to furnish any labor or materials. In furtherance of these purposes and agreements the defendants have boycotted the plaintiff and all owners for whose buildings the plaintiff has furnished labor or materials, and all contractors or builders by whom the plaintiff has been employed, directly or indirectly, and have threatened to institute strikes of all these members on all work on which any of the members were engaged for any owner or by any contractor for whom the plaintiff has furnished labor or materials, and the defendants have instituted strikes in accordance with these threats in all cases where their demands have not been promptly complied with.

Comparing the facts found with those alleged in the complaint, we find a marked dissimilarity. We can discover no finding of the illegal purpose of these defendants which the complaint reiterates, nor one of a conspiracy and agreement such as is alleged save in one particular. That agreement is not specifically found, but it is found that the several defendant local unions have adopted the same or analogous by-laws obligatory upon all of their members. These by-laws prohibit members working with non-union men under penalty for violation. They provide that "no member shall work for any employer who is employing nonunion * * * workers," nor on any job contracted for by any nonunion contractor, nor on any job sublet to any contractor by any open shop or nonunion contractor. The Hartford Building Trade Alliance has adopted a by-law, of which Alliance all defendant unions are members, and by which by-law all defendants are bound, that "no member of this Alliance shall work with any person working at a trade in the Structural Building Trades Alliance who does not hold a working card from the Alliance." These by-laws create an agreement on the part of these several unions and all of their members, binding upon them, that their members will not work for any employer employing nonunion men on that job, nor for any nonunion contractor, nor on any job sublet to any contractor by any open shop or nonunion contractor. Interpreted

together, these several by-laws constitute an agreement, which membership imposed upon all members of defendant unions, that they would not work on any job on which nonunion men or employers are at work. All members of defendant unions have ceased to work and refused to work on any building when the nonunion employees of the plaintiff have commenced work on such building. In one instance the members of the defendant unions withdrew from work on five buildings being erected by a single general contractor because the plaintiff's nonunion employees were at work on one of these buildings. The defendants maintain their legal right to do these acts, and threaten and intend to continue in such course, unless restrained by injunction.

The case set up in the complaint is not the agreement to cease work for a contractor if nonunion men are employed by him on any of his jobs, and no matter where located, upon which defendants are not at work, and to which they have no relation; and if the complaint did rely upon this cause of action the finding does not support it. It recites that, in one instance, the members of defendant unions ceased work on five buildings in process of erection by one contractor, because plaintiff's nonunion employees were at work on one of these buildings. A single instance of one act done would hardly permit a holding that the trial judge had, in refusing an injunction, exercised his discretion improperly. It is noticeable that the finding does not state that these strikes were instituted for any of the unlawful purposes so frequently reiterated in the complaint. The trial court could not find the existence of an illegal purpose without proof, and we cannot so hold without a finding to that effect. If the purpose of the strikes was illegal, they were clear deprivations of the right of the plaintiff to work. *State v. Glidden*, 55 Conn. 47, 8 Atl. 890, 3 Am. St. Rep. 23. If the purpose was to better the condition of the defendants, a situation is presented not heretofore considered by us, viz. a determination of whether an agreement to strike in a case in which the striking workmen are not concerned in a trade dispute, or in which their labor has not come in competition with nonunion labor, is lawful. Its decision is practically another phase of the question decided in *Pickett v. Walsh*, 192 Mass. 582, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, in the last point treated in that case, and the first and second causes of action set forth in the complaint, pages 579, 587 of the opinion. We express no opinion upon this point, leaving its decision open until it is fairly raised in the pleadings and in the record on appeal.

[1] The agreement of the defendant unions and their members, that the members would refuse to work with nonunion men, followed by action by the members ceasing to work

with the nonunion men of the plaintiff, is the only ground of complaint which the facts found support. Individuals may work for whom they please, and quit work when they please, provided they do not violate their contract of employment.

[2] Combinations of individuals have similar rights, but the liability to injury from the concerted action of numbers has placed upon their freedom to quit work these additional qualifications: That their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy. *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564, is an example of an agreement which we hold to be contrary to public policy. The members of a union, acting upon their agreement, may refuse to enter upon employment with nonunion labor, or refuse to continue their employment with nonunion labor, provided their action does not fall within the qualifications of their freedom of action already stated. *Pickett v. Walsh*, 192 Mass. 572, 582, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *Burnham v. Dowd*, 217 Mass. 351, 356, 104 N. E. 841, 51 L. R. A. (N. S.) 778; *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 284; *Gray v. Building Trades Council*, 91 Minn. 171, 185, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172. In *State v. Stockford*, 77 Conn. 227, 237, 58 Atl. 769, 107 Am. St. Rep. 28, Hall, J., thus states our law:

"Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

[3] The facts found show that the plaintiff has suffered damage in its business and that the defendants contemplated this probable effect. A cause of action was thus made out, entitling the plaintiff to judgment, unless the defendants have made out, or the facts presented disclose, that the defendants were justified in what they did. *Connors v. Connolly*, 86 Conn. 641, 647, 86 Atl. 600, 45 L. R. A. (N. S.) 564. The finding is not express upon this point, but we are of the opinion that the necessary implication from the subordinate facts found is a justification for the defendants' course.

[4] The end the defendants had in view by their by-laws was the strengthening of their unions. That was a legitimate end.

There is no indication that the real purpose of the defendants was injury to the plaintiff, or the nonunion men it employed. Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants, begun and prosecuted for their own legitimate interests. The means adopted were lawful; no unlawful compulsion in act or word was present.

[5] The plaintiff had its option to employ the defendants or not. Trade conditions did not convert this legal option into practical compulsion, since over one-third of the men, working in all of these trades to which the defendants belong in this locality were nonunion men. The cessation of work was not intended to cause a breach of existing contracts, and the cancellation of some of its contracts by the plaintiff is, so far as we know, attributable to the plaintiff's act, rather than to the defendants'. Certainly the finding is too bare of detail to permit the latter conclusion.

[6] The notification by the defendants to the general contractors and owners of the probability of a strike by them in case the plaintiff was employed on any job on which they were engaged was no more than a notice that, if nonunion labor was employed on jobs on which the defendant union men were employed, the defendants would strike. If the defendants had the right to contract that they would not work with nonunion labor, and if they might cease work if nonunion men were employed, as we hold in *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28, we can see no unlawfulness in their notice to contractors and employers of what would happen if nonunion men were employed on jobs on which they were engaged. The notice was the course of fair dealing. It did not take away the free choice from the contractor or owner; it possessed him of the facts which might affect his decision. We do not think the notice was an act fairly within the intimidation statute. General Statutes, § 1296. The facts surrounding the giving of such a notice might bring it within the statute; the facts detailed in this finding do not.

There is no error. The other Judges concurred.

(73 N. H. 607)

LESLIE v. CITY OF KEENE.

(Supreme Court of New Hampshire. Cheshire. April 3, 1917.)

1. HIGHWAYS §213(2) — DAMAGES WHILE TRAVELING DANGEROUS EMBANKMENT — QUESTION FOR JURY — STATUTE.

Whether an embankment is dangerous, within Laws 1893, c. 59, § 1, providing that towns are liable for damages to any person traveling upon dangerous embankments, etc., is for the jury; but whether there is any evidence from

which the conclusion can be drawn is a question for the court.

2. HIGHWAYS — 192 — DAMAGES TO PERSON TRAVELING — EMBANKMENT — DANGEROUS SLOPE — STATUTE.

So far as persons traveling on foot are concerned, a regular slope of one foot in six is not, in and of itself, a dangerous embankment, within Laws 1893, c. 59, § 1.

3. MUNICIPAL CORPORATIONS — 785 — DAMAGES ON "DANGEROUS EMBANKMENT" — STATUTE.

Though it might be possible for a traveler to be thrown from a path into a brook lying 13 feet from the path, the slope to the brook being regular, and the fall but one foot in six, no reasonable man could anticipate that such was likely to happen, so that the path was not on a "dangerous embankment," within Laws 1893, c. 59, § 1, to render the city liable for death of a child, who was thrown from a cart drawn on the path by a playmate, and whose body was later found in the brook.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Dangerous Embankment.]

4. MUNICIPAL CORPORATIONS — 819(4) — DAMAGES ON DANGEROUS EMBANKMENT — LIABILITY OF CITY — STATUTE.

Plaintiff administratrix cannot recover from a city for death of a child, as having been injured on a dangerous embankment, within Laws 1893, c. 59, § 1, unless the child was traveling along the path on the embankment when his playmate, who was drawing him in a cart, turned it to the right, so that the child fell out, and no part of the child's journey from the path to the brook, where his body was later found, lying 13 feet away from and below the path, was voluntary.

Transferred from Superior Court, Cheshire County.

Action by Mary L. Leslie, administratrix, against the City of Keene. Transferred on plaintiff's exception to verdict directed for defendant. Exception overruled.

Case for causing the death of the plaintiff's intestate. Trial by jury. Verdict directed for the defendants. The intestate, who was less than four years old, was traveling on or near the east line of Damon court toward Beaver street in a cart drawn by a boy of five at the time the accident happened, and just before they reached that street the boy turned so sharply to the right that the cart tipped over on one wheel and threw the intestate out. Later his body was found in Beaver brook. There is no sidewalk on the east side of the court, but those who have occasion to use that side of the street travel in a well-defined path very near the east line of the court. Beaver brook is 13 feet east of this path. The bank of the brook is a little more than 2 feet lower than the path, and the slope is regular.

Benton & Pickard, of Keene, for plaintiff. John E. Allen and William H. Watson, both of Keene, for defendant.

YOUNG, J. [1, 2] The plaintiff's exception must be overruled, unless it can be found that the intestate was traveling on a dangerous embankment within the meaning of Laws

1893, c. 59, § 1, at the time the accident happened. Wilder v. Concord, 72 N. H. 259, 263, 56 Atl. 193. And while it is true, as the plaintiff contends, that the question of whether an embankment is dangerous, within the meaning of this section, is for the jury, it is also true that whether there is any evidence from which that can be found is a question for the court, and all fair-minded men must agree that, in so far as persons traveling on foot are concerned, a regular slope of one foot in six is not in and of itself a dangerous embankment within the meaning of that section. If it is true, as the plaintiff contends, that there should be a railing on the east side of Damon court at the place where the accident happened for the protection of those traveling on Beaver street, it comes to nothing in so far as the questions we are considering are concerned, for the intestate was traveling on Damon court—not Beaver street—at the time the accident happened. Laws 1893, c. 59, § 1. If, therefore, there is a dangerous embankment on the east side of Damon court at and near its intersection with Beaver street, it is because of the nearness of the brook to the path in which those who have occasion to use that side of the court travel. In other words, it is because the path is so near the brook that the defendants ought to have anticipated that those having occasion to use the path might fall, slip, or be thrown from it into the brook, for the purpose of a railing is to enable travelers to use the highway in safety—not to prevent them from leaving it voluntarily. Robertson v. Hillsborough, 99 Atl. 1069.

[3] It is obvious that, when the ground is free from ice and snow, it is a physical impossibility for one using this path to slip or fall from it into the brook. While it may be possible for a traveler to be thrown from it into the brook, no reasonable man would anticipate that that was likely to happen; for the brook is 13 feet from the path, the slope regular, and the fall but 1 foot in 6. One difficulty with the plaintiff's contention that that is what happened in this case is that there is no evidence to sustain it. The evidence relevant to how the accident happened is that the boy who drew the cart was but five years old, and while it shows that he was running, it also shows that he was not running very fast when he turned to the right. In other words, it shows that he was running just as you would expect a boy of five, who was drawing a cart, would run, and that the intestate simply fell from the cart when it tipped up on one wheel. There is no evidence that even tends to the conclusion that he was thrown violently from the cart, and when we consider the distance of the brook from the path and the character of the land between, it is clear that he was not thrown into the brook from the path.

[4] In short, if it is assumed that the boy was in the path when he turned to the right, it cannot be found that the intestate was thrown from the cart into the brook; for, while the evidence will warrant either a finding that the cart was in the path when the boy turned to the right, or a finding that the intestate was thrown from the cart into the brook, it will not warrant both of these findings, and the plaintiff cannot recover, unless he shows that the intestate was traveling along this path when the boy turned to the right, and that no part of his journey from the path to the brook was voluntary.

Plaintiff's exception overruled.

(78 N. H. 463)

BOSTON & M. R. R. v. CITY OF CONCORD.

SAME v. STATE.

(Supreme Court of New Hampshire. Merrimack. June 30, 1917.)

1. TAXATION ~~§~~144—PROPERTY TAXABLE—MATERIALS USED FOR REPAIR—"ORDINARY BUSINESS"—"STOCK IN TRADE"—"MECHANIC"—"TRADESMAN."

Under Laws 1911, c. 169, § 11, providing that every railroad shall pay to the state an annual tax upon the value of its property used in its ordinary business, which would not be exempt from taxation if owned by a natural person or ordinary business corporation, plaintiff railroad, which ordinarily carries on the business of building and repairing its equipment, is liable to state tax for the materials thus used; the term "ordinary business," as used in the statute, being synonymous with the business a person ordinarily carries on, and the materials used being "stock in trade," and the plaintiff a "mechanic" and "tradesman," within Pub. St. 1901, c. 55, § 7, subd. 6, imposing a tax on stock employed by mechanics or tradesmen in their trade or business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Business; Stock in Trade; Mechanic.]

2. TAXATION ~~§~~494(4)—RAILROAD PROPERTY—POWER OF COURTS.

In a proceeding to abate taxes assessed by defendant city, the court had no jurisdiction to value or tax the property of petitioner railroad that escaped taxation by the tax commission; its only power being that given by Laws 1911, c. 169, to review such orders and findings of the tax commission created as come before it on appeal.

3. WORDS AND PHRASES—"TRADESMAN."

Any person is a "tradesman" who carries on the manufacturing or repairing business for himself, whether he does the work with his own hands or employs others to do it for him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tradesman.]

Transferred from Superior Court, Merrimack County.

Petitions by the Boston & Maine Railroad against the City of Concord and the State to abate taxes. Cases transferred from superior court, without rulings. First case sustained, and tax abated; and second case dismissed. See, also, 78 N. H. 192, 98 Atl. 66.

Tax appeals. The first is an appeal from a tax assessed by the city of Concord in 1913

on materials used by the plaintiffs in building and repairing equipment at their Concord shops. After the opinion holding that the property was not taxable in Concord (78 N. H. 192, 98 Atl. 66) was filed, the Attorney General intervened and asked the court to order the plaintiffs to pay the state a tax on the property in question for that year as the price of a decree abating the illegal tax. The court found that the property would have been taxed by the state in 1913, but for the tax commission's mistake in thinking that it was taxable in Concord, and that it would be just for the court to assess a tax on the property in this proceeding, if it is taxable and the court has power to tax it. The questions whether the property is taxable under the provisions of Laws 1911, c. 169, and whether the court has power to tax it, were transferred by Sawyer, J., without a ruling from October term, 1916, of the superior court.

The second is an appeal from the tax commission's assessment of the general railroad tax assessed on the plaintiffs' property for the year 1916. The tax commission included the materials and supplies used in the plaintiffs' Concord and Keene shops at their average value for the year in the appraisal of their taxable property; and the question of whether these materials are taxable was transferred by Chamberlain, O. J., without a ruling, from the superior court.

Streeter, Demond, Woodworth & Sulloway, of Concord, and Branch & Branch, of Manchester, for plaintiff. James P. Tuttle, Atty. Gen., for the State.

YOUNG, J. [1] The question whether the materials the plaintiffs use in building and repairing equipment are taxable by the state is common to both appeals, for if these materials are not taxable they were not taxable in 1913. Whether they are taxable depends on whether the plaintiffs use them in their ordinary business, within the meaning of Laws 1911, c. 169, for section 11 provides that:

"Every railroad * * * shall pay to the state an annual tax, * * * upon the actual value of its property and estate used in its ordinary business which would not be exempt from taxation if owned by a natural person or ordinary business corporation."

The plaintiffs concede that they ordinarily carry on the business of building and repairing equipment in connection with their transportation business, but contend that that is not their ordinary business, within the meaning of section 11. In other words, they contend that the property in question is not used in their ordinary business, within the meaning of that section, and that it is not taxable, even though it would be taxable, if owned by an individual or ordinary business corporation. They base this contention on what was said in *Boston & Maine R. R. v. Franklin*, 76 N. H. 459, 84 Atl. 44, as to the

meaning of the term "ordinary business," as used in P. S. c. 64, § 12.

The purpose the Legislature had in mind when it enacted section 11, as well as the sense in which it used the term "ordinary business," are questions of fact pure and simple, and, like all such questions, to be decided, not by rules of law, but by weight of competent evidence. It is fair to assume that the Legislature did not intend, when it enacted that section, to put railroads in a better position, in so far as taxation is concerned, than individuals and ordinary business corporations; but that is the effect of section 11 if the term "ordinary business" is given its ordinary meaning. It is true there is a presumption that that is the sense in which the Legislature used that term; but it is a presumption of fact, not law, and consequently it may be rebutted by competent evidence, and the fact that, if that term is given its ordinary meaning in section 11, the personal property railroads use only mediately in the transportation business escapes taxation, notwithstanding it would be taxable if owned by an individual, tends very strongly to the conclusion that that was not the sense in which the Legislature used that term in that section. In other words, it is so improbable that the Legislature of 1911 intended to exempt property, when owned by a railroad, that would be taxable if owned by an individual or ordinary business corporation, as to warrant the court in holding that that was not the purpose it had in mind when it enacted section 11, if the terms it used are capable of the construction that property which is taxable under the provisions of P. S. c. 55, when owned by an individual, is taxable under the provisions of chapter 169 when owned by a railroad. *Phillips Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589.

The language of section 11 is fairly capable of such a construction, for "ordinary business" is often used as synonymous with the business a person ordinarily carries on; and if that term is given that meaning in section 11 the property in question is taxable, if it would be taxable if owned by an individual. It does not necessarily follow, therefore, from the fact that the Legislature used the term "ordinary business" in P. S. c. 64, § 12, to describe the transportation business, that that is the sense in which it used that term in Laws 1911, c. 169, § 11; for, as we have seen, whether that was the sense in which it used it is a question of fact, and, while the evidence in the *Franklin Case* all tended to the conclusion that that was the sense in which the Legislature used it in section 12, the evidence in this case tends very strongly to the conclusion that that term, as used in section 11, includes any business railroads ordinarily carry on in connection with the transportation business. Since the plaintiffs ordinarily carry on the business of building and repairing equipment, the materials in question are taxable as stock in

trade, if they would be so taxable if owned by an individual or ordinary corporation carrying on the same business in the way and for the purpose the plaintiffs carry it on.

Stock in trade is defined in P. S. c. 55, § 7, subd. 6, as the stock of mechanics and tradesmen employed in their trade or business. Any person is a tradesman who carries on the manufacturing or repairing business for himself, whether he does the work with his own hands or employs others to do it for him; for example, a blacksmith who runs a shop in which he shoes his neighbor's horses and mends their tools is a tradesman within the meaning of this section. *White Mt. Fur Co. v. Whitefield*, 77 N. H. 340, 91 Atl. 870, and that is also true of the *Amoskeag Manufacturing Co. Company v. Manchester*, 70 N. H. 200, 46 Atl. 470. Since the plaintiffs ordinarily carry on the business of building and repairing equipment, they are mechanics and tradesmen within the meaning of section 7, and the materials they use in that branch of their business constitute property used in their ordinary business within the meaning of that term as used in section 11, and are taxable unless the fact the only use they make of these materials is to build and repair the equipment they use in other branches of their business deprives them of the character of stock in trade. In fact, the plaintiffs concede that these materials would be taxable as stock in trade if they used them to build and repair equipment for others, but contend that they are not stock in trade within the meaning of this provision of the statutes, because the only use they make of them is to build and repair the equipment they use in the transportation business. In other words, the plaintiffs concede that they are mechanics or tradesmen within the meaning of this provision of the statutes, but contend that the property in question is not taxable as stock in trade, because they do not carry on this branch of their business for profit.

If it were conceded that this conclusion could be drawn from the findings in the case, it would not help the plaintiffs for the property that is taxable as stock in trade is "stock * * * employed in their trade or business." The plaintiffs carry on the business of building and repairing the equipment they use—consequently the property in question is property they employ in their trade or business. While the plaintiffs' contention that the materials they use to build and repair equipment stand just exactly the same, in so far as taxation is concerned, as those a teamster uses to build and repair carts, is sound, its application to their contention that the property in question is not taxable is not apparent. If a teamster was ordinarily engaged in building and repairing carts, either for himself or others, in connection with his teaming business, then and in that case building and repairing carts would be his business within the meaning of section 7, subd. 6, and the materials he used in that business

would be taxable as stock in trade. If, however, the only work of this kind that he did was occasionally to build or repair a cart, he would not be engaged in the business of building carts, and, while the materials he used might or might not be taxable under some other provision of the statutes, they would not be taxable as stock in trade, for a tax on stock in trade is not a tax on any specific property, but a tax on the money a person employs in his trade or business. So, if all the business of this kind the plaintiffs did was to occasionally repair a car or an engine, they would not be engaged in the business of building and repairing equipment, and while the materials they used for that purpose might be taxable, they would not be taxable as stock in trade. That, however, is not this case; for the plaintiffs are engaged in building and repairing equipment. In fact, building and repairing it is as much a business in which they are engaged as transporting freight and passengers. It must be held, therefore, that the materials in question are stock in trade, within the meaning of P. S. c. 55, § 7, subd. 6, and that they were properly taxed by the state in 1916.

[2] The only other question that will be considered is whether the court has such jurisdiction of the plaintiffs and their property that it can value the property that escaped taxation in 1913 and assess a tax on it in this proceeding. It is enough, in so far as this case is concerned, to say that if the court has power to assess a tax on the property in question in this proceeding, it has power to assess a tax on it in a proceeding brought for that purpose; for the power to make such orders as justice requires, conferred on it by P. S. c. 59, § 11, does not include the power to compel the prevailing party in a tax appeal to pay a debt, that could not be otherwise collected, which he owes a stranger to the suit as the price of a decree abating the illegal tax, and the court must have that power, if it is to give the state the relief prayed for. The power to determine what property shall be taxed and by whom the tax shall be assessed is vested in the Legislature, subject to the limitations imposed on it by the Constitution; consequently the court has no jurisdiction either to value the plaintiffs' property or to assess a tax on it, unless there is a statute giving it that power.

The only statute giving the court any power, in so far as taxing the plaintiffs' property is concerned, is Laws 1911, c. 169—the act creating the tax commission. Section 8 of this act provides that the commission shall appraise the taxable property of railroads and certain other corporations, and assess a tax on them for the benefit of the state. Sections 11 and 24 delimit the property taxable under the provisions of section 8. Sections 12, 13, 14, 15, 16, and 17 prescribe how the commission shall proceed in appraising the

property, and specify certain things that it shall consider in ascertaining the value of the property and determining the rate at which it shall be taxed. Section 18 fixes the time within which the tax shall be assessed, and provides for rehearings; and section 19 gives both parties an appeal to the court from any order or finding of the commission by which their rights may be concluded. The court's power, therefore, in respect to both appraising and taxing the plaintiffs' property, is the power to revise the commission's findings on appeal; for that is the only power that chapter 169 confers on it. In other words, the court has no common-law jurisdiction in respect to valuing and taxing the plaintiffs' property, and its statutory jurisdiction is limited to revising such orders and findings of the tax commission as come before it on appeal. The court, therefore, has no power to impose a tax on the plaintiffs' property that escaped taxation in 1913 in this proceeding. Whether it has such power, on appeal from an order of the tax commission, taxing or refusing to tax the property, is a question that is not and cannot be raised in either of these proceedings, and as to it no opinion is intended to be expressed.

The order in the first case should be: Appeal sustained. Tax abated. In the second: Appeal dismissed. All concurred.

(181 Md. 209)

ROSENZWOG v. GOULD. (No. 26.)

(Court of Appeals of Maryland. June 28, 1917.)

1. TRUSTS §197—SALE ON COURT'S ORDER—TITLE OF PURCHASER—COLLATERAL ATTACK.

Where a court having jurisdiction determined the title to a trust estate, and, on request being made by the parties in interest, directed the trustee to sell the property and distribute the proceeds among them, and the request was filed and the property duly sold to plaintiff, the sale reported, ratified, and confirmed, a distribution of the trust estate made, and no appeal taken from the decree, defendant, in suit for specific performance of a contract for the purchase from plaintiff of a ground rent issuing out of the property, could not attack plaintiff's title, since where there was jurisdiction in a court, the erroneous or improvident exercise of it is not to be corrected at the expense of a purchaser having a right to rely on the court's order.

2. DESCENT AND DISTRIBUTION §17—CONTINGENT REMAINDER—DEATH OF REMAINDERMAN.

Where a contingent remainder is devised, and the remainderman dies before the happening of the contingency, his representatives or heirs take his interest.

3. WILLS §700—CONSTRUCTION—JURISDICTION—PARTIES.

Testator's will directed that trustees should receive \$10,000, proceeds of a life policy, invest in ground rents, and pay from the net proceeds for 10 years \$50 to liquidate a debt of \$500; that, until the debt was paid, testator's widow should receive the balance of the returns, but, after full payment, she should receive the whole of the net proceeds for life; that after her death the trustees were to pay the same in like manner to testator's daughter for life, after her death in equal proportions to her children until the

youngest should reach 21, and that then, to such children as should be living, the whole estate should be given in fee simple, but that if the widow died and the daughter left no child or children, the trustee should pay to testator's sister \$100 a year during her life, the balance of the dividends to be added to the principal and retained for 21 years after testator's death and that of his wife and daughter, when the estate should be divided equally among his brothers and sisters, naming them. The sister given a contingent remainder of \$100 a year died several years before testator's widow and daughter. *Heid*, that with the heirs of testator's deceased brother and sisters before the court, it had jurisdiction, at suit of the executors, to decree to whom the trust estate should go.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Suit by Beryl M. Gould against Morris J. Rosenzweig. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Karl A. M. Scholtz, of Baltimore, for appellant. Leigh Bonsal, of Baltimore, for appellee.

CONSTABLE, J. This appeal is from a decree passed decreeling specific performance of a contract made by the appellant for the purchase from the appellee of a ground rent issuing out of property located in Baltimore city. The bill alleged that the appellee acquired title through one James H. Corrigan, substituted trustee of the trust estate created by the will of Samuel Hubbell, who died in 1836, leaving surviving him as his heirs at law and next of kin a widow, Sarah C. Hubbell, who died in 1880, and a daughter Rachel, who intermarried with one Barnard; that the daughter Rachel had one child, Kate G. Barnard, who married one Gaspari; that Kate G. Gaspari died in 1911, without descendants and prior to the death of her mother, the daughter of the testator, in 1915. Shortly after the death of Rachel E. Barnard her executors filed a petition in the equity case, in which years prior the superior court had assumed jurisdiction over the Samuel Hubbell trust estate, asking the court to decree as to whom the trust estate should go, that is, to the legatees under a will left by the said Rachel E. Barnard or to the heirs at law of the brother and sisters of the testator, Samuel Hubbell, who had been named in his will to receive the principal of the trust estate in the event of the death of his daughter Rachel without descendants. To this petition all of the legatees under the will of Rachel E. Barnard and all of the descendants of the deceased brother and sisters of Samuel Hubbell, who were entitled by descent or otherwise to the estate of their respective parents, filed answers. Upon submission of the case to the court, it was decreed that the daughter Rachel had but a life estate, and the trustee was directed upon request being made by the descendants of the brother and sisters, all of whom were sui juris, to sell

the property and distribute the proceeds among them. Said request was filed, and the property duly sold to the appellee and said sale duly reported to and ratified and confirmed, and a distribution of the trust estate made in conformity to the decree, and no appeal taken from the decree. The answer filed by the appellant admitted all the allegations of facts contained in the bill, but alleged that the decree authorizing the sale and distribution under the same was invalid, for want of proper parties before the court. The case was then heard on bill and answer.

[1] This case plainly comes within the thoroughly settled doctrine applicable to collateral attacks upon titles obtained by purchasers at sales under decrees of a court of equity. The rule is well stated in *Long v. Long*, 62 Md. 33, as follows:

"With respect to the jurisdiction and power of the county court to pass the decree, under which the sale was made, we can entertain no doubt. The clause of the will forbidding the sale or lease of the property until the occurrence of certain events, did not affect the jurisdiction of the court. The court was one of general equity jurisdiction, and the subject-matter and the parties fell within the scope and limit of that jurisdiction. The object of the application was, in the first place, to have one trustee removed and another appointed in his stead; and, in the second place, to have real property that was held in trust sold for the interest and common benefit of all parties concerned. These were objects clearly within the jurisdiction of the court; and, while it may have been error to authorize the sale, in view of the special provision of the will, yet that was matter of construction upon which the court was competent to pass, and for any error committed in that respect, the proper remedy was either by bill of review in the same court, or an appeal to a court of review. The general and well-settled rule of law in all such cases is that when the proceedings are collaterally brought in question, and it appears on their face that the subject-matter was within the jurisdiction of this court, they were not impeachable for mere errors or irregularities that may be apparent. Such errors and irregularities must be corrected by some direct proceeding, either in the court to set them aside, or on appeal. If, however, there be a total want of jurisdiction, either of parties or subject-matter, the proceedings are void and can confer no right, and will be rejected, though the objection to them be taken in a collateral proceeding. But where there was jurisdiction in the court, the erroneous or improvident exercise of it, or the exercise of it in a manner not warranted by the evidence before it, whether that be in respect to the construction of written instruments, or deductions drawn from unwritten proof, the errors, however apparent, are not to be corrected at the expense of a purchaser, who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction. The county court having jurisdiction over the subject-matter and the parties, it had a right to decide every question that arose in the cause, and whether the decision be right or wrong, it must be respected by all other courts when coming collaterally in question. Any other principle would unsettle and render insecure the larger portion of the titles of the country. This court, in common with the other appellate courts of this country, has repeatedly asserted these principles to their fullest extent."

See *Miller's Equity*, §§ 516, 517, and notes. Such being the law applicable, it only re-

mains to ascertain whether the proper parties were before the court, in order that it should have had complete jurisdiction to make the decree a valid one, so far as this attack upon its validity is concerned. We do not deem it necessary to set out the will of Samuel Hubbell verbatim, but will confine ourselves to the substance thereof as pertinent to the question here involved. It directed that certain trustees should receive the sum of \$10,000, the proceeds of a life insurance policy, and invest the same, preferably, in ground rents in Baltimore city, and pay from the net proceeds thereof for a term of 10 years \$50 to a certain Capt. Godfrey or his heirs for the purpose of liquidating a debt of \$500 owing by him to Godfrey; until that debt was paid in full the widow was to receive the balance of the rents and profits, but, after the full payment, the widow was to receive the whole of the net profits, for life. After the death of the widow the trustees were to pay the same, and, in like manner, to his daughter Rachel during her natural life—"and after her death the same and in equal proportions to her children until the youngest of them shall have attained the age of twenty one years, then to such children as shall be living at that time the whole estate shall be given in fee simple when said trust shall be at an end. But in the event of the death of my said wife S. C. Hubbell, and my daughter, Rachel Eliza Hubbell, said Rachel Eliza Hubbell leaving no child or children, then said trustees shall pay to my sister, Susan Scott, one hundred dollars a year during her natural life."

The balance of the dividends were to be added to the principal of the estate and "retained in the hands of the trustees for the term of 21 years after the death of the testator, and his wife, S. C. Hubbell, and his child, Rachel Elizabeth Hubbell," at which time the estate was to be divided equally among his brother and sisters, each of whom was named expressly in the will. Susan Scott died several years before the widow and daughter of the testator.

[2] It is a well-settled principle of law that when a contingent remainder is devised, where the person who is to take is certain, and that person dies before the happening of the contingency, his representatives or heirs take his interest. *Buck v. Lantz*, 49 Md. 439; *Hambleton v. Darrington*, 38 Md. 434; *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014. By the terms of the will the sisters and brother were to take in the event of the death of his daughter leaving no child or children. At the time of the daughter's death all of the sisters and brothers were dead. The court, in construing the will and determining the parties entitled under its terms, took proof as to whom were the heirs, or otherwise entitled, of the deceased brother and sisters, and determined them, and held that, since the wishes of the testator had been gratified and the persons entitled were sui juris, the trust would be terminated upon their request and consent.

[3] We must hold then that with these parties before the court it had jurisdiction, and that therefore the decree passed therein is not subject to this collateral attack.

It follows that the lower court was correct in passing the decree from which this appeal was taken.

Decree affirmed, with costs to the appellee.

(131 Md. 239)

WESTERN NAT. BANK v. JENKINS et al.
(No. 42.)

(Court of Appeals of Maryland. June 28, 1917.)

1. MORTGAGES ⇨16—FUTURE ADVANCES—VALIDITY—STATUTES.

Mortgages for future advances are still valid in Maryland; Laws 1825, c. 50, and Laws 1872, c. 213, codified in Code Pub. Gen. Laws 1904, art. 66, § 2, being strictly regulations, not prohibitions, of such mortgages.

2. MORTGAGES ⇨50—"MORTGAGE TO SECURE FUTURE ADVANCES"—STATUTE.

Where a mortgagee passed over to the mortgagor, on execution of the mortgage, the entire consideration in money stated in the mortgage, taking the mortgagor's promissory note for the sum, it not being contemplated or suggested that he should make any further loans, and the money was turned over to a trustee, to be applied by him in the construction of buildings for the mortgagor, and the entire amount of the mortgage loan was so applied, the mortgage was not a "mortgage to secure future loans or advances" within Code Pub. Gen. Laws 1904, art. 66, § 2, providing that no mortgage to secure future loans and advances shall be valid, unless the amount or amounts of the same and the times when they are to be made shall be specifically stated in the mortgage, and it constituted a first lien on the mortgaged property.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Suit by the Roland Realty Company and Samuel H. Barton against Robert H. Jenkins, Alfred Jenkins Shriver, individually and as trustee, Howard C. Wilcox, trustee, the Western National Bank, and Edwin T. Dickerson. From the decree, the Western National Bank appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Frank B. Ober and Joseph C. France, both of Baltimore, for appellant. Vernon Cook, of Baltimore, for appellees.

BURKE, J. The Roland Realty Company, a building corporation, hereinafter called the Realty Company, executed and delivered a mortgage to Alfred Jenkins Shriver on certain property described in the mortgage to secure the payment of three negotiable promissory notes made by the mortgagor to the order of the mortgagee. One of these notes was for the sum of \$62,700, and payable one year after its date; the other two being for the interest to accrue on said principal sum, each being for the sum of \$1,881, and payable in 6 and 12 months, respectively, after date. The notes and mort-

gage were dated the 1st day of August, 1911, and the mortgage was recorded among the land records of Baltimore city. A second mortgage on the property, bearing the same date, was executed by the Realty Company and delivered to Alfred Jenkins Shriver to secure the payment of the sum of \$5,000 and interest thereon. The circumstances, briefly stated, under which these mortgages were made, are as follows:

On July 11, 1911, an application was made by the Realty Company to Alfred Jenkins Shriver for a mortgage loan on property located on the north side of Thirty-Seventh street, in the city of Baltimore, between Chestnut and Elm avenues. The application stated that it was proposed to erect upon the land a certain number of dwellings therein described, which it was represented in the application would cost between \$2,100 and \$2,200 each, and further that the actual cost of the land to the appellant was \$15,333.33. Certain representations as to improved land and sales in the locality were also made. The amount of the loan applied for was \$66,000, at 6 per cent., payable semiannually, for one year, and the appellant agreed to give a bond of a Baltimore City Bonding Company for the amount of the mortgage for the completion of the buildings. It also agreed to pay a commission of 5 per cent. on the amount of the mortgage loan and a title fee, the amount of which was not at that time fixed, but which was subsequently agreed to be 1 per cent. of the mortgage loan. The applicant further stated that it expected to provide the additional money, over and above the mortgage loan, necessary to complete the buildings from the sale of other real estate and general credit. This application was made by Charles L. Fulton on behalf of the Realty Company. Mr. Shriver brought the application to the attention of Robert H. Jenkins, who agreed to make a mortgage loan of \$62,700, instead of \$66,000, as applied for; it having been found that the dwellings proposed to be built could be erected for a less sum than that stated in the application. This reduced amount was satisfactory to the applicant, and it agreed to accept it. The loan was to be put through either on July 26 or August 1, 1911. There is some conflict in the evidence upon this, but it is not of any importance in this case.

The Realty Company was not able to give the completion bond provided for in the contract, but it gave a bond with individual sureties. It was agreed that Mr. Jenkins should draw his checks to the order of the mortgagor for the amount of the loan, who in turn should pass the money over to Alfred Jenkins Shriver, as trustee, for deposit as a special fund in the Western National Bank, and applied by him to the construction of the buildings in accordance with a schedule of payments agreed upon by the parties. The Realty Company did not have

title to the land on July 26, 1911, but it expected to perfect its title by August 11, 1911. As Mr. Shriver was about to leave the city, the following things took place on July 26, 1911, in connection with the loan:

On that day two checks were drawn by Robert H. Jenkins as follows:

"Baltimore, July 26, 1911.

"The National Bank of Baltimore:

"Pay to the order of the Roland Realty Company forty-two thousand seven hundred dollars. \$42,700.00. Robert H. Jenkins."

This check was indorsed as follows:

(1) "Pay to the order of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company, for R. H. Jenkins.

"Roland Realty Company.

"By Charles L. Fulton, President."

(2) "For deposit to acct. of Alfred J. Shriver, trustee, in matter of Roland Realty Company, for R. H. Jenkins, per Z. Bond Evans."

"Baltimore, Maryland, July 26th, 1911.

"No. 6.

"Maryland Trust Company:

"Pay to the order of Roland Realty Company twenty thousand dollars.

"Robert H. Jenkins."

The indorsements on this check were as follows:

(1) "Pay to the order of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company, for R. H. Jenkins.

"Roland Realty Company.

"By Charles L. Fulton, President."

(2) "For deposit to account of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company, for R. H. Jenkins, per Z. Bond Evans."

The checks were delivered to the Realty Company, and Z. Bond Evans, whose indorsements appear thereon, was a clerk in Mr. Shriver's office. These checks were deposited in the Western National Bank under the above indorsements and were paid, and the proceeds carried to the credit of Mr. Shriver, as trustee, in that bank. On the deposit book of the bank the following notation appears:

"Western National Bank of Baltimore, July 26. Cash \$62,700. Alfred J. Shriver, trustee, in the matter of Roland Realty Company, for R. H. Jenkins."

The bank agreed to pay 3 per cent. on the deposits. The two mortgages were executed on July 26, 1911, and held by direction of Mr. Shriver until August 1, 1911, when it was expected that the mortgagor would then have title, and the transaction would be finally closed. Upon the return of Mr. Shriver to the city about September 17, 1911, he found that the transaction had not been put through as previously arranged. Mr. Robert H. Jenkins became apprehensive about the loan, and expressed a desire to call it off. After a number of interviews between Alfred Jenkins Shriver and Charles L. Fulton, the Realty Company entered into the following agreement on October 4, 1911, under which the loan was made:

"Roland Realty Company, in connection with the construction of thirty-three houses on the north side of Thirty-Seventh street and concerning the deposit of sixty-two thousand seven

hundred dollars in the Western National Bank:

"Whereas, the Roland Realty Company has agreed to execute and deliver, for the purpose of having the same recorded, certain mortgages, being dated the 1st day of August, 1911, to Alfred Jenkins Shriver, who in turn is about to assign the mortgage for sixty-two thousand seven hundred dollars to Robert H. Jenkins; and whereas, bonds have been executed of date of August 1st by the said Roland Realty Company, and certain sureties therein named to secure the completion of thirty-three houses on Thirty-Seventh street, between Chestnut and Elm avenues, and which lots of ground are fully referred to in said mortgage; and whereas, it was agreed, for the purpose of insuring the prompt construction of said houses according to the terms of said bond according to the plans and specifications referred to in said bonds, and especially that they should be completed within the period of time mentioned in said bonds, that the title to said property, subject to said mortgages, would be transferred to Alfred J. Shriver, trustee, by a deed duly executed and acknowledged, but to be held by said trustee and not recorded until some default should occur in constructing said thirty-three houses according to the provisions indicating the periods of time within which the stages of construction should proceed as hereinafter set forth in the schedule attached hereto, or that some default should occur in any of the covenants of said mortgages.

"And it is also agreed that, should any such default occur, said deed shall, at the option of the trustee, be immediately recorded, and that the said trustee is hereby fully authorized and empowered to take possession of said property, and either, in his discretion, to complete said houses from the funds on deposit in the Western National Bank, and should additional funds be necessary he is further authorized to borrow other funds that may be necessary to complete said houses according to said plans and specifications, and he shall have full power to sell, lease, mortgage, or otherwise dispose of said property, in his discretion, for the purpose of executing all the agreements in connection therewith, and after deducting all expenses which he may incur for the purpose of completing said houses, including the usual commissions to the trustees, commissions to a builder, if it may be necessary to employ a builder, at 10 per cent., the usual commissions to real estate brokers for the purpose of either leasing, selling, or mortgaging said property, and he shall pay the balance, if any, to the said Roland Realty Company.

"It is also agreed that the said trustee may, on the demand of the mortgagee, return the remainder of said fund to the mortgagee, should any such default occur, or he may, at the option of the said mortgagee, apply the same to the completion or the construction of said houses. Should any such default occur in the completion or the construction of said houses, the trustee shall have J. S. Downing, or some other experienced builder, examine said houses and certify to the trustee that the work has not progressed according to the schedules hereinafter set forth and according to the plans and specifications and the bond, and the period of four days shall elapse from the time that the trustee may mail any such notice to said Roland Realty Company at its office in the city of Baltimore, at 1024 Fidelity Building, before the trustee shall declare a default and take possession of the property. The trustee, may, in his discretion, for good and reasonable cause shown, waive any default. And it is further agreed that, should any default occur, interest paid by the Western National Bank shall be paid over to the mortgagee, but the amount of interest so paid shall be credited to the said Roland Realty Company on account of the interest due on the mortgage. Should the interest on the mortgage not be paid when due, the trustee is hereby authorized to pay the interest and to deduct the same from the payments due to

said Roland Realty Company for work done and due to it for the construction of said houses.

"It is agreed that the work of constructing said houses shall begin without any delay on the 5th day of October, and it is agreed that it shall be completed as to the stages of completion and within the periods of time hereinafter set forth in the schedules attached hereto and which is considered a part hereof.

"In testimony whereof, witness the corporate seal of the said Roland Realty Company and the signature of its president.

"[Seal.] Roland Realty Company.

"By Charles L. Fulton, President."

Before this paper was executed Mr. Shriver assigned the mortgage to Mr. Jenkins by assignment dated October 1, 1911. Attached to this agreement was a schedule of items, and the periods of time within which the houses should be completed, and the times when the amounts Mr. Shriver, as trustee, should pay to the Realty Company out of the special deposit for the construction of the houses. The work of construction began promptly, and Mr. Shriver, as trustee, paid out of the trust fund during the course of the work the sum of \$40,425, and the balance of the special deposit, as will hereafter be seen, was used in the completion of the dwellings.

In the application for the loan the Realty Company stated, as we have said, that it expected to get the additional money needed for the completion of the dwellings from the sale of other real estate and from general credit. This credit it obtained at the Western National Bank, which began on July 28, 1911, to make loans to the Realty Company upon its promissory notes, indorsed by Charles L. Fulton and David M. Fulton. It began these loans with no idea of a mortgage security, relying largely upon what it supposed to be the financial responsibility of David M. Fulton, and continued them until September 19, 1912, at which time the indebtedness of the Realty Company to the bank upon demand loans amounted to \$35,000. About that date the bank deemed it advisable to get from the Realty Company some further security. This matter was turned over to Mr. W. Burns Trundle, its counsel, who caused an examination of the title of the Realty Company's property to be made. The bank knew of the Jenkins and Shriver mortgage at the time it began advancing money to the Realty Company, and David M. Fulton testified that he told the bank that the money deposited "covered this piece of property, and that amount of money was expected to build the houses, * * * to be drawn out at certain intervals as the houses were built." Mr. Trundle, after the examination of the title, reported to the bank:

"From the facts stated in connection with the mortgage of the Roland Realty Company to Alfred Jenkins Shriver and the advances made by him, Alfred Jenkins Shriver, to said company after the date of the mortgage, that it was evidently intended to be a mortgage to secure future advances."

With full knowledge of the two mortgages, and after being advised by its counsel, the bank procured a mortgage from the Realty Company to Edwin T. Dickerson, who was acting in its behalf, for \$35,000. This mortgage was dated September 21, 1912, and was assigned by Mr. Dickerson to the bank on October 11, 1912. The bank then notified Mr. Shriver that the Jenkins mortgage was void, and that the Dickerson mortgage was the only valid lien on the property, and also informed him that the bank proposed to attack the mortgage. Subsequently it was discovered that the Realty Company owed large sums to materialmen for building materials which had gone into the property, and to workmen, and the bank advanced the money to pay these obligations, and took a fourth mortgage in the name of Mr. Dickerson for \$10,400. This mortgage was dated October 25, 1912. Then ensued conferences and lengthy correspondence between Mr. Shriver and the counsel for the bank as to the rights of the respective mortgagees.

The work on the buildings had ceased, and suggestions were made that Mr. Shriver use the unexpended money in bank to complete the buildings. Default had occurred in the mortgage covenants, and the Realty Company had defaulted under the agreement of October 4, 1911. The bank insisted that the Jenkins and Shriver mortgages were invalid, and that it had held the only valid lien on the property. Mr. Shriver insisted that the Jenkins and his own mortgage were valid, and stood unmovable upon his rights and obligations under the agreement of October 4, 1911, and refused to advance any more money, except in conformity to the provisions of that instrument. In the meanwhile the buildings, in their unprotected and uncompleted condition, were rapidly depreciating. Mr. Jenkins procured a decree for the foreclosure of his mortgage, and Howard Wilcox was appointed trustee to make the sale.

On February 12, 1913, the bill in this case was filed by the Realty Company and Samuel H. Barton, a lessee of certain of the lots, against Robert H. Jenkins, Alfred Jenkins Shriver, Alfred J. Shriver, trustee, Howard C. Wilcox, trustee, the Western National Bank, and Edwin T. Dickerson. The prayers of the bill were:

"(1) That a receiver may be appointed by this court to take charge of said houses and of the remainder of said fund on deposit in the Western National Bank to the credit of Alfred J. Shriver, trustee as aforesaid, and to proceed with the completion of said houses, and for said purpose to make use of said fund so far as the same may be necessary. (2) That the said Robert H. Jenkins and Alfred J. Shriver, individually and as trustee, as aforesaid, and the said Howard C. Wilcox, trustee as aforesaid, may be enjoined temporarily and permanently from further proceeding in said foreclosure suit, and particularly from making sale of the said property under the foreclosure decree as advertised or otherwise. (3) That your orators may

have such other or further relief as their case may require."

All the defendants, except Mr. Wilcox, trustee, answered the bill, and on the 15th day of May, 1913, the court passed a decree by which Alfred Jenkins Shriver was appointed trustee to take charge of the property, and also of the unexpended balance of the mortgage money remaining in the Western National Bank, and to use that sum in completing the houses. He was also empowered to sell the property. The fourth, fifth, sixth, and seventh paragraphs of the decree are here transcribed:

"(4) That in completing the houses hereinbefore mentioned the said receiver shall first use the sum of \$22,475 now on deposit with the Western National Bank above mentioned, and the accrued interest thereon, which amounts to 3 per cent. from August 1, 1912, and that in the event that said sum and interest is insufficient to complete said houses according to the original plans and specifications thereof, and to make the same salable as above stated, that then the Western National Bank shall furnish all such further sums of money as may be necessary for that purpose.

"(5) That said receiver shall pay out of said fund on deposit in the Western National Bank the court's costs and expense, amounting to about \$80, incurred in connection with the foreclosure proceedings in the case filed in this court by Robert H. Jenkins against the Roland Realty Company; said amount not to be charged against or deducted from the mortgage claim of said Robert H. Jenkins.

"(6) The said Robert H. Jenkins and Western National Bank shall be entitled to a first lien on all the property herein mentioned; the said Robert H. Jenkins to have such lien for the above sum of \$22,475, with the interest which shall have accrued thereon as above set out, and said Western National Bank to have a lien for all such sums as may be advanced by it under the terms of this decree—said liens to cover said property, not only for the principal sums above mentioned, but also for interest on the same at the rate of 6 per cent. per annum from the time such sums are paid to the receiver until they are repaid by him. And it is further ordered that out of the proceeds of the sale of the houses, as they shall be sold from time to time by said receiver, there shall be paid to the said Robert H. Jenkins the amount of the deposit* in the Western National Bank, with interest on the same as above set out, and, when said sums shall have been fully paid and returned to the said Robert H. Jenkins, that then from the proceeds of subsequent sales there shall be paid the said Western National Bank the amount of money that shall have been advanced by it under the terms of this decree to the receiver, together with interest on the same, as above set out.

"(7) That all questions of rights and priorities not expressly covered herein between the various parties mentioned in the pleadings in this case are hereby reserved for the further decision of this court, and the distribution of all proceeds of sale over and above the amounts required to reimburse the said Robert H. Jenkins and the said Western National Bank for the sums advanced to the receiver under this decree as above set forth, shall be held subject to the further order of the court."

By an auditor's report filed January 24, 1917, it appears that there is a balance in cash in the hands of the receiver of \$31,362 and unsold property of the value of \$11,017. These two amounts are not sufficient to pay

the balance due on the Jenkins mortgage, or the mortgages of the bank, and both mortgagees—Jenkins and the bank—are claiming the fund in this case. The lower court awarded the fund to Mr. Jenkins, and the appeal in this case was taken by the Western National Bank from that decree.

The sole ground upon which the Western National Bank assails the Jenkins mortgage is that it is alleged to be a mortgage to secure future advances or loans, and since the amounts of the same and the times when they were to be made are not specifically stated in the mortgage, the mortgage is void under section 2, article 66, of the Code. Mr. Jenkins acted in absolute good faith in the transaction, and it is not claimed that he had in contemplation an evasion of the provision of the Code referred to.

[1] Prior to the act of 1825 (chapter 50), the validity of mortgages in this state to secure future loans or advances was well recognized, and in the absence of statutory prohibition they were so regarded wherever the common law prevailed. Their use and convenience grew out of the necessities of trade and commerce, and were availed of by merchants and bankers, to provide for continuous dealings and security for debts, balances, and obligations to accrue at any future time. Judge Story, in *Leeds v. Cameron*, 3 Sumn. 488, Fed. Cas. No. 8,206, said that:

"Nothing can be more clear, both upon principle and authority, than that, at common law, a mortgage bona fide made may be for future advances and liabilities for the mortgagor to the mortgagee, as well as for present debts and liabilities."

See, also, *Wilson v. Russell*, 13 Md. 530, 71 Am. Dec. 645.

Mortgages for future advances are still valid in this state. Neither the act of 1825 (chapter 50) nor the act of 1872 (chapter 213) forbids them. They are statutory regulations—not prohibitions—of such mortgages. The first act was intended to limit the effect and operation of such mortgages, by confining the lien of the mortgage to the principal sum or sums specified and recited in the mortgage. The evils which this act was intended to remedy are fully stated in *Cole v. Albers*, 1 Gill, 412, which will be presently referred to. Under the act of 1825 it was not required that in a mortgage to secure future loans or advances the amounts of the future advancements and when they should be made should be stated in the mortgage, but this requirement was added by the act of 1872 (chapter 213), which provides that:

"No mortgage to secure such future loans or advances shall be valid unless the amount or amounts of the same and the times when they are to be made shall be specifically stated in said mortgages," etc.

The real questions in this case are: First, what is a mortgage for future loans or advances? and, secondly, is the Jenkins mortgage such a mortgage? These questions, upon the facts and circumstances in this case,

considered in connection with the law, common and statutory, upon the subject of mortgages for future loans and advances, appear to us to present no real difficulty. In the case of *Maus v. McKellip*, 38 Md. 231, Judge Robinson said:

"In the *Cole v. Albers*, 1 Gill, 423, the construction and purposes for which the act of 1825 was passed were fully considered by this court. In that case the mortgage was to secure the mortgagees to the extent of \$10,000. It appeared in evidence that, at the time of its execution, a much less sum was due from the mortgagor, but that the mortgagees were responsible for other sums on account of the mortgagor, and that it was the intention of the mortgagor, as shown upon the face of the mortgage, to protect them to the amount of the \$10,000, mentioned as the consideration. The court held the mortgage was a valid security to the amount of \$10,000, because, that sum being mentioned in it, no one could be deceived or prejudiced. 'The design of the lawmakers,' says Judge Archer, 'in the passage of the act of 1825 (chapter 50), was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of its execution, and of which the deed by its terms gave no notice, as if a deed were executed to cover a mortgagee against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee. * * * A practice prevailed anterior to the act of 1825 (chapter 50) of taking mortgages for specified sums of money, greatly below the value of the mortgaged premises, with a clause or clauses providing that the mortgaged premises should be held as a security for all future liabilities or advances by the mortgagee to the mortgagor, by which means the creditors of the mortgagor were defrauded, sometimes by fraudulent combinations between the mortgagor and mortgagee, or by the acts of the mortgagee alone, who, after the known insolvency of the mortgagor, purchased up liabilities of the mortgagor at depreciated rates, and held them as liens on the mortgaged premises for their nominal amounts. * * * Such transactions the law was designed to meet.' We have thus quoted at length the opinion of the court, because in it the construction and purposes of the act of 1825 are fully considered. It will thus be seen that, although the act of 1825, codified in article 64 of the Code, was directed against any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of the mortgage; that is, against new loans or debts, not contemplated by the parties at the time of the execution of the mortgage, but contracted subsequently and attached to the original debt by a new and springing contract between the parties."

[2] The facts show that Mr. Jenkins passed over to the mortgagor at the time of the execution of the mortgage the entire consideration stated in the mortgage, and took the promissory note of the mortgagor for that sum. It was not contemplated or suggested that he should make any further loans. The money was turned over to Mr. Shriver, trustee, to be held and applied by him in the construction of the buildings under the terms of the agreement of October 4, 1911, and the entire amount of the mortgage loan has been so applied. The trustee was holding the money in trust for the parties. The use and possession and dominion over the money had passed from Mr. Jenkins. Whose money was it that the trustee was holding?

Certainly it did not belong to Mr. Jenkins. That it was really the money of the Realty Company, which it had borrowed from Mr. Jenkins, and which the trustee was holding for its benefit under the provisions of the trust agreement, is shown by the fact that it received from the trustee more than \$40,000 of the fund prior to the commencement of this litigation, and has since secured the application of the whole balance to the completion of the houses. Mr. Jenkins contemplated and entered into no scheme to evade the law, as was done in *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571, 52 Atl. 582, 53 Atl. 148, which, upon the controlling facts, was wholly and entirely different from the facts appearing in this record. We therefore hold that the Jenkins mortgage is not a mortgage to secure future loans or advances, within the meaning of section 2, article 66, of the Code, and that it constituted a first lien upon the mortgaged property. The decree of the lower court properly awarded the fund in the hands of the receiver to Mr. Jenkins, and the decree will be affirmed.

As to the second mortgage to Alfred Jenkins Shriver for \$5,000, Mr. Shriver did not appeal from the decree, and, as there is no money in the hands of the receiver to be applied to his mortgage, we do not find it necessary to pass upon its validity.

Decree affirmed, with costs.

(131 Md. 235)

CARNAGGIO v. CHAPMAN. (No. 47.)

(Court of Appeals of Maryland. June 28, 1917.)

1. TRIAL ¶252(8) — INSTRUCTIONS — COLLISION AT STREET INTERSECTION—LAST CLEAR CHANCE.

In an action by plaintiff for personal injuries sustained when knocked down by defendant's automobile near a street intersection, *held*, under the evidence, that plaintiff's prayer, submitting the doctrine of last clear chance, was properly refused.

2. TRIAL ¶253(9)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction that the burden is upon plaintiff to establish by a fair preponderance of affirmative evidence that the negligence of defendant caused the accident is not objectionable because using the word "affirmative," especially where the negligence, if any, must be found in the affirmative evidence of plaintiff.

Appeal from Baltimore Court of Common Pleas; Morris A. Soper, Judge.

"To be officially reported."

Action by Antonio Carnaggio against George W. Chapman. Judgment for defendant, and plaintiff appeals. Affirmed, with costs to defendant.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

George Washington Williams, of Baltimore (John Holt Richardson, of Baltimore, on the brief), for appellant. R. Bayly Chapman, of Baltimore, for appellee.

PATTISON, J. This is an appeal from a judgment for the appellee in an action brought against him by the appellant to recover damages for personal injuries sustained by him, resulting from the alleged negligence of the appellee in the operation of his automobile.

The plaintiff, Antonio Carnaggio, while crossing Baltimore street, at or near its intersection with Charles street, on July 12, 1916, was knocked down and personally injured by the car or automobile of the defendant driven by him. The plaintiff was crossing from the north to the south side of Baltimore street, while the automobile of the defendant was going west on Baltimore street.

The testimony of the plaintiff as to the happening of the accident is exceedingly meager, and we will state it as it appears in the record. It is as follows:

"That the accident happened at Charles and Baltimore streets, to the best of his recollection, at between 3 and 4 o'clock. That he was about to cross the street; had his eyes open; saw an automobile. That he stepped over in order to wait for this automobile to go by. Then an automobile came from the rear of this one, and it struck him. That the machines were going west. That he had not passed Baltimore street. That he had made only about two or three steps. That he was watching the man in the front machine all right, and he was all right, but all at once unexpectedly, the other machine came from the back of the one in order to pass this and struck him. That the first machine passed him. The second machine did not whistle, or sound any bell, but just struck him. That it tried to pass the first machine and struck him."

There was no other witness who testified for the plaintiff as to the happening of the accident.

The defendant testified that he was driving a runabout automobile on Baltimore street, going west. He stopped when he reached Charles street, and waited until signaled by the semaphore in charge of the officer to proceed. He crossed Charles street about 6 or 7 miles an hour. There was no machine in front of him on the right-hand side of the street between Charles and Hanover streets. After passing Charles street he pulled out to the right side of the street. He was going slowly, and pulled to the right so that if any one wanted to pass him they could do so. A machine did pass him going west on Baltimore street between 50 and 75 feet west of Charles street. He saw it pass him, but did not pay much attention to it. He did not take his eyes off the street, and was going at that time about 8 or 10 miles an hour. The other car was going probably 15 or 18 miles an hour when it passed him, and was out in the car tracks. He was then asked:

"Did you see the plaintiff in this case before the happening of the accident? A. He was not out in the street. Q. Did you see where he came from? A. This man stepped off the curb; that is the only way I can figure it. I just had a glimpse of him. He stepped off the footway, and the minute he did, I put my brake on and stopped the car."

He then testified that the left-hand front wheel was on the man when he stopped. Some one said:

"'Back, back; your front wheel is on the man's leg.' I stopped that quick."

He further said "that he did not try to pass or go around any other machine there on Baltimore street." Upon cross-examination, he stated that when he arrived at the east side of Charles street, there was not any one ahead of him; that he was straddling the north track of Baltimore street, or he may have been between the tracks. When signaled he went across Charles street and stayed on the right side. After crossing Charles street he drove close to the curb, probably a foot and a half from the curb. When the accident occurred he got out, put the man in the machine, and rushed him to the hospital.

Patrick Leland, police officer stationed at the intersection of Charles and Baltimore streets, testified: That he recalled the occasion of the accident. He saw the defendant's machine and another going west on Baltimore street. They stopped east of Charles street, and awaited the signal for east and west. When it was given they both started. "The defendant was on the inside, or next to the north-curb of Baltimore street, when the other man tried to pass him, and they both came just together like that, on the center of the street, at the center of Charles street. There were both machines together. What called my attention to it was that I was watching to see if there was any violation of the law, because the other machine was on the west-bound track, and before the accident, about a second before the accident happened, this machine passed Chapman, say about a yard on the west side of Baltimore street." That he assumed just a second after that machine passed, he saw Chapman's machine stop like that, and somebody shout, and he ran over. That he did not see a machine come around to the right of another machine, as plaintiff testified, and strike the plaintiff; both machines were going west, and defendant's machine was passed by another machine. The accident happened about 30 feet from the crossing. That he gave the signal for east and west bound vehicles; north and south bound were stopped until they got the signal. The defendant crossed Charles street at a speed between 6 and 8 miles an hour.

These witnesses, the defendant and Leland, were substantially corroborated in all the material facts to which they testified by John W. Rice, who was standing on the corner of Charles and Baltimore streets at the time

of the accident, and John C. Weedon, who was riding with the defendant in the machine. We will not state their testimony in full, as it would unnecessarily prolong this opinion.

At the conclusion of the case the plaintiff offered four prayers, designated as 1, 1½, 2 and 3. The first and third were granted. The others were rejected.

The defendant offered five prayers. The first and second asked that the case be taken from the jury, the first because of a want of legally sufficient evidence, and the second because of contributory negligence of the plaintiff. These prayers were refused. The third, fourth and fifth were granted.

There is but one exception in the record, and that is to the rulings on the prayers.

The plaintiff does not concede the correctness of the court in refusing its 1½ prayer, but he does not allude to it at all in his brief, and we find no reversible error in the action of the court in its refusal to grant it.

[1] The second prayer of the plaintiff submitted the doctrine of the last clear chance to the jury. There was not the slightest evidence upon which this prayer could have been based, and consequently it was properly rejected.

[2] The argument of the plaintiff was chiefly directed to the ruling of the court in granting the defendant's fifth prayer. By this prayer the court was asked to instruct the jury that the mere happening of the accident complained of raised no presumption of negligence on the part of the defendant operating the automobile referred to in the evidence, but the burden is upon the plaintiff to establish by a fair preponderance of affirmative evidence that negligence on the part of said defendant caused said accident, and if the minds of the jury are left by the evidence in a state of even balance as to the existence of such negligence, then the verdict of the jury must be for the defendant. The objection to this prayer is to the statement that:

"The burden is upon the plaintiff to establish by affirmative evidence that negligence on the part of said defendant caused said accident."

It is the use of the word "affirmative" to which the objection is made. This objection we think is fully answered by this court in *Sullivan v. Smith*, 123 Md. 558, 91 Atl. 456. There was in that case a prayer, word for word, like the prayer here objected to, and the same objection was there made. Chief Judge Boyd, speaking for the court, said:

"That is met by the case of *B. & O. R. R. Co. v. State, Use of Savington*, 71 Md. 590, on page 599 [18 Atl. 969, on page 971] where Chief Judge Alvey said: 'It is incumbent upon the plaintiff to give some affirmative evidence of the existence of such negligence.' That has been approved in *Riley v. N. Y., P. & N. R. R. Co.*, 90 Md. 53 [44 Atl. 994] and *B. & O. R. R. Co. v. Black*, 107 Md. 642 [69 Atl. 439, 72 Atl. 340]. Nor can we agree with the appellant that this prayer prevented the jury from

considering any evidence reflecting upon the negligence of the defendant, except that offered by the plaintiff. The burden was undoubtedly on the plaintiff to establish by a preponderance of evidence that the negligence on the part of the chauffeur caused the accident. That might be established by witnesses offered by the defendant, but the burden was nevertheless on the plaintiff to establish it. * * * If such an expression as that used in this prayer now under consideration could not be used, it would be difficult to submit a proper prayer on the burden of proof. What we have said above ought to be sufficient to show that the use of the expression 'affirmative evidence' does not make the prayer objectionable. * * *

We may also add to what has been said of this prayer that, if there was any negligence at all on the part of the defendant causing the injury complained of, it must be found in the affirmative evidence of the plaintiff, or not at all; consequently the plaintiff was not injured by the granting of the prayer. We also find no error in the ruling of the court on the defendant's third and fourth prayers.

The judgment of the lower court will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

(131 Md. 228)

MAYOR AND CITY COUNCIL OF BALTIMORE v. SCOTT et al. (No. 35.)

(Court of Appeals of Maryland. June 28, 1917.)

1. MUNICIPAL CORPORATIONS §621—COMPPELLING ISSUANCE OF BUILDING PERMIT—FRAUD ON COURT.

Petitioner for mandamus against the mayor and city council of Baltimore to compel issuance of a permit to erect a building could not obtain the permit by mandamus to erect the building for purposes set out in his petition, and, after erection, use the building for other purposes, without first obtaining the mayor's approval, since the action would be a fraud on the court.

2. MUNICIPAL CORPORATIONS §621—BUILDING PERMIT—VIOLATION—SUFFICIENCY OF EVIDENCE.

In suit by the mayor and city council of Baltimore to enjoin the owner of a building, and his tenants, from using the building as a place where automobiles might be repaired, etc., evidence held to show that the owner had violated the spirit which caused the court to issue mandamus to compel plaintiffs to issue to the owner a permit to erect a building for automobile stores, not a service station authorizing the relief asked.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Suit by the Mayor and City Council of Baltimore, a municipal corporation, against Walter Scott, Firestone Tire & Rubber Company, and others, bodies corporate. From an order dismissing the bill of complaint, plaintiff appeals. Reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander Preston, Deputy City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellant. Randolph

Barton, of Baltimore (James J. McGrath, of Baltimore, on the brief), for appellees.

CONSTABLE, J. This case is a sequel to that of *Stubbs v. Scott*, reported in 127 Md. 86, 95 Atl. 1060, wherein the appellant in that case, as inspector of buildings of Baltimore city, was directed, by the writ of mandamus, to issue to the appellee a permit to erect a building as prayed for. The present appeal is from an order dismissing the bill of complaint of the appellant in the present case, praying for an injunction to restrain the appellees from using the building, erected under the aforesaid permit, in the manner they are now doing.

[1] It appears from the record that Walter Scott, one of the appellees, on the 18th day of June, 1915, filed his petition in the superior court of Baltimore city, praying that the writ of mandamus be directed to the building inspector of Baltimore city, requiring him to issue to the petitioner a permit for a building, to which we will refer more in detail later. The petitioner recited therein that:

"In or about the month of February, 1915, desiring to erect and conduct a salesroom and service station for the sale of automobiles, and for the other purposes incident to the business of such establishments"

—he applied to the defendant for a permit to erect a building suitable for that business, on the lot of ground situated on the east side of St. Paul street, between Mt. Royal avenue on the north and Preston street on the south, having a frontage on said street of 110 feet and a depth of 122 feet and 6 inches back to an alley running parallel with said St. Paul street and of a width of 20 feet. It was then recited that the said permit was not granted, and that "subsequently your petitioner, being still anxious to secure a location on said lot for the sale of automobiles, abandoned the idea of establishing a service station at the place named, and purchased said lot of ground from the owners of the same and now own said property," and that he again made application to the defendant "for a permit to erect on said lot four stores for general business purposes, in accordance with the provisions of the plat and specifications herewith filed; * * * that your petitioner proposes to use one of said stores for the purpose of exposing for sale and for selling automobiles; that the other stores he proposes to rent, or, if it proves to be expedient so to do, to sell them, when they will be used for such purposes as stores so located may be profitably used." This application was also refused. The court, after hearing the testimony, in which the petitioner fully explained the purposes for which he intended to use the building under his first application as well as under his second application, directed the writ of mandamus to issue. This court on appeal affirmed that decree. Chief Judge Boyd, in delivering the opinion of the court on that appeal, said:

"He (Stubbs) admitted that he was influenced by the facts that the plan of the building was susceptible of being used as a garage, and that the second applicant was the same person as the first applicant. He also admitted that he discredited Mr. Scott's good faith and his statement that he wanted it now for stores. * * * As we have seen, the petitioner in this case asked for a mandamus to compel the respondent to issue a permit 'to erect on said lot four stores for general business purposes, in accordance with the provisions of the plat and specifications herewith filed.' The order of the lower court directed 'that the writ of mandamus be forthwith issued in manner and form as prayed in said petition,' and we cannot admit, as understood it to be suggested at the argument by counsel for appellant, that the petitioner can obtain a permit, through the aid of the court, to erect a building for purposes set out in his petition, and then, after he has erected the building, make use of it for purposes such as he is not entitled to use it for, without first obtaining the approval of the mayor, particularly for such purposes as his petition shows he first asked a permit for, which was refused. That would be a fraud on the court which granted him the relief prayed for, and any attempt to perpetuate it could and should promptly be checked. We are not now called upon to pass on the validity of the ordinance, in so far as the particular provisions applicable to garages, etc., and numbered 5, are concerned, inasmuch as if the petitioner desired to attack the ordinance he could have done so, but, practically conceding it to be valid, abandoned further effort to get that permit, and now seeks one for another avowed purpose. Hence we say he would not be permitted to erect a building, under a permit obtained by the help of the court, for the purpose stated in the petition, and then use it for other purposes which were denied him. We do not mean to say he cannot use a store to exhibit automobiles for sale, as he says his intention is, but he cannot, under the permit to be granted under this petition, use it as a garage or service station, such as he first applied for."

All that remains for us to determine, upon this appeal, is whether or not there has been such a use of the building as to evidence a total disregard of the reasons expressed by this court, as to why the permit should be granted. And for this purpose, no better method can be employed than to examine the testimony of Scott, given during the trial of the petition for the mandamus, in reference as to what purpose he had intended to put the building to when he first applied for the permit, and what he said his intention was on his application for the second permit, and to contrast that testimony with that in the present appeal:

"Q. Did you ever apply to the authorities in Baltimore for a permit to erect and conduct a salesroom and service station for the sale of automobiles on St. Paul street? A. Yes, sir. Q. When was that? A. That was early in the spring, or late winter. Q. What did you contemplate having there at that time? A. A service department. Q. What is a service station? A. It is a service department. It is a place where you take care of cars you sell and keep them in running order; if anything gets out of order and needs attention, it is the place where you give it to them; they get attention there. Q. You have workmen for the purpose of repairing? A. Yes, sir. Q. Some blacksmithing is done? A. No. Q. Is not that an incident to repairs that take place? A. It could, but we don't run it that way; most of the parts we get from the factory. Q. You do have hammering

and noises of that kind incident to making repairs? A. Yes, sir. Q. This peculiarity of a service station is different from some other kind of station, is it not? A. I don't exactly get that. Q. A service station is where you repair automobiles? A. Yes; give them whatever attention is required. Q. As they come in, do you take them on storage? A. No, sir. Q. That is not an incident of a service station? A. We do not, but probably some other places do. Q. Is not that one of the incidents of a service station also taking them on storage? A. That is optional with the man; of course, some do."

He then testified from the plans and specifications filed as exhibits that:

The building to be erected would be a two-story one, containing four stores on the lower floor, each with a frontage of 27½ feet, and a depth of 122½ feet; that the part of the building he intended to occupy was the front portion of the second store from the south end of the building, the dimensions of which were 27½ feet at the front to a depth of 40 feet. Q. You are going to use the first 40 feet as a storeroom; that is, an exhibition room? A. Yes, sir. Q. What are you going to use the balance in the rear for? A. In the rear, I am going to rent that for anything that I can use it for, anything at all, it is for rent. Q. You are going to keep automobiles there for sale? A. Yes; that is the idea. Q. As a matter of fact, that in reality is the kind of business you wish to conduct, the kind that the Zell and the Mardel people conduct? A. Not exactly; no, sir. I wish to conduct what I now conduct, sales agency, and to take care of my own customers, my business has grown, and I am not in a proper neighborhood for the business I want to get; I want to get in an automobile district. I want to show my goods where the other large dealers in Baltimore show theirs; that is why I want to get down there; that is the main reason; a service station can be added afterwards; it makes no difference about a service station, but I want to have the sales store there, I want to get there so that when people go from Zell's they will walk into my place, or from the Mardel place, which is only a square or less than a square further. Q. Your original plans, the ones which were not granted, call for a service station? A. Yes. Q. What do you mean by service station? A. I mean a place to take care of cars I sell, and keep them in running order. Q. Keep them in repair, is that right? A. Yes, sir. Q. Back of that salesroom, will there be one or more rooms? A. Back of the salesroom, on account of not getting the permit that I wanted, I would rent for some purpose, I would rent out, I would have to rent that out; what I am desirous of getting is a salesroom; in the rear of that, I cannot have a service station, and I will rent it out for any purpose I can rent it out for; I would fix that up to suit some tenant I will have to get; that room will not be any good to me there."

Could testimony have been made stronger than this to convince the court that Scott had absolutely given up all idea of having a service station upon the premises, and that he had fully made up his mind to confine his efforts to a salesroom alone without thought of doing repair work of any kind. It is not necessary to quibble over the technical meaning of the expressions, "public or private service stations," or "public or private garages," for we have in plain language, from Scott, just exactly the character of service station he sought in his first application, and in emphatic language that he had

abandoned the idea for such a station. It is no wonder then that this court, with the opinion that Scott had a legal right to erect stores upon his lot, together with Scott's disclaimer, of any idea of using the stores for any other purpose, brushed aside the argument of the counsel for the city, based upon no proof, that the second application was a mere subterfuge to gain what he had lost on the first application.

Now, let us inquire what was done by Scott after the building was erected, and what was being done by him and his tenants at the time of the filing of this bill. The building was erected according to the plans, and was divided into four stores, on the lower floor, of equal widths and equal depths. The two adjoining stores to the north were leased, for a period of years, to the Firestone Tire & Rubber Company, for the purposes, as expressed in the lease, of carrying on "the operation of its business as a salesroom and other purposes pertaining to said business, such as storing of stock, repairing and service purposes." The lease contained the condition that it would "abide by and perform all of the requirements of law, or city ordinance touching the said premises, and any business to be carried on, or about the same." The store at the south end of the building was leased for a term of years. And the lessee covenanted that it would not "cause, or suffer any noisy, offensive or improper use of said premises to be made, or use any part thereof for any purpose more injurious than that of a salesroom for automobiles, automobile supplies, and accessories; nor do anything, nor to permit anything to be done, which in any way would conflict with the laws, rules or ordinances of the city of Baltimore." The remaining store is occupied in its entirety by Scott. After the filing of the bill, the Little Giant Sales Company is alleged to have sold out its interest to the Reo Maryland Company, which company is now occupying those premises, though the president seems to be the same person. Scott has the agency for, and sells the Marmon Pleasure Car, and the Reo Maryland Company has the agency for, and sells the Reo Truck. So the building is occupied by three concerns, engaged in the sale of automobiles, or their accessories. Under our previous decision, there could be no objection to this, but it is contended, and, in our opinion, proved by the overwhelming weight of the testimony, that they are doing more than this. In fact, so far as the testimony of Scott is concerned, it is admitted that he is doing more, but it is claimed by him that what he is doing is that which is necessary for the prosecution of his business of selling automobiles. What we refer to is that all of these concerns are conducting service stations. According to the proof, and the admissions, the Reo Maryland Company and Scott are both repairing automobiles upon the premises in large num-

bers. Scott, in admitting this, testifies that in making repairs he confines himself exclusively to the cars which he sells and to the cars of different makes which he takes in exchange, or part payment, of those he sells. He testified that he employed four workmen on the premises, but that no work was done on any of these cars, but that character of work which could be done by physical labor without the aid of machinery, such as was produced by power. The proof shows that the Reo Company does its work in the same way, with the difference that it does not confine itself to its own make of trucks, and those taken in exchange, but takes in generally any car, and has a sign over its place of business "Reo Emergency Station."

[2] Without going into detail of the testimony, we are of the opinion that Scott has flagrantly violated the spirit which caused a permit to erect stores to be extended to him, as a short extract from his testimony in this case will show:

"Q. I am not asking you what you wanted to do. We all know that, and stopped you from doing it. I am asking you now what you did do, you got a permit to put a building there with stores in it, did you not? A. Yes, sir. Q. And then you added a service station on your own account, did you not? A. On my own account? Q. Yes? A. What do you mean by my own account? Q. You did not have a permit for a service station? A. No, I did not have a permit for a service station, I had a permit to put a building up there, and I took it from that, to sell automobiles, that was an incident to the sale, a necessity to the sale, and as long as I conducted the place as a private place, and not as a public place, there would not be any objection."

We need only refer to his testimony given in the mandamus case, and quoted above by us, to show conclusively that this is exactly what he had applied for in his first application for a permit, and which had been abandoned by him upon the refusal of that permit. And that is the very thing which this court said, in its opinion, should promptly be checked if he attempted to do. We do not think it was possible for him to have misunderstood this language:

"We do not mean to say he cannot use a store to exhibit automobiles for sale, as he says his intention is, but he cannot, under the permit to be granted under this petition, use it as a garage or service station, such as he first applied for."

He had told the court, in the plainest kind of language, what his idea of a service station was, and that he was not asking for a permit for that. Upon such assurance, his permit was granted for an exhibition room for automobiles. And yet, now, he admits that he is doing the very selfsame thing that this court had said he should not do.

The Firestone Tire & Rubber Company, as its name implies, is a concern dealing in automobile tires. As we have pointed out above, Scott leased two of the stores to it for the purposes of a salesroom and other purposes pertaining to said business, such as storing of stock, repairing, and service

purposes. On the day the company moved into its new quarters, there appeared in the Daily Press of Baltimore, a write-up inspired by the manager of the company of its new quarters, and what the automobile public could expect of it. The article is too long to reproduce in this opinion, and we will content ourselves with a few extracts as illustrating the trend of the whole article:

"On the first floor will be a garage occupying 3,000 square feet. This will be used for motor trucks, which can drive in from the alley in the rear. The hydraulic press of 200 tons' capacity is in this garage, and the owner of a truck may take his truck to this garage and have tires pressed on his wheels in the quickest time with experts. This garage is equipped to take care of all the needs of a wheel of a truck."

Again:

"The manager of the local Firestone branch states that the new branch here is one of the most complete in the entire country, and that everything has been done towards rendering the best possible service to users of Firestone tires, whether pneumatic or solids for trucks. Special equipment has been installed to take care of truck tire users, and the owners of trucks will find, says Mr. Leisure, that Firestone service here will be unparalleled in any part of the entire country."

And again:

"Practically 24 hours a day service will be rendered truck users at the new Firestone branch. * * * He will be told that he can bring his trucks into the Firestone Garage late at night and workmen will be kept there to press on the tires when the trucks arrive."

"Service to Truck Owners."

"This new, fully equipped branch brings factory efficiency to you. Workmen with all the ability of home-plant experts are here with complete shop equipment. Depend on us to keep your trucks moving. Command the facilities of this service station when your truck needs attention. It was installed to serve you."

The proof shows conclusively that they were doing all that their advertisement claimed that they would do. They had installed the large hydraulic press, which from the proof seems to have been in almost constant use night and day, disturbing a number of the neighbors by the noises produced by it. Trucks were coming and going and blocking up the alley in the rear constantly. In our opinion they cannot and should not be permitted to use these stores in the manner they have been doing since the first day of their occupancy. The service which they are giving to the automobile public, with the exception of the actual sale of tires, is absolutely contrary to the conditions under which the building permit was granted to Scott.

As stated above, the Little Giant Sales Company alleged in its answer that it sold out its interest in the lease to the Reo Maryland Company. The bill was not amended so as to make the Reo Maryland Company a party defendant, and therefore there is no prayer against it for relief, but the prayer asks for relief only against the original defendants, "and each of them, their agents

and servants," so, notwithstanding, we think that in a proper proceeding the Reo Company should be enjoined nevertheless in this proceeding we are not directing in remanding the case, that the injunction shall issue against it. But if there is any disposition shown on its part to ignore this opinion, the appellant should have no difficulty in securing immediate relief for its infractions.

The Marmon & Cole Sales Company, one of the defendants, is not shown to have had any connection whatever with the building, or any of the business therein conducted, and took no part in these proceedings, by answer or otherwise.

For the above reasons we will reverse the order appealed from, and remand the cause in order that an injunction may issue as prayed against all the defendants, with the exception of the Marmon & Cole Sales Company.

Decree reversed and cause remanded, the appellees to pay the costs.

(121 Md. 50)

MAYOR AND CITY COUNCIL OF BALTIMORE et al. v. CHESAPEAKE & POTOMAC TELEPHONE CO. OF BALTIMORE CITY. (No. 50.)

(Court of Appeals of Maryland. June 28, 1917.)

1. TAXATION \S 466, 493(7) — ASSESSMENT — APPEAL.

Under Laws 1914, c. 841, adding section 238 to Code Pub. Civ. Laws, art. 81, creating the state tax commission, and providing that any taxpayer, having been assessed by the order of the county commissioners or the appeal tax court of Baltimore city, after a hearing, may appeal to the state tax commission, etc., and section 244 (added), providing that appeals from any action of the state tax commission to the city court shall be taken, within 30 days of such action, by petition setting forth the question or questions of law desired to be reviewed, the state tax commission had jurisdiction to entertain the appeal of a telephone company from an assessment of its physical structures made by the appeal tax court of Baltimore city, and the Baltimore city court was limited, on appeal to it from the order of the tax commission reversing the assessment, to consideration of the questions of law only presented by the petition, and could not review or pass upon any questions of fact involved in the assessment of the property by the state tax commission.

2. TAXATION \S 485(2) — ASSESSMENT OF TAXES — REVIEW — EVIDENCE.

On appeal to the state tax commission from an assessment made by the appeal tax court of Baltimore city of the physical structures of a telephone company in the city, evidence for the telephone company of the findings of the public service commission in the matter of the telephone company's rate case was admissible as part of the record of proceedings of the appeal tax court, under Laws 1914, c. 841, adding section 244 to Code Pub. Civ. Laws, art. 81, providing for appeals to the state tax commission.

3. TAXATION \S 493(7) — ASSESSMENT — REVIEW — EVIDENCE.

Oral evidence tending to impeach the written statement of valuation furnished the telephone company was admissible.

4. TAXATION — 452—POWERS OF STATE TAX COMMISSION—FINAL DECISION OF QUESTIONS OF FACT—CONSTITUTIONALITY.

It was competent for the Legislature to confer on the state tax commission power to finally decide questions of fact, without an appeal, except upon questions of law.

5. TAXATION — 493(8)—ASSESSMENT—REVIEW—SCOPE—FINDING OF FACT.

On petition of appeal to the Baltimore city court from an order of the state tax commission reversing an assessment made by the appeal tax court of Baltimore city of the physical structures of a telephone company in the city, the first prayer for ruling of the mayor and city council of Baltimore was that, if the court found that the state tax commission, in reducing the assessment of the property of the telephone company from one amount to another, acted on the assumption that the value fixed by the public service commission for rate-making purposes was the value which should be fixed by the tax commission for purposes of taxation, etc., the tax commission committed an error. *Held*, that the prayer was erroneous, as requiring the court to find a question of fact, when it was sitting to review questions of law only, involved in the assessment of the telephone company's property.

6. TAXATION — 493(8)—ASSESSMENTS—POWER OF STATE TAX COMMISSION — REVIEW OF FINDINGS ON QUESTIONS OF FACT.

The final determination of assessments of all property in the counties, cities, and towns of Maryland is specially conferred by statute on the state tax commission, and the valuation is to be made according to its best judgment from the evidence before it, and the courts are without jurisdiction to review its findings on questions of fact.

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

"To be officially reported."

Proceedings to assess the physical structures of the Chesapeake & Potomac Telephone Company. The state tax commission reversed an assessment by the Appeal Tax Court of Baltimore City, and from an order of the Baltimore city court, dismissing petition of appeal, the Mayor and City Council of Baltimore and the Appeal Tax Court appeal. Order affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

S. S. Field and R. Contee Rose, both of Baltimore, for appellants. Shirley Carter, of Baltimore (Bernard Carter & Sons, of Baltimore, on the brief), for appellee.

BRISCOE, J. The appeal in this case is by the mayor and city council of Baltimore and the appeal tax court of that city from an order of the Baltimore city court, dated March 19, 1917, dismissing a petition of appeal from an order of the state tax commission of Maryland, dated the 16th day of August, 1916, reversing an assessment made by the appeal tax court of Baltimore city of the physical structures of the Chesapeake & Potomac Telephone Company in the city of Baltimore. The form of the order is as follows:

Ordered this 16th day of August, 1916, by the state tax commission of Maryland, that the assessment of \$3,214,289.00 made by the appeal tax court of Baltimore city of the poles and fixtures, aerial cable, aerial wire, underground conduit, underground cable, submarine cable, including appurtenances, of the Chesapeake & Potomac Telephone Company of Baltimore city, be and the same is hereby reversed. And it is further ordered, that the poles and fixtures, aerial cable, aerial wire, underground conduit, underground cable, submarine cable, including appurtenances, of the Chesapeake & Potomac Telephone Company of Baltimore city, situated and located in the city of Baltimore, be and hereby are assessed at the sum of \$2,745,358.00.

[Signed] A. P. Gorman, Jr.,
Lewin W. Wickes,
Commissioners.

It appears from the petition of appeal of the Chesapeake & Potomac Telephone Company, set out in the record, and which was filed on its appeal, before the state tax commission of Maryland, that the appeal tax court of Baltimore city, on the 7th of April, 1916, assessed its physical structures at the aggregate amount or value of \$3,214,289; the property consisting of 6,068 poles, 498,509 feet of aerial cable, 3,023.34 miles of aerial wire, 854,836 feet of underground conduit, and 1,911,371 feet of underground and submarine cable. By the second paragraph of the petition it is alleged that, in compliance with sections 159 and 162 of article 81 of the Code of Public General Laws of Maryland of 1912, the proper officer of the telephone company furnished to the appeal tax court of Baltimore city a true statement of all real property owned and possessed by it situated or located in the city of Baltimore, state of Maryland, and among other items were its poles and fixtures, aerial cable, underground conduit, underground cable, and submarine cable, with their appurtenances. By the fourth paragraph it is further alleged that the telephone company is advised, and therefore charges, that the assessment made by the appeal tax court of the items of property owned and possessed by the company in the city of Baltimore is illegal, because more than the actual cash value of the property aforesaid, not looking to a forced sale, and because in excess of the value put upon the same items of property when valued according to law by public service commission of Maryland for the purpose of fixing rates to be charged for telephone service, and is erroneous by reason of overvaluation, and is unequal, in that the assessment has been made by a higher proportion of valuation than other real property on the tax roll by the same officers, and that the telephone company is injured, or will be, by such illegal, unequal, or erroneous assessment, and prays the commission to review the assessment.

On the 8th of May, 1916, a copy of the petition was served upon the appeal tax court, and a hearing before the tax commission was set for June 22, 1916, at 1:30 p.

m. At the hearing a demurrer was interposed to the petition, and the demurrer was overruled; but a demurrer to a part of paragraph 4 of the petition was sustained—that is, to so much of the paragraph of the petition of appeal as refers to the illegality of the assessment made by the appeal tax court of Baltimore, because the same is in excess of the value put upon the same items of property when valued according to law by the public service commission of Maryland for the purpose of fixing rates to be charged for telephone service, because the same is bad in substance and insufficient in law. The case was then heard and fully argued on both sides before the tax commission, and on the 16th of August, 1916, the order herein recited was passed, setting aside the assessment, which had been made by the appeal tax court, and assessed the property at \$2,765.358. The case was heard on appeal, in the Baltimore city court, on the 16th of March, 1917, without a jury, and the questions submitted for review and determination are stated, in the record to be as follows:

(1) The jurisdiction of the state tax commission to entertain this appeal.

(2) The admissibility of evidence for the telephone company of the findings of the public service commission in the matter of the Chesapeake & Potomac Telephone Company of Baltimore City—rate case.

(3) The admissibility of oral evidence tending to impeach the written statement of valuation furnished said telephone company on March 1, 1916.

(4) The manner and form of said order for action of the state tax commission, dated the 16th day of August, 1916, reversing the assessment of the appeal tax court and reassessing said property.

(5) The method of computing the deterioration of the property in said appeal involved.

(6) The method of computing the construction of overheads in estimating the value of the property in said appeal involved.

(7) The method of conserving the record of proceedings at the hearing of this appeal, and such other questions of law involved in this appeal as may be raised at the hearing hereof.

[1] There can be no difficulty as to the jurisdiction of the state tax commission to entertain the appeal from the appeal tax court, raised by the first question. By section 238 of chapter 841 of the Laws of 1914, creating a state tax commission for the state, it is provided that:

Any taxpayer, * * * having been assessed by the order of the county commissioners or appeal tax court of Baltimore city, after a hearing as hereinbefore provided, may appeal to the state tax commission. * * *

And it is further provided, by the same section, that there shall be an appeal to court on questions of law only from decisions of the state tax commission, to the court in that county where the property is situated, and the state tax commission is empowered to participate in any proceeding in any court wherein any assessment or taxation question is involved. By section 244 of the same act it is also provided that appeals from any

action of the state tax commission to court shall be taken within 30 days of such action by petition setting forth the question or questions of law which it is desired by the appellant to review. All appeals to court in Baltimore city shall be to the Baltimore city court, and there shall be a further right of appeal to the Court of Appeals from any decision of the Baltimore city court or of the circuit courts of the several counties.

It will be thus seen that the circuit court was limited, on the appeal, by the express terms of the statute, to a consideration of the questions of law only, presented by the petition, and could not review or pass upon any questions of fact involved in the assessment of the property by the state tax commission. The language of the act is clear and positive that the state tax commission should have the final determination of assessments of all property in all the counties and cities of the state, subject to such review only by the courts as was provided by the statute itself.

[2] There was no error in the ruling of the court in admitting the evidence embraced in the second question, or in rejecting the petitioner's second prayer, which presented the same question. This prayer asked the court to rule that the state tax commission committed an error of law in admitting the proceedings of the public service commission in evidence before the state tax commission, and therefore the order of the state tax commission of August 16, 1916, should be set aside. This evidence was admissible as a part of the record of proceedings of the appeal tax court, under section 244 of chapter 841 of the Laws of 1914.

But, apart from this, there was testimony, independent of the findings of the public service commission, as to the values of the telephone company's property before the tax commission, from which the values could have been ascertained. It cannot, therefore, be held that the findings of the tax commission in this case were based exclusively upon the findings of the public service commission, because it appeared in evidence from the record of proceedings of the appeal tax court, or that they (tax commission) adopted the legal principle upon which the public service commission acted, for the purpose of fixing the rates, as the basis of the valuation of the property for purposes of taxation.

[3] The third and fourth propositions presented for review are without merit. The evidence offered under the third was admissible. The objection to the form and validity of the order presented by the fourth was properly overruled.

The fifth and sixth questions presented by the petition are questions of fact, and not of law, and are not open for review by the courts. Apart from the plain provision of the statute controlling this case, it has been held

by this court that the valuation of property for the purposes of taxation is not a judicial function, and the Legislature could not lawfully require this court to act as a final board of review in the assessment of property; that it was not the design of similar statutes to require this court to review the findings of fact made by the court below as to the correctness of the assessment. *Baltimore City v. Bonaparte*, 93 Md. 156, 48 Atl. 735.

The seventh question relates to "the method of conserving the record of proceedings on the appeal," and seems to be unimportant. It was not pressed in the argument, nor urged in the brief of counsel. The record in this proceeding appears to be regular and in entire compliance with the provisions of the statute.

[4] The contention of the appellant that it was not competent for the Legislature to confer the power upon the state tax commission to finally decide questions of fact without an appeal, except upon questions of law, cannot be sustained. No authority has been cited in support of such a proposition, and none we believe can be found. *Margraff v. Cunningham*, 57 Md. 585; *Shellfish Com'rs v. Mansfield*, 125 Md. 632, 94 Atl. 207.

The remaining objections presented for our consideration arise upon the rulings of the court, upon the admissibility of evidence and upon its refusal to grant the appellants' first prayer, in the course of the trial in the Baltimore city court. There was no such error in the rulings of the court in sustaining the objections and excluding the offer of proof embraced in the first, second, and third bills of exceptions, disclosed by the record, that would authorize a reversal in this case. The questions and offer of proof would have presented questions of fact, and not of law, and could not have been considered by the court, and were therefore properly excluded.

[5] The appellants' first prayer was also properly rejected. It is as follows:

If the court finds that the state tax commission, in its order of August 16, 1916, reducing the assessment of the property of the Chesapeake & Potomac Telephone Company therein mentioned from \$3,214,289 to \$2,745,258, acted upon the assumption that the value fixed by the public service commission for rate-making purposes was the same value which should be fixed by the state tax commission for the purposes of taxation, and that the state tax commission, in making said reduction, simply took the valuation of the public service commission for the larger amount of said property, then the court rules that the state tax commission committed an error of law in making said reduction, and that said order of August 16, 1916, of the state tax commission should be set aside.

This prayer was clearly erroneous, because it required the court to find a question of fact, when it was sitting for the purpose of reviewing questions of law only, involved in the assessment of the appellee's property.

[6] The final determination of assessments

of all property in the counties, cities, and towns of the state is specially conferred by the statute upon the state tax commission itself, and the valuation is to be made according to its best judgment from the evidence before it, and the courts are without jurisdiction to review its findings upon questions of fact. In *Mayor & City Council of Baltimore v. Bonaparte*, 93 Md. 156, 48 Atl. 735, it is said:

If the valuation of which the city complains in this case had been made in the city court by a jury, instead of by the judge sitting without a jury, it cannot be pretended that this court could consider the evidence on which the verdict was founded, with a view to overrule or vary the result reached by the jury. If this be so—and it cannot be questioned—upon what principle can it be said, because the finding was by a judge, and not by a jury, that we may examine the evidence adduced below and affirm or reverse or modify the conclusion of fact reached by the judge?

After a careful consideration of this case, we are of opinion that the court below committed no reversible error, in its order of March 19, 1917, dismissing the petition on appeal to it from the order of the state tax commission dated the 16th of August, 1916; and for the reasons stated its order will be affirmed.

Order affirmed, with costs.

(131 Md. 111)

AMERICAN PIANO CO. v. KNABE et al.
(No. 31.)

(Court of Appeals of Maryland. June 27, 1917.)

1. CORPORATIONS \S 319(7) — LEASES—INDIVIDUAL INTEREST OF OFFICERS—FRAUD—SUFFICIENCY OF EVIDENCE.

In action by lessee against lessors, who were also officers of the plaintiff corporation, evidence that plaintiff was originally assignee of a lease, that the lease in suit embodied the same terms, that the rent reserved was the same amount paid under the prior lease, and that the lessors subsequently sold the property for a lump sum and in addition required a portion of the annual rent to be paid to them, held insufficient to show fraud on the part of the officers.

2. CORPORATIONS \S 319(7)—LEASE—INDIVIDUAL INTEREST OF OFFICERS IN LEASE.

Evidence held insufficient to show that lease from officers to corporation reserved excess rental, where the corporation, as assignee of a prior lease, had paid the same rental.

Appeal from Circuit Court No. 2 of Baltimore City, in Equity; Carroll T. Bond, Judge.

"To be officially reported."

Suit by the American Piano Company against Ernest J. Knabe, Jr., and others. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

R. E. Preece and S. S. Field, both of Baltimore, for appellant. Chester F. Morrow and Alfred S. Niles, both of Baltimore (Car-

lyle Barton and Bartlett, Poe & Claggett, all of Baltimore, on the brief), for appellees.

URNER, J. The American Piano Company is the lessee of a lot of ground and mercantile building, situated at the southwest corner of Park avenue and Fayette street, in the city of Baltimore, under a lease dated December 29, 1908, and executed by the appellees, Ernest J. Knabe, Jr., and William Knabe who were at that time the owners of the fee in the property. The lease is for a term of 21 years, beginning January 1, 1909, and it provides for a rental of \$7,500 per annum to be paid by the lessee, in addition to taxes, water rent, and other assessments, and the costs of insurance and repairs. There is a recital in the lease that the demised property was already in the possession of the lessee as the assignee of a pre-existing lease from the same reversloners to the William Knabe & Co. Manufacturing Company, dated January 2, 1908, and that it was the desire of the parties to the new lease that it should be executed in substitution for the one previously in force. The provisions of the two leases were the same as to the rent and other charges to be paid by the lessee, and also as to the duration of the leasehold terms they respectively created. At the time of the execution of the substituted lease to the American Piano Company, the appellee Ernest J. Knabe, Jr., was the president of that corporation, and he executed the lease, both in his official capacity on behalf of the lessee company and in his individual interest as one of the lessors. By a deed bearing the same date as the new lease the reversion in the property was conveyed by the lessors to Mr. Theodore Marburg, in consideration of \$85,000 to be paid by the grantees, and the agreement on his part to pay to the grantors annually \$1,000 of the rent to be received by him under the lease. The terms of the purchase were not set forth in the deed, only a nominal consideration being therein stated. In March, 1915, the lessee corporation filed the pending bill of complaint, alleging that it had just learned of the agreement in reference to the payment by Mr. Marburg to Ernest J. Knabe, Jr., and William Knabe, of a portion of the rent for which the lease provided, and charging in effect that, with a view to such agreement, the rent which the company was required to pay had been fixed at an excessive amount by the Messrs. Knabe, while acting in the dual capacities of owners of the leased property and president and director, respectively, of the lessee company, and that in thus securing personal profit and advantage for themselves at the expense of the corporation they practiced a fraud upon its rights which renders the lease void, at least to the extent of the rent which they reserved for their own benefit. The answers emphatically denied the allegations of fraud, and asserted that the rental, for which the lease to the American Piano Company makes

provision, is fair and reasonable, and that the reservation to the lessors of \$1,000 of the annual rent, as part of the consideration for the sale of the reversion to Mr. Marburg, has resulted in no prejudice whatever to the lessee's interests.

[1] Upon the evidence in the record we fully agree with the conclusion of the court below that the charge of fraud has not been sustained. There is no dispute in the testimony as to the salient facts in the case, and these are wholly inconsistent with the theory that the Messrs. Knabe abused their official relationship with the lessee corporation for their own advantage, or that any fraud upon it in respect to the lease in question was in fact committed. The rent which the company agreed to pay under the substituted lease of December 28, 1908, was the same in amount as the rent it had been paying as the tenant under a prior lease which antedated its organization. There is nothing in the record to show that the formation of the American Piano Company was even thought of when the preceding lease was executed in January, 1908. The Messrs. Knabe were at that time not only the owners individually of the leased property, but were also in control of the William Knabe Co. Manufacturing Company, to which the lease was then made upon terms identical with those now prevailing. There is no reason to suppose that the persons who thus had the same concern in the lease with respect to both the contracting interests had any disposition to stipulate for an exorbitant rental.

[2] According to the weight of the evidence upon the subject, we think it is fairly well established that the rent is not in fact excessive. It has been paid for more than six years by the present lessee, without any suggestion that the amount is not reasonable and proper. During the greater part of that period neither of the Messrs. Knabe has been in a position to direct the affairs of the American Piano Company, or to interfere, if they had been so inclined, with its right to question the propriety of their action, when serving as its officers, in assenting to the terms of rental of which the company now complains. If the reversion had not been sold, or the Messrs. Knabe had continued to sustain the relation of lessors, we should not be justified, upon the evidence, in relieving the lessee of the payment of any part of the rent on the ground that it had been unfairly imposed.

The execution of a new lease direct to the American Piano Company, in substitution for the one they held by assignment from the Knabe Company, was due to the fact that Mr. Marburg, who was about to purchase the reversion from the Messrs. Knabe, desired to take it subject to a lease under which the tenant then in possession would be obligated as an original party to the instrument, and not as a mere assignee. While the substituted lease was executed for the lessee company

by Ernest J. Knabe, Jr., as its president, his act was formally ratified by its directors by a resolution in which the lease was expressly approved. As the owners of the reversion in the leased property, the Messrs. Knabe held an interest which was distinct from that of the lessee corporation, and which they had an undoubted right to sell and convey. The consideration for such a sale was a matter with which the lessee was not concerned, so long as its own interests were not affected. It was competent for the reversioners to sell their estate for any amount upon which they and the purchaser might agree. The price which they proposed to Mr. Marburg was over \$100,000 but it was finally agreed that he should pay \$85,000 outright and \$1,000 of the rent annually. If the sale had been made for a single sum equal to the aggregate amounts of the original and rental payments just mentioned, it is probable that no question would have been raised as to the propriety of the agreement. The mere fact that part of the consideration was to be paid in annual instalments, out of the rent received by the grantee, could not possibly prejudice the lessee company's interests. Its obligations and its rights have remained wholly unaffected.

A review of the testimony in any detail would serve no useful purpose. The controlling facts have been stated, and the evidence and arguments presented in support of the theory upon which the suit is based have been thoroughly considered. There is, in our judgment, no sufficient ground upon which to invalidate the lease or the agreement under investigation, or to doubt the propriety of the conduct and motives of any of the parties who participated in the execution of those instruments.

Decree affirmed, with costs.

(131 Md. 156)

McLAUGHLIN v. McGEE et al. (No. 32.)

(Court of Appeals of Maryland. June 27, 1917.)

1. COURTS \S 472(4)—CONFLICTING JURISDICTION—PROBATE AND CIRCUIT COURTS.

Code Pub. Civ. Laws, art. 93, \S 293, giving orphans' courts concurrent jurisdiction with circuit courts to authorize and direct the sale of real estate of intestates where the appraised value does not exceed \$2,500, and section 295, authorizing issuance by such courts of a warrant to appraisers, does not give an orphans' court, having jurisdiction of an estate of a decedent, jurisdiction of the surplus under a mortgage foreclosure decree, though the surplus is less than \$2,500, so as to deprive the circuit court, rendering the decree of foreclosure, of jurisdiction to distribute such surplus.

2. COURTS \S 472(4)—CONFLICTING JURISDICTION—PROBATE AND CIRCUIT COURTS.

That a part of the surplus resulted from the sale of leasehold properties could not affect the jurisdiction of the circuit court, where it was alleged that the deceased mortgagor had no estate, real or personal, other than that covered by the mortgages, and that there was not enough personal property to pay the debts and costs of administration.

3. JUDGMENT \S 688—PERSONS CONCLUDED—JUDGMENT AGAINST EXECUTOR.

While absolute judgments at law, obtained by a creditor of a deceased person against his executor or administrator, generally amount to an admission of assets, and could not, prior to Acts 1916, c. 14, be resisted by the executor or administrator on the ground of a deficiency of assets, yet, as between the creditors and the heirs at law in a proceeding to subject the real estate to the payment of the debt, the judgment is not conclusive, and the creditor must show a deficiency of assets.

4. EXECUTORS AND ADMINISTRATORS \S 229—PRESENTATION OF CLAIMS—EFFECT.

Under Code Pub. Civ. Laws, art. 16, \S 218, providing that if a decedent leaves real estate, but does not leave personal estate sufficient to pay his debts and costs of administration, a court of equity may decree a sale of so much of the realty as may be necessary to pay his debts, and section 219, providing that the certificate of the register of wills to the proof of such claims or distribution shall be prima facie evidence of the claims, and sufficient to entitle them to distribution out of the proceeds of the real estate, unless excepted to by some interested person, a judgment creditor of a decedent, by filing a copy of his decree against the executor in the orphans' court, was not estopped from filing his petition in a suit to foreclose a mortgage on the decedent's land for the payment of his debt from the surplus.

5. MORTGAGES \S 568—FORECLOSURE—SURPLUS—DISTRIBUTION—PARTIES.

Where a judgment creditor of a deceased mortgagor files his petition in a suit to foreclose the mortgage for payment of his judgment from the surplus, the mortgagor's personal representative should be made a party, unless it clearly appears that there was no personalty, or that there was so little as not to justify administration, or that there was some other valid reason for not requiring it.

6. EQUITY \S 219—DEMURRER—DEFECTS NOT APPARENT ON FACE OF BILL.

Where the judgment creditor's petition for payment of his debt from the surplus asked for a subpoena against the mortgagor's executor, an objection to proceeding further until the executor was regularly brought into court could not be taken by demurrer, as the petition did not disclose any defect in this respect.

7. MORTGAGES \S 568—FORECLOSURE—SURPLUS—DISTRIBUTION—PARTIES.

Where the trustee under the mortgage was also the mortgagor's executor, and was in court in his individual capacity and as trustee, his failure to appear as executor, though not formally summoned, could not delay or affect the proceedings, since, if there was anything for the executor to do, it was his duty to appear.

8. APPEARANCE \S 24(1)—EFFECT—WAIVER OF DEFECTS IN PROCESS.

Where interested persons appeared and demurred to the judgment creditor's petition, they made themselves parties, even though there was some defect in the prayer of the petition, or in the proceedings seeking to have them brought before the court.

9. WILLS \S 7—LAPSED LEGACIES—POWER TO BEQUEATH OR DEVISE.

Under Code Pub. Civ. Laws, art. 93, \S 326, providing that a devise or bequest to one dying before the testator shall not lapse, but shall have the same effect to transfer the right, estate, and interest mentioned in the devise or bequest as if such devisee or legatee had survived the testator, a legatee dying before the testator cannot bequeath what he would have received under the testator's will, if he had survived him.

10. WILLS \Leftrightarrow 552(3)—**LAPSED LEGACIES—PERSONS TAKING.**

Under Code Pub. Civ. Laws, art. 93, § 326, a legacy to one dying before testator does not pass as assets to the legatee's executor or administrator, but goes directly to his heirs or next of kin.

11. MORTGAGES \Leftrightarrow 568—**FORECLOSURE—SURPLUS—DISTRIBUTION—PARTIES.**

On a judgment creditor's petition for payment of his judgment from the surplus on foreclosure of a mortgage, it was not necessary to make the administrator c. t. a. of a deceased son of a deceased mortgagor a party, where the son died before the mortgagor, as his administrator had no interest in the fund.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

From decrees sustaining demurrers and dismissing the petition of William D. McLaughlin against Lawrence J. McGee and others for the payment of an indebtedness due him from the surplus, McLaughlin appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

J. Morfit Mullen, of Baltimore, for appellant. J. Royall Tippet of Baltimore (William Colton, of Baltimore, on the brief), for appellees.

BOYD, C. J. This is an appeal from three decrees of the lower court sustaining demurrers to and dismissing the petition of William D. McLaughlin, seeking to have an indebtedness due by Bridget McGee to him paid out of a surplus remaining in the hands of a trustee who, under a decree appointing him to sell certain real and leasehold properties which were included in a mortgage given by Bridget McGee to Lawrence J. McGee, trustee, sold them and the sales were duly ratified. The decree of sale was passed under the Public Local Laws of Baltimore City, and J. Royall Tippet was appointed trustee to make the sales. He reported sales of two leasehold properties included in the mortgage, amounting to \$775, and of four properties in fee simple, the proceeds of which amounted to \$5,850—the total being \$6,625. The sales were excepted to by Mary E. O'Hare, a daughter of Bridget McGee, who had died in 1913, but the exceptions were dismissed and the sales ratified on October 20, 1916.

The petition of the appellant alleges that he loaned Bridget McGee \$4,000 upon a mortgage, and on foreclosure of it there was a deficit of \$1,408.77. Lawrence J. McGee, executor of Bridget McGee, was duly summoned, and on March 29, 1915, a decree in personam was entered against said executor for said sum, as authorized by section 731a of article 4 of Public Local Laws. The appellant filed his claim in the orphans' court of Baltimore City, where it was duly passed; but he alleges in his petition that Bridget

McGee had no estate, real or personal, at the time of her death, other than that included in the two mortgages, and that she did not have personal estate sufficient to pay her debts and the costs of administration. She made a will by which she left \$700 to her daughter, Mary Ellen O'Hare, and the residue of her estate to her two sons, Rev. Joseph Francis McGee and Lawrence John McGee. The latter she also appointed her executor. The will was admitted to probate on the 15th of April, 1915, and letters testamentary were issued to Lawrence J. McGee the same day. Mary E. O'Hare filed a caveat to the will on the 17th of April, 1915, and Lawrence J. McGee, executor, filed an answer to it on April 30th, and since that time nothing has been done in relation to the caveat.

Demurrers were filed to the petition of the appellant by Lawrence J. McGee, individually and as trustee, by J. Royall Tippet, trustee, and by Mary Ellen O'Hare, on the grounds: (1) That the petition did not state a cause of action which gave the court jurisdiction; (2) because of the lack of necessary parties; (3) because the court was without jurisdiction in the premises; (4) because the jurisdiction of the matters and things alleged in the petition is exclusively within that of the orphans' court, and not within the circuit court of Baltimore City; and (5) for other reasons to be made known at the hearing. No opinion was filed, and hence we are not informed as to the reasons for the action of the lower court.

[1] In the brief of the appellees it is contended that as two of the properties were leasehold the jurisdiction of the orphans' court over them was exclusive, and as the other properties described in the mortgage and reported sold, after the payment of the mortgage debt and expenses, would leave in the hands of the trustee less than \$2,500, the orphans' court, under article 93, section 293, of the Code, had concurrent jurisdiction with courts of equity, and its jurisdiction should not be disturbed. But the language of that statute does not justify the contention made. In the first place, it only applies to the real estate of intestates, and hence is not applicable to this case; but beyond that the object of the statute is manifest. It was intended to give the orphans' courts jurisdiction of the real estate of intestates to the amount of \$2,500, but not to confer general equity powers on them beyond what was necessary for the sales specifically authorized. In order to give orphans' courts jurisdiction in the cases referred to in that section, the real estate must be appraised, and in section 295 provision is made for the appointment of the appraisers. The statute does not give them jurisdiction in a proceeding such as this, and the fact that the surplus is less than \$2,500 can make no possible difference.

[2] Then the mere fact that \$775 of the proceeds of sales were from leasehold properties could not affect the jurisdiction of the circuit court, which already had jurisdiction over the fund in the hands of the trustee. The petition alleges that there is not enough personal property to pay the debts and costs of administration—indeed, it alleges that Mrs. McGee had no estate, real or personal, other than the property covered by the two mortgages. If the whole of the \$775 was applied, it would not be much more than half of the petitioner's claim. There could be no valid reason for subjecting the fund, or such part of it as might be held to be personalty, to the commissions of the executor and other expenses of administration, and there is no statute or decision in this state which requires that to be done in a case of this kind. The circuit court had jurisdiction over the proceedings to foreclose the mortgage, and it must not only make distribution to the mortgage debt and expenses, but it must see that the excess is properly disposed of. If, then, a creditor goes into court, and makes such allegations as are necessary to sustain a creditors' bill, and sustains them by the necessary proof, there could be no reason for sending him to the orphans' court, especially if there are no funds there.

[3, 4] There is no ground for contending, as the appellees do, that, because the appellant filed a copy of his decree against the executor of the estate of Bridget McGee in the orphans' court, he is estopped from thereafter going into a court of equity. It may be well to say in passing that, although absolute judgments at law obtained by a creditor of a deceased person against his executor or administrator generally amount to an admission of assets, and could not, prior to chapter 14 of Acts of 1916, be resisted by him on the ground of a deficiency of assets, yet as between the creditors and the heirs at law, in a proceeding to subject the real estate to the payment of his debt, such a judgment was not conclusive, and a creditor must show a deficiency of assets. *Gaither v. Welch*, 3 Gill & J. 259; *Boteler v. Beall*, 7 Gill & J. 389, 397. Creditors of deceased persons have the right to have their claims passed in the orphans' court, but that does not prevent them from proceeding in a court of equity, by way of a creditors' bill in case of an insufficiency of assets. Section 218 of article 16 in terms provides that if a person leaves real estate, but does not leave personal estate sufficient to pay his debts and costs of administration, a court of equity may decree a sale of so much thereof as may be necessary to pay his debts. Moreover, section 219 of that article expressly provides that the certificate of the register of wills to the proof of such claims or distribution thereto in the orphans' court shall be prima facie evidence of the claims, and sufficient to entitle them to distribution out of the pro-

ceeds of the real estate of the deceased debtor, unless excepted to by some person interested in the estate. There is, therefore, not only no estoppel, but the statute expressly provides for filing the certificate of the register of wills, which is made prima facie evidence.

The case of *Macgill v. Hyatt*, 80 Md. 253, 30 Atl. 710, relied on by the appellees, was a wholly different case. There the bill alleged that the debtor had real and personal estate of great value, and it did not allege that the personal estate was insufficient to pay the debts. It was said by the court that it was not shown that sufficient personal property to pay all the debts had not come into the hands of the executor, and, if it had, the remedy of the creditor was against the executor's bond. Nor does the case of *Wright v. Williams*, 93 Md. 66, 48 Atl. 397, also relied on by the appellees, in any way prevent the appellant from coming into a court of equity. Of course, when two courts have concurrent jurisdiction, the one first taking jurisdiction retains it, but there are no such conditions here.

We did not suppose, until we heard this case, that the right of a creditor to proceed against a surplus in the hands of a trustee, in a mortgage foreclosure proceeding, would now be questioned in this state, if the necessary allegations are made, and the necessary parties are before the court. The question is so thoroughly settled that we will only refer to some of the authorities, without deeming it necessary to quote from them. *Miller's Equity Proc.* 458, § 377; *Fenwick v. Laughlin*, 1 Bland, 474; *Gaither et al. v. Welch*, 3 Gill & J. 259, 263; *Griffith v. Parks*, 32 Md. 1, and many other cases, might be cited. In *Griffith v. Parks*, Judge Alvey, on page 5 of 32 Md., in showing that it was not necessary to proceed by original bill, but that a petition was sufficient in the case before him, relied on the practice in cases of this kind, as established by *Fenwick v. Laughlin*, and *Gaither v. Welch*.

[5] It is also objected that there is a lack of necessary parties—the appellees claiming that the executor of Mrs. McGee was not made a party. The petition expressly prayed for a writ of subpoena against him and that the parties to the case be required to show cause why the relief sought should not be granted. There seems to be some confusion as to whether the personal representative should be made a party in such a proceeding as this, but in *David v. Grahame*, 2 Har. & G. 84, *Tyler v. Bowie*, 4 Har. & J. 333, and *Baltimore v. Chase*, 2 Gill & J. on page 381, our predecessors held that in a proceeding for the sale of real estate of a person dying without leaving personal property sufficient to pay his debts it was necessary to make the executor or administrator a party. There were original bills in those cases to sell the real estate, under what is now section 218 of

article 16 of the Code, but the reasoning of Chief Judge Buchanan in *David v. Grahame* would apply with equal force to a proceeding by petition of this kind. In *Macgill v. Hyatt*, on page 259 of 80 Md., on page 712 of 30 Atl., where one ground of the decision was that the failure to make the personal representative a party to the bill made it demurrable, it was said that "It is conceded this is generally so where, as here, a creditors' bill is filed for the sale of a deceased debtor's real and personal estate," and Judge Fowler distinguished *Hammond v. Hammond*, 2 Bland, 347, saying that in that case it appeared that the debtor left no personal property whatever, or so little that no one had taken out letters of administration, and the court declined to sanction the rule of practice sought to be established by *Tessler v. Wyse*, 3 Bland, 57. It was held in *Macgill v. Hyatt* that the personal representative was a proper party; but, as we have seen, personalty as well as real estate was involved there.

In *Jones v. Jones*, 1 Bland, 443, 18 Am. Dec. 327, cited by the appellees, the fund was in the sheriff's hands arising from an execution sale of real estate; but it was held to have been converted into personalty, and hence the administrator was a necessary party, which differs from a sale of real estate under a mortgage, as decided in *Fenwick v. Laughlin*, where the surplus was held to be real estate, and that case has since been followed. In this case, where some leasehold and some real estate were sold, there were both personalty and realty in the surplus, and hence it would seem to come within *Macgill v. Hyatt*. But, independent of that, we think the correct practice requires the personal representative to be made a party, unless it clearly appears that there was no personalty, or there was so little as not to justify taking out letters of administration, or there was some such valid reason for not requiring it.

Applying the rule, then, to this case, what is the result? Lawrence J. McGee is the executor of the will, and the demurrer filed by him begins, "Lawrence J. McGee, individually, and Lawrence J. McGee, trustee, demurs to the amended petition," etc. It is signed, "J. Royall Tippet, Attorney for Lawrence J. McGee, Individually, and Lawrence J. McGee, Executor." While it is irregularly drawn, it may well be presumed that the demurrer was intended to have been filed by him as executor, as his attorney so signed it, and as trustee he has no interest in the surplus. The only possible interest he could have in that capacity would be to see that his mortgage was allowed in full; but his right to have that done was not questioned, and the petition only seeks to affect the surplus after the mortgage is paid.

[6-8] As the question of the correct practice was raised, we have perhaps gone more

at length into that than the exigencies of this case demanded. We are simply passing on demurrers, and, as we have seen, the petition expressly asks for a subpoena against Lawrence J. McGee, as executor. How, then, can the demurrers reach the question? There is nothing in the petition to show that Lawrence J. McGee, executor, was not made a party—on the contrary, it shows that he was. If he was not summoned as such, or did not voluntarily appear, if objection to the petitioner's proceeding further until the executor is regularly brought into court is desired to be made, it would have to be done in some way other than by demurrer to the petition, as that does not disclose any defect in that respect. But, to avoid any misapprehension of our position on the subject, we will add that, as this executor is undoubtedly in court in his individual capacity and also as trustee, his failure to appear as executor, even if he has not been formally summoned as such, cannot delay or affect the proceedings. If there is anything for the executor to do, especially as to whether the personal estate is sufficient to pay the debts of the deceased, it is his duty to appear, if he has not already done so, as he has knowledge of the proceedings. He, J. Royall Tippet, trustee, and Mary Ellen O'Hare, have all appeared and demurred, and they have made themselves parties, even if there was any defect in the prayer of the petition or the proceedings seeking to have them brought before the court.

It is also objected that the personal representative of Rev. Joseph Francis McGee was not made a party; but, if the petition correctly states the facts, as we must assume, in considering the demurrers, it does, he died before his mother. If his mother's will should be set aside, in the caveat proceeding, then he did not inherit anything, and, if the will is sustained, the devise and bequest to him do not lapse, but under section 326 of article 93 they "shall have the same effect and operation in law to transfer the right, estate and interest in the property mentioned in such devise or bequest, as if such devisee or legatee had survived the testator."

[9] In the leading case of *Glenn v. Belt*, 7 Gill & J. 362, that provision was construed, and questions were settled then that have since been recognized as the established law of this state. It was distinctly held that the power of devising was not enlarged or affected by that statute—that a legatee who died before the testator could not bequeath what he would have received under the testator's will, if he had survived him. The reason for that is that a testator cannot devise or bequeath what he has no interest in at the time of his death, when his will takes effect. Judge Archer began his opinion in that case by saying:

"Madam Volumbrum's will could only operate to pass that which by law was the subject of

a devise or bequest. The expectancy of a benefit to be derived from the will of Clery was but a naked possibility, and could not, under any authority cited, be the subject of a testament. Indeed, it has been conceded that such is the law, unless some alteration has been effected in it, by Acts 1810, c. 34."

That act is the original one upon which section 326 is founded. Madam Volumbrum was a legatee under Mr. Clery's will, and she died before he did. The court in effect said that she had nothing to will, when she died, as coming through Clery's will.

[10] The next question then was, Who took the legacy which was saved from lapsing by the act? It was held that it went directly to those who would have been entitled to it, if the legatee had survived the testator—that it did not pass as assets to the executor or administrator of the deceased legatee, but the transfer was to persons in esse, entitled to the distribution of the legatee's estate. It is not liable for the legatee's debts, and goes directly to the next of kin, and not through the medium of an executor or administrator of a deceased legatee, if personalty, and, if it is real estate, it goes directly to the heirs of the devisee, subject to the dower of a husband or wife, as decided in *Vogel v. Turnt*, 110 Md. 192, 72 Atl. 661. See, also, *Wallace v. Du Bois*, 65 Md. 153, 4 Atl. 402; *Halsey v. Convention of Prot. Epis. Ch.*, 75 Md. 275, 23 Atl. 781; *Garrison v. Hill*, 81 Md. 206, 31 Atl. 794.

[11] So, although the petition refers to the will of Rev. Jos. F. McGee as he died before his mother, he could not have devised or bequeathed any property left in her will to him, but it went to his heirs or next of kin, as the case may be. If his will had taken effect on the property sold under the mortgage, which sales produced the surplus in controversy, then the proceeding would have been defective for not filing a copy of his will; but, as he received nothing under the will of his mother which he could will, it was not necessary to file his will, and as his administrator c. t. a. does not take any of this fund, and has no interest in any of the properties, as far as appears in the record, there is no necessity for making his administrator c. t. a. a party. There is nothing to show that any one but Mrs. O'Hare and Lawrence J. McGee have any interest in what would have gone to the Rev. Jos. F. McGee, if he had survived his mother, and, as they are parties, are actually in court demurring to the petition, there is nothing in the petition to show a lack of necessary parties. If any other person has an interest, that can be shown in the answer; but the petition does not disclose such interest, and hence it is not demurrable on that account.

The demurrers should have been overruled, and the parties required to answer. It follows that the decrees sustaining the demur-

ers and dismissing the petition must be reversed.

Decrees reversed, and case remanded for further proceedings; the costs in this court to be paid by the appellees, and those below to abide the final result.

(131 Md. 175)

OWEN et al., County Com'rs, v. WILMER.
(No. 38.)

(Court of Appeals of Maryland. June 27, 1917.)

1. APPEAL AND ERROR §32—JUDGMENTS APPEALABLE—JUDGMENT ON APPEAL FROM JUSTICE OF THE PEACE.

No appeal lies to the Court of Appeals from a judgment recovered on an appeal from a justice of the peace, if the justice rendering the judgment and the circuit court affirming it had jurisdiction.

2. JUSTICES OF THE PEACE §57(1)—DISQUALIFICATION—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 7, providing that no judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within prescribed degrees, or where he shall have been of counsel in the case, refers only to judges of courts of record or courts of law, and not to a justice of the peace, who is not considered a court of law or of record.

3. JUSTICES OF THE PEACE §57(1)—DISQUALIFICATION—INTEREST AS STOCKHOLDER.

There being no constitutional or statutory provision disqualifying a justice of the peace from entertaining an action by a corporation in which he is a stockholder, no such disqualification exists.

4. DISTRICT AND PROSECUTING ATTORNEYS §3(5)—ASSISTANTS—COMPENSATION—AUTHORITY OF COURT.

Under Code Pub. Civ. Laws, art. 26, § 7, authorizing circuit courts to appoint assistant counsel for the state to aid in the trial of criminal or other state cases when the public interest requires it, and section 8, providing that county commissioners shall levy and pay for the services so rendered, providing that the amount shall not exceed \$100, the circuit court has authority to fix and define the compensation of counsel so appointed within the statutory limits.

5. JUDGES §49(2) — DISQUALIFICATION — PRIOR DECISION BY JUDGE.

Judges of a circuit court, appointing assistant counsel for the state in a criminal proceeding and certifying to the county commissioners that the fee claimed by such counsel is reasonable and should be paid, are not thereby disqualified, under Const. art. 4, § 7, to hear an appeal from a justice of the peace in an action against the county commissioners for the fee so allowed, as the interest which disqualifies under the constitutional provision mentioned is an interest whereby the judge will gain or lose something the value of which may be estimated, and a judge is not disqualified merely because he has expressed his opinion as to the case.

6. JUSTICES OF THE PEACE §167(2)—APPEAL—CHANGE OF VENUE.

The constitutional provision pertaining to the removal of causes gives circuit courts no power to remove causes pending before them on appeal from a justice of the peace.

Appeal from Circuit Court, Charles County; John P. Briscoe, B. Harris Camaller, and Fillmore Beall, Judges.

Action by L. Allison Wilmer, to the use of

the Eastern Shore Trust Company, against John W. Owen and others, County Commissioners for Charles County. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Adrian Posey and F. Stone Posey, both of La Plata, for appellants. L. A. Wilmer, of Leonardtown, and W. Mitchell Digges, of La Plata, for appellee.

CONSTABLE, J. [1] This appeal was taken from a judgment recovered upon an appeal to a circuit court, from a judgment rendered by a justice of the peace. The only question involved before us, of course, is a jurisdictional one, since it is an absolutely settled question in this state, that no appeal lies to this court from a judgment recovered on an appeal from a justice of the peace, if the justice rendering the judgment, and the circuit court in affirming it, had jurisdiction of the case. *Cole v. Hynes*, 46 Md. 181; *Burrell v. Lamm*, 67 Md. 580, 11 Atl. 56. The circuit court for Charles county, acting under the authority conferred by article 26, § 7, appointed the legal plaintiff assistant counsel for the state in a criminal proceeding. At the conclusion of the case the judges certified to the county commissioners that the plaintiff had been so appointed by them, and had rendered the services for which he claimed compensation, and further certified that the fee claimed, of \$100, was a reasonable one, and should be paid. The plaintiff thereupon assigned the claim to the equitable plaintiff, which upon the county commissioners refusing to pay, in full, brought suit for the balance before a justice of the peace. Judgment was given for the plaintiff, and the defendant appealed to the circuit court.

[2] Two pleas were filed by the appellant, seeking to raise the question of jurisdiction; but demurrers interposed to them were sustained by the court. By the first, it was alleged that the justice of the peace by whom the judgment was rendered was a stockholder of the appellee corporation, and was therefore disqualified to hear the case. The contention is that the disqualification was brought about through the provision of section 7 article 4 of the Constitution, which reads as follows:

"No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as now are, or may hereafter be prescribed by law, or where he shall have been of counsel in the case."

We cannot accede to this proposition. The disqualification provided for by the Constitution refers only to judges of courts of record or courts of law. The office of a justice of the peace has never been considered a court of law or a court of record. In *Welkel v. Cate*, 58 Md. 105, this court said:

"At common law, justices of the peace were merely conservators or keepers of the peace, and although the Legislature in this state has conferred on them a limited jurisdiction in civil and criminal cases, the office itself has never been considered a court of law. This, we think, is apparent from Constitution, art. 4, § 1, by which it plainly appears, that a court of law, within the meaning of the Constitution, is a court of record."

[3] There being no constitutional provision nor statute touching the disqualification of a justice of the peace on the grounds here alleged, it follows that the justice in this case had jurisdiction to hear the case.

[4] A very similar case, on the facts, is that of *Worcester County v. Melvin*, 89 Md. 37, 42 Atl. 910, in which Chief Judge McSherry, in delivering the opinion of the court, announced, very instructively, the meaning and effect of sections 7 and 8 of article 26 of the Code, taken in connection with section 266 of article 24 of the Local Code applicable to Worcester county, by which it was provided that no compensation should be allowed an attorney rendering services under the terms of sections 7 and 8, art. 26, of the General Code, except upon the order of the court, certifying the nature of the services and the amount to be paid for such services. It was held that this placed upon the commissioners the imperative duty of levying for and paying the amount so certified. Although there is no statute applicable to Charles county similar to that in force in Worcester county, forbidding the compensation to be paid unless the court fixes the amount, yet the reasoning used in the case cited is equally pertinent to this case as to that. The court said:

"This legislation gives to the court ample authority not only to assign counsel to defend an accused, but to fix and define, not exceeding a designated maximum sum, the amount of compensation to be paid by the county commissioners for such services. The General Assembly has seen fit to repose in the courts this authority. It is an authority immediately connected with the administration of justice and could not well be lodged anywhere else without seriously interfering with the very object the legislation was designed to accomplish. If to the county commissioners were committed the power to determine the amount of compensation to be paid in such cases, or if, as is contended for in this proceeding, they were clothed with a discretion to allow or disallow altogether, the sum claimed, it would embarrass the courts most seriously in the trial of criminal cases, because courts would then be reluctant, if not wholly unwilling, to impose upon a member of the bar the labor and responsibility of defending an accused, inasmuch as there would then be no certainty that the labor when performed, though performed in obedience to the court's instructions, would be adequately paid for, or even paid for at all."

Although in several of the counties there is no prohibition upon the commissioners, like that in Worcester county, yet the practice prevails in many of them of having the courts certify to the appointment, services, and amount to be paid, thus following the interpretation placed upon sections 7 and 8 of article 26 by this court.

[5] The question, however, raised in the present case under the second plea, is whether, under the Constitution, the action of the court in certifying, as above stated, resulted in their disqualification to sit in the case. And this, of course, must be determined upon whether their action is to be held as bringing them within the class embraced within the words "in any case wherein he may be interested." The contention made by the appellant is that the disqualification is caused by a sentimental, as well as by a pecuniary, interest; in other words, by pride of opinion. Disqualification by Constitutions and statutes is imposed, not only through the fear that judges might act dishonestly or with partiality, but in order that courts might be free from all suspicion of partiality, and thus promote the feeling that all litigants may feel confident, as they have a right to so feel, that their interests are in the hands of fearless, fair, and impartial judges. In some of the states prejudice and bias have been made, by statute, the basis for disqualification; but in those jurisdictions the bias and prejudice refer, not to the subject-matter of the litigation, but only to the mental attitude of the judge towards the parties. In this case the judges, following their practice, merely expressed for the guidance of the commissioners that, in their opinion, the charge was reasonable and proper and should be allowed. While this was an expression of their opinion on both the law and fact, yet, in our opinion, it could not operate so as to amount to a disqualification because of "interest" to sit in the case that afterwards arose.

The Constitution or statutes of most, if not all, of the different states contain a general provision to the effect that a judge shall not act as such in a cause in which he is interested; but the overwhelming weight of authority in construing the meaning that is to be attached to the provision is that, to bring about a disqualification, the interest must be a pecuniary or a personal right or privilege in some way dependent upon the result of the case, as contradistinguished from every bias, partiality, or prejudice which the judge may entertain with reference to the case. Of course, the cardinal rule in construing all written instruments, where there is any doubt apparent as to the meaning of the language used, is to search for the intention of the makers, and, when that is discovered, that intention must govern. Reading the language of section 7 of article 4, it is found that it enumerates the only instances in which an interest, not necessarily pecuniary, will disqualify a judge. These are where he has been of counsel in the case, or where either of the parties may be connected with him by affinity or consanguinity within a certain degree. By naming those special cases where the

judge's feelings may be interested, though he may not gain or lose by the event of the suit, the law doubtless intended to limit all other cases of interest to such as should be of a pecuniary nature. The judge must, by the judgment in the case, gain or lose something, the value of which may be estimated; and we cannot ingraft upon our Constitution that a judge is disqualified because he has expressed his opinion as to the case. *McInnes v. Wallace* (Tex. Civ. App.) 44 S. W. 537; *King & Davidson v. Sapp*, 66 Tex. 519, 2 S. W. 573; *Ex parte State Bar Association*, 92 Ala. 113, 8 South. 763; *Foreman v. Marianna*, 43 Ark. 324; *Sauls v. Freeman*, 24 Fla. 209, 4 South. 525. 12 Am. St. Rep. 190; *Foreman v. Hunter*, 59 Iowa, 550, 13 N. W. 659; *Sjoberg v. Nordin*, 26 Minn. 501, 5 N. W. 677; *Conklin v. Squire*, 4 Ohio Dec. 493; *Hungerford v. Cushlon*, 2 Wis. 397; *Inhabitants of Northampton v. Smith*, 11 Metc. (Mass.) 395.

[6] The appellants, after the overruling of their demurrers, filed a suggestion for the removal of the case to some other court for trial. It is settled that the provisions of the Constitution pertaining to the removal of causes gave the circuit courts no power to remove causes pending before them on appeal. *Hoshall v. Hoffacker*, 11 Md. 362; *Cooke v. Cooke*, 41 Md. 368; *Geekie v. Harbour*, 52 Md. 460. Being of the opinion, therefore, that neither the justice of the peace nor the judges were disqualified from sitting in the case, it follows that they had jurisdiction, and this appeal must be dismissed.

Appeal dismissed; the appellants to pay the costs.

(131 Md. 182)

SCHLENS v. POE et al. POE et al. v.
SCHLENS. VILLAGE OF LYONS
et al. v. SAME. (Nos. 39-41.)

(Court of Appeals of Maryland. June 27, 1917.)

1. INSURANCE — 679 — REINSURANCE CONTRACT—CONSTRUCTION.

The U. Co. and the M. Co. entered into a contract for a five-year period, whereby the M. Co. was to participate in one-third of the business of the U. Co., share one-third of the profits, and bear one-third expenses. The contract provided for an account to be rendered by the U. Co. to the M. Co. within two months after the end of each year. The account was to be examined within one month after its receipt, and the amount due from either party paid immediately. There was also a provision for an account stated at the close of the fifth or last year. *Held*, that accounts as between the companies could be stated upon an annual basis, which would in effect be final, and that such accounts were not bound to remain open until the end of the five-year period.

2. RECEIVERS — 189—ACTION BY RECEIVER—EXPENSES OF LITIGATION.

The litigation between the receivers of the U. Co. and the M. Co. involved the right of the receivers to recover under a contract for an entire period of five years. So far as recovery

was concerned, it was necessary to sustain the contract as a whole. One S. was assignee of all rights under the first two years of the contract, and was interested in sustaining the entire contract. *Held*, that the costs and expenses incurred in prosecuting the litigation against the M. Co. to sustain the entire contract should be borne by S. in proportion to the amount of his recovery.

Appeals from Circuit Court of Baltimore City; Chas. W. Heuveler, Judge.

Consolidated actions by Gustav A. Schlens against Edwin W. Poe and others, receivers, and by Edwin W. Poe and others, receivers, and the Village of Lyons and others, against Gustav A. Schlens. From a decree of the Circuit Court, three appeals were taken here. Affirmed in part, and reversed in part, and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Alfred S. Niles, of Baltimore (Carlyle Barton and Chester F. Morrow, both of Baltimore, and Morris Wolf, of Philadelphia, Pa., on the brief), for Schlens. Edgar Allan Poe and J. Kemp Bartlett, both of Baltimore, for receivers of United Surety Co. and Village of Lyons and others.

STOCKBRIDGE, J. The present appeal brings to the attention of this court for the fifth time the contract entered into some 12 years ago between the United Surety Company of the City of Baltimore and the Munich Insurance Company. The previous cases will be found reported, respectively, in *Munich Reinsurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579, *Receivers of United Surety Co. v. Munich Reinsurance Co.*, 121 Md. 479, 88 Atl. 271, *Poe v. Munich Reinsurance Co.*, 126 Md. 520, 95 Atl. 164, and *Schlens v. Poe*, 128 Md. 352, 97 Atl. 649. The main facts in this litigation are fully set out in 121 Md. 479, 88 Atl. 271, and 128 Md. 352, 97 Atl. 649, and it would serve no useful purpose to repeat them again. It should be stated in limine that no new question of law is now presented, or one which has not already been considered and passed upon. The only questions upon which any argument is possible arise out of the report of the auditor, made after and for the purpose of carrying into effect the decision of this court in 128 Md. 352, 97 Atl. 649.

The real points now attempted to be called in question are three in number, and are succinctly stated in the brief filed on behalf of Mr. Schlens as follows:

"(1) What portion of the amount received by the receivers September 30, 1913, in payment of their claim against the Munich Reinsurance Company, represented the interest of Mr. Schlens therein? (2) What amount of the expenses incurred in recovering this amount is properly chargeable to Mr. Schlens? (3) Is the Lynch item a proper credit to be allowed the receivers?"

Upon the first of these propositions there is no difficulty whatever. The principles

which guided the auditor in his action were those expressly announced by this court, speaking through Judge Urner, in 121 Md. 479, 88 Atl. 271. Much time and effort was given by the counsel representing the receivers and the Bank of Lyons in an endeavor to induce this court to alter or modify the conclusion heretofore reached, and on a careful review of the entire litigation no sufficient reason appears for so doing.

[1] The theory upon which the counsel for the receivers apparently proceed is that no account as between the two companies could be stated upon an annual basis which would in effect be final, but that such accounts were bound to remain open until the end of the entire five years of the contract. The complete answer to this is to be found in the eighth and ninth articles of the contract, which provided for the statement of accounts within two months after the close of each year of the business of the preceding year, and the payment by one company or the other of the balance as shown to be due by such accounts. The account to be stated at the close of the fifth or last year would inevitably, under the provisions of the contract, differ in certain respects from the annual accounts of the preceding year, but that was provided for in the agreement, as was distinctly recognized in the decision in 121 Md. 479, 88 Atl. 271.

[2] The indebtedness of the Munich Company to the United Surety Company for the years 1906 and 1907 was an issue directly involved and determined in 121 Md. 479, 88 Atl. 271, and that Mr. Schlens, as assignee of the interest of the Messrs. Knabe, was entitled thereto for the two years named, was fully passed upon in 128 Md. 352, 97 Atl. 649. This is, of course, subject to any proper deduction for payments made for or on account of the interest of the Messrs. Knabe, acquired under their contract with the United Surety Company, and also a proper proportion of the expenses incurred in recovering the indebtedness of the Munich Company.

The last requires the determination of the second question above stated. Two theories have been suggested for the ascertainment of this proposition—one, that Mr. Schlens should share in the expenses in proportion to his recovery; the other, that Mr. Schlens should be required to pay but two-fifths of the amount of those expenses, by reason of the fact that his interest related only to two years out of the five for which the contract was to run. Neither of these will result in exact justice to all the parties interested, but an approximation of it is all that can be made.

The litigation between the receivers of the United Company and the Munich Company involved the right of the receivers to recover for an entire period of five years. So far as the recovery was concerned, it was indivisible; that is to say, the contract could not

have been sustained as to two years and held void as to the other three years, and while Mr. Schlens was entitled to a recovery only for two years of the time of the contract, he was nevertheless vitally interested in sustaining the entire contract, as otherwise there would have been nothing to come to him as the result of the litigation. It would be inequitable, therefore, to hold that Mr. Schlens was liable only for two-fifths of the cost and expenses incurred in the prosecution of the litigation against the Munich Company. In the brief filed by Mr. Schlens in the case reported in 128 Md. 352, 97 Atl. 649, it was said that he, through his counsel, was willing to agree "to share the expenses in proportion to his recovery." That proffer is now sought to be withdrawn, and it probably had no binding or legal effect upon Mr. Schlens. It is also to be noted that the expression in the prior case proposing the sharing of the expense is not altogether free from ambiguity.

What we have to deal with upon this question is not so much a question of legal right, as one of doing justice and equity as between the parties, and in the view of this court, unless there are some special circumstances which should control the court, the costs and expenses should equitably be borne by Mr. Schlens and the receivers, in the same proportion that the amount of the interest accruing to Mr. Schlens bears to the amount which will pass to the receivers of the total recovery from the Munich Company. The costs and expenses were of two characters: (1) The counsel fees and costs incurred in the contention to sustain the entire contract; and (2) the counsel fees and fees paid the Audit Company of New York and the American Audit Company, for auditing the accounts for the five years.

It is urged on behalf of Mr. Schlens that this second element of expense stands in a somewhat different position from the first. The endeavor to separate this portion of the expense cannot be successfully maintained, in view of the fact that the employment of the auditing companies was agreed to by the parties on the 19th of November, 1910, by which agreement the auditing companies were to state accounts in annual periods, not for certain specified or designated years less than the five years embraced in the original contract between the United Surety Company and the Munich Company. Mr. Schlens was not a party to this agreement. That agreement was between the representatives of the two insurance companies; but Mr. Schlens now depends for the ascertainment of the amount of his claim upon the accounts so stated, and it would be inequitable for him to claim an advantage resulting from the work of the auditing companies, and be relieved from the burden thereby entailed. This court feels constrained to hold, therefore, that Mr. Schlens should share in the

expenses connected with the Munich claim in proportion to the amount of his recovery.

In what is known as the Lynch claim, the court is asked to treat as a set-off, or to charge back against Mr. Schlens, the sum of \$1,000, being the proceeds of certain shares of stock in an apartment house company in Washington, which stock had, at the time when the United Surety Company was a going concern, been turned over to it as security for a claim which it had against a man by the name of Lynch, and which stock was subsequently sold and netted the sum of \$950. In dealing with this claim the auditor reported that testimony in addition to that produced before him was proposed to be given before the court, and that without such additional testimony he did not feel that he could pass on this item intelligently. By the decree of the court the \$1,000, known as the Lynch claim, was determined to be a proper credit to be allowed to the receivers. With this conclusion this court is unable to agree. It was not until long after the proceedings in this matter had been under way that any claim whatever was set up on behalf of the receivers for the allowance of this claim as a charge against the interest of Mr. Schlens. The evidence and pleadings both tend to show that the receivers, with full knowledge of the facts, at first made no claim whatever upon this sum, and that claim was first set up when the present counsel for the receivers came into the case. How far it entered into the consideration of the court in the case reported in 128 Md. 352, 97 Atl. 649, it is impossible to say, but the opinion in that case concludes with these words:

"All the set-offs, except the item of \$1,981.16, with interest, will be disallowed."

But it is not necessary to rest the conclusion upon this branch of the case either upon the theory of estoppel or of res adjudicata. The indebtedness of Lynch was for the sum of \$2,247.10. For this a note of \$3,475 was taken, together with 85 shares of the capital stock of the Blinney Apartment House Company. This collateral was among the assets which were sold by the surety company to Mr. Knabe. When the stock was sold, and the proceeds remitted from Washington to the receivers, they were immediately turned over by the receivers to the counsel for Mr. Schlens. At the time when this occurred the receivers had been in possession of the property for more than two years, but made no claim that this stock or any part of it properly belonged to them as against Mr. Schlens, the assignee of the Messrs. Knabe. Apparently the theory of the receivers or their counsel now is that the assignment of the stock was for the purpose of securing advances made subsequent to the assignment, but the whole evidence tends to discredit this theory, and accordingly this claim of the receivers and the Bank of Lyons will be disallowed.

The decree of the circuit court of Baltimore City, from which the three appeals were taken, and which have now been considered, will be affirmed in part, and reversed in part, and the case remanded, to the end that the said decree may be modified in accordance with the views above expressed.

Decree affirmed in part, and reversed in part, and case remanded; the costs to be paid by the receivers out of the funds in their hands.

(131 Md. 208)

HENDERSON et al. v. HENDERSON et al.
(No. 55.)

(Court of Appeals of Maryland. June 28, 1917.)

1. WILLS § 687(3) — CONSTRUCTION — “REMAINING.”

Testatrix created a trust in a portion of her estate in favor of her daughter, and a separate trust of the residue of the estate for the benefit of her two sons during their respective lives, and provided that “in case either of my sons mentioned in this article of my will shall depart this life, without leaving a child or children, or descendant or descendants thereof, living at the time of his death, or in case he should leave a child or children, or descendant or descendants thereof living, at the time of his death, and such child or children, and descendant or descendants shall all subsequently depart this life, under twenty-one years of age, and without issue living, at the time of his, her or their respective deaths, then in trust, that the one moiety or half of the estate or property in this article of my last will mentioned shall go to and become the property of my remaining son, and his heirs, executors, administrators and assigns forever.” The daughter is still living. One of the sons died without issue, and was predeceased by the other, who left a son now 25 years old. *Held*, that the word “remaining,” as used in the will, was synonymous with “surviving,” and not intended in the sense of “other,” and that therefore the will made no provision for the contingency which happened, and there was an intestacy as to the remainder in which the son last dying had an interest for life which became equally vested in the sister and nephew.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Remaining.]

2. WILLS § 448—CONSTRUCTION—AVOIDING INTESTACY.

While every presumption is to be made against intestacy where the will purports to dispose of the residue of the estate, yet such presumption does not change the clear effect of the language which the testatrix has chosen to employ.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

“To be officially reported.”

Suit between Virginia May Henderson and others and Catherine E. Henderson and others. From the decree entered, the former appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Raymond S. Williams and Arthur W. Machen, Jr., both of Baltimore (Slingluff & Slingluff and A. Dana Hodgson, all of Balti-

more, on the brief), for appellants. C. Morris Harrison, of Baltimore (Robert L. Gill, of Baltimore, on the brief), for appellees.

URNER, J. The will of Virginia C. Henderson, a resident of the city of Baltimore, who died in the year 1892, created a trust of a portion of her estate in favor of her daughter, Virginia M. Henderson, for life, and a separate trust of the residue of the estate for the equal benefit of her sons, Henry C. Henderson and George B. Henderson for their respective lives. It was provided that upon the death of the daughter the estate held in trust for her during her life should go to her issue living at the time of her death who might attain the age of 21 years, but if no such issue should survive, then the property should vest in her two brothers already named as tenants in common. There is a provision also that upon the death of either of the two sons the half of the residuary estate held in trust for his benefit should go to his issue who might reach the age of 21 years. The clause to be construed in this case then follows:

“But in case either of my sons mentioned in this article of my will shall depart this life, without leaving a child or children, or descendant or descendants thereof, living at the time of his death, or in case he should leave a child or children, or descendant or descendants thereof living, at the time of his death, and such child or children, and descendant or descendants shall all subsequently depart this life, under twenty-one years of age, and without issue living, at the time of his, her or their respective deaths, then in trust, that the one moiety or half of the estate or property in this article of my last will mentioned shall go to and become the property of my remaining son, and his heirs, executors, administrators and assigns forever.”

Virginia M. Henderson is still living. George B. Henderson died in the year 1902, leaving a son, George Stewart Henderson, who is now 25 years of age. Henry C. Henderson died in March, 1916, without issue, and the question to be determined relates to the proper disposition of the portion of the estate in which he had a life interest. It is claimed in its entirety by George Stewart Henderson, as the sole surviving issue of his deceased father, on the theory that it has passed to him upon his uncle's death without issue, in view of the provision of the will that in such a contingency the property should go to the “remaining son” of the testatrix, “and his heirs, executors, administrators and assigns forever.” This theory is opposed by the testatrix's daughter, Virginia M. Henderson, who asserts that, as her brother George B. Henderson was not living when the life estate of her brother Henry C. Henderson expired, the former did not answer to the description of the “remaining son” to whom, and his heirs, executors, administrators, and assigns, the estate in remainder was devised and bequeathed, and that consequently a condition of intestacy exists as to that portion of the estate, as a result of which it

has vested equally in herself and her nephew as the decedent's only next of kin and heirs at law.

[1] The decision of the question thus presented depends upon the effect to be given the word "remaining" in the clause we have quoted. The nephew's contention is that it was intended to be understood in the sense of "other"; while the aunt's theory is that it was used as the equivalent of "surviving." If the former interpretation is adopted, and the limitation is construed as being in effect to the "other" son upon the death of one without issue, it is assumed and urged that no contingency of survivorship prevented the vesting of the remainder in the other son prior to the period of his brother's death. But if the term "remaining" is interpreted as "surviving," then the vesting of the remainder in either son would depend upon his actually surviving the son who died without issue.

The will provides that in the event just indicated "then" the designated portion of the trust estate should "go to and become the property of" the "remaining son." This strongly suggests that the vesting was to be upon the basis of a status existing at the time when the contingency of the death of a son without issue occurred. The word "remaining" involves the idea of continuance in the same state or position. Century Dictionary; Webster's New International Dictionary. The son in whom the interest in remainder was intended to vest on the occurrence of the contingency mentioned was the son then "remaining." A son who had previously died could not answer to that description. The term evidently is synonymous with "surviving" in the sense in which it is here employed. This is the sense in which it has been understood by this court in other cases in which testamentary limitations have been construed. In *Turner v. Withers*, 23 Md. 41, the court said:

"We are of opinion that by the words 'remaining children' the testator intended those children who might remain alive at the death of the first devisee for life—surviving children. This is the natural and ordinary meaning of the words, and we find nothing in the will to warrant any other interpretation."

In that case the interests devised to the "remaining" children were for their lives, and this in itself was conclusive as to the intention that only surviving children should be entitled to such estates. But the definition there given of the term "remaining" is equally appropriate to the will now being construed. In *Wilson v. Bull*, 97 Md. 128, 54 Atl. 629, a devise of life estates to the testator's children was followed by a contingent limitation upon the death of one without issue to the testator's "surviving child or children." This was held to mean that, "whenever one of his children should die leaving no child or children surviving, then his remaining children or his surviving children should take the share of the child so dying."

If in this case the remainder had been limited to the surviving son of the testatrix, it clearly could not be held to have vested in a son who died before the period when the contingency was to be determined. The cases of *Wilson v. Bull*, supra, *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, and *Hill v. Safe Deposit Co.*, 101 Md. 60, 60 Atl. 446, 4 Ann. Cas. 577, are decisive of that question. No different effect can be given to the limitation to the "remaining" son in the present will, in view of the meaning of that term as generally understood and as judicially accepted.

In providing for the disposition of her residuary estate after the death of her two sons, the testatrix considered the contingencies of the death of either with or without issue then living. If either should die leaving issue any of whom should attain the age of 21 years, such surviving issue were to take the share of the deceased parent. On the other hand, if either of the sons should die without issue then living, or leaving issue who should not live to become 21 years of age, then the "remaining" son was to have the portion of his deceased brother. But the testatrix apparently did not consider the contingency, which has happened, of the death of one son without leaving issue and without being survived by the other son.

If we should interpret the term "remaining" as being synonymous with "other," and should hold that the remainder in controversy vested in the son who first died, such a result would have to be recognized regardless of the question as to whether the one first dying left issue who survived to the age specified. Upon such a theory of construction the remainder thus held to be vested in the predeceased son would be absolute, and would not be defeasible upon his death without leaving issue. But in the event of his death without issue his own original portion of the trust estate would devolve upon his brother, who had already died without surviving descendants. A contingency which would result in such an interchanging devolution of the estates in remainder was evidently not within the contemplation of the testatrix when she prepared her will.

The limitation in remainder to the remaining son "and his heirs, executors, administrators and assigns forever" would simply have had the effect of vesting an absolute estate in the surviving son upon the death of the other without issue, and it did not operate to establish a line of heirs in whom the remainder should vest, upon the theory of stirpital succession advanced in the argument. In *Wilson v. Bull*, supra, the limitation, upon the death of a child without issue, was to the "surviving child or children, his, her, or their heirs, executors, administrators and assigns absolutely." It was held that the issue of a deceased child were not entitled to share with the surviving children. The same conclusion had been reached in the construction

of a somewhat similar provision in *Anderson v. Brown*, *supra*. In the cases just referred to, as in the one now presented, there was no limitation over in the event of the death without issue of all the children in whom the preceding estates were vested.

[2] The fact that the view we are adopting will produce a state of partial intestacy is no reason for refusing to apply the terms of the will according to their plain and ordinary meaning. While every presumption is to be made against intestacy, where the will purports to dispose of the residue of the estate, yet such presumption does not change the clear effect of the language which the testatrix has chosen to employ. In the opinion in *Hill v. Safe Deposit Co.*, *supra*, Chief Judge McSherry said:

"It is true there is a presumption that a testator does not intend to die intestate, especially where there is a residuary clause in the will, and the courts will generally struggle against adopting an interpretation which would lead to that result; but, as already indicated in the citations from *Jarman*, and from the judgment in *Wake v. Varah*, *supra*, the consequences arising from an intestator are not considered sufficient to indicate that the word 'survivor' was designed by the testator to be synonymous with the word 'other.'"

According to our construction of the will before us, no provision has been made for the contingency of the death of one of the sons of the testatrix in the lifetime of the other, who subsequently died without issue, and hence there is an intestacy as to the remainder in the portion of the estate in which the son last dying had an interest for life, which consequently has become vested equally in the sister and nephew of the testatrix as her only heirs at law and next of kin.

The decree below, which was based upon a different theory of construction, will be reversed, and the cause remanded to the end that a decree may be entered giving effect to the conclusions we have stated.

Decree reversed, and cause remanded; the costs to be paid out of the trust estate.

(130 Md. 627)

LOEBLEIN et al. v. CLEMENTS. (No. 18.)
(Court of Appeals of Maryland. June 26, 1917.)
SALES § 178(4)—DELIVERY AND ACCEPTANCE
—ACTIONS FOR RECOVERY OF PURCHASE
PRICE—UNIFORM SALES ACT.

Where defendants purchased a granite monument, consisting of bases, die, and cap, erected same, attempted to remedy alleged defects, and failing to do so replaced the defective parts with others, all without the knowledge of the seller, they cannot resist payment of the purchase price; Uniform Sales Act (Code Pub. Civ. Laws, art. 83) § 69, providing that a buyer is deemed to have accepted the goods when he does any act in relation to them after delivery which is inconsistent with ownership by the seller.

Appeal from Circuit Court, Baltimore County; Allan McLane, Judge.

"To be officially reported."

Suit by Charles Clements against Joseph Loeblein and another, trading as Loeblein Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

G. Clem Graetzel, of Baltimore, for appellants. J. Purdon Wright, of Baltimore (Armstrong Thomas, of Baltimore, on the brief), for appellee.

URNER, J. The appellants, who are engaged in the marble and granite business in Baltimore county, ordered from the appellee, who is a granite dealer in Massachusetts, a monument of that material which the purchasers had contracted to erect in a local cemetery. The monument was to consist of a bottom base, second base, die, and cap, of specified dimensions, and the price for which it was to be furnished by the appellee was \$434. In due time the monument, in crated sections, was shipped by rail to the appellants, and was moved by them directly from the car to the cemetery without inspection. When the various parts had been placed in position, it was discovered that there were several spots on the cap and die which the appellants regarded as defects. Without waiting to give the appellee an opportunity to replace those sections of the monument, the appellants attempted to remove the supposed blemishes by cutting into the surface of the granite. Later on they removed the cap and die to their place of business, and substituted for them corresponding sections, obtained from another source, which they erected on the bases procured from the appellee. This suit has resulted from the refusal of the appellants to pay the purchase price for the monument, on the ground that it did not conform to the specifications. At the trial of the case a verdict was rendered by the jury in favor of the plaintiff for the amount claimed under the contract of sale. The judgment entered on the verdict is the basis of this appeal.

There are three bills of exception in the record, but they need not be separately discussed, because the plaintiff was clearly entitled to recover, and the defendants have therefore no legal occasion to complain of the rulings which contributed to that result. The testimony on both sides is in agreement as to the vital fact that the defendants treated and used the purchased property in the manner already described, which was wholly incompatible with the right of rejection now asserted. According to the Uniform Sales Act, the buyer is deemed to have accepted the goods when they "have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller." Code, art. 83, § 69. There could not well be a plainer case

than the present for the application of that principle. The testimony was in conflict as to whether the monument had any blemishes of which the defendants could rightfully complain, and as to whether they had notified the plaintiff of such an objection within five days after the delivery, as provided in the agreement of purchase; but there is no contradiction as to the defendants having changed the condition of the two upper sections of the monument, and as to their having permanently appropriated the two bases to the use for which they were intended. That such conduct necessarily involved an acceptance of the monument, under the indivisible order of purchase, is too plain for argument.

There was no evidence offered in support of a defense by way of recoupment of damages on account of the alleged defects. The whole purpose of the defendants' proof was to absolutely defeat a recovery, upon the theory that the monument delivered did not conform to the terms of the purchase. Such a defense could not properly have been given recognition in the rulings of the court below, in view of the undisputed and conclusive acts of acceptance shown by the record.

Judgment affirmed, with costs.

(131 Md. 47)

WILSON v. WILLIS et al. (No. 27.)

(Court of Appeals of Maryland. June 27, 1917.)

1. EQUITY §141(1) — PLEADING — LACHES — EXPLANATION OF DELAY.

A bill for accounting of rents and profits arising out of certain lands of plaintiff's deceased husband, brought 22 years after the death of her husband, is insufficient on demurrer, where no explanation or excuse is shown for the long delay.

2. DOWER §62 — ESTOPPEL IN PAIS.

A woman may estop herself from setting up a claim for dower by acts in pais.

3. DOWER §78 — ACTION FOR ACCOUNTING — PLEADING.

In accounting by widow for rents and profits for purpose of obtaining dower, it is not incumbent on plaintiff, alleging that defendants are unlawfully in receipt of the lands, to negative the possible ways in which defendants might be lawfully in receipt of the land; the issue as to whether the land had been conveyed to defendants, or whether plaintiff had by deed or contract released her claim of dower, being matter of defense.

Appeal from Circuit Court, Talbot County, in Equity; Wm. H. Adkins, Judge.

Bill for accounting by Mary E. S. Wilson against J. McKenny Willis and another. From an order sustaining a demurrer to the bill, plaintiff appeals. Affirmed and remanded, with leave to amend.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

G. L. Pendleton, of Baltimore, for appellant. Joseph B. Seth and Wm. Mason Shehan, both of Easton (Seth & Shehan, of Easton, on the brief), for appellees.

STOCKBRIDGE, J. This case brings up for review the correctness of an order of the circuit court for Talbot county in sustaining a demurrer to a bill of complaint filed for an accounting of rents and profits arising out of certain lands of the plaintiff's deceased husband. The allegations of the bill are exceedingly meager. They set out the conveyance of a tract of land to William G. G. Wilson on the 17th of August, 1854, the marriage of the plaintiff and Dr. Wilson 19 years later, in 1873, Dr. Wilson's death 21 years after, in 1894, and that the plaintiff has demanded, for the purpose of obtaining her dower, an accounting from the defendants of rents and profits received by them, and been refused. The plaintiff then claims \$48,000, with interest, and prays for an accounting.

[1] There is no statement in the bill of the time when a demand was made, but the bill was filed in December, 1916, and it would seem probable that the demand had not been made at a much earlier date. Apparently, therefore, the first claim that the plaintiff made to be entitled to dower was 22 years after the death of her husband. This long lapse of time is unusual and called for an explanation. It cannot be said from the allegations of the bill whether the doctrine of laches may or may not be successfully invoked, either to the whole or some part of the claim now made. So long a delay in asserting it entitled the defendants to an explanation showing that the plaintiff had not been derelict in asserting her rights to an extent that might operate to estop her at least to a portion of the claim made.

[2] That a woman may estop herself from setting up a claim for dower by acts in pais is settled by a long line of authorities. 9 R. C. L. p. 607, and cases there cited. The great preponderance of authority is to the effect, where there has been adverse possession, continued for the statutory period after the husband's death, it will defeat the widow's right of dower. See cases collected in 9 R. C. L. p. 612. Whether such is the rule in this state is open to question, in view of the language used in *Sellman v. Bowen*, 8 Gill & J. 50, 29 Am. Dec. 524. Nor is it necessary to now pass upon that question. But certainly some explanation is due to show why no demand was made until 22 years after Dr. Wilson's death.

[3] The bill further charges that the defendants "are now receiving the rents and profits from the said lands wrongfully, and have been receiving said rents and profits for a long time." It is urged by the counsel for the appellees that it was incumbent upon the plaintiff to go further, and negative a

number of possible ways in which the defendants might be lawfully in receipt of the rents. The position of the appellees in this respect is not as well taken as upon the ground already discussed. It is probably true that the bill should have set out a seisin in Dr. Wilson at the time of his marriage to the plaintiff, or at some time during the coverture of the plaintiff; but whether the land had been conveyed to the defendants, with or without the joinder of the plaintiff, or whether she had by deed or contract released her claim for dower, were matters of defense for the Messrs. Willis to set up.

In view of the lack of allegations in the bill of matters vital to the assertion of the plaintiff's claim, the order appealed from, which sustained the demurrer to the bill and gave the plaintiff leave to amend, was correct, and will be affirmed, and case remanded, with leave to amend the bill of complaint.

Order affirmed, with costs, and case remanded, with leave to amend.

(121 Md. 351)

LUDWIG et ux. v. BALTIMORE COUNTY COM'RS. (No. 72.)

(Court of Appeals of Maryland. June 28, 1917.)

1. APPEAL AND ERROR §41(1)—JUDGMENT OF CIRCUIT COURT OF BALTIMORE COUNTY—FINALITY.

Where the circuit court of Baltimore county acted under a special and exclusive jurisdiction in affirming an order of the county commissioners overruling exceptions to the award of examiners in the assessment of benefits and the award of damages in the construction of a sewerage system in a proceeding by the commissioners under Acts 1912, c. 157, § 132m, and Acts 1916, c. 197, not specifically giving a right of appeal to the Court of Appeals, its judgment was final and conclusive.

2. APPEAL AND ERROR §41(1)—JUDGMENT OF CIRCUIT COURT OF BALTIMORE COUNTY—APPEAL.

While the Court of Appeals cannot review the action of the circuit court of Baltimore county upon appeal where that court had jurisdiction, yet if the county commissioners from whose order an appeal was taken to the circuit court failed to comply with the statutes relating to sewer construction (Acts 1912, c. 157, § 132m, and Acts 1916, c. 197), an appeal would lie to the Court of Appeals from the circuit court's action.

3. COUNTIES §20½—SEWER CONSTRUCTION—VALIDITY OF STATUTE.

Acts 1912, c. 157, § 132m, authorizing the county commissioners of Baltimore county to adopt regulations relating to the installation of a sewerage system, and Acts 1916, c. 197, ratifying such regulations, were a valid exercise of legislative power.

4. COUNTIES §22—SEWER CONSTRUCTION—PROCEEDINGS BY COUNTY COMMISSIONERS—VALIDITY.

Proceedings of the county commissioners of Baltimore county in a proceeding to install a sewerage system strictly conforming to Acts 1912, c. 157, and Acts 1916, c. 197, were not avoided because the commissioners did not give notice by publishing the petition of the 50 taxable inhabitants, because the petition was not signed by 50 taxable inhabitants, and because of alleged error in excluding evidence to show

that part of such inhabitants were not taxable inhabitants.

Appeal from Circuit Court, Baltimore County; Allan McLane, Judge.

"To be officially reported."

Proceeding by the County Commissioners of Baltimore County against William F. Ludwig and Mary Ludwig, his wife. From an order of the circuit court of Baltimore county affirming an order of the County Commissioners overruling defendants' exceptions to the award of examiners and the assessment of benefits and the award of damages in the construction of a sewerage system and confirming the same and dismissing defendants' appeal from such order, the defendants appeal. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

A. P. Shanklin, of Towson, for appellants. T. Scott Offutt and Edward H. Burke, both of Towson, for appellee.

BRISCOE, J. On October 23, 1914, the state board of health of Maryland, by virtue of the power conferred upon it by chapter 810, Acts of 1914 of the General Assembly of Maryland, directed the county commissioners of Baltimore county to install and put in operation a sewerage system within what was designated as "the Arlington and vicinity district," as described on a plat attached to the order.

The Arlington area, it is stated, includes a part of Baltimore county lying north and adjacent to the city of Baltimore. Topographically it is divided into two drainage areas by a natural watershed. One area drains into Jones Falls, a stream taking its rise in the northern part of Baltimore county and flowing into and through the city of Baltimore. The other drains naturally into a small stream known as Peck's run, which is a tributary of Gwynn's Falls, which also flows through Baltimore city.

The act of 1914 (chapter 810) was before this court for consideration in *Welch v. Cogan*, 128 Md. 1, 94 Atl. 384, and the constitutionality of the act was upheld and sustained. The validity of a similar order, as in this case, was passed by the state board of health, and the power and authority of the county commissioners to execute and carry into effect such order were passed upon and fully recognized in *Welch v. Cogan*, supra; so these questions are no longer open for discussion in this court.

The proceedings for the purpose of providing funds for the construction and establishing of the sewerage system here in question were instituted and had under and by virtue of the power and authority vested in the county commissioners of Baltimore county by chapter 157 of the Acts of 1912, as

amended by chapter 804 of the Acts of 1914 and chapter 197 of the Acts of 1916. The method and machinery adopted and pursued by the county commissioners are set out in full in the record, and from an order of the county commissioners passed on the 22d day of November, 1916, overruling the defendants' exceptions to the award of the examiners in the assessment of benefits and the award of damages in the construction of the sewerage system, and confirming the same, an appeal was taken to the circuit court of Baltimore county. It appears from the record that the result of the proceedings in the circuit court of Baltimore county was as follows:

"The motion to quash was submitted to the court, and was overruled. Thereafter the appellant refused to proceed further with his case, and Mr. Offutt made a motion to dismiss the appeal and affirm the order of the county commissioners. The motion was granted; the court stating that it would pass an order affirming the order of the county commissioners."

From the judgment and order in the case, this appeal has been taken. A motion has been filed by the appellee to dismiss this appeal upon the ground: First, that the appellants have no right of appeal from the judgment of the circuit court of Baltimore county; and, second, because this court is without jurisdiction to review the rulings of the circuit court on the record in this case.

By reference to the various acts of assembly referred to herein it will be seen that no right of appeal is specially given by the statutes to the Court of Appeals from the circuit court of Baltimore county in the proceedings provided therein.

By chapter 157 of the Acts of 1912, § 132m, it is provided that:

"The commissioners shall have full power and authority to provide by regulations * * * for the taking of any private property or property rights of any kind which may reasonably be necessary for any of the purposes specified in this act, including the acquisition of property or property rights for the disposition of sewage: Provided, however, that such regulations shall contain appropriate provisions for notice to the owner or owners of such property or rights, an opportunity to be heard and the payment of compensation for property or property rights so taken, and also for an appeal by such owner to the circuit court for Baltimore county, with the right to a jury trial on issue of fact involved in such taking; and said commissioners shall also have full power and authority likewise to provide for ascertaining what amount of actual benefit will accrue to the owner or possessors of any ground or improvements within said county by reason of the construction or enlargement of such sewerage system or systems, and to provide for assessing and levying the cost of such work in whole or in part upon the owners of property so benefited to the extent of such benefit, and for collecting the same, such assessment to be made only after notice, with an opportunity to be heard and the right of appeal as aforesaid, and when so made, to be a lien upon the property of the person so assessed until paid, and to be recoverable as county taxes are."

By chapter 197 of the Acts of 1916, providing for the construction and establishment of sewers, sewerage systems, etc., in

Baltimore county, and providing the ways and means therefore, etc., an appeal is provided from the assessment or award made by the county commissioners to the circuit court for Baltimore county, and upon the trial of such appeal the court shall give such judgment in the matter as may be proper, and the assessment for benefits and the awards for damages to the extent the order is affirmed shall become final and shall be collected and shall become due and payable as provided by the statute.

[1] It is well-settled law in this state that if the circuit court in this case acted under a special and exclusive jurisdiction, its judgment is final and conclusive, unless the right of appeal is expressly given by statute.

In *Railroad Co. v. Condon*, 8 Gill & J. 448, it is said that there is no appeal expressly given to the Court of Appeals under the act of assembly investing the county courts with the power of hearing and setting aside inquisitions like the present. It is a special limited jurisdiction given to the county courts, from the decision of which no appeal lies to any other tribunal. *Savage Mfg. Co. v. Owings*, 3 Gill, 498; *Margraff v. Cunningham*, 57 Md. 585; *Wells v. Thomas*, 72 Md. 26, 19 Atl. 118; *Hull v. Southern Development Co.*, 89 Md. 11, 42 Atl. 943.

[2] While it is clear that this court could not review the rulings or action of the circuit court upon appeal if that court had jurisdiction yet it is also well settled that, if the county commissioners exceeded their jurisdiction conferred by the statute, and failed to comply with the essential requirements of the statute, an appeal lies to this court from the action of the circuit court. *Greenland v. County Com'rs*, 68 Md. 59, 11 Atl. 581; *Smith v. Goldsborough*, 80 Md. 49, 30 Atl. 574; *Cumberland R. R. Co. v. Martin*, 100 Md. 165, 59 Atl. 714; *Montgomery County v. Henderson*, 122 Md. 533, 89 Atl. 858.

This brings us to a closer examination of the statutes and the correctness of the procedure adopted and followed by the county commissioners thereunder.

The objections raised by the appellant upon the motion to quash, it will be seen, upon a careful examination of the record, appear to be more technical than real, and, even if they could be considered, would not have injured or prejudiced the rights of the appellant under the proceedings in this case. They are as follows:

(1) Because the county commissioners did not give notice by publishing the petition of the 50 taxable inhabitants as required by statute.

(2) Because the petition was not signed by 50 taxable inhabitants as the statute required.

(3) That the court below committed reversible error in refusing to admit evidence to show that of the 50 petitioners 11, when they signed it, were not taxable inhabitants.

[3] The rules and regulations adopted by the county commissioners of Baltimore county relating to the installation of the sewerage system were approved by the order of the state board of health. They were adopted by the county commissioners on August 6, 1914, and were passed under the authority of chapter 157 of the Acts of 1912, and these ordinances were subsequently ratified and sanctioned by chapter 197 of the Acts of 1916. These acts were a valid exercise of legislative power, and are free from any constitutional objection urged against them. *Welch v. Coglan*, 126 Md. 1, 94 Atl. 884, and cases there cited.

[4] The proceedings of the county commissioners were conducted in strict conformity with these statutes, and the essential requirements of the statutes were in substance fully complied with, and the irregularities complained of were not such as to avoid or to justify the court in striking down the proceedings.

The record in the case discloses the fact that the proceedings before the commissioners were conducted with great care, and the statutes followed with unusual particularity. We have examined the record with care and the various questions presented by the very full and carefully prepared brief filed by the counsel for the appellee, in so far as they are before us on this appeal, and must determine there is nothing in the objections urged by the appellant to render the proceedings void, certainly so far as they affect any jurisdictional questions.

There were certain exceptions taken to the rulings of the court upon testimony upon the motions to quash the assessment, but they are not presented by bills of exceptions and will not be considered by us.

It follows from what has been said that the county commissioners and the circuit court of Baltimore county had jurisdiction in this case, and, the judgment of the circuit court being final under the statute, this court is without authority or jurisdiction to review the action of the court below.

If the appeal was properly before us, we would have no hesitation in affirming the action of the circuit court and the order appealed from herein.

Appeal dismissed, with costs.

(131 Md. 87)

DICUS v. DICUS. (No. 53.)

(Court of Appeals of Maryland. June 28, 1917.)

1. DIVORCE §130—CRUELTY—STATUTE—EVIDENCE.

Under Code Pub. Gen. Laws 1904, art. 35, § 4, providing that no divorce shall be granted on the testimony of the plaintiff alone, a wife's corroborated testimony as to her husband's cruelty, contradicted by him, would not sustain a decree of divorce on that ground.

2. DIVORCE §129(1)—ADULTERY—EVIDENCE. Evidence in a wife's suit for divorce held to establish the husband's alleged adultery.

3. DIVORCE §129(9)—ADULTERY—PROOF.

It is not necessary that direct evidence of the fact of adultery shall be offered, and the offense may be proven by circumstances which justify the inference of guilt.

4. DIVORCE §172—FORMER ADJUDICATION—CONCLUSIVENESS.

A decree in a former suit for divorce on the ground of the husband's adultery dismissing the bill for insufficiency of proof, and from which there was no appeal was no bar to a subsequent suit for divorce on the ground of his subsequent commission of the offense.

5. DIVORCE §115—ADULTERY—EVIDENCE.

In a wife's suit for divorce on the ground of adultery, evidence referring to circumstances proven in her former suit for the same cause was admissible as reflecting upon the husband's subsequent conduct.

6. DIVORCE §209—ALIMONY PENDENTE LITE.

The settled rule is that a wife without adequate means shall be awarded alimony pendente lite, regardless of the merits of the litigation.

7. DIVORCE §182—COSTS AND COUNSEL FEES—JURISDICTION.

A wife's application for an order that her husband pay her a sufficient sum for her costs and counsel fees in the prosecution of her appeal from a decree in her divorce suit should be made to the court below, even after the appeal has been entered.

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

"To be officially reported."

Suit for divorce by Margaret S. Dicus against Jacob M. Dicus. From a decree dismissing the suit, plaintiff appeals. Decree reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

David Ash, of Baltimore, for appellant. Morrill N. Packard and Benjamin L. Freeny, both of Baltimore, for appellee.

URNER, J. The appellant sued for a divorce from her husband, the appellee, on the grounds of cruelty and adultery, and this appeal is from a decree dismissing the bill of complaint.

[1] The only evidence in support of the charge of cruelty was the appellant's own testimony, and that was contradicted by the appellee. There was no corroboration in any form of the wife's statements as to the mistreatment of which she complained. In a suit for divorce a decree cannot be entered upon the testimony of the plaintiff alone, but corroborative proof is requisite. Code, art. 35, § 4; *Tomkey v. Tomkey*, 130 Md. 292, 100 Atl. 283; *Marshall v. Marshall*, 122 Md. 694, 91 Atl. 1067; *Twigg v. Twigg*, 107 Md. 677, 69 Atl. 517. The allegation of cruelty therefore is not sufficiently sustained to justify a decree of divorce on that ground.

[2, 3] With respect to the charge of adultery we have reached a different conclusion. In our opinion the proof points convincingly to the husband's infidelity. It is shown and

admitted that he is living in the same house with the woman who is named in the bill as the person with whom the alleged adultery was committed. This woman, according to the decided weight of the testimony, has a bad reputation for chastity. She was embraced and caressed by the appellant's husband on a number of occasions in the presence of a caller at the house, who testified to that effect. It is proven by another disinterested witness that the correspondent surreptitiously left the appellee's house one afternoon by the back way, while his wife and family were away from home. Just before the woman left the house, as it was testified, the appellee went to the back gate and looked up and down the alley, through which she immediately afterwards took her departure. They were twice alone together for the greater part of the day at an untenanted house of the appellee in the country. On one of these occasions he was heard to address a term of endearment to her when she called to him from an upper room to bring some water. He was once heard to talk to the woman so immodestly that she protested, with the remark that a visitor, before whom the language was used, might think that she was being kept by the appellee. His associations with the correspondent were begun long prior to the final separation between himself and his wife in October, 1913, and have continued to the present time. He is the only male lodger in the house which the woman occupies with her sister and niece. The sister's reputation for chastity has also been impeached.

The proof in this case is clear as to the existence of the disposition and opportunities from which the commission of the adultery changed is to be inferred. It is not necessary, and it is usually impossible, that direct evidence of the fact of adultery shall be offered. The offense may be proven by circumstances which justify the inference of guilt. *Shufeldt v. Shufeldt*, 86 Md. 529, 39 Atl. 416; *Thiess v. Thiess*, 124 Md. 295, 92 Atl. 922; *Kremelberg v. Kremelberg*, 52 Md. 553; *Rasch v. Rasch*, 105 Md. 506, 66 Atl. 499; *Robbins v. Robbins*, 121 Md. 695, 89 Atl. 1135. The conduct of the appellee and correspondent, as described in the testimony, their familiarities and embraces, his open immodesty of language in addressing her, their clandestine movements when they were alone at his house, her reputation for lack of virtue and his position and opportunities as an inmate of her home, lead us irresistibly to a conviction as to the adulterous nature of their relations.

[4, 5] This is the second suit by the appellant for divorce from her husband on the ground of adultery with the same correspondent who is named in the present bill. The first suit was instituted immediately after the final separation of the parties in 1913. That suit resulted in a decree dismissing the bill for insufficiency of proof. There was no

appeal from that decree, and it is relied upon as a former adjudication of the question involved in the pending suit. This defense is not sustainable. Whatever effect the former decree might be held to have in precluding a divorce for adultery alleged to have been committed before that decision, it certainly cannot have the effect of shielding the appellee from the legal consequences of the subsequent commission of such an offense. The testimony in the case now before us relates to incidents which have occurred and conditions which have existed since the prior decree was rendered. Some of the evidence refers to circumstances proven in the former case, but this was admissible as reflecting upon their later conduct. *Shufeldt v. Shufeldt*, supra. Upon the testimony as a whole we are satisfied that adultery of the husband since the dismissal of the first bill has been sufficiently proved, and that the wife is therefore entitled to an absolute divorce.

[6] The decree under review, in disposing of the pending suit, refused the prayer of the bill for an allowance of alimony pendente lite, although it required the defendant to pay a fee for the plaintiff's solicitor. The record does not disclose any reason for excepting the case from the settled rule that a wife without adequate means should be awarded alimony pendente lite regardless of the merits of the litigation. *Crane v. Crane*, 128 Md. 214, 97 Atl. 535; *Buckner v. Buckner*, 118 Md. 268, 84 Atl. 471.

[7] Application has been made to this court for an order requiring the appellee to pay the plaintiff a sufficient sum for her costs and counsel fee in the prosecution of the appeal. This was a question over which the court below had jurisdiction after the appeal was entered. *Crane v. Crane*, supra; *Outlaw v. Outlaw*, 122 Md. 695, 91 Atl. 1067; *Rohrbach v. Rohrbach*, 75 Md. 318, 23 Atl. 610; *Buckner v. Buckner*, supra. The application should have been made to the trial court, and if it had been presented there, we have no reason to doubt that it would have been given due consideration.

The decree will be reversed, and the cause remanded for a decree of divorce a vinculo matrimonii, and for such allowance of alimony, under the prayers of the bill, as the court below may determine to be proper.

Decree reversed, with costs, and cause remanded.

(131 Md. 280)

GISCHELL v. BALLMAN et ux. (No. 45.)
(Court of Appeals of Maryland. June 28, 1917.)

1. WILLS \Leftrightarrow 802(1)—DEVISES IN FEE.

Testator willed land to his youngest son, his heirs and assigns, and directed that, as the devisee was not so well able to provide for and take care of himself, another should look after his interest, advise and direct him, and in case the devisee should not marry and should die first, such other should have and inherit one-half of said part of said property. *Held*, that the

devisee, having married, became the owner in fee simple of the land devised.

2. WILLS \Rightarrow 672(1)—TRUSTS—EVIDENCE.

The part of the will directing that another shall look after the devisee's interest did not create a trust.

3. WILLS \Rightarrow 601(4)—REDUCTION OF FEE-SIMPLE ESTATE—LIFE ESTATE.

A later item of a will directing that all the land and property hereby bequeathed shall not be sold on any account could not have the effect of reducing a fee simple to a life estate.

4. WILLS \Rightarrow 649—RESTRAINT ON ALIENATION.

The item was a restraint on alienation, and therefore void.

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Suit by Frank H. Ballman and wife against William G. Gischell. Decree for plaintiffs, and defendant appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Charles H. Buck, of Baltimore, for appellant. Charles F. Stein, of Baltimore, for appellees.

BOYD, C. J. This is an appeal from a decree for specific performance requiring the defendant (appellant) to pay to the plaintiffs (appellees) the purchase money for a tract of land in Anne Arundel county which he agreed to purchase from them, and directing the plaintiffs to convey said land to the defendant upon his payment of the purchase money or bringing it into court. The appellant states in his answer that he is anxious and willing to complete the purchase, and to pay the purchase money, and that he will do so in accordance with his contract if by a true construction of the devise to Frank Harman Ballman in the will of Henry Ballman the former became and is seised of the entire and absolute fee-simple estate in the lands purchased.

[1] Henry Ballman, the father of Frank H. Ballman, died on or about the 31st day of October, 1884, seised of a tract of land containing about 50 acres, of which that in controversy in this case is a part. By his last will and testament he devised to his daughter, Laura Caroline Ballman, one-third part of his home tract of land, where he then resided, and to his son Christian Frederick Ballman the north third of the home farm, and made the following provision for his son Frank Harman Ballman, one of the appellees:

"Item. I will and bequeath to my youngest son, Frank Harman, the south third of my home tract, containing sixteen and three-quarters acres of land, more or less, with the old dwelling house and the large barn and such buildings as shall fall to his third of said tract, with the well of water and pump, but I will and direct that the heirs to the several parts of my home farm shall have equal right to use the well or pump aforesaid, provided they bear equal part of the repairs to said pump and well. And further that each of said heirs shall have free right of way to and from said farm, or their

parts thereof, without let or hindrance. To the said Frank, his heirs and assigns. And whereas the said Frank is not so well able to provide for and take care of himself, I direct that Henry Frederick shall look after his interest, advise and direct Frank as best he can, and in case Frank shall not marry and die before the said Henry, then the said Henry shall have and inherit one-half of Frank's part of said property, and I also direct that in case Frank shall die as aforesaid, that Henry shall have him decently buried and properly attend to him in all his sickness in consideration of the aforesaid interest."

The answer admits that after the death of the testator, and under the provisions of the will, Frank H. Ballman entered into possession of the part of the tract of land devised to him, claiming to be seised of the entire fee-simple estate therein, and that he has ever since remained in possession thereof, always claiming to be so seised of the entire fee-simple estate, but the appellant contends that by the true construction of the will he did not become seised of the entire fee-simple estate, and at best only became seised of a defeasible estate in fee therein, to be divested upon his marriage or death before the death of his brother, Henry, and that, although he is married and alive, he is not seised of the entire fee-simple estate, and cannot convey such estate to the appellant as was contracted to be sold him.

The appellant makes no objection to the provisions for the use of the well or pump or the right of way provided for in the will. It is not easy to find such difficulty about the title as justified an appeal to this court. The will was evidently not drawn by one skilled in such work, but it is sufficiently clear to show the intention of the testator. After saying that he wills and bequeaths to his son Frank Harman the south third of his home tract, and giving the heirs the right to the use of the well or pump and the right of way, the testator apparently desired to emphasize the fact that he intended his son Frank to have the property in fee simple, as he added in a separate sentence, "To the said Frank, his heirs and assigns." He had in previous items left a third of his home tract to his daughter, Laura Caroline, and the north third of that farm to his son Christian Frederick, and in both of those items used the same language, except he added the word "forever" in his gift to Charles Frederick.

[2] The part of the item leaving the property to Frank in which he directs that Henry Frederick shall look after his interest, advise and direct him as best he can, certainly did not create a trust. It was just an expression of the father of the interest he had in the welfare of his youngest son, calling upon Henry to watch over him. Then when the will says, "and in case Frank shall not marry and die before the said Henry, then the said Henry shall have and inherit one-half of Frank's part of said property," etc.,

it is clear that Henry was only to have the one-half if Frank did not marry and died before him. As it is admitted that Frank has married and is still living, clearly Henry has no interest in the property by reason of that provision. The testator did not simply say, "in case Frank *dies* before Henry," but "in case Frank shall not *marry* and die before the said Henry." He knew that if he married he might leave a child or children, or a widow, or both, surviving him, and he indicated no intention to leave the one-half to Henry in that event, or in any event, unless Frank did not marry and predeceased Henry. The concluding clause of the item, "and I also direct that in case Frank shall die as aforesaid," could have no effect unless he did not marry and did die before Henry. It seems to us that that item is too clear for controversy.

[3] The next item in the will is as follows:

"Item. I will and direct that all the land and property hereby by me bequeathed shall not be sold on any account, but that the aforesaid heirs may rent or lease their said parts of said land, but shall not sell during their natural lives."

Inasmuch as by the will the testator had already given Frank a fee-simple interest in the property he left to him, that item cannot have the effect of reducing his interest to a mere life estate. Such a construction would be wholly contrary to the provision as to Henry taking under the previous item the property left to Frank; for, if Frank only had a life estate, how could Henry "have and inherit one-half of Frank's part of said property"? But such restraints on alienation are not favored, and are very generally held to be contrary to public policy. In many cases in this court the subject has been dealt with. Amongst them are *Smith v. Clark*, 10 Md. 186; *Warner v. Rice*, 66 Md. 436, 8 Atl. 84; *Stansbury v. Hubner*, 73 Md. 228, 20 Atl. 904, 11 L. R. A. 204, 25 Am. St. Rep. 584; *Trinity M. E. Church v. Baker*, 91 Md. 539, 574, 46 Atl. 1020; *Blackshire v. Samuel Ready School*, 94 Md. 773, 51 Atl. 1056; *Clark v. Clark*, 99 Md. 356, 58 Atl. 24; and *Doan v. Ascension Parish*, 103 Md. 662, 64 Atl. 314, 7 L. R. A. (N. S.) 419, 115 Am. St. Rep. 379. See, also, *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507, 32 L. R. A. (N. S.) 695, reported in *Ann. Cas.* 1912C, 1311, where there is a note on page 1329, citing many authorities, and *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 South. 641, L. R. A. 1916B, 1201, reported in *Ann. Cas.* 1916D, 1248, and note on page 1254.

[4] It is clear that this item is such an attempted restraint on the alienation of the property left Frank in fee simple (as we hold it was left) as to be void and of no effect. We are only concerned with Frank's interest, and therefore say nothing as to the others, but our silence must not be construed as intimating a doubt on the subject as to those

interests, as we neither express nor intimate any opinion.

The decree will be affirmed, but we will direct that each side pay one-half of the costs in this court, and that the appellant pay the costs below, as directed by the decree of the lower court.

Decree affirmed, each party to pay one-half of the costs in this court, and the appellant to pay the costs below.

(131 Md. 70)

HOCHSCHILD et al. v. OECIL. (No. 52.)
(Court of Appeals of Maryland. June 28, 1917.)

1. NEGLIGENCE §136(22)—JURY CASE.

In an action for injuries sustained by plaintiff in entering defendants' store through a revolving door, the question of negligence held for the jury.

2. TRIAL §295(1) — INSTRUCTIONS — CONSTRUCTION TOGETHER.

In determining the correctness of a prayer the Court of Appeals must not only consider the part to which objection is made, but, in connection therewith, must also consider the portion of the prayer conceded to be correct, as well as the other granted prayers in the case, in respect to the evidence offered.

3. TRIAL §295(3)—INSTRUCTION.

In an action for injuries to plaintiff in entering defendants' store through a revolving door, plaintiff's requested instruction told the jury that, when the proprietor of a store expressly or by implication invites others to come upon his premises for business or other purposes, it is his duty to be reasonably sure he is not inviting them into danger, and he must exercise ordinary care to render the premises reasonably safe; that, where the owner of a store expressly or by implication invites others to come into it, if he permits anything of a dangerous character to exist therein which results in injury to another exercising ordinary care, the owner is answerable for the consequences. Held that, though the latter part of the prayer ignored the necessity of finding negligence on defendants' part, the necessity for a finding of negligence was sufficiently shown by the prayer as a whole, particularly in view of an instruction contained in defendants' prayer that plaintiff was not entitled to recover unless the jury was satisfied that defendants failed to exercise due care to provide a reasonably safe door.

4. NEGLIGENCE §119(4)—ISSUES AND PROOF — CAUSE OF INJURY.

In an action for injuries to plaintiff in entering defendants' store through a revolving door, where the negligence charged was that defendants failed to maintain the door in a reasonably safe condition, testimony offered by defendants that there were no revolving doors in general use so constructed that a person using them could not be knocked off his feet by another coming behind him and pushing with violence was properly excluded as foreign to the issue.

Appeal from Superior Court of Baltimore City; Chas. W. Heulsler, Judge.

Action by Mary D. Cecil against Max Hochschild and others, copartners trading as Hochschild, Kohn & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

William L. Marbury, of Baltimore (Marbury, Gosnell & Williams, of Baltimore, on the brief), for appellants. L. Wethered Barroll, of Baltimore (Hope H. Barroll and Robt. J. Gill, both of Baltimore, on the brief), for appellee.

PATTISON, J. This is an appeal from a judgment recovered by the appellee against the appellants for injuries sustained by her in entering the storehouse and premises of the defendants through a revolving door.

The action in this case was brought upon a declaration containing two counts. The alleged negligence charged against the defendants in the first count causing the injury complained of is that they neglected to discharge and perform the duty of providing for the safety of their customers "by having proper friction strips attached to said door, which strips were not properly attached, but the said strips had been worn, so that the door revolved with a dangerous ease and rapidity, with which it should not have revolved," and in the second count they are charged with the failure "to exercise ordinary and reasonable care in the control of the operation and movement of the said door."

The plaintiff, a woman 68 years of age, in stating the circumstances of the accident, which occurred on December 4, 1915, said:

"I went to Hochschild's [the defendant] upon the Howard street side, entering the first door. As I went in, the door was apparently moving very slowly, and I went in my usual way. I am always cautious, was always cautious, of those doors, and before I escaped the door there was a sudden blow, some one, or there came a sudden blow that threw me on the floor, struck me on my right arm and side, and threw me on my left side on the floor. It came so suddenly that I did not realize for an instant what had happened, and after a moment, of course, they came to me and helped me up."

She further testified that it was the door that struck her; that she "felt the blow very decidedly"; that partitions in the door were of glass, and she saw no one in front of her at the time passing through the door; whatever motion there was came from behind and she failed to see it; that she saw a colored man standing between the doors, that is, between the two revolving doors, one of which she entered; she could not say whether the man touched the door or not, but he did not stop it, or it would not have struck her; that she was a regular customer at the store, and was acquainted with the premises and the door through which she passed; she had gone through it many times. As to this particular door she said:

"Somehow I always felt it was more dangerous. I do not know why, but it always seemed to me to be more dangerous than the others."

She said:

"I did not stop in the door. I did not go very fast, because I never do rush in those doors, but I went my ordinary gait."

When asked how she was thrown to the floor, she answered:

"I was thrown on my left side. It struck me on my right shoulder and side, and my left side and hip sustained the injury, the fractured break."

There were no other witnesses offered by the plaintiff as to the circumstances of the happening of the accident.

Joseph L. Downes, general agent of the Northwestern Life Insurance Company, and brother of the plaintiff, testified that he examined the door some time between the 10th and 15th of December, and "found the rubbers on the sides that held the door in very bad shape," and the door, if you went through it at any ordinary speed, "would go around four or five times"; by giving the door "an ordinary push it would keep going around, unless somebody else went in there or the man caught it"; that the strips were placed on what he "would call the back of the arms"; that they were worn out and did not have the effect of retarding the speed of the door in revolving; "they barely touched" the well of the door. He testified that the door in which the accident occurred differed from the other door on Howard street in that it had a solid top; that he did not know whether this caused the door to go fast or not; that he examined other revolving doors in other department stores in the neighborhood, and also one at the Calvert Bank. "Those doors did not go anything like as fast as the door in which the plaintiff was injured, nor did the other door on Howard street in the same building."

John H. Driver, engaged in the business of supplying specialties to buildings, testified that he was familiar with revolving doors; that the door in question "is what is known as the Van Kannel door, which is the pioneer revolving door." He described such door by saying that, "if you can imagine a table with one leg and fastened to the leg four flaps or wings; this table instead of being fastened at the top, and supported at the top, it runs on an axle at the top, supported at the bottom; it works more like a top than anything I can compare it to." He stated that, "the speed of the door is governed by the friction of the strips, not weather strips, but side flaps that project and engage the well or opening which the door is in, so that the door cannot run away"; that there is nothing about the door to prevent it from running away except the side flaps that brush the well; that they curve as they go around, although they are apparently straight; that they act as a brake; that two of them at all times brush against the side of the well; that they are made of hard rubber and "should at least rub from a quarter to a half inch on this surface." Witness further said that a door used so much as the one in question should be inspected not less than once a week, and the "adjusting of the

strips possibly once a month, and new strips not less than once a year, because weather conditions hurt a strip. In the summer time it dries up." Witness then told how to adjust or remove the strips, and stated that when properly adjusted "the door will open, and possibly one flap will move about one-third of the circumference of the door." When the pressure is removed, "the door will come back to a standstill within about six inches," and where the strips are properly adjusted the door is considered fairly safe.

James B. Scott, consulting engineer, when produced by the plaintiff, testified that the rubber strip has two or three functions; first of all it performs the function of a weather strip, and in addition to that it retards the revolution of the door "so the speed will not become excessive without an abnormal amount of power being exerted on the door"; that it also performs the function of a flexible edge, so if a person should inadvertently get his fingers caught between the well of one of the strips "they would meet the yielding surface of the rubber instead of being sheared off as they would be if the doors were rigid at the edge." He further stated, however, if the rubber strip was not used, "it would be necessary from a point of safety to adopt some other device to dampen the revolution of the door," but the use of these strips is "the simplest and most common sense way to accomplish the object," and that they also accomplish "two or three other objects at the same time." Witness, in speaking of the Van Kannel door, said it is what you might call an obsolete type of door; "you might say it was one of the original doors, the pioneer door;" that it differs from the modern door in that the latter has "a stationary ceiling," and a rubber strip at the top and bottom which furnishes additional friction, although the main point where the friction is applied is at the circumference of the door. The principal advantage, however, in the modern door over the other "is that it eliminates this big flywheel top," which in the former type revolved with the door, and gives to its movement a greater momentum.

There were other witnesses produced by the plaintiff who testified as to the character and extent of the injuries sustained by her, but it is not necessary to state the evidence of these witnesses in deciding the questions of law presented by this appeal.

Walter Sondhelm, the general manager of the defendant firm, offered by the defendants, testified that he did not know of any difference between the movement of the old and new type of doors, but was inclined to think that the old type was more difficult to revolve than the new type. It revolved less freely than the new, and required a little more effort to push it around. The strips, as he stated, were put there for two reasons, one to keep out the dust and draught, and the other to protect the fingers of persons in tak-

ing hold of the edge of the door; that the strips were not there for the purpose in any way of affecting the speed in the operation of the door; he did not know how often the rubber strips had been removed and new ones put on; that the doors were actually used eight months in the year, and in his opinion the table at the top of the door tends to retard its motion.

Dent Downing, "housekeeper" at defendants, who had charge of the doors, when called by the defendants, testified that he makes a general inspection of the store several times a day, sees that the doors are clean, that they revolve properly, and are in proper mechanical condition; that he was familiar with the door where the accident occurred. There is no difference, he states, between the old and new type of doors so far as the speed and operation by the public is concerned. There is upon the doors two brass bars, with sufficient space between the bars and the glass for a handhold, which is to enable the passenger to go through in safety. He did not know when these strips were replaced prior to the 4th day of December, 1915, but was sure they had been replaced within two years; that they were not replaced on account of the rubber wearing out, but because of people tearing some parts of them away and making them look ragged and ugly. This was done on an average about once a year. He never removed the rubber strips and replaced them "with reference to their causing more or less friction on the doors." They had extended the rubbers to keep out the air, and at the same time it increases the friction, but they were never extended for the primary purpose of increasing the friction. That had never entered his mind.

George W. Morey, chief engineer at the store of the defendants, when offered as a witness by them, stated "that the door in question moved as hard, if not a little harder, than the other doors; that they considered it in a good condition on December 4, 1915; the strips touched the walls of the door opening sufficiently to keep out the air."

Mrs. Louise Robinson, an employé of the firm of Hochschild, Kohn & Co., and who was in the store at the time of the accident, testified for the defendants, saying:

"I saw a frail, elderly lady walking slowly through the door. Apparently she hesitated a moment, then a customer came to my counter, and I turned to the customer. Just as quickly the lady fell, and I excused myself and went to her assistance. When she hesitated she was just inside the door just as she had passed through it."

The record discloses that there were seven exceptions noted by the defendants to the rulings of the court on the evidence and one to its rulings on the prayers.

The plaintiff offered four prayers. The first and second were refused, and third and fourth were granted.

The defendants offered five prayers. The

first and fifth were refused. The second, third, and fourth were granted.

The defendants' first prayer is as follows:

"No evidence has been introduced in this case legally sufficient to entitle the jury to find that the injuries to the plaintiff complained of in the declaration were caused directly by the violation or neglect on the part of the defendants of any legal duty resting upon them, as alleged in the declaration, and therefore the verdict of the jury should be for the defendants upon the issues joined."

[1] This prayer, as we have said, was refused, and, we think, properly refused, as the evidence, in our opinion, is legally sufficient to take the case to the jury.

In *Norton v. Chandler Co., Inc.*, 221 Mass. 90, 108 N. E. 897, the facts offered to the jury were very nearly the same as those presented in this case, and in that case the court held that:

Such facts "warranted the finding of negligence on the part of the defendant: First, in not inspecting the friction strips; and, secondly, in allowing the door to fall into a defective condition through failure to adjust the friction strips on their being worn down."

And we find no error in the rejection of the defendant's fifth prayer.

The case was submitted to the jury upon the plaintiff's third and fourth and the defendants' second, third, and fourth prayers.

The plaintiff's third prayer instructed the jury:

"That when the proprietor or owner of a store used for the selling merchandise, expressly or by implication invites others to come upon his premises, either for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. Where the owner or proprietor of a store expressly or by implication invites others to come into the store, if he permits anything of a dangerous character to exist therein which results in injury to one availing herself of the invitation, and who at the same time is exercising ordinary care, such owner or proprietor is answerable for the consequence."

[2] In determining the correctness of this prayer we must not only consider the part to which objection is made, but in connection with it we must also consider the conceded portion of the prayer as well as the other granted prayers in the case in respect to the evidence offered.

[3] It might be said of the part of the prayer objected to, if standing alone, that it ignores the necessity of finding negligence on the part of the defendants, and permits the plaintiff to recover, though such negligence be not shown, but the necessity for such finding we think is sufficiently shown by the prayer as a whole, when the part objected to is considered in connection with the earlier part of the prayer; and we think the necessity for so finding would be so understood by the jury. That such was the meaning of the prayer is further shown by the instruction of

the court contained in the defendants' third prayer, where the jury were instructed that:

The plaintiff was "not entitled to recover in this case until they are satisfied from the evidence that the defendants Hochschild, Kohn & Co. failed to exercise due care to provide for the use of their customers a revolving door in such condition at the time of the accident that it could be used with reasonable safety by persons using reasonable care."

The prayer states that liability attached to the defendant "if he permits anything of a dangerous character to exist therein which results in injury to one availing herself of the invitation," etc., but it is shown by the record that the evidence of negligence is confined solely to the defective door. No other thing of a dangerous character was mentioned or referred to. Therefore it was only to the defective door that the minds of the jurors could have been directed.

The plaintiff's fourth prayer was the usual damage prayer in cases of this character and was properly granted.

[4] The court's ruling upon the first exception to the evidence was correct, as the exception came too late, and we find no error in its ruling on the second exception. The third, fourth, fifth, and sixth were to the refusal of the court to admit testimony offered by the defendants that there were no revolving doors in general use so constructed that a person using it could not be knocked off his feet by another coming behind him and pushing with violence against one of the partitions of the door. The negligence charged against the defendants was that they negligently failed to maintain the door in a reasonably safe condition for the use of their customers, exercising reasonable care. There was no evidence whatever that the fall of the plaintiff resulting in the injury complained of was caused by any one passing through the door behind her and pushing one of the partitions of the door, and we fail to see how the fact sought to be proved under these exceptions could in any way properly aid in deciding the issues presented, but such fact, we think, would be entirely foreign to the issue, and one that should not have been admitted; consequently the court was right, in our opinion, in excluding this testimony.

As we find no errors committed by the court in its rulings, the judgment below will be affirmed.

Judgment affirmed, with costs to the appellee.

(131 Md. 168)
STATE v. SHAPIRO. (No. 37.)

(Court of Appeals of Maryland. June 27, 1917.)

1. LICENSES \Leftrightarrow 7(7) — ARBITRARY AND UNEQUAL TAX—"OCCUPATION TAX."

Laws 1916, c. 704, § 172, requiring junk dealers to take out an annual license, is not in violation of Bill of Rights, art. 15, providing that every person ought to contribute his proportion of public taxes according to his actual

worth in property; it being a tax upon an occupation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation Tax.]

2. CONSTITUTIONAL LAW \S 225(1), 253—**DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAW.**

The Legislature has the right to make separate and different provisions for distinct classes and areas in the enactment of its license laws, and the exercise of such power does not conflict with the constitutional rights to the equal protection of the laws, or to due process of law, if the regulations operate equally, and the limitations are not clearly unreasonable.

3. LICENSES \S 7(5)—**JUNK DEALER'S LICENSE—REASONABLENESS—PRESUMPTION.**

Laws 1916, c. 704, \S 172, basing license fees for the privilege of dealing in junk upon population of the city or county where conducted, is based upon an accepted theory of classification, and will be presumed to be reasonable, in the absence of conclusive proof to the contrary.

4. LICENSES \S 7(9)—**JUNK DEALER'S LICENSE—FEES—REASONABLENESS.**

Laws 1916, c. 704, \S 172, is a revenue measure not purporting to have any relation to the police power; and where there is no evidence that fees imposed upon junk dealers are excessive, they will be presumed to be fair and reasonable.

5. EVIDENCE \S 20(1)—**STATUTES** \S 47—**UNCERTAINTY—"JUNK DEALER."**

Laws 1916, c. 704, \S 172, imposing a license tax upon junk dealers, is not void for uncertainty, although the term "junk dealer" is not defined, as the nature of the business is commonly known, and may be judicially noticed; a "junk dealer" being a person engaged in buying and selling old iron or other metals, glass, paper, cordage, or other waste or discarded material (citing Words and Phrases, Junk).

Appeal from Criminal Court of Baltimore City; James P. Gorter, Judge.

"To be officially reported."

Jacob S. Shapiro was indicted for dealing in junk without first having obtained a license. From a judgment discharging defendant, after his demurrer to the indictment had been sustained, the State appeals. Reversed, with costs, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Philip B. Perlman, of Baltimore, and Albert C. Ritchie, Atty. Gen. (William F. Broening, State's Atty., Lindsay C. Spencer, Asst. State's Atty., both of Baltimore, on the brief), for the State. Henry M. Siegel, of Baltimore (Siegel & Siegel, of Baltimore, on the brief), for appellee.

URNER, J. The indictment in this case charges the defendant with unlawfully dealing in junk in Baltimore City without first taking out a license therefor as required by law. The statute alleged to be violated is the Act of 1916 (chapter 704, \S 172), which, under the caption, "Junk Dealers," provides as follows:

"Each person, firm or corporation dealing in junk within this state shall pay for the privilege of conducting such business by first taking out

an annual license therefor, for each place of business and paying the following license fee, namely: In cities or counties of 50,000 inhabitants or over, each, per annum, \$30.00; in cities or counties of 10,000 to 50,000 inhabitants, each, per annum, \$20.00; in cities or counties of 5,000 to 10,000 inhabitants, each, per annum, \$10.00; in Baltimore City, \$250.00."

By a later section of the act a fine of \$100 is directed to be imposed for the failure of one engaged in the business to procure the requisite license.

A demurrer to the indictment disputes the validity of the statute on the following grounds: (1) That it violates the Fourteenth Amendment of the federal Constitution, by attempting an exercise of taxing power which unjustly, arbitrarily, and unreasonably discriminates against the defendant and all others similarly engaged in business in Baltimore City and in favor of other persons located elsewhere in the state, and which deprives the defendant and others in like situation of their liberty, property, and business without due process of law, and denies them also the equal protection of the law. (2) That the act violates the Constitution of Maryland for the reasons just stated, and also because the license required to be obtained by the defendant for his business in Baltimore City is an arbitrary and unequal tax imposed contrary to the fifteenth article of the Bill of Rights, and is not a lawful exercise of the police power. (3) That the license fee attempted to be levied upon the defendant is an abuse of the police power of the state, in that it is manifestly in excess of any legitimate charge for supervision or regulation of the business in which the defendant is engaged. (4) That there is no definition of the term "junk dealer" in the act, and no fixed or certain popular meaning of the term, and hence the act is void for uncertainty.

The appeal is by the state, and is from a judgment discharging the defendant, after his demurrer to the indictment had been sustained.

[1] The license fee required by the act of 1916 to be paid by a dealer in junk "for the privilege of conducting such business" is a tax imposed upon an occupation. It is not a property tax to which the equality provision of article 15 of the Bill of Rights applies. It belongs to the class of taxes which that article permits to be "laid with a political view for the good government and benefit of the community." *Ruggles v. State*, 120 Md. 562, 87 Atl. 1080; *State v. Applegarth*, 81 Md. 300, 31 Atl. 901, 28 L. R. A. 812; *Rohr v. Gray*, 80 Md. 276, 30 Atl. 632.

[2] The Legislature is under no constitutional obligation, either federal or state, to observe a definite rule of uniformity in the enactment of its license laws. It is not required to establish the same license system and regulations for all the interests and political divisions over which its authority ex-

tends. It has the right to make separate and different provisions for distinct classes and areas. The exercise of such power does not conflict with the constitutional right to the equal protection of the laws, or to due process of law, if the prescribed regulations operate equally and uniformly upon the class and within the area affected, and their limitations are not clearly unreasonable. These principles have been firmly settled by the decisions. *Magoun v. Illinois Trust Co.*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Holden v. Hardy*, 169 U. S. 395, 18 Sup. Ct. 383, 42 L. Ed. 780; *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. Ed. 229; *Bowman v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *L'Hote v. New Orleans*, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Amer. Coal Co. v. Allegheny Co.*, 128 Md. 564, 98 Atl. 143; *Mt. Vernon Co. v. Frankfort Co.*, 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636; *Clark v. Harford Agr. Ass'n*, 118 Md. 608, 85 Atl. 503; *Crisswell v. State*, 126 Md. 103, 94 Atl. 549; *Sweeten v. State*, 122 Md. 634, 90 Atl. 180; *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201; *Ruggles v. State*, 120 Md. 561, 87 Atl. 1080.

[3] The statute here in question provides different rates of license fees for the privilege of dealing in junk, according to the population of the county or city where the business is being conducted. In Baltimore City, in which approximately one-half of the inhabitants of the state reside, the rate is \$250, while it ranges from \$10 to \$30 in the counties and other cities with their much smaller populations. There is nothing in the terms of the act, or in the record, to reflect upon the propriety of such a provision. It is in fact based upon an accepted theory of classification for license purposes. *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461; *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162. It must be presumed to be reasonable, in the absence of clear and conclusive indications to the contrary. *Bachtel v. Wilson*, 204 U. S. 36, 27 Sup. Ct. 243, 51 L. Ed. 357; *Holden v. Hardy*, *supra*; *Mt. Vernon Co. v. Frankfort Co.*, *supra*; *Ruggles v. State*, *supra*. Provision might have been made by independent local laws for the licensing of junk dealers in one or more of the political subdivisions of the state. The courts would not be justified in declaring such statutes invalid merely because they were of local application or divergent in their terms. If this were a proper ground upon which to defeat an act of assembly, the validity of much important local legislation might be successfully disputed.

101 A.—45

As this court had occasion to say in *Stevens v. State*, 89 Md. 674, 43 Atl. 931:

"It has long been the policy of the state of Maryland to enact local laws affecting only certain counties, or to exempt particular counties or localities from the operation of general laws."

This policy is not prohibited by any provision of the Constitution of Maryland or of the United States. The fact, therefore, that the statute now being considered does not affect alike all the counties and cities to which it applies, is not a sufficient reason for declaring it invalid.

[4] The contention that the annual fee required to be paid by junk dealers in Baltimore City is unreasonable and excessive rests largely upon the theory that it is imposed in the effort to raise revenue under the guise of an exertion of the police power of the state, and that the amount of the fee is far beyond the legitimate costs incident to the regulation of the business. It is also urged that the law is unfair and arbitrary, because it makes no distinction in reference to the volume of the business conducted by the licensees. The license provision under inquiry is plainly a revenue measure. It is enacted and codified under the head of "Traders' Licenses." It does not purport to have any relation to the police power, although in determining the amount of the fees to be paid by junk dealers the Legislature may properly have taken into consideration the fact that the business is an appropriate object of police supervision, especially in a large city, because of the opportunities it often affords for the disposition of stolen property. *Duluth v. Bloom*, 55 Minn. 101, 56 N. W. 580, 21 L. R. A. 689; *People v. Rosenthal*, 197 N. Y. 394, 90 N. E. 991, 46 L. R. A. (N. S.) 31; *City of Chicago v. Lowenthal*, 242 Ill. 404, 90 N. E. 287; *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463. The court has no right to assume that these particular license charges specified in the act before us are unreasonable exactions. There is no evidence in the record upon which we can base such a conclusion. Every presumption is to be made in support of the theory that the General Assembly has validly and properly exercised its powers. It was possessed of full constitutional authority to legislate upon the subject of occupation taxes, and its action reflects its judgment that the fees imposed in this instance are fair and reasonable. Its decision of that question will be upheld by the courts, in the absence of clear and convincing proof that the charges are in fact exorbitant and oppressive. *Leser v. Wagner*, 120 Md. 677, 87 Atl. 1040. The cases of *Vansant v. Harlem Stage Co.*, 59 Md. 335, and *State v. Rowe*, 72 Md. 548, 20 Atl. 179, cited by the appellee, were not concerned with the validity of legislative acts, but with questions as to the right of a municipality to raise revenue under a charter power to license and regulate. This distinction was

noted in the case of *State v. Applegarth*, 81 Md. 300, 31 Atl. 961, 28 L. R. A. 812.

[8] There is no force in the contention that the act is void as to the requirement of a license for "junk dealers" because the meaning of that term is left indefinite and uncertain. The business of dealing in junk is a distinct and recognized branch of commercial enterprise. Its nature and incidents are commonly known and may be judicially noticed. A junk dealer is one who is engaged in the business of buying and selling junk, which is defined to be:

"Old iron, or other metal, glass, paper, cordage, or other waste or discarded material, which may be treated or prepared so as to be used again in some form." Webster's New International Dictionary; Century Dictionary; 4 Words & Phrases, 3874; *Commonwealth v. Ringold*, 182 Mass. 309, 85 N. E. 374; *City of Duluth v. Bloom*, 55 Minn. 97, 56 N. W. 580, 21 L. R. A. 689.

It was not necessary that the provision as to this class of licenses should have more specifically defined the business to which it is intended to apply.

None of the objections urged by the appellee against the validity of the license law under which he is indicted are in our judgment sustainable, and we must accordingly hold that the demurrer should have been overruled.

Judgment reversed, with costs, and new trial awarded.

(131 Md. 215)

LANG et al. v. WILMER. (No. 83.)

(Court of Appeals of Maryland. June 28, 1917.)

1. HUSBAND AND WIFE §14(2)—TENANTS BY ENTIRETY.

If realty was conveyed by a third person to husband and wife jointly, the habendum of the deed indicating that the survivor should take, husband and wife held the property as tenants by the entirety.

2. DEEDS §93—INTENTION OF GRANTOR.

The intention of the grantor of a deed should prevail unless in conflict with some settled rule of law.

3. EXECUTORS AND ADMINISTRATORS §39—ASSETS OF ESTATE—LEASEHOLD PROPERTY.

On the death of the owner of leasehold property, the estate devolves upon his personal representatives.

4. JUDGMENT §870(4)—DEATH OF JUDGMENT DEBTOR — REVIVING JUDGMENT AGAINST LAND.

Where defendant in a judgment dies, a scire facias may be sued out to revive the judgment against the administrator alone to bind the assets in his hands; but where it is desired to revive the judgment against the land of the deceased judgment debtor, the scire facias should also issue against the heirs and terre-tenants.

5. JUDGMENT §870(4)—REVIVAL OF JUDGMENT AGAINST LAND—PARTY.

The estate a wife acquired under a deed from her husband to himself and her was not subject to the lien of a judgment against the husband, and after his death she was not, as to her interest in the land, a proper party to scire facias to revive the judgment against the land, and her title was not affected by judgment of fiat.

6. JUDGMENT §870(1)—REVIVAL—DECEASED JUDGMENT DEBTOR'S NEXT OF KIN—DESCRIPTION OF PROPERTY.

Scire facias against a deceased judgment debtor's next of kin as terre-tenants to revive the judgment against them is a proceeding in rem, and the judgment of fiat obtained is not a personal judgment against them, but one subjecting the property in their possession, so that the proceedings must specifically describe the property.

7. EXECUTORS AND ADMINISTRATORS §17(6)—RIGHT TO APPOINTMENT—CREDITORS.

By Code Pub. Gen. Laws 1904, art. 93, § 30, on failure of those first entitled to administration to apply for letters, administration may be granted by the orphans' court to the largest creditor applying.

8. LIMITATION OF ACTIONS §43, 83(2)—STATE OF LIMITATIONS—JUDGMENTS.

The statute of limitations begins to run as to judgments from the date of the judgment, and is not suspended by death of the judgment debtor or neglect of those entitled to obtain administration.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

"To be officially reported."

Suit by Edwin M. Wilmer against Charles F. Lang and others. From an order overruling their demurrer, Charles F. Lang and two other defendants appeal. Decree reversed, and bill dismissed as to appellants.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

William L. Stuckert, of Baltimore, for appellants. David Ash, of Baltimore, for appellee.

THOMAS, J. The bill of complaint in this case, which was filed by the appellee, "in his own right and on behalf of all creditors of the respective defendants who may come in and share the costs of this cause," against the appellants, Charles F. Lang and Henrietta V. Lang, his wife, Albert Lang, August Lang, and the Ninth West Columbia Building Association of Baltimore City, alleges: (1) That the appellee obtained a judgment by confession against Charles Lang for the sum of \$59.97 and costs, with interest from May 31, 1901, which was duly recorded on June 2, 1901, in the superior court of Baltimore city. (2) "That on or about the 3d day of November, 1890, a conveyance was recorded among the land records of Baltimore city, in the office of the superior court, in Liber J B, No. 1317, folio 100, etc., of a certain leasehold property known as No. 764 St. Peters street, from Charles Lang, grantor, to Charles Lang and Maria Lang, his wife, grantees, said conveyance containing these words, 'grants unto Charles Lang and Maria Lang, his wife, their personal representatives and assigns, * * * to have and to hold the said described lot of ground and premises unto and to the use of said Charles Lang and Maria Lang, his wife, and unto the survivor's personal representatives and assigns.'" (3)

That Charles Lang died intestate on the 7th of September, 1906, "leaving no real or leasehold property or interest in other than his interest in the property referred to in paragraph 2"; that his said widow and his next of kin "defaulted as to an administration" on Charles Lang's estate, but that Maria Lang assumed possession of the "entire estate" in the leasehold property, No. 764 St. Peters street, as her own property, and so dealt with it as stated in paragraph 4 of the bill. (4) That immediately prior to the death of Maria Lang, on September 23, 1907, she attempted to convey the property, by deed dated the 19th of September, 1907, and duly recorded among the land records, etc., to her son, Charles F. Lang, and Henrietta V. Lang, his wife, "by the entireties." (5) That on September 19, 1907, Charles F. Lang and his wife executed a mortgage of said leasehold property, which was duly recorded, to the Ninth West Columbia Building Association of Baltimore city to secure the payment of \$800. (6) That the plaintiff is advised that the conveyance to Charles Lang and Maria Lang, his wife, "passed nothing, or, if anything at all, only an undetermined moiety interest in said leasehold property to Maria Lang, and not a survivorship in the whole property, which, according to the terms of said conveyance, gives the said leasehold property to the 'survivor's personal representatives and assigns.'" (7) That he, the plaintiff, on the 8th of February, 1907, "recovered a judgment fiat executio," on his said judgment, "against Maria Lang, Albert Lang, and Charles F. Lang, personal representatives of Charles Lang, deceased, and said judgment fiat was duly recorded on or about the 9th of April, 1907, in the superior court of Baltimore city." (9) That, so far as the plaintiff knows, the surviving children of Charles Lang and Maria Lang are Charles F. Lang, Albert Lang, and August Lang. (10) "That your orator is a judgment fiat creditor of said Maria Lang, now deceased, and of Charles F. Lang and Albert Lang, as aforesaid; and that he is a judgment fiat creditor of August Lang in the sum of \$13.05, with interest from the 20th day of April, 1903, and costs \$2.60, and counsel fee of \$10, with waiver of all exemption and other laws, which judgment has been duly recorded in the superior court of Baltimore city, in Magistrate's Judgment Records, Liber S C L, No. 71, folio 550, etc.; and that he is also a judgment creditor of Henrietta V. Lang, the wife of Charles F. Lang, in the sum of \$32.49, with interest from September 29, 1908, and costs \$4.23, and 25 cents recording fees, duly recorded in the superior court of Baltimore city, in Magistrate's Judgment Records, Liber S C L, No. 52, folio 306," etc. (11) "That your orator's respective judgment liens aforesaid are liens upon the estate of Charles Lang, deceased, in the said leasehold property No. 764 St. Peters street, as well as liens

upon any part or share of said property claimed by or otherwise distributable to any of said judgment debtors aforesaid." (12) That the plaintiff is without an adequate remedy at law.

The bill prayed the court (1) to decree that said leasehold property, No. 764 St. Peters street, "is subject to the liens of the respective judgment debts of said respective persons, due to your orator, and to other creditors who may come into this cause, as aforesaid, by the priorities." (2) "That the aforesaid deed of conveyance from Charles Lang to himself and Maria Lang, his wife, be decreed to be null, void, and of no effect to pass a joint estate nor an estate by entireties." (3) That the deed of said property from Maria Lang to Charles F. Lang and Henrietta V. Lang, his wife, be decreed to be null and void. (4) That the mortgage to the Building Association be declared void, except as to the share or interest of Charles F. Lang in said leasehold property. (5) That the "court take jurisdiction of said leasehold property, * * * and appoint a trustee to sell" the same, "and that the proceeds be distributed under the direction of the court, to such persons as may be entitled thereto."

Charles F. Lang and Henrietta V. Lang, his wife, and the Building Association demurred to the bill on the following grounds: (1) That the plaintiff had not stated such a case as entitled him to any relief against them; (2) that the plaintiff had an adequate remedy at law; and (3) that the judgments referred to in the bill were barred by the statute of limitations. This appeal is from the order of the court below overruling the demurrer.

The averments of the bill are very indefinite, but apparently the theory upon which the bill was filed is that the deed of November 3, 1890, from Charles Lang to Charles Lang and Maria Lang, his wife, was either totally void, or was only effective to convey to Maria Lang an undivided one-half interest in the property mentioned.

[1] The deed is not set out in full in the bill or filed as an exhibit, but, judging from the part of the premises and the habendum quoted in the bill, it is clear that if the property had been so conveyed by a third person to Charles Lang and Henrietta V. Lang, his wife, the grantees would have held the property as tenants by the entireties, not only because the conveyance was to them jointly, but because the habendum clearly indicates that the survivor was to take. *Craft v. Wilcox*, 4 Gill, 504; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Fladung v. Rose*, 58 Md. 13.

It is said in 13 Cyc. 527:

"A person cannot convey to himself alone, and if he makes a conveyance to himself and others the latter only will take as joint tenants."

In support of the text the author cites *Cameron v. Steves*, 9 New Brunsw. 141. The same case is referred to in note 1, p. 109, of

vol. 9 Am. & Eng. Ency. of Law, where it is said:

"In *Cameron v. Steves*, 9 New Bruns. 141, it was held that a man cannot convey land to himself, and therefore a deed from A. to B., C., and himself, and their heirs, being inoperative as to A., vested the whole estate in B. and C. as joint tenants. Delivering the opinion of the Court, Cater, C. J., said: It is laid down in Perkins that a feoffment, with livery from A. to A. and B., vests the whole estate in B., for A. could not make livery to himself; therefore, by virtue of the livery to B., he became enfeoffed of the whole. The reason of this case would not seem to apply equally to statutory conveyances where no livery is required, and it may be doubted whether a man could enfeoff another of an undivided share of an estate to be held with the feoffor. But there is another principle which would seem applicable to this case, under which the whole estate would vest in Cameron and Marshall. In *Sheppard's Touchstone* (a book of very high authority), at page 82, it is laid down: 'If a deed be made to one that is incapable, and to others that are capable, in this case it shall inure only to him that is capable. (And if they were to be joint tenants, the person who is capable shall take the whole; but if they were to be tenants in common, he shall have only his particular share.)'"

In the case of *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404, which was an action of ejectment to recover certain lands, William H. Budlong, the owner of the fee in the property, executed and delivered to his wife, Annette Budlong, a quitclaim deed, by which he purported to convey the property to her, her heirs and assigns, forever. Following the habendum clause of the deed was the following proviso:

"Provided always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say: (1) It is reserved that said party of the second part shall not, at any time during the lifetime of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part or his joining in such conveyance. (2) It is further reserved that in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then in such case, and upon such decease, the said premises, as above described, with all and singular hereditaments and appurtenances thereunto belonging or in any way appertaining, shall forthwith, upon such decease, revert back unto the said William H. Budlong, of the first part, and to his assigns, forever."

Budlong's wife died in April, 1886, and he died in June of the same year. Previous to his death he devised the land so conveyed to Bertha M. Budlong; and Bassett, a brother, and Beeman, a nephew, of Annette Budlong, her only heirs at law brought the suit. The circuit court held that the plaintiffs were entitled to recover, but the Michigan Supreme Court reversed the judgment, and in the course of its opinion said:

"Every deed or contract in writing is supposed to express the intention of the parties executing it, and when the object or purpose of such deed or contract is called in question in a court of justice, the first inquiry is, What is the intention of the parties as expressed in the written instrument? It is very plain, upon the face

of the instrument, that Mr. Budlong did not intend to convey to his wife the title to the premises in fee simple absolute. She was precluded from conveying in any manner the premises described without his written assent or joining in the conveyance; and if she died before he did, she was to have no further interest in the land. If he died before she did, then the title in fee simple absolute should pass and become vested. Such is the apparent intention of the parties as expressed in the deed. It is the duty of the court to so construe the instrument as to carry out the intent of the parties making it, if no legal obstacle lies in the way. * * * We do not think it is necessary to resort to the surrounding facts and circumstances in order to discover the intent of the parties. If, however, we look to the surrounding facts and circumstances, we find them all affording evidence of the intent expressed in the instrument. * * * When it is considered that he was a farmer and a householder, and continued his residence upon the premises until his death, and retained the use and enjoyment of his personal property, it is evident that, by executing the deed to his wife, he did not intend to part with the title to his real estate, unless the contingency should occur of his dying before his wife died. That event did not occur, and the estate never vested in his wife. The condition in the deed that his wife should not convey or mortgage the land without his written assent or joining in the deed is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory, and no force or effect be given to this part of the instrument. To hold that the title did pass by the absolute words of the granting clauses would violate that rule of construction which requires that every portion of the instrument should be given effect according to the intention of the parties. When we consider the intimate relation of the parties to the instrument—that of husband and wife—the effect of the arrangement entered into was that the title of the real estate should, in the event of the death of either, go to the survivor. Doubtless a simpler way to accomplish the object would have been for them to have united in a deed to a third party, and for him to have conveyed to them jointly, and then, under the statute, the survivor would have succeeded to the whole title and estate."

In the case of *Pegg v. Pegg*, 165 Mich. 228, 130 N. W. 617, 33 L. R. A. (N. S.) 168, Ann. Cas. 1912C, 925, Davis Pegg conveyed to his wife, Mary C. Pegg, "an undivided one-half interest" in and to two parcels of land. In the deed, between the granting and habendum clauses, there was inserted the following clause:

"The object and purpose of this deed is to convey to said second party such an interest in said land that the parties hereto will have an estate in entirety, and that the same shall survive and vest in the survivor as the full and complete estate."

Davis Pegg died, and his wife claimed the property on the theory that she and her husband owned it as tenants by the entirety, while the children and grandchildren of Davis Pegg insisted that the grantor and grantee were tenants in common, and that upon the death of Davis Pegg his one-half interest in the property descended to them. In disposing of the case the Michigan Supreme Court said:

"Davis Pegg conveyed an undivided one-half interest in said premises to complainant. He retained an undivided one-half interest therein.

After this was done, they had distinct titles, and were therefore tenants in common. The title remained that way until Davis Pegg died. The question is, then, What became of his undivided half? Ordinarily it would descend to his heirs, the defendants, and it did so descend, unless the clause which was inserted carried it in a different direction. Complainant contends that it did not so descend, because she and her husband owned the premises as tenants by the entirety, and were made such by said deed, and that now, as survivor of her husband, she is entitled to the whole of said premises. In order to own the whole, as survivor, she would have to be seised of the whole before his death. Whatever vested in her as survivor must have been owned by both her and her husband before his death, and each must have been seised of the whole. As neither one * * * was seised of the whole, but both held by distinct titles, they could not have been tenants by the entirety. Neither were they tenants by entirety of the undivided half conveyed to her, because Davis Pegg reserved no interest in the undivided half he conveyed to the complainant. The deed as a whole cannot be construed as creating a tenancy by entirety, because the law was not followed in creating it. At the common law, the unities of time, title, interest, and possession had to be observed in creating such an estate. * * * The common law has remained unchanged in this respect, and is now in force. In the attempt to create an estate by entirety, in the case under consideration, neither the unity of time nor title was observed. The estate was not created by one and the same act; neither did it vest in them at one and the same time. If the clause inserted can be said to be a part of the habendum of the deed, as is argued, then that part of the habendum must fail, on the ground that it seeks to enlarge an estate in common, which is granted, into an estate of entirety, without complying with the rules of law for the creation of such an estate. By reason of these considerations, the deed must be read as though the 'clause' had been omitted. The deed created a tenancy in common between complainant and husband, and upon his decease his undivided one-half of the premises descended to his heirs."

The decision in *Pegg v. Pegg* is criticized in the editor's note, and he cites *McRoberts v. Copeland*, 85 Tenn. 211, 2 S. W. 33, as holding that where a husband conveys property, and in the habendum reserves a life estate to himself and his wife, the life estate inures upon the death of the grantor to the survivor. But it is apparent that the controlling feature of *Pegg v. Pegg* was that the grant to the wife was only of an undivided one-half interest in the property, which made the wife a tenant in common, and which the court held could not be enlarged by the subsequent clause of the deed. Neither the husband or wife was seised of the whole.

In the case at bar the conveyance was not in terms of an undivided one-half interest in the property, but a grant of the entire estate to husband and wife, "their personal representatives and assigns," and there is no conflict between the granting and the habendum clauses of the deed.

[2] The intention of the grantor that the whole estate should vest in the survivor is manifest, and that intention should prevail unless in conflict with some settled rule of law. *Georges Creek Co. v. Detmold*, 1 Md. 238. Under the Code, a married woman

may hold property acquired by her after her marriage as her separate estate, and a married man may convey property directly to his wife. Code, art. 45, §§ 1, 4; *Trader v. Lowe*, 45 Md. 1, 14. As Charles Lang did not intend to convey the estate to himself and wife as tenants in common, under the principle announced in *Cameron v. Steves*, Maria Lang would take the whole property. On the other hand, if, contrary to the express intention of the parties, we construe the deed as conveying to Maria Lang only an undivided one-half interest in the property, then, under the decision in *Pegg v. Pegg*, Charles Lang and his wife held the property as tenants in common, and upon his death his interest passed to his personal representatives. If, as in *McRoberts v. Copeland*, we treat the deed as creating a new estate in both of the grantees, we not only have the common-law unities of time, title, etc., of a tenancy by entirety, but we give effect to the clear intention of the parties that the whole estate should vest in the survivor, his or her personal representatives and assigns.

In this case, however, we do not find it necessary to construe the deed in question. In the demurrer the appellants rely upon the statute of limitations. The judgment against Charles Lang was recorded on the 22d of June, 1901, and the bill of complaint in this case was not filed until September 5, 1916.

[3] Upon the death of an owner of leasehold property, the estate devolves upon his personal representatives. *Merryman v. Long*, 49 Md. 540. The bill alleges that no letters of administration upon the estate of Charles Lang were taken out. It further alleges that on the 8th of February 1907, the plaintiff "recovered a judgment of fiat executio * * * against Maria Lang, Albert Lang, and Charles F. Lang, personal representatives of Charles Lang, deceased." If no letters of administration were taken out, as averred in the bill, Maria Lang, Albert Lang, and Charles F. Lang could not have been the personal representatives of the deceased.

[4] Where the defendant in a judgment dies, a *scire facias* may be sued out to revive the judgment against the administrator alone to bind the assets in his hands; but where it is desired to revive the judgment against the land of the deceased judgment debtor, the *scire facias* should also issue against the heirs and terre-tenants. 2 Poe, P. & P. § 593; *Tiers v. Codd*, 87 Md. 447, 39 Atl. 1044. In *Polk v. Pendleton*, 31 Md. 118, Chief Judge Bartol said:

"Who are terre-tenants within the meaning of the law, whom it is necessary to make parties to the *scire facias*? All who are in possession, deriving title under the judgment debtor, such as heirs, devisees, or alienees, after the judgment. They are in as of the estate of the judgment debtor, and before the judgment can be revived and enforced by execution against the land, so as to divest their title, it is necessary to warn them by the *scire facias*, so that they may have an opportunity of making their

defense, and of claiming contribution from others holding lands of the judgment debtor, bound by the judgment. * * * But where a party is in possession, holding by title adverse to that of the judgment debtor, or paramount to his, such party is not a terre-tenant, within the meaning of the law, because his rights are in no manner affected by the judgment. If he have a good title, the judgment does not bind the land, nor can a sale under the execution affect his interest. If he have not a good title, then he would have no right to claim contribution by reason of the land being taken to satisfy the judgment."

[5] The estate Maria Lang acquired under the deed in question was not subject to the lien of the judgment against Charles Lang, and she was, therefore, as to such interest, not a proper party to the scire facias, and her title under the deed was not affected by the alleged judgment of fiat. 2 Freeman on Judgments (4th Ed.) § 448; Adams v. Stake, 67 Md. 447, 10 Atl. 444.

[6] Assuming that where a judgment debtor dies leaving leasehold property, the judgment may be revived by a scire facias against his next of kin as terre-tenants without making the administrator a party, the scire facias against them is a proceeding in rem, and the judgment obtained is not a personal judgment against them, but one subjecting the property in their possession, which belonged to the judgment debtor, to the payment of the debt, and the proceedings must therefore contain a specific description of the property against which execution is to be awarded by the judgment of fiat. 2 Poe, P. & P. § 600; Thomas v. Bank, 46 Md. 57; Bish v. Williar, 59 Md. 382; Tiers v. Codd, 87 Md. 447, 39 Atl. 1044; Wright v. Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702. The bill does not allege that the judgment against Charles Lang was revived by a judgment of fiat against his next of kin or those who would be entitled to the property as distributees of his estate, and it does not therefore appear from the bill that the judgment was revived as a lien against the property. On the contrary, the bill alleges that he recovered a judgment of fiat against Maria Lang, Charles F. Lang, and Albert Lang as the personal representatives of the deceased.

As we have said, the bill avers that no letters of administration were taken out. We would not be justified in holding that the judgment was revived against Maria Lang and Charles F. Lang, as administrators of Charles Lang, when the bill clearly shows that they were not the administrators of his estate. In Wilmer v. Trumbo, 121 Md. 445, 88 Atl. 259, this court held that execution on a judgment of fiat against one who had been proceeded against as the personal representative of the deceased judgment debtor, but who in fact was not the personal representative of the deceased, should be enjoined.

[7] Upon the failure of those first entitled

to administration to apply for letters, administration may be granted by the orphans' court to the largest creditor applying for the same. Code, art. 93, § 30.

[8] The statute of limitations begins to run as to judgments from the date of the judgment, and is not suspended by the death of the judgment debtor, or neglect of those entitled to obtain administration upon his estate. See Brooks v. Preston, 106 Md. 693, 68 Atl. 294, and cases cited in the opinion of the court.

It follows from what has been said that the demurrer interposed in the court below by Charles F. Lang and Henrietta V. Lang, his wife, and the Building Association, the appellants in this court, should have been sustained, and that the decree of the court below must therefore be reversed.

Decree reversed, with costs, and bill dismissed as to the appellants, Charles F. Lang and Henrietta V. Lang, his wife, and the Ninth West Columbia Building Association of Baltimore City.

(131 Md. 265)

SOLVUCA v. RYAN & REILLY CO. (No. 46.)
(Court of Appeals of Maryland. June 28, 1917.)

1. EMINENT DOMAIN §2(1) — EMPLOYER'S COMPENSATION ACT—TAKING OF PROPERTY WITHOUT COMPENSATION.

Employer's Compensation Act (Laws 1914, c. 800) is not violative of Const. art. 3, § 40, prohibiting the taking of property without just compensation agreed upon or awarded by a jury.

2. JURY §35(2)—EMPLOYER'S COMPENSATION ACT—JURY TRIAL.

Employer's Compensation Act is not violative of Const. art. 15, § 6, providing for a jury trial of all issues of fact in civil proceedings, as the act expressly provides for a jury trial on appeals.

3. CONSTITUTIONAL LAW §80(2) — MASTER AND SERVANT §347—EMPLOYER'S COMPENSATION ACT—JUDICIAL POWERS.

Employer's Compensation Act is not violative of Const. art. 4, § 1, vesting the judicial power of the state in named courts, or article 8 of Declaration of Rights, declaring that the legislative, executive, and judicial powers of the government ought to be forever separate and distinct, as the act did not constitute the State Industrial Accident Commission a court.

Appeal from Baltimore Court of Common Pleas; Morris A. Soper, Judge.

"To be officially reported."

Suit by Antoni Solvuca against the Ryan & Reilly Company. Judgment for defendant, and plaintiff appeals. Affirmed, with costs.

See, also, 129 Md. 235, 98 Atl. 875.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

David Ash, of Baltimore, for appellant. Edwin W. Wells, of Baltimore, and Albert C. Ritchie, Atty. Gen., for appellee.

THOMAS, J. This suit was brought by the appellant to recover for injuries receiv-

ed while in the employ of the appellee, and charged in the declaration to have been caused by its negligence. As we said in the first appeal (129 Md. 235, 98 Atl. 675), the narr., on its face, presents a good cause of action, but the defendant interposed the following plea:

"That in conformity with the provisions of chapter 800 of the Acts of 1914, generally known as the Employer's Compensation Act, this defendant, the Ryan & Reilly Company, exercised the option of securing compensation for its employes engaged in hazardous employments, as provided in section 15 and subsection 3 of said act; that by an order of the State Industrial Accident Commission passed the 28th day of January, 1915, and which continued in effect until the 15th day of January, 1916, this defendant was permitted to carry its compensation risk as a self-insurer, having established its financial ability to assume the payment of the compensation required; that on the 26th day of February, 1915, the date of the alleged injury to the plaintiff in this cause, said order was in effect, and the defendant * * * had thereby secured compensation to this employe who was injured while in a hazardous employment, and the defendant fully complied with the provisions of the Compensation Act as provided by section 15, subsection 3, of said act."

The plaintiff demurred to this plea. It is not suggested that the plea is defective in form, but the purpose of the demurrer was to challenge the constitutionality of the act, which, it is claimed, contravenes the Fourteenth Amendment and article 7 of the Constitution of the United States and the Declaration of Rights and Constitution of this state.

This act, commonly called the Workmen's Compensation Act, declares in its preamble that the state—

"recognizes that the prosecution of various industrial enterprises which must be relied upon to create and preserve the wealth and prosperity of the state involves injury to large numbers of workmen, resulting in their partial or total incapacity or death, and that under the rules of the common law and the provisions of the statutes now in force an unequal burden is cast upon its citizens, and that in determining the responsibility of the employer on account of injuries sustained by his workmen, great and unnecessary cost is now incurred in litigation, which cost is borne by the workmen, the employers and the taxpayers, in part, in the maintenance of courts and juries to determine the question of responsibility under the law as it now exists; and, * * * in addition thereto, the state and its taxpayers are subjected to a heavy burden in providing care and support for such injured workmen and their dependents, which burden should, in so far as may be consistent with the rights and obligations of the people of the state, be more fairly distributed as in this act provided;" and that "whereas, the common-law system governing the remedy of workmen against employers for injuries received in extrahazardous work is inconsistent with modern industrial conditions, and injuries in such work, formerly occasional, have now become frequent and inevitable": Therefore "the state of Maryland, exercising herein its police and sovereign power, declares that all phases of extrahazardous employments be, and they are hereby withdrawn from private controversy, and sure and certain relief for workmen injured in extrahazardous employments and their families and dependents are hereby provided for, regardless of questions of fault, and to the ex-

clusion of every other remedy, except as provided in this act."

The act creates a commission to administer the law; authorizes it, for the purpose contemplated by the act, to require the attendance of witnesses and the production of books, pay rolls, documents, and testimony, and to apply to any judge of the supreme bench of Baltimore city, or of the circuit court of any county, for a rule on any witness refusing to testify, or to produce a book or paper, to show cause why he should not be committed to jail; to adopt reasonable and proper rules to govern its procedure; and provides that the commission shall not be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rule of procedure, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the act. The commission is required to make annually a report to the Governor of the number of awards made by it, the causes of the accidents, and a detailed statement of its expenses and of the condition of the state accident fund (therein provided for), together with any other matter it may deem proper to report. Every employer is required to pay or provide, as required by the act, compensation, according to the schedule contained therein, "for the disability or death of his employe resulting from an accidental personal injury sustained by the employe arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the wilful intention" of the employe to bring about the injury or death of himself or of others, or where the injury results solely from the intoxication of the employe while on duty. The liability prescribed above is exclusive, provided that, if the employer shall fail to secure the payment of compensation as provided in the act, an injured employe, or his legal representatives in case death results from the injury, "may, at his option, elect to claim compensation" under the act, or to maintain an action in the courts for damages, in which action the defendant shall not plead as a defense that the injury was caused by the negligence of a fellow servant or the negligence of the employe, or that the employe assumed the risk of the employment. The employer is required to secure the compensation provided by the act (1) by insuring the payment of the same in the state accident fund; (2) by insuring the payments in any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or, (3) if he does not voluntarily adopt one of the above methods, by furnishing the commission with satisfactory proof of his ability to pay such compensation, and depositing, when required to do so, with the commission securities in an

amount to be determined by the commission, to secure his liability. Provision is made for the establishment of a fund called the state accident fund, to insure employers against liability, and payment to employes and their dependents of the compensation specified. A great number of employments are specified as extrahazardous, and the act is made to apply to all other extrahazardous employments. Compensation is allowed for temporary and permanent and for partial and total disability according to the schedule contained in the act, and provision is made for compensation to dependents where the injury results in the death of the employé. An appeal is allowed from the decision of the commission to the circuit courts or the common-law courts of Baltimore city by an employer, employé, beneficiary, or person feeling aggrieved by such decision; and provision is made for trial by jury in the courts of issues of fact, and for the reversal or modification by the court of the decision of the commission, in accordance with the law and facts, and for a further appeal from the judgment of the circuit court or common-law court of Baltimore city to this court.

All of the questions raised by the demurrer, except the two to which we shall hereafter refer, are so fully covered by recent decisions of the Supreme Court of the United States, and by a recent decision of this court, that it would be useless to undertake a further discussion of them here.

We have frequently said that "the law of the land," in the Constitution of this state, and "due process of law," in the Constitution of the United States, mean the same thing. *Baltimore Belt R. R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74; *Public S. Com. v. N. O. Ry. Co.*, 122 Md. 355, 90 Atl. 105. In the case of *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, decided March 6, 1917, Mr. Justice Pitney, in delivering the opinion of the Supreme Court, after reviewing the provisions of the Workmen's Compensation Law of New York, which are like those of our statute, said:

"The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employé that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employé; (b) that the employé's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employé are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment. * * *

"In considering the constitutional question, it is necessary to view the matter from the standpoint of the employé as well as from that of the employer. For while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed, * * * yet, as pointed out by the Court of Appeals in the *Jensen Case*, 215 N. Y. 526 [100 N. E. 600, L. R. A. 1916A, 408, Ann. Cas. 1916B, 276], the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employé, is invalid as against the employer.

"The close relation of the rules governing responsibility as between employer and employé to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. * * * The common law bases the employer's liability for injuries to the employé upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law, and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense, safety appliance acts being a familiar instance. * * *

"The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim respondent superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employé; yet, if the alter ego, while acting within the scope of his duties, be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

"The immunity of the employer from responsibility to an employé for the negligence of a fellow employé is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employé and presumably taken into account in the fixing of his wages. * * * The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. * * * It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

"The same may be said with respect to the general doctrine of assumption of risk. By the common law the employé assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employé does not, in ordinary cases, assume the special risk. * * * Plainly these rules as guides of conduct and tests of liability are subject to change

in the exercise of the sovereign authority of the state.

"So, also with respect to contributory negligence. Aside from injuries intentionally self-inflicted for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject in their bearing upon the employer's responsibility are subject to legislative change; for contributory negligence again involves a default in some duty resting in the employé and his duties are subject to modification.

"It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employé, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

"But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employé.

* * * The statute under consideration sets aside one body of rules only to establish another system in its place. If the employé is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employé's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employé under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

"We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

"Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employé resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employé's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefit according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

"Of course, we cannot ignore the question whether the new arrangement is arbitrary and

unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employé, by mutual consent, engage in a common operation intended to be advantageous to both; the employé is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employé may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support, or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employé alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power, a loss of that which stands to the employé as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in case where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall; that is, upon the injured employé or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employé's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

"Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. * * *

"We have referred to the maxim *respondent superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, this maxim was said by Best, C. J., to be 'bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it.' And this view has been adopted in *New York*. *Cardot v. Barney*, 63 N. Y. 281, 287 [20 Am. Rep. 533]. The provision for

compulsory compensation, in the act under consideration, cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employé's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employé as a probable and foreseen result. In ignoring any possible negligence of the employé producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employé for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employé, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence. * * *

"But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: 'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.' *Coppage v. Kansas*, 236 U. S. 1, 14 [35 Sup. Ct. 240, 243 (59 L. Ed. 441, L. R. A. 1915C, 960)]. And this is the other: 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.' *Truax v. Raich*, 239 U. S. 33, 41 [36 Sup. Ct. 7, 10 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 263)].

"It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employé to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' *Holden v. Hardy*, 169 U. S. 366, 397 [18 Sup. Ct. 383, 390 (42 L. Ed. 780)]. It cannot be doubted that the state may prohibit and punish self-maiming and at-

tempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable'; and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. * * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employées, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. * * *

"No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth Amendment. * * *

"The objection under the 'equal protection' clause is not pressed. The only apparent basis for it is in exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. * * *

"We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. * * *

"The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. * * *

"This being so, it is obvious that this case presents no question as to whether the state might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employé is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employé's interests."

See, also, *Hawkins v. Bleakly*, 243 U. S. 210, 37 S. Ct. 255, 61 L. Ed. 678; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685; *Jensen v. South-*

ern Pacific Co., 215 N. Y. 514, 109 N. E. 600 [L. R. A. 1916A, 403, Ann. Cas. 1916B, 276]; State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; Day v. State, 7 Gill, 321.

In the case of *Am. Coal Co. v. Allegany Co.*, 128 Md. 564, 98 Atl. 143, the act of 1910, chapter 153, as amended by the act of 1912, chapter 445, which provides for the creation of a "miners' and operators' co-operative relief fund" for the relief of employes injured in coal and clay mining in Allegany and Garrett counties and the dependents of employes injured or killed in such mining, was attacked on the several grounds mainly relied on by the appellant in this case, but this court held that the act was free from the constitutional objections urged against it, and well within the police power of the state. In the course of the opinion Judge Burke said:

"There can be no doubt that the Legislature intended by the act of 1910, chapter 153, to change the rules of the common law, in the classes of industry referred to in the act, theretofore prevailing in this state governing the recovery for work accidents. It may be said that it is now generally recognized that the application of the old rules governing the relation of master and servant in certain classes of occupation are unsuitable to our changed industrial and corporate condition. The application of the principles of the common law to suits for personal injuries sustained in hazardous employments resulted in many cases in injustice to the parties concerned as well as to the state. It filled the courts with litigation; it became the fruitful source of perjury; it engendered bitterness between employer and employe; it resulted in great economic waste; and it turned out an army of maimed and helpless people as dependents upon the charity of friends or the public. The operation of these rules came to be regarded as 'foolish, wasteful, inefficient, and barbarous'; and the national government and a number of the states have now replaced them by efficient and humane laws."

[1, 2] The appellant further insists that the act in question violates section 40 of article 3, and section 6 of article 15, of the Constitution of this state, prohibiting the taking of property without just compensation agreed upon between the parties, or awarded by a jury, and providing for the preservation of trial by jury of all issues of fact in civil proceedings. The act expressly provides for a jury trial on appeals from orders of the commission, and in the case of *Frazier v. Leas*, 127 Md. 572, 96 Atl. 764, this court held that on appeal either party had the right to call witnesses in support of his case, and that the Legislature evidently intended to secure the party appealing the benefit of section 6, art. 15, of the Constitution, providing for trial by jury of all issues of fact in civil proceedings, etc. In the case of *Steuart v. Baltimore*, 7 Md. 500, the court said:

"These cases fully establish the principle that where a law secures the trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground

that the party, if he thinks proper, can have his case decided by a jury before it is finally settled"

—and in the case of *Ulman v. Baltimore*, 72 Md. 609, 21 Atl. 711, 11 L. R. A. 224, Judge McSherry, speaking for the court, said:

"Had the act of 1874 gone further and empowered the city to make provision by ordinance for giving notice to, and allowing a hearing of, the parties to be affected by the paving of a street, either before the city commissioner, or some other local tribunal, and then, for an appeal to the city court where a trial by jury could be had, it cannot be doubted that the proceedings would have been in accord with both the federal and state Constitutions. *Steuart v. Baltimore*, 7 Md. 500; *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616.]"

[3] It is also urged on behalf of the appellant that the act contravenes the provision of section 1 of article 4 of the Constitution of the state, which vests the judicial power of the state in the Court of Appeals, circuit court, orphans' court, and the courts for Baltimore city provided for in said article, and article 8 of the Declaration of Rights, which declares that:

"The legislative, executive and judicial powers of government ought to be forever separate and distinct from each other."

It is said in 6 R. C. L. § 159:

"The distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely on the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not, seems to be better indicated by the nature of a thing than its definition."

In the case of *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656, Chief Judge Le Grand said:

"But it is said, on behalf of the plaintiffs, that since the adoption of the present state Constitution, the mayor of Hagerstown could not try and fine under the ordinance, because the exercise of such power is but the exertion of the judicial power, which, by the Constitution, is confined to certain specified classes of persons, and that the mayor of Hagerstown is not included in the enumeration.

"This argument would be entitled to great weight, if we thought the power exercised by the defendant was, in the sense of the Constitution, a part of the judicial power. But we entertain no such opinion. We regard it as but a part of the police power, as contradistinguished from the regular judiciary powers of the state. From time immemorial, a distinction has been observed between the two, both in England and this country. It would be next to, if not quite impossible, for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruption, indeed to do most of the

thousand things necessary to be done, to carry on its various and indispensable operations, if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictment, and trial. It has always been understood that, under the police power, persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportioned the administration of the judicial power, strictly as such. We regard the power conferred on the corporation of Hagerstown, to summarily punish persons of the description of the appellant, Elmira, as admitted to have been, as falling directly within the definition of a police regulation."

The same objection was urged against the Workmen's Compensation Law of Wisconsin, but the Supreme Court of Wisconsin, in *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, sustained the act, and said in reference to that objection:

"The next important contention is that the law is unconstitutional because it vests judicial power in a body which is not a court and is not composed of men elected by the people, in violation of those clauses of the state Constitution which vest the judicial power in certain courts and provide for the election of judges by the people, as well as in violation of the constitutional guaranties of due process of law. It was suggested at the argument that the Industrial Commission might perhaps be held to be a court of conciliation, as authorized to be created by section 16 of article 7 of the state Constitution; but we do not find it necessary to consider or decide this contention. We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the Constitution. It is an administrative body or arm of the government, which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi judicially; but it is not thereby vested with judicial power in the constitutional sense.

"There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. Examples may be easily thought of. Town boards, boards of health, boards of review, boards of equalization, railroad rate commissions, and public utility commissions all come within this class. They perform very important duties in our scheme of government, but they are not Legislatures of courts."

The Workmen's Compensation Law, which was passed in the exercise of the police power of this state, creates a commission known as the State Industrial Accident Commission to administer the provisions of the act. In the discharge of its duties and the exertion of its powers it is required to exercise judgment and discretion, and to apply the law to the facts in each particular case, but it is clear that the Legislature never intended to constitute the commission a court, or to confer upon it the judicial power of the state within the meaning of the constitutional provisions referred to.

It follows from the views we have expressed that the demurrer to the plea of the de-

fendant was properly overruled, and that the judgment of the court below must be affirmed.

Judgment affirmed, with costs.

(131 Md. 30)

LEE, Water Engineer, et al. v. LEITCH et al.
(No. 49.)

(Court of Appeals of Maryland. June 28, 1917.)

1. MANDAMUS \Leftrightarrow 73(1) — DUTY OR OBLIGATION.

Rights and duties are correlative, and unless there was a duty or obligation upon the water board of a city to have installed the water in a residence the property owners were not entitled to writ of mandamus against the board.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 661(1)—CONTROL OVER STREETS.

The Mayor and City Council of Baltimore have full and complete control over the streets and highways of the city, the power to maintain and regulate the use of the streets being a trust for the benefit of the general public conferred on the city by its charter.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 111(1)—ORDINANCES—VALIDITY.

Ordinances of the city of Baltimore giving the water board power to make and pass rules and regulations for its government, the laying and tapping of pipes, for the protection and preservation of the pipes, or other property and appurtenances of the waterworks, etc., passed in pursuance of power granted by the state, were valid local laws.

4. WATERS AND WATER COURSES \Leftrightarrow 202—ORDINANCES—VALIDITY—REASONABLENESS.

Rule 14 of the water board of Baltimore city, passed in 1896 as an expression of the long-established policy of the city, providing that whenever an application is made to the department for the introduction of water for any premises, the street being covered with asphalt pavement, etc., the department will not introduce water until the applicant has obtained a permit from the city commissioner's department, indorsed by the mayor, for the water department to open the street, is not void as unreasonable.

5. MUNICIPAL CORPORATIONS \Leftrightarrow 62 — ORDINANCE DELEGATING POWER TO WATER BOARD.

The grant of power to the water board to make such rule, made by Baltimore City Code 1906, art. 40, providing that the water board shall have power to make and pass all rules and regulations for the laying and tapping of pipes, etc., was not an unlawful delegation of power to the water board.

6. MANDAMUS \Leftrightarrow 73(1)—RIGHT TO WRIT.

In view of rule 14 of the water board of Baltimore city, providing that whenever an application is made for the introduction of water for any premises, the street being covered with asphalt pavement, etc., the water will not be introduced until the applicant shall have obtained a permit from the city commissioner's department, indorsed by the mayor, applicants for the introduction of water into their premises which fronted on a street with an asphalt paving were not entitled to mandamus to compel the water board to introduce the water, the mayor having refused to indorse the permit pursuant to a long-established policy of his office not to permit the cutting up of improved paving to lay pipes.

Appeal from Baltimore City Court; John J. Dobler, Judge.

Petition for mandamus by Jessie S. Letch and Estelle Snow Wilcox against Walter E. Lee, water engineer of Baltimore city, and

Walter E. Lee and others, constituting the water board of the municipal corporation known as the Mayor and City Council of Baltimore. From an order that writ issue against defendants, they appeal. Order reversed and petition dismissed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Benj. H. McKindless, Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellants. William Edgar Byrd and Charles Lee Merriken, both of Baltimore (Frank M. Merriken, of Baltimore, on the brief), for appellees.

BURKE, J. The controlling facts of this case, briefly stated, are these: The appellees, Jessie S. Leitch and Estelle Snow Wilcox, are the owners of a lot of ground on Liberty Heights avenue, in Baltimore city, located 185 feet west of Carsdale avenue. They acquired title to this lot by a deed from the Forest Park Company of Baltimore city, dated February 7, 1916. The deed contained a description of the property conveyed and in it the following clause appears:

"That all right, title, and interest in and to the avenues, streets, roads, lanes, sidewalks, alleys, or paths, as the same are laid out and shown on the plat of the company's property filed among the land records of Baltimore city, in Liber S C L, No. 2888, folio 608, and which may constitute one or more of the line or lines of the lot hereby intended to be conveyed, are hereby expressly reserved by the company, its successors and assigns, subject, nevertheless, to a right of way to the said grantees, the survivor thereof, their assigns, and the heirs and assigns of the survivor, over and upon the said avenues, streets, roads, lanes, sidewalks, alleys, or paths until the same shall be condemned for public use; and that all references to or mention of avenues, streets, roads, lanes, sidewalks, alleys, or paths in this deed will be and are for the purpose of description only, and not for the purpose of dedication."

One of the alleys referred to in the deed is in the rear of the appellees' property, and runs to Carsdale avenue, which is a macadam street. This alley, according to the understanding of Henry W. Webb, the vice president of the Forest Park Company, and who had charge of the active management of the affairs of the company, was laid out to serve the houses fronting on Liberty Heights avenue. Liberty Heights avenue was paved by the State Roads Commission, and turned over to and accepted by the city in April, 1915. Robert M. Cooksey, the highways engineer of Baltimore city, said the pavement of Liberty Heights avenue is what is called "sheet asphalt, vitrified brick street; that is, sheet asphalt on the outward portions, outside of the tracks, and then vitrified brick in the railway area, and the vitrified brick covers that portion from outer rail to outer rail, and the dummy space is vitrified brick." It is a high-class pavement, and the avenue had been in the control of the city about 18 months before the commencement of this suit.

Section 37, art. 91, of the Code, provides that:

"No opening shall be made in any such highway, nor shall any structure be placed thereon, nor shall any structure which has been placed thereon be changed or renewed, except in accordance with a permit from the commission, which shall exercise complete control over such highways, except as herein otherwise provided. No state highway shall be dug up for laying or placing pipes, sewers, poles, wires or railways, or for other purposes, and no trees shall be planted or removed or obstruction placed thereon without the written permit of the state roads commission, or its duly authorized agent, and then only in accordance with the regulations of said commission; and the work shall be done under the supervision and to the satisfaction of said commission."

An opening was made in Liberty Heights avenue in 1914, while the avenue was under the jurisdiction of the State Roads Commission, in order to install water in the house of Jesse Hamburger, which adjoins the property of the appellees. The precise circumstances under which this was permitted do not appear, but we will assume it was done with the assent of the State Roads Commission.

The city water main is located in the bed of Liberty Heights avenue at a distance of about seven feet from the curb, and at the time the appellees purchased their property they were assured by an agent of the Forest Park Company that water connection had been made with the city main to the curb line. No such representation to this effect was made by any official or employé of the city, and such representation made to the appellees was unknown to the city. The appellees made no investigation or inquiry to ascertain the truth of the representation. Its falsity could have been readily discovered by a simple inquiry of the water board. The appellees began the erection of a dwelling house upon the lot, and it was then discovered that the water connection had not been made. They applied for a permit to make the connection with the main in the bed of Liberty Heights avenue. The installation involved the opening or cutting of this recently laid high-class pavement, and the city authorities declined to grant the permit. The ground of their refusal is stated in two letters of Mayor Preston to Mr. Charles Lee Merriken, attorney for the appellees, dated, respectively, August 19 and September 20, 1916, and in the testimony of the mayor and that of Mr. Cooksey, the highways engineer. Mayor Preston had been fully advised by Mr. Merriken as to the facts attending the application for the permit, and in his letter of August 19th said:

"I have your letter of August 18th. I really am placed in a very embarrassing position about this case and a good many other similar ones. I have to make a definite statement to the public and property owners, and am compelled to live up to it. I have no doubt that the water can be gotten in the back way of the property of Mrs. Jessie S. Leitch, on the north side of Liberty Heights avenue, a block and a half west of Garrison avenue, at perhaps additional cost, but

do not see how we can cut the improved paving there at this time. I have uniformly declined to do this in hundreds of cases.

"Perhaps, if you take the matter up with Mr. Lee, water engineer, or the construction division of the water department, some way can be found whereby the water can be gotten into the house from the rear."

On August 29th, Mr. Merriken replied stating that it would cost \$200 to introduce the water through the alley in the rear of the appellees' property, and again urged the granting of the permit. In reply to this the mayor wrote as follows on September 20th:

"I have your letter of September 19th. I have no doubt that the water department will permit Mrs. Leitch to tap the supply pipe of her neighbor. I can see no objection to this plan, provided she pay the usual water charges. The tunneling suggested by you would involve opening the street at the main. I regret to have to stand to our guns on these matters, but I have made no exception in any case. Of course, where there has been injury to the surface of the street, breaks in the mains, where sewer lines have to be opened, repairs have to be made, and in these cases water is allowed to be introduced, because it does not involve the independent cutting of the streets. I have not allowed any exception to be made to this rule, and if it has been done it is in violation of my orders."

On September 23, 1916, the water engineer, Mr. Lee, wrote to Mr. Merriken that:

"The only way in which the supply can be brought into Mrs. Leitch's new house, without disturbing the improved paving on Liberty Heights avenue, is by laying a service pipe in the alley north of Liberty Heights avenue, from Carsdale to a point on the east side of her lot."

In his testimony the mayor said:

"There is always a constant resistance on our part to destroying pavements that have been newly put down, except in cases where there seems to be a necessity for it, where there has been a break under the pavement, where the gas mains or sewers are broken under the paving, and they have to go into them to repair them; but we try not to do it if there is any possible remedy, any possible relief, any possible way by which it can be avoided. We found out that this could be avoided by a little additional expense on the part of the property owners; and we refused, in common with all other similar cases that come under my direction, to cut the improved paving. There is a constant battle to prevent property owners from cutting the improved paving; and if they see any improved paving go down in front of their property, without any regard for public interests, in practically a week or a day afterwards they come in and want to enlarge the water pipe, or put in sewer connections, or water connections, so it is a constant battle to prevent the paving from being cut; and this is one of the hundreds of cases that we have to decline. The objection is, in the first place, what it should cost, and, in the second place, is getting the back-fill so the pavement will stand up after it is repaired. Sometimes we have to repair it once or twice or two or three times. The tendency is that the back-fill sinks under the pavement, and then it goes down; and, of course, the other thing is that, while you may be able to repair it very well, yet, at the same time, it is not a good thing to put down a new pavement and then go and cut it up again. On Baltimore street you would be surprised at the attitude of the community on the subject. I have letters constantly calling my attention to the fact that the new pavement has been put down on Calver street and a new cut was put in there. * * * Baltimore street has been repaved, a new street put down

on Baltimore street, and yet there have been fifty cuts on Baltimore street on account of the defective back-fill. The structures under the street go down with the back-fill, the sewer and the water pipes, and electric conduit, for example. Now, then, you go down and cut down to repair a water pipe, and the fill goes in as well as you can make it, as well as you can practically make it, and the back-fill goes down and carries with it the structures on the side, no matter how well you make it. In other cities they drill, or make a small hole in the middle of the pavement and drill in. Well, we have not been able to do that very successfully, for the reason that our streets are so full of pipes that have been put down under various grants of the Legislature, gas pipes generally, and then bought out by the Consolidated, and such things, so we cannot drill very well; I mean drill from the side, horizontally; but we have one constant battle. The applications for cuts in improved pavements come over my desk with what is known as a red flag, with a red piece of paper attached, showing that they are cuts in improved pavings, so that we can examine those cuts promptly and classify them as far as we can. Where we have old pavements, we are not so careful about it, macadam, old macadam paving, or old cobble, that does not come up at all. It is the improved, expensive pavement that has been put down by the property owners where we resist the cutting process wherever we can and exercise the best discretion we have in the public interests. I receive a great many applications for installing pipes to the curb line, and I constantly refuse to grant these permits. Sometimes the circumstances or equities in the case seem to direct a different discretion. For instance, if the pavement is five or six or seven years old, if the pavement is already cut at that point for any purpose—suppose, for instance, there is a broken main there, and the property owner wants to go down into the same cut, we let them go. It is already there. There are a good many parallel cases that control the exercise of discretion. Mr. Hubert passed on some of them, in order to take the volume of business, and I do generally. For the first four years I think I took charge, and now Mr. Hubert is passing on them very largely in my office in my absence. I have never, so far as I can recall, none that I know of, granted any permits for opening improved paving where the circumstances were such as are present in this case. Other than the reasons which I have stated, I can only say, I am down there at the City Hall trying to protect the city's property as best I can and exercising the best discretion I can in the matter."

Mr. Cooksey said:

"The reasons which operate would cause me to believe that it was proper to refuse this application. They are that I was under the impression that when the application was first presented the lot had just been sold by the company or parties developing that part of the city, and I knew, or thought I knew, they were well acquainted with our regulations regarding the tearing up of pavements, and I thought they should have made it their business to see that all their vacant lots which they proposed to improve were properly connected up before the new paving was laid. There has been a good deal of new paving laid in that territory. The company I am speaking of is the Forest Park Company, which sold to Mrs. Leitch. I also considered the reasons that apply to all permits for cutting new pavements, the fact that you cannot very well, at any reasonable cost, repair a pavement so that it will be as good as before it was cut. It is practically impossible to join the asphalt around the edges of the cut. Every effort is made to make a bond, but it does not actually bond. The concrete does not bond to the old concrete base, and I think we all know

that it is pretty hard to ram any trench so that there will be no settlement. It may stand up a year and it may stand up a year and a half, but it generally settles some, which means a depression, and which means going back and spending the city's money again to bring that cut up to grade. Then, of course, we cannot always get a plant to handle the cut immediately, and therefore we have got a hole which must be taken care of temporarily—in other words, it is temporary—and that permits moisture to enter and often makes it dangerous. * * * In other words, there is always a line in there between the old and new paving—a line between the material that goes in to make the patch in the original paving. This permits moisture to get in under the patch. There are times, of course, when that will seal over, but when the seal on the top is broken there is no bond all the way down, and if moisture gets in there in cold weather it immediately begins to lift the edge of the patch and it starts to disintegrate, the result of which is more work on that patch and unsatisfactory results in the end. That is, you cannot make a patch as good as the original paving and you have holes or depressions. Considering these things led to the general policy that we should make as few cuts in the paving as possible, and this is the general policy of the highways engineer's office, so much so that I continually advise other departments to explain the necessity before we will grant them permits for their own extension and repair work. The witness further testified that his department turns down probably three to five hundred applications a year for tearing up the new pavements, and the applications of the city departments are turned down for the same reason. Some of the applications for tearing up improved paving are granted, but the applications which are granted are under some of the following classes: Water leaks are granted, of course. Generally an emergency is given and an emergency break is given prompt attention, because if the water leak is not repaired it will damage a greater and larger area of the street, and the quicker it can be repaired the less damage will be done. A gas leak will always affect the asphalt in the same manner. It seeps up and the paving will disintegrate from escaping gas. The extension or enlarging of a water service in the downtown sections where sprinkler service is installed for fire protection. This is granted for fire protection. The extension of the water system—that is, a main connection, or an extension of the main of the water department for better service—but they are looked into quite well before they are granted. Q. Now, for merely curb-line connections—that is, connections from the main line to the curb line—do you or not grant those? A. We do not, unless it is a case of the connection becoming worn out or breaking. Practically a leak or a choked connection. Q. But I am speaking of absolutely new connections. A. We do not grant those. Q. Now, we have been speaking of newly laid paving. Is there any period of time which you have fixed in your judgment when that no longer applies? A. After five years."

The city was willing to permit the introduction of the water from Carsdale avenue by the rear alley mentioned, or to allow the appellees to connect with the supply pipe of Mr. Hamburger, but refused, for the reasons stated, to cut the pavement on Liberty Heights avenue. It does not appear that the Forest Park Company had any objection to the introduction of the water through the rear alley, and in view of the testimony of Mr. Webb and the representation of their agent made to the appellees at the time of

their purchase, that the water connection had been made, it is hardly likely it would have objected. So far as we are informed by the record, the real reason why the appellees did not secure the water in that way was because of the additional cost. Failing to obtain the permit applied for, the appellees filed a petition in the Baltimore city court for a writ of mandamus, and that court, after hearing the testimony, by an order dated January 22, 1917, ordered the writ of mandamus to issue against the appellants, "constituting the water board of the municipal corporation known as the Mayor and City Council of Baltimore, commanding them to proceed forthwith with the installation of water from the water main of the Mayor and City Council of Baltimore, located in the bed of Liberty Heights avenue to the *kerb* line in front of the property of the petitioners." This appeal was taken from that order.

The single question is, Had the court the right, under the facts and circumstances stated, to compel by mandamus the water board to install the water as directed by the order appealed from? In dealing with this question, it is important to keep in mind some fundamental principles governing the issuance of the writ of mandamus. It was said in *Upshur v. Baltimore City*, 94 Md. 743 51 Atl. 953, that:

"It must be remembered that a writ of mandamus is not a writ of right granted as of course, but it is one which is allowed 'only at the discretion of the court to whom the application is made. This discretion will not be exercised in favor of applicants unless some just or useful purpose may be answered by the writ.' *Booze v. Humbird*, 27 Md. 4. It is also well settled that the relator's right which is sought to be enforced must be a clear, distinct legal right (*State ex rel. O'Neill v. Register et al.*, 59 Md. 287), and that it must be certain and free from doubt. Mandamus is an extraordinary process, 'and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, * * * this writ will not be granted.'"

And in *Brown v. Bragunier*, 79 Md. 234, 29 Atl. 7, it was said:

"The remedy by mandamus is not one which is accorded *ex debito iustitiam*. The writ is a prerogative one; and unless the right which the relator seeks to enforce is clear and unequivocal, and the correlative duty which the respondent refuses to perform is purely ministerial, and there be no other adequate remedy at law, it will not be granted."

[1] Rights and duties are correlative, and unless there was a duty or obligation upon the water board to have installed the water as ordered, the appellees were not entitled, under the authorities cited, to the writ of mandamus. To know what its duty was under the circumstances, it is necessary to examine certain provisions of the charter and ordinances of the city which relate to this subject. The installation of the water, which the appellants were directed to make, involved the opening or disturbance of the surface of a newly paved street. If the appellees have a right to require the opening of a

pavement, others similarly situated must be accorded the same right, and the policy adopted by the mayor for the preservation of newly laid pavements will be set aside, and the resulting injury described in the testimony, which that policy was designed to prevent, will inevitably ensue.

[2] It is well settled that the Mayor and City Council of Baltimore have full and complete control over the streets and highways of the city.

"This legislative authority over the streets is sometimes classified as belonging to the police power; that is to say, that great power which embraces the protection of life, limb, health, and property, and the promotion of the public peace and safety. It is a high conservative power of the utmost importance to the existence of good government." *Lake Roland Elevated R. R. Co. v. Baltimore*, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126.

The power to maintain and regulate the use of the streets is a trust for the benefit of the general public. This power, in express terms, is conferred by the charter upon the city. By subsection 26 H, § 6, the power is given to the city "to regulate the opening of street surface for the purposes authorized by law or ordinance." The power to control and supervise the streets and highways of the city is comprehended in the grant of police power to the municipality. By subsection 18 of section 6 of the charter (Act of 1898, c. 123) it has the power—

"to pass ordinances for preserving order, and securing property and persons from violence, danger and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the great interest and insuring the good government of the city. To have and exercise within the limits of the city of Baltimore all the power commonly known as the police power to the same extent as the state has or could exercise said power within said limits."

And by subsection 31 of section 6 it is further provided that:

"The foregoing or other enumeration of powers in this article shall not be held to limit the power of the mayor and City Council of Baltimore, in addition thereto to pass all ordinances not inconsistent with the provisions of this article or the laws of the state as may be proper in executing any of the powers, either express or implied, enumerated in this section and elsewhere in this article, as well as such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the city of Baltimore; and it may provide for the enforcement of all such ordinances by such penalties and imprisonments as may be prescribed by ordinance; but no fine shall exceed five hundred dollars, nor imprisonment exceed twelve months for any offense."

In *Rossberg v. State*, 111 Md. 394, 74 Atl. 581, 134 Am. St. Rep. 626, Judge Pearce, in discussing the police power of the city, said:

"Broader or more comprehensive police powers could not be conferred under any general grant of police power, for the purposes mentioned in section 18, than those granted in that section, and when we consider the 'Welfare Clause' of the charter, sec. 31, greater emphasis could not be laid upon the implied powers of the city for the maintenance of the peace, good government, health, and welfare of the city than is there laid.

That section expressly declares that, no enumeration of powers in that article shall be deemed to limit the power of the city, in addition thereto, to pass all ordinances, not inconsistent with that article or the laws of the state, as may be proper in executing any of the enumerated powers, express or implied, contained anywhere in said article. * * * In the present case the legislative grant is not merely one of power to pass ordinances relating to specified police powers, regarded as a part only of the general police power, but the grant is of 'all the power commonly known as the police power, to the same extent as the state has or could exercise said power within said limits.' The implication, therefore, is a necessary one, that, notwithstanding the preceding clause of that section of the charter enumerated certain purposes for which ordinances might be passed, the Legislature intended the city to have, in addition, the power to pass ordinances for any and all purposes relating to the exercise of the police power. If, therefore, the power to pass the ordinance in question can be considered as an implied power, it is well within the definition of an implied power given by Judge Cooley, since the whole police power cannot be exercised if the exercise of any part of such power is to be withheld because such part is not expressly granted. But we regard the power here in question as an express power, and this is so whether we look, in the construction of the charter, either to one or both of the sections heretofore reproduced. The grant of all the police power is an express grant, and every part of the whole is therefore derived by express grant in section 18. If there could be any doubt of this, such doubt is set at rest by section 31, which, as we have said, expressly declares that the power to pass any ordinance, not inconsistent with that article or with the laws of the state, shall not be limited by any enumeration of powers anywhere in said article. We regard the legislative intent therefore to be clear, whether the power be viewed either as express or implied. We did not understand the appellant to deny that this power can be delegated by the state to a municipal corporation. It is true, as a general proposition, that the Legislature cannot delegate its power to make laws, but as expressed in 28 Cyc. 698: 'After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power, and therefore nondelegable, the doctrine is firmly established and now well recognized that the Legislature may expressly or by implication, delegate to municipal corporations the lawful exercise of police power within their boundaries. * * * It may be full or partial, regular or summary; but it is never exclusive, as the Legislature has no authority to divest itself of any of its sovereign functions or powers.'

By subsection 30 of section 6 of the charter, the Mayor and City Council was empowered "to establish, operate, maintain and control a system of water supply for Baltimore city, and to pass all ordinances necessary in the premises"; and it was further invested with "all * * * rights and powers necessary for the introduction of water into said city, and to enact and pass all ordinances, from time to time," which may "be deemed necessary and proper to exercise the powers and effect the objects above specified."

The water board, under the charter, is the second subdepartment of public improvements, and it has charge of the water supply of the inhabitants of the city.

By ordinance No. 28, approved March 9,

1896, and codified as section 1, art. 40, of the Baltimore City Code of 1906, it was ordained that:

"The water board shall have power to make and pass all rules and regulations for the government of the board, the laying and tapping of pipes, or for the protection and preservation of the said pipes, or other property and appurtenances of the waterworks; and to affix penalties, and to enforce the same for any violation of their rules and regulations; it shall also have power to adopt all necessary regulations to preserve the purity of the water, and to enact and enforce such rules, regulations and penalties as they may deem necessary, in accordance with the provisions of this Code."

A prior ordinance is found in the City Code of 1893 (article 54, sec. 11) which authorizes the water board—

"to make and pass rules and regulations for the government of the board, the laying of pipes and for the protection and preservation of said pipes or other property and appurtenances of the waterworks."

[3] These ordinances passed in pursuance of power granted by the state, were valid local laws. *Gould v. Baltimore City*, 120 Md. 534, 87 Atl. 818.

Prior to the passage of this latter ordinance, an ordinance was passed in November, 1892, prohibiting any person, persons, or corporations from tearing up the streets, without first having obtained a written permit therefor from the city commissioner, approved by the mayor. This ordinance was recognized as valid in *State v. Latrobe*, 81 Md. 233, 31 Atl. 788, and acting under the authority conferred upon it by the ordinance of 1893, above referred to, the water board in October, 1895, passed the following rule:

"Rule 14. Whenever an application is made to this department for introduction of water for any premise or premises wherein the city main may lay, said street being covered with asphalt pavement, asphalt block, Belgian block, or any improved pavement, this department will not introduce the supply of water until the applicant or applicants have obtained a permit from the city commissioner's department and indorsed by the mayor for this department to open the street. And be it further understood that the applicant or applicants will have to bear all the expenses for the proper repairs and repaving of any such street."

One of the main objects of the rule was the preservation and protection of the streets and highways of the city, and the water board, evidently had in mind the ordinance of 1892 and the opinion of this court in *State v. Latrobe*, supra, which was filed April 4, 1895. This rule has been in force and acted upon by the water board ever since its adoption, with one single practical modification. As the highways engineer is, with respect to the issuance of the permit, the legal successor of the city commissioner's department, the issuing of the permit now devolves upon him; but it must, however, be indorsed by the mayor.

[4, 5] It is argued that this rule is void—First, because it is unreasonable; and, secondly, that the grant of power to make it is

an unlawful delegation of power to the water board. As to the first contention, it must be apparent from what we have said that the rule is an expression of the long-established policy of the city and is founded upon considerations of public welfare. Nor do we think the rule "delegatus non potest delegare" applies. The corporation may act in such matters by its officers and agents. This was recognized in *State v. Latrobe*, supra, and, as said by Judge Schmucker in *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739, 134 Am. St. Rep. 586:

"It has * * * been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld."

In this connection we may also refer to *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266, and *Brown v. Stubbs*, 128 Md. 129, 97 Atl. 227.

Judge Pearce said in *Rossberg v. State*, supra, that the powers vested in the city "are broad and sweeping, and are expressed in terms which indicate a liberal view of the need of broad powers for effective local government of a great city." The writ was not directed against the mayor, and there is nothing to indicate that his objection to the issuance of a permit was based upon passion, prejudice, hostility, or any unworthy motives. He was exercising his best judgment in the public interests in maintaining what we think to be a wise public policy. It was said in *Upshur v. Baltimore*, supra, that the writ of mandamus "is based upon reasons of justice and public policy to preserve peace, order, and good government" (*Poe's Prac.* § 708), and it obviously, therefore, will not be granted where those ends would be subverted or might be frustrated.

[6] For the reasons stated we sustain the validity of rule 14 of the water board, and it follows from that holding that the appellees were not entitled, under the authorities cited, to the writ of mandamus, and the order appealed from must be reversed and the petition dismissed.

Order reversed and petition dismissed, with costs.

(116 Me. 506)

STAPLES v. EMERY et al.

(Supreme Judicial Court of Maine. Aug. 24, 1917.)

APPEAL AND ERROR \Leftrightarrow 928(2)—PRESUMPTION—INSTRUCTIONS.

Where no exceptions to instructions are presented, it must be assumed that proper instructions were given to the jury.

On Motion from Supreme Judicial Court, Waldo County, at Law.

Action by Sewall L. Staples against Warren K. Emery and others. On motion for a new trial after verdict. Motion overruled.

Argued before KING, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Dunton & Morse, of Belfast, for plaintiff.
Tascus Atwood, of Auburn, for defendants.

PER CURIAM. Action to recover for services. Defendant claimed an entire contract, that plaintiff was guilty of a breach thereof, and further claimed damages in recoupment for that breach. Plaintiff denied that the contract was an entire one, and further claimed that defendant, by failure to make payments as agreed upon, was guilty of violation of the contract which did exist. No exceptions are presented, and it must be assumed that proper instructions were given to the jury. The evidence is bluntly conflicting, but the issues, under proper instructions, were issues of fact within the province of the jury to determine.

After a careful examination of the testimony, we are unable to say that the jury so manifestly erred as to require the verdict to be set aside.

Motion overruled.

(116 Me. 311)

SMITH v. TILTON.

(Supreme Judicial Court of Maine. Aug. 24, 1917.)

1. TRIAL \S 251(2)—INSTRUCTIONS—ISSUES TO SUPPORT.

In an action for money paid to defendant upon his fraudulent representation that an attorney had advised him that plaintiff might obtain an order for the sale of land, wherein defendant denied the fraud and alleged that the money was paid him as a part of the purchase price of a farm conveyed to plaintiff's son, but did not allege plaintiff's fraud in attempting to obtain an order of sale, defendant's requested instruction that, if she placed the money in his hands to conceal it so as to make a sale of the land appear to be necessary, she could not recover, was properly refused, as being without the issues.

2. MONEY RECEIVED \S 12 — DEFENSES — FRAUD.

In such case plaintiff's fraud, if any, in attempting to conceal the money paid to defendant so as to obtain an order for the sale of land in which she had a life interest with a power of sale would not bar her recovery, where it might enable her to live without selling the farm, which, if unsold, would descend to her deceased husband's collateral heirs, whose interests were to that extent involved.

Exceptions from Supreme Judicial Court, Somerset County, at Law.

Action by Murtha W. Smith, by conservator, against George A. Tilton. From the refusal to give his requested instruction, defendant excepts. Exceptions overruled.

Argued before KING, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Butler & Butler, of Skowhegan, for plaintiff. Walton & Walton, of Skowhegan, for defendant.

PHILBROOK, J. Action for money had and received.

The plaintiff is the widow of Prescott A.

Smith, who died testate. By the terms of his will all his personal property was bequeathed to his widow, "the same to be hers absolutely," as the will states. She was also devisee of a life estate in all his real property, with the power to sell and dispose of the same, or any part thereof, if necessary for her comfortable support and maintenance. After her decease, if there had been no disposal as above provided for, the use, income, and occupation of the home farm were devised to the only child of the testator, Harry P. Smith, for the term of his natural life. At the decease of the latter the home farm was bequeathed to the person or persons who would be the nearest relatives of the testator, according to the laws of descent, other than any and all issue of the son, Harry, and his wife, Grace Butler Smith, which issue was expressly excluded as beneficiaries under the will.

When the conditions of the instrument became known, the son was naturally disappointed as to the provisions made for himself and his disinherited children, and made threats to contest the father's testament. It is obvious from the record that the plaintiff, with a maternal love of son and grandchildren which is quite natural, sympathized with Harry in his disappointment. The matter became the subject of domestic discussion, and members of the legal profession were consulted with a view to ascertaining whether the terms of the will, so far as they affected Harry and his children, could be avoided. The plaintiff stated in her testimony that she got her son and this identical defendant to consult attorneys and find out if it could be done, saying also that if it could be she so desired for the children's sake and to please Harry. The necessity of selling the real estate was clouded by the fact that the personal property bequeathed to the plaintiff amounted to about \$2,400, which sum included about \$1,800 deposited in a local bank, and also by the further fact that, exclusive of this bequest, the plaintiff, at the time of her husband's decease, had about \$400 of her own money on deposit in a bank.

The defendant owned a farm which Harry desired to purchase. There was talk among the interested parties to the effect that if the widow could give a good title to the home farm then the defendant would convey his farm to Harry and receive in part payment thereof the deed of the home farm from the plaintiff. Hence the question of necessity of sale of the home farm by the plaintiff became the stumbling block which must be removed from the pathway leading to the power to give good title to that farm by the plaintiff. She says that she told the defendant and her son to ascertain, by consulting a certain attorney in whom she professed to have confidence, whether and how these

transactions could be carried out successfully. Finally, she says, the defendant told her they had seen this attorney and had been advised by him that she would not be obliged to reach her last dollar before she could sell the home place, and that, if most of the money was put out of sight, it would enable the trade to be accomplished and carried through more quickly. She says that she relied upon this advice and the statement of the defendant that it had been given, and paid the defendant \$600 "to get it out of sight, so that trade could be completed quicker; so I would be able to sell the home place."

She now says that she was deceived and defrauded by the defendant, that the alleged advice reported to her from her attorney was in fact never given, and seeks to recover the \$600 which she paid him.

The defendant denies the deceit and fraud, and alleges further matter of defense that the plaintiff gave the \$600 to her son to enable him to purchase the defendant's farm, and that the same was received by him as a part of the consideration for said farm which he the same day conveyed to the son, all being done in the presence of the plaintiff.

It does not appear from the record that plaintiff ever executed a deed of the home farm to the defendant; her sole effort being to recover the money paid to the defendant under the claim already described.

[1] The defendant requested the following instruction:

"That if the defendant falsely represented to the plaintiff that Mr. M., her attorney, said it would be legal for her to do so, yet if she thereupon placed the \$600 sued for in this action in the hands of the defendant with intent to get it out of sight and for the purpose of giving the false impression that it was necessary for her to sell the real estate of her deceased husband, thereby depriving others of their rights, and preparatory to so doing, then she cannot recover the same back from the defendant."

The presiding justice declined to give this instruction and allowed exceptions. The case is before us upon these exceptions, and upon no other ground. The requested instruction was evidently based upon the familiar principle that, if a person commits a fraud, he cannot ask the law to help him get back his money which he fraudulently paid away. But we have carefully examined the declaration and brief statement, as well as the plea and special matter of defense, and do not find that fraud on the part of the plaintiff was made an issue by the pleadings. As we have already stated, the plaintiff's declaration raises the issue of fraud on the part of the defendant. The defendant de-

nies this allegation and raises a further and substantive issue, namely, that the plaintiff gave the \$600 to her son to enable him to purchase a farm of the defendant, and that the same was received by the defendant as a part of the consideration of said farm. The defendant was evidently content to rest his defense upon these pleadings, but plainly they did not raise the issue of fraud or fraudulent conduct on the part of the plaintiff.

In many jurisdictions the law seems to be well settled that instructions should be confined to the issues made by the pleadings. We borrow the language from some of the leading cases.

Instructions of the court should confine the attention of the jury to the issues made by the pleadings. *Holt v. Pearson*, 12 Utah, 63, 41 Pac. 560, citing as authority *Terry v. Shively*, 64 Ind. 106; *Conlin v. Railroad Co.*, 36 Cal. 404; *Frederick v. Kinzer*, 17 Neb. 368, 22 N. W. 770; *Glass v. Gelvin*, 80 Mo. 297. Instructions to juries should be confined to the issues made by the pleadings. *Jacksonville Electric Co. v. Batchis*, 54 Fla. 192, 44 South. 933, citing as authority *Walker v. Parry*, 51 Fla. 344, 40 South. 69; *Hinote v. Brigman*, etc., 44 Fla. 589, 33 South. 303. It is an established principle of law that the instructions to a jury must be based upon and applicable to the pleadings. *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378. We think this principle is sound, workable, and in the interest of justice in the trial of causes, and so we hold that the refusal to give the requested instruction, it not being pertinent to any issue raised by the pleadings in the case at bar, was entirely proper.

[2] We do not overlook the contention of the defendant that courts owe it to the public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality, or public policy, even if objection be not made by the parties interested. But this principle, in our minds, does not apply here. Rights of third parties, namely, the collateral heirs of the testator, were involved. The recovery of this money by the plaintiff may enable her to live without the necessity of sale of the real estate, which, if not sold, will descend by the will to those collateral heirs. The defendant should not be allowed to keep this money if so doing would fraudulently deprive those heirs of what would rightfully be theirs. We think this is not a case where courts are required to interfere of their own volition in the interests of public policy or the integrity of judicial tribunals.

Exceptions overruled.

(116 Me. 316)

KING v. THOMPSON.

(Supreme Judicial Court of Maine. Aug. 28, 1917.)

1. WORK AND LABOR — PLEADING.

General omnibus count, with specification that under it plaintiff will show that defendant is indebted to her for labor according to account annexed, is count on account annexed for work and labor, since plaintiff's right of recovery is limited by her specification.

2. REFERENCE — FINDINGS OF FACT.

Under Rev. St. 1903, c. 84, §§ 83, 85, making auditors' reports prima facie evidence, the effect of an auditor's report as prima facie evidence for party offering it is not destroyed as to uncontested findings, where she introduces other evidence to disprove some of its findings.

3. EVIDENCE — OPINION — EVIDENCE — ADMISSIBILITY.

In an action on an account annexed for work and labor in doing housework for wife of defendant's intestate, objection to question what amount of the time she was able to do her own housework is properly sustained as calling for judgment of witness.

4. WORK AND LABOR — EVIDENCE — WEIGHT AND SUFFICIENCY.

In action on account annexed for work and labor, items of account must be proven by clear and definite evidence.

5. WORK AND LABOR — PLEADING — EVIDENCE ADMISSIBLE.

In action on account annexed for work and labor, plaintiff can recover only for services specified in her account.

6. REFERENCE — REPORT AS EVIDENCE — EXCEPTIONS — CONCLUSIONS BASED ON INCOMPETENT EVIDENCE.

In view of Rev. St. 1903, c. 84, § 84, no exception lies to the admission in evidence of an auditor's report, objected to for the first time at trial, on ground that his conclusions were based on incompetent evidence.

Exceptions from Supreme Judicial Court, Kennebec County, at Law.

Action by Annie E. King against Herbert Thompson, administrator of the estate of A. Frank Pulsifer. Judgment for plaintiff, and defendant excepts. Exceptions sustained, and new trial ordered.

Argued before CORNISH, C. J., and KING, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

George W. Heselton, of Gardiner, for plaintiff. A. S. Littlefield, of Rockland, for defendant.

BIRD, J. This is an action of assumpsit originally brought against A. Frank Pulsifer. An auditor was appointed, and after hearing before him defendant died intestate, and his administrator, before trial by the jury, became the party defendant. The writ is dated March 18, 1914.

The declaration contains two counts. The first count is upon account annexed for the sum of \$3,099.71, and the second is the general omnibus count with the specification that under it "the plaintiff will show that the defendant owes her for labor done between the date of April 29, 1884, and the date of

the purchase of this writ some \$3,099.71, according to the account annexed."

[1] The latter commences with a charge under date of April 29, 1884, and ends with one under date of November 22, 1913. Charges are made in each of the months between these dates, except 14. Each charge is made under a specific date, and is for either one day's or one-half day's labor or work in nursing the wife of intestate, who was the mother of plaintiff, or housework at the uniform rate of \$1 per day. The second count therefore is substantially an account annexed for work and labor. *Carson v. Calhoun*, 101 Me. 456, 458, 64 Atl. 838; *Gooding v. Morgan*, 37 Me. 419, 423. See, also, *Pettingill v. Pettingill*, 64 Me. 350, 358, 359. *Cape Elizabeth v. Lombard*, 70 Me. 396, 400, is not authority to the contrary. Nor is the dictum in *Dexter Savings Bank v. Copeland*, 72 Me. 220, 222. The specifications rendered necessary for a valid attachment of real estate may be relied upon by the defendant equally with that filed by plaintiff under rule 11 (70 Atl. viii). Primarily the former is for the information of creditors and purchasers. *Saco v. Hopkinton*, 29 Me. 268, 271; see, also, *Fairbanks v. Stanley*, 18 Me. 296, 302; *Jordan v. Keen*, 54 Me. 417. But obviously it cannot be held that the defendant may not equally rely upon it. In *Carson v. Calhoun*, supra, the specification in the writ under the money count was not made to enable a valid attachment of real estate to be made, and yet it is held that the claim of the plaintiff was restricted and his right of recovery limited by his specification.

At the October term, 1914, the defendant pleaded the general issue with brief statement invoking the statute of limitations, and the case was sent to the auditor. It may be inferred that the report of the auditor was filed at the March term following. The cause was submitted to a jury at the March term, 1916, and resulted in a verdict for plaintiff in substantially the amount claimed in the account annexed. The case is before this court upon exceptions and the usual motion for new trial.

In the bill of exceptions are found 13 exceptions to refusals to instruct the jury as requested, numerous exceptions to the admission and exclusion of evidence, 6 exceptions to the charge to the jury of the presiding justice, and exceptions to the admission of substantially the whole of the report of the auditor, as based upon incompetent evidence.

[2] The first exception to refusals to instruct is:

"The plaintiff having attacked the auditor's report which was put in by her, that report no longer makes for her a prima facie case, and she must prove otherwise all the elements necessary to make out her case."

The statute regarding auditors provides that:

Their "report is prima facie evidence upon such matters only, as are expressly embraced in the order." "Their report may be used as evidence by either party, and may be disproved by other evidence." R. S. 1903, c. 84, §§ 83, 85.

Here is found nothing to indicate that impeachment or disproof of the report is confined to the party not offering it, but rather the contrary. So it is held in *Howard v. Kimball*, 65 Me. 308, 326, 327, 328, 329, where the report was offered by plaintiff and wherein the court says:

"The defendant was at liberty to put in the same evidence which was before the auditor or such other evidence pertinent to the case before the jury as he desired, and this right does not seem to have been abridged. Either party has that right and will commonly find it necessary to avail himself of it, as to disputed items, whether the object be to impeach or to support the auditor's report" without destroying the prima facie effect of its findings unless successfully impeached or disproved.

To the same effect is *Kendall v. Weaver*, 1 Allen (Mass.) 277, 278, 279, where again the report was offered by plaintiff, the court saying:

"The party reading it may, as well as his adversary, produce evidence in addition to it, and may prove items not allowed by the auditor, or offer proof to contradict any part of it."

See *Smith v. California Ins. Co.*, 87 Me. 190, 195, 32 Atl. 872.

The instructions given by the justice presiding were without error.

In view of the conclusion to which the court must come upon the exceptions discussed below, which will render a new trial necessary, it is deemed profitless to consider the other exceptions to the charge of the presiding justice or to his refusal to instruct, or other exceptions to the admission or exclusion of evidence.

[3, 4] The following question was addressed by plaintiff to one of her witnesses, a daughter of the plaintiff, subject to objection and exceptions:

"Q. From that time down (when witness was ten years old), what is your best judgment of the amount of time your grandmother was able to do her own housework?"

"A. She was not able to do her own work one-half of the time, near."

The obvious intention was to show that the inability of the defendant to perform work, was proof of, or tended to prove, items of the account annexed. Each item of the account annexed is or may be a separate contract of itself. *Bennett v. Davis*, 62 Me. 544; *Turgeon v. Cote*, 88 Me. 108, 111, 33 Atl. 787.

Vagueness and indefiniteness of proof are as much an objection to sustaining a count for money had and received as they are in other actions (*Titcomb v. Powers*, 108 Me. 347, 348, 349, 80 Atl. 851); and we conceive that clear and definite evidence is as essential in proof of the items of an account annexed. The question, moreover, calls not for a statement of fact, but for the judgment of the witness. We think the question inadmissible, and the exception is sustained.

[5] Exceptions are taken to the refusal of

the court to rule, as requested by defendant, that:

"The plaintiff is only entitled to recover in this action for the services specified in her account, and you are not authorized to found your verdict on any other services."

It follows, we think, from our conclusions already reached, that the instruction requested should have been given. While it is probably true that the formal count in quantum meruit is no longer necessary in any case (*Lawes' Pl. in Assumpsit*, 504), and that the value of work and labor done may be recovered under a general count in indebitatus assumpsit, it should be noted that such general count makes no attempt to set out or specify the particular labor performed. Such, as we have seen, is not the case in the present action. The exception is sustained.

[8] Much of the confusion which has arisen in the case might have been avoided by different procedure. The defendant objects that the report of the auditor, or substantially the whole of it, is based upon illegal evidence. In *Briggs v. Gilman*, 127 Mass. 530, 531, and cases cited, it is correctly stated that:

"The object of the statute by which the courts are authorized to refer cases to auditors and to require their reports to be read as prima facie evidence, although neither party may desire it, is to simplify and elucidate the issue to be tried. * * * If one of the findings of the auditor appears to the court, upon the facts reported by him, to be erroneous in matter of law, or in excess of the authority conferred by the rule of reference, the jury may be instructed accordingly, and so much of his report stricken out, leaving the rest to have its proper weight and effect. * * * But an objection to a portion of the evidence upon which the auditor has based his conclusion cannot be taken, as matter of right, except by motion to recommit the report to the auditor before the trial. To allow such an objection to be taken for the first time, at the trial, as a ground for rejecting the whole report and proceeding to trial without it, would defeat the purpose of the statute."

See, also, *Silver v. Worcester*, 72 Me. 322, 325; *Collins v. Wickwire*, 162 Mass. 143, 145, 38 N. E. 365; *Harvard Brewing Co. v. Killian*, 222 Mass. 13, 15, 109 N. E. 649.

And again it has been decided by the same court that the objection that certain evidence contained in an auditor's report was inadmissible is no ground for excluding the report or for striking out those portions of it on a motion made at the trial. *Leverone v. Arancio*, 179 Mass. 439, 448, 61 N. E. 43, and cases cited. No exception lies to the admission in evidence of an auditor's report, objected to for the first time upon the grounds that his conclusions were based on incompetent evidence. *Winthrop v. Soule*, 175 Mass. 400, 56 N. E. 575. See, also, *Kendall v. May*, 10 Allen (Mass.) 59; *Allwright v. Skillings*, 188 Mass. 538, 539, 540, 74 N. E. 944.

The provisions of the statute under which the decisions of the Supreme Judicial Court of Massachusetts were reached are substantially identical with our own. "Their report may be recommitted. They may be discharg-

ed and others appointed." R. S. c. 87, § 89 (R. S. 1903, c. 84, § 84). We find nothing in the decisions of our own court holding otherwise. As a new trial is ordered, application for recommitment of the report may be made in vacation (R. S. c. 87, § 37), or at the next term. *Phillips v. Gerry*, 75 Me. 277, 279.

The motion for new trial is not considered.

The exceptions are sustained and new trial ordered.

(88 N. J. Eq. 81)

LAMBERT v. VARE. (No. 42/402.)

(Court of Chancery of New Jersey. July 23, 1917.)

1. DEEDS ¶112(2) — CONSTRUCTION — LAND COVERED.

The owner of land between a street running parallel with the seacoast laid the tract out in streets, blocks, and lots, the streets running from the existing street to the shore. Her conveyance of part thereof described the tract sold as beginning at the line of the original street, running thence southerly 275 feet; thence easterly, parallel with the original street, 185 feet to the east line of another street; thence northerly in the line of such street 275 feet to the original street; thence to place of beginning. The map referred to showed fractional lots not numbered lying between the tract so described and the ocean. *Held*, that the tract conveyed did not extend to the ocean.

2. COVENANTS ¶31 — AGREEMENT TO CONVEY — APPLICATION.

The owner of land lying between the ocean and a street when she conveyed a tract running from the parallel street 275 feet toward the water and bounded on two sides by mapped streets laid out by her covenanted that all lands which should thereafter be made by accretions from the ocean or should accrue to her by reason of a boardwalk being moved oceanward, etc., should be subdivided into lots of the size of those shown on the map, that the streets shown on the map should be continued to the high-water line of the ocean, and that all of the restrictive building covenants should be binding on such additional lots. *Held*, that the covenant was not limited to accretions to that part of the owner's tract which did not lie to seaward of the land so sold; the description thereof not purporting to extend to the ocean.

3. QUIETING TITLE ¶44(1) — AFFIRMATIVE OF ISSUE OF TITLE.

In suits to quiet title, complainant, who must be adjudged to be in peaceable possession before jurisdiction over the issue of title can be assumed, is given the benefit of his peaceable possession, and defendant assumes the burden of the affirmative on the issue of title, and carries the burden of establishing a title in conformity with the specification of title which the statute requires him to set forth in his answer.

4. NAVIGABLE WATERS ¶44(3) — ACCRETION — TITLE.

When a deed calls for the ocean as a boundary, the land conveyed extends to the ocean for all time, whether high-water mark recedes or encroaches by natural accretions or erosions.

5. BOUNDARIES ¶37(1) — LOCATION OF HIGH-WATER LINE — SUFFICIENCY OF EVIDENCE.

In a suit to quiet title to a tract of land forming part of a beach, evidence *held* not to justify finding that the line of ordinary high tide of the ocean when title passed from the common source of title to defendant's predecessor was shoreward of a line 275 feet southerly

of a street running parallel with the shore, or coincident with such line.

Suit between Archibald S. Lambert and Ida M. Vare. Decree advised pursuant to the prayer of the bill.

Clarence L. Cole, of Atlantic City, for complainant. Lewis Starr, of Camden, and Charles C. Babcock, of Atlantic City, for defendant.

LEAMING, V. O. This suit has been brought by complainant to quiet title to a tract of land which forms a part of the beach front at Atlantic City. At the hearing complainant's peaceable possession was established. No issue at law having been demanded, this court then proceeded to final hearing on the issue of title.

All or nearly all of the locus in quo appears to have been below or oceanward of the line of ordinary high tide of the ocean at some time prior to this date. Both complainant and defendant have acquired from the state riparian leases covering the disputed territory; but both riparian leases contain the usual provision that the lease shall be void and of no effect if the person to whom the lease is made is not the owner in fee of the fast land adjoining the land in which the right of the state is conveyed. The riparian lease to defendant contains a further clause that it is made subject to any rights which were acquired by Jesse R. Turner under a former riparian lease made to Turner by the state covering the same territory. Complainant now enjoys any rights acquired by Turner under that riparian lease.

Part of the controverted territory, though covered by the descriptions contained in these two riparian leases, has now become "fast land" by reason of accretions from the ocean. The title to that part of the locus in quo accordingly requires no riparian grant for its support, unless such accretions are to be deemed artificial. The outer or oceanward part of the locus in quo is still probably below the line of ordinary high-water mark, and title to that portion apparently can only be claimed under the state.

It is conceded that August 3, 1901, Hannah E. Kelley was the owner of a large tract of land extending from Atlantic avenue to the ocean, and as such owner was then owner of the ripa. No title or rights had at that time ever existed in any of the territory oceanward of the Kelley tract except the rights of the state therein. Atlantic avenue runs parallel to the ocean and the Kelley tract embraced the territory lying between the ocean and Atlantic avenue from Columbia avenue on the east to Tallahassee avenue on the west.

The primary dispute at the foundation of the present controversy arises from a deed

of conveyance made by Mrs. Kelley to John M. Hilton for a large portion of the Kelley tract. That deed described the land conveyed as commencing at Atlantic avenue and extending toward the ocean to a line parallel to Atlantic avenue and 275 feet distant therefrom. As will hereinafter be more fully pointed out, that deed was obviously made upon the assumption on the part of the parties thereto that the tract conveyed did not extend to the ocean, but left land owned by Mrs. Kelley between the ocean and the extreme southerly boundary of the tract thus conveyed. Upon that assumption Mrs. Kelley subsequently (in 1903) conveyed to Jesse R. Turner and Harry R. Young the land lying between the southerly boundary line described in the Hilton deed and the ocean, that deed calling for the ocean as the southerly boundary of the tract conveyed. It is under the rights conferred by that deed that complainant now holds.

Defendant claims that, although the deed from Mrs. Kelley to Hilton did not purport to extend to the ocean, it in fact did so extend, because, as it is now alleged by defendant, the ordinary high-water mark of the ocean was at that time within 275 feet of Atlantic avenue, and Hilton accordingly became riparian owner by operation of that grant. Under that assumption defendant has acquired the benefits of a quitclaim deed from Hilton extending from a point 236 feet south from Atlantic avenue to the ocean.

It will thus be observed that complainant claims the ownership of the ripa under the deed from Mrs. Kelley to Young and Turner, which claim assumes that her earlier deed to Hilton did not constitute Hilton riparian owner, and defendant claims the ripa under a deed from Hilton, which claim assumes that the deed from Mrs. Kelley to Hilton did convey the ripa.

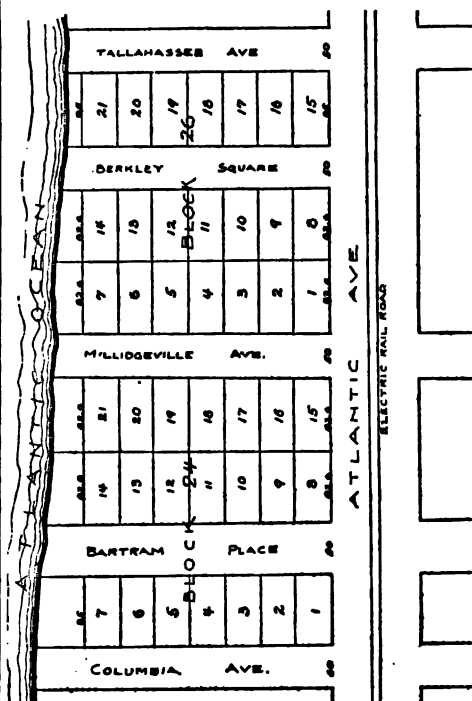
Accordingly the major portion of the testimony has been directed to the ascertainment of the line of ordinary high tide of the ocean at the date of the deed from Mrs. Kelley to Hilton with a view of ascertaining whether that deed constituted Hilton the riparian owner. If it did, the subsequent deed from Mrs. Kelley to Turner and Young for the territory extending from the southerly boundary named in the Hilton deed to the ocean, under which deed complainant claims to have acquired the ripa, would obviously convey nothing.

A proper examination of this issue necessitates a more detailed statement of the Kelley-Hilton conveyance, its terms, and the map with reference to which it was made.

As already stated, it is conceded that Hannah E. Kelley prior to August 3, 1901, owned the tract of land extending northerly and southerly from Atlantic avenue to the ocean and extending easterly and westerly from Columbia avenue to Tallahassee

avenue. The legal title to a portion of the tract was in one Henderson Synnamon, but that circumstance is conceded to be immaterial.

Prior to August 3, 1901, Mrs. Kelley had caused the tract to be laid out in streets, blocks, and lots, and had filed in Atlantic county clerk's office a map of the tract which delineated those physical features. That map discloses streets extending north and south from Atlantic avenue to the ocean and numbered lots between the streets. These several streets, in order, beginning with the most easterly street, are Columbia avenue, Bartram place, Millidgeville avenue (now called Kingston avenue), Berkley square, and Tallahassee avenue. As the land now in controversy lies oceanward of the tier of lots easterly of and adjacent to Berkley square, only that portion of the map between Millidgeville avenue and Berkley square need be specifically shown. The following is a copy of that portion of the map.



August 3, 1901, an agreement was executed by Mrs. Kelley and John M. Hilton by the terms of which Mrs. Kelley agreed to sell to Hilton on terms specifically named certain specified portions of her tract. That part of the tract lying between Millidgeville avenue and Berkley square is described in that agreement as follows:

"Also beginning at the southwest corner of Atlantic and Millidgeville avenues and runs thence (1) southwardly in the west line of Millidgeville avenue two hundred and seventy-five feet; thence (2) eastwardly parallel with Atlantic avenue one hundred and sixty-five feet to the east line of a fifty foot wide street called Berk-

ley square; thence (3) northwardly in the east line of said Berkley square parallel with Millidgeville avenue two hundred and seventy-five feet to the southerly line of Atlantic avenue; thence (4) eastwardly in the southerly line of Atlantic avenue one hundred and sixty-five feet to the place of beginning—being lots numbered 1 to 14, inclusive, in block 26 of lands belonging to Hannah E. Kelley, situate between Atlantic avenue and the Atlantic Ocean from Columbia avenue to Tallahassee avenue, in Atlantic City aforesaid, and duly laid out in blocks and lots by the said Hannah E. Kelley, a map or plan of which is filed in the clerk's office of the county of Atlantic at May's Landing, New Jersey, and a copy of which is attached hereto and made a part hereof."

It will be observed that this description of the land between Millidgeville avenue and Berkley square embraces 14 specific lots, and is a rectangular tract the southerly boundary of which is described as parallel to Atlantic avenue and 275 feet distant therefrom, and further that the map, a copy of which is attached to the agreement, discloses fractional lots, not numbered, lying between the 275-foot boundary line and the ocean as delineated on the map. It should also be here added that the agreement of sale embraced all the lots lying between Bartram place and Millidgeville avenue, and also those lying between Columbia avenue and Bartram place, designated as lots 1 to 21, inclusive, in block 24, and that the description of these lots was in like manner to a line 275 feet south of and parallel with Atlantic avenue, and also that the map discloses fractional lots between the ocean and the said lots numbered from 1 to 21.

[1] From the manner in which the land to be conveyed is described in this agreement by reference to the map attached to it, it is entirely obvious that the parties to the agreement did not undertake to extend the land on which the agreement operated to the ocean, but, on the contrary, attempted to stipulate for the sale of a tract of land to a definite straight line distant 275 feet southerly from and parallel with Atlantic avenue without including land which the map disclosed as lying between the ocean and the 275-foot line. It is this boundary line 275 feet southerly from Atlantic avenue which defendant now claims was at the date of this agreement in fact in the ocean, and hence it is claimed, the conveyance made pursuant to the agreement in fact included the ripa, even though the parties to the agreement may have intended and believed to the contrary.

The conclusion that the parties to this agreement and the conveyance which followed it did not intend to convey to the ocean is not only apparent from the manner in which the land is described and the delineations of the map annexed to the agreement, but is also reasonably apparent from certain covenants contained in the agreement, and in the conveyance subsequently made pursuant to the agreement, which covenants related to the unsold portion of the Kelley

tract. The agreement contains a series of restrictive building covenants subject to the operation of which the contemplated conveyance was to be made, and also provides that the same restrictive covenants should be inserted in all deeds of land thereafter made by Mrs. Kelley of the remaining portion of her tract, and then provides as follows:

"That all lands which shall hereafter be made by accretions from the Atlantic Ocean, or which shall accrue to her to the northward of the present boardwalk by reason of the same being moved oceanward or by reason of the lines of the present Ocean Front Park being moved oceanward, shall be subdivided into lots of the same size as those shown on the map aforesaid; that the streets shown on the map aforesaid shall be continued to the high-water line of the Atlantic Ocean; and that all of the following covenants and restrictions shall be binding and enforceable upon such additional lots which shall accrue to her by reason thereof."

[2] It is claimed by defendant that this covenant has reference only to accretions to that part of the Kelley tract which is not southerly of the land described in the agreement; but it seems impossible to attribute to it that restricted application. When it is considered that the description of the land to be sold does not purport to extend to the ocean and that the general description of her entire tract refers to the ocean as its southerly boundary, and that the description is made with reference to a map which shows land between the land to be sold and the ocean, and that the primary interest of the purchaser would necessarily be in the preservation of the restrictive covenants in land to be sold in front or oceanward of the tract purchased, it seems impossible to conclude that the stipulation above quoted was not intended to bind Mrs. Kelley to observe those restrictive covenants as to land thereafter acquired by her through accretions in front of the tract to be conveyed pursuant to the agreement.

The deed from Mrs. Kelley to Hilton, pursuant to the agreement already considered, was made December 31, 1901. That deed contains a description of the land in the same language as the agreement and contains the same covenants as the agreement. Whether that part of the covenants contained in the agreement and deed of conveyance which confirmed all subsequent accretions to Mrs. Kelley was operative to vest in her an equitable title to the accretions thereafter forming, as against a person claiming the accretions under Hilton, if the 275-foot boundary line should now be found to have then been in fact oceanward of high-water mark, I think it unnecessary here to consider.

[3] In suits to quiet title the complainant, who must be adjudged to be in peaceable possession before jurisdiction over the issue of title can be assumed, is given the benefit of his peaceable possession, and defendant then assumes the burden of the affirmative of the issue of title and carries the burden of establishing a title in conformity with

the specification of title which the statute requires such defendant to set forth in his answer. Accordingly at the hearing defendant assumed the burden of establishing that the line of ordinary high tide of the Atlantic Ocean was shoreward of 275 feet from Atlantic avenue at the point shown as lot 14 on the Kelley map when the title passed from Mrs. Kelley to Hilton.

[4] The difficulty in establishing a fact of that nature more than 16 years after the date under investigation is apparent from the nature of the testimony adduced at the hearing. Conflicting testimony, due to the frailty of memory of witnesses after so long an interval of time, is inevitable in almost any case; but the ascertainment of the location of the line of ordinary high tide of the Atlantic Ocean on a nearly level sand beach upon which the uninterrupted waves of the ocean wash introduces many elements of uncertainty not incident to ordinary issues. When a deed calls for the ocean as a boundary, the boundary is certain for all time, for it extends to the ocean, whether high-water mark of the ocean recedes or encroaches by natural accretions or erosions. But the accurate ascertainment of the location of the line of ordinary high tide on our South Jersey ocean front at a given date 16 or 17 years prior to the period of investigation approaches the impossible. An inch of elevation may represent many feet of distance in the shoreward point to which the waves of the ocean extend, and each successive wave varies in force and height; and to this must be added the circumstance that the influence of the moon and sun causes every tide, even the two tides of each day, to vary in height, and there must also be recognized the additional circumstance that winds and storms, whether present or recent and whether near or far removed, also render the tides abnormal, and even barometric pressure materially affects their height. These and divers other circumstances disclose the imperative necessity for accurate data, if certainty is to be attained, where the issue involved is whether ordinary high tide of the ocean was a few feet shoreward or oceanward of a given point at a given time. On a fresh water river the line of vegetation may form a reasonably accurate guide, and on inland salt waters, especially where steep banks exist, the water stains on the coarse salt grasses afford an aid; but on an almost level ocean washed sand beach, where no vegetation exists either below or above the line of high tide, the difficulties presented in the absence of scientific data are almost unsurmountable. The mark impressed upon the sands by the preceding high tide signifies little unless the conditions surrounding that high-water mark are taken into account, and the debris deposited on the beach, if any, by preceding high waters signifies little unless it is known whether such deposit has been the result of a storm tide.

[5] In my judgment the evidence in this suit does not justify a finding that the line of ordinary high tide of the ocean was shoreward of the line 275 feet southerly of Atlantic avenue or even reached that line at the time title passed from Mrs. Kelley to Hilton.

A detailed review of the testimony seems unnecessary. Some witnesses have testified that at what they called ordinary high tide the water did extend shoreward of at least some parts of the line in question; others have testified to the reverse. The witness for defendant whose testimony most impressed me was John Leeds. His work on the premises was of a nature to appropriately impress upon his memory the tidal conditions there existing at the time his work was performed, and his statement is that the line of ordinary high tide was 15 or 20 feet inside the 275-foot boundary line. Others in like position to observe have testified to substantially the same. On the contrary, witnesses for complainant whose testimony seems entitled to equal weight have testified that the line of ordinary high tide was outside or oceanward of the 275-foot line. These witnesses include members of the life guard who patrolled the beach daily or twice daily for a period of time from long before to after the time of inquiry.

Most of the testimony has been directed to conditions existing in March, 1902, and subsequent thereto. This arises from the fact that in March, 1902, the erection of a bulkhead was begun on the 275-foot boundary line. This was some two or three months after the deed from Mrs. Kelley to Hilton was made and over six months after the agreement of sale which conferred the equitable title on Hilton. That bulkhead was begun at a point easterly of the locality now in question and was being constructed in a westerly direction on the line here in controversy. The testimony of several of the witnesses of defendant who worked on that structure is to the effect that when that bulkhead had been built about one-half of its proposed length—probably to about Millidgeville avenue—a severe storm occurred which washed away the engine which was used in connection with the work, and thus interrupted the work for a time. Mr. Bowen, who was inspector on that work, testified that that storm washed away the beach about 2 feet in depth at the vicinity of Berkley square, and that prior to that storm the tides had not interfered with their work, but that after the storm the tide came 15 or 20 feet inside the line of their proposed work at Berkley square. The testimony of other witnesses of defendant who were employed on that work is consistent with the view that prior to that storm the tides did not reach the line of their work, but after the storm it did extend beyond that line in the vicinity of Berkley square owing to the washout caused by that storm. The single fact that the stationary engine which supplied

power for the work on the bulkhead was located 15 or 20 feet outside or oceanward of the line of the bulkhead up to the time of the storm strongly indicates that ordinary tides did not reach the line in question. The circumstance that in March or April, 1902, a storm washed away that part of the beach in such manner as to cause ordinary tides to extend landward of the 275-foot line in question is obviously immaterial if, in the year 1901, when the Hilton title was acquired by him, the exterior line of his grant extended only to a point shoreward of high-water mark. *Ocean City Ass'n v. Shriver*, 64 N. J. Law, 550, 46 Atl. 690, 51 L. R. A. 425.

I am convinced that the deed from Mrs. Kelley to Hilton was not only designed to extend to a line above the line of ordinary high tide and to leave in Mrs. Kelley the title to the land lying between that line and the ocean, but also that the line thus established was in fact above the line of ordinary high water.

Another claim of defendant yet remains to be examined.

March 30, 1903, Mrs. Kelley conveyed to Turner and Young the land lying between the 275-foot boundary line and the ocean, and by mesne conveyances Turner became the sole owner under that conveyance. The final deed to Turner in severalty was dated April 10, 1908. In the meantime (January 20, 1908) Hilton conveyed to Yocum lot 14 on the Kelley map. This conveyance was made by describing that lot by metes and bounds, and did not call for the ocean as a boundary. By mesne conveyances one Aiken became owner of lot 14 on the Kelley map September 1, 1908. All these deeds in the Aiken title contain the same description as that in the deed from Hilton to Yocum. Defendant, Mrs. Vare, now owns lot 14 under the Aiken title, but the deed from Aiken to defendant, Mrs. Vare, contains a description calling for the ocean as a boundary. November 19, 1908, Turner, as grantee of Mrs. Kelley of the land outside of lot 14 extending to the ocean, executed a deed to one Reichner for a lot adjacent to and oceanward of lot 14 and of the same size as lot 14. That deed describes the lot by metes and bounds, and does not call for the ocean as a boundary, and contains the following covenant:

"Provided however, and it is hereby expressly agreed and understood, that this conveyance is for a definite tract of land, and that the said party of the second part, his heirs or assigns, derive no title to lands oceanward of the tract hereby conveyed by reason of the said Atlantic Ocean at any time in the future encroaching upon said land hereby conveyed, and upon said ocean receding from lands hereby conveyed the title to said lands oceanward of said lands hereby conveyed remains in said Jesse R. Turner, his heirs and assigns, it is also understood and agreed that in no case shall the said party of the second part, his heirs or assigns, have the right to apply for a riparian grant in front of the lands hereby conveyed, such a right being expressly reserved to the said Jesse R. Turner, his heirs and assigns, it is hereby agreed that

the present high-water line is oceanward of the lands hereby conveyed, which lands do not border on the Atlantic Ocean, but that lands now owned by Jesse R. Turner in front of lands hereby conveyed do border on Atlantic Ocean, and that he, the said Jesse R. Turner, his heirs and assigns, have the exclusive right of applying for said riparian grant under all circumstances."

Notwithstanding the above covenant, Reichner, by quitclaim deed dated August 31, 1909, conveyed to Aiken territory embracing lot 14 on the Kelley map and all land outside thereof extending to the ocean. The deed from Aiken to defendant Mrs. Vare accordingly includes whatever rights Aiken may have acquired by the quitclaim deed which he received from Reichner.

Defendant has accordingly made claim that the deed from Turner to Reichner of November 19, 1908, although purporting to extend only 39 feet south from lot 14 of the Kelley map, i. e., from the 275-foot boundary line heretofore described, and, although containing the covenant above quoted, in fact extended to the ocean, because the ocean was at that time less than 39 feet southerly of the southerly line of lot 14. In consequence of that claim testimony of witnesses has been heard touching the location of ordinary high tide November 19, 1908. It should also be noted that Aiken, prior to his conveyance to defendant, also procured quitclaim deeds from both Hilton and Yocum covering the territory between the northerly line of lot 14 and the ocean.

The same or even greater difficulties have been encountered in defendant's effort to establish that in the fall of 1908 the line of ordinary high tide was landward of 29 feet south of the southerly boundary of lot 14 as shown on the Kelley map. All witnesses appear to agree that the beach front has gradually made out or oceanward from 1901 or prior thereto to the present time, but do not agree as to the line of high tide in 1908, and I am convinced that upon the whole evidence no finding can be adequately supported to the effect that in 1908 the line of ordinary high water was not oceanward of the exterior boundary described in the deed from Turner to Reichner—that is, a line distant 814 feet southerly from and parallel to Atlantic avenue. But, should it be adequately established that at the date of the Turner-Reichner deed ordinary high tides extended shoreward of that line, it is difficult to see how Reichner, or defendant claiming under him, could acquire title to the accretions as against Turner contrary to the covenants of Reichner's deed above quoted.

My conclusions are that the deed of December 30, 1901, from Mrs. Kelley to Hilton, which deed embraced lot 14 on the Kelley map, did not constitute Hilton a riparian owner, but that, on the contrary, Mrs. Kelley at that time remained the owner of "fast land" outside or oceanward of lot 14, which land so owned by her extended from lot 14 to the ocean, that Turner, as grantee of Mrs.

Kelley, by mesne conveyances became the riparian owner, and that his riparian ownership was not divested by the deed of November 19, 1908, and that on May 11, 1914, as such riparian owner, Turner was entitled to receive from the state the riparian lease of that date. It follows that complainant, as grantee of Turner, became the owner of so much of the locus in quo as may now be above the ordinary line of high tide, and lessee, under the Turner riparian lease, of so much of the locus in quo as may at this time be outside or oceanward of the ordinary line of high tide.

I will advise a decree pursuant to the prayer of the bill.

(257 Pa. 353)

MAGIER v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 16, 1917.)

RAILROADS §398(1) — **INJURY ON TRACK — NEGLIGENCE—EVIDENCE.**

In an action for damages for personal injury from being struck by defendant's freight car, evidence held not to show defendant's negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Kajman Magier against the Philadelphia & Reading Railway Company to recover damages for personal injury. Verdict for defendant by direction of the court, and judgment thereon, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-TREZAT, POTTER, STEWART, and FRAZER, JJ.

Daniel G. Murphy, of Philadelphia, for appellant. Wm. Clarke Mason, of Philadelphia, for appellee.

POTTER, J. In this suit to recover damages for personal injuries, the trial judge gave binding instructions in favor of defendant company, upon the ground that there was no evidence of negligence upon the part of plaintiff sufficient to justify its submission to the jury, and for the further reason that, even if any such inference could be drawn from plaintiff's testimony, it was clear that he was guilty of contributory negligence.

We are not convinced that the court below erred in its conclusion, or that we should disturb the judgment entered upon the verdict directed by the court. The plaintiff in a vague way undertook to locate the accident at a crossing upon Rose street, in the borough of Tamaqua; but his story was incoherent. He said he neither saw nor heard a train, but that as he stepped upon the third track he was struck by a box car. Plaintiff did not show that the box car was operated by the defendant company, or that there was any shifting of cars at that time and place. On the other hand, from the evidence of sev-

eral witnesses, it appeared that prior to the accident plaintiff was so much under the influence of liquor that he did not know where he was or where he was going. The physician, who was called to attend him after the accident, testified that he was at that time visibly intoxicated. From the evidence of the witnesses, who found him after the accident, and picked him up and cared for him, it appeared that he was found beside the railroad track, with his foot cut off and lying against the rail, at a point more than 1,900 feet from any crossing. Plaintiff made no denial of the fact that he was found after the accident at the place indicated, nor did he attempt to explain how he could possibly have been at that point with his amputated foot, had the accident occurred at the crossing, or at any point other than that at which he was found. From the case as here presented by the plaintiff, the jury could not reasonably have found that the defendant was negligent, or that it failed to discharge any duty which it owed to the plaintiff, and a verdict in his favor could not be permitted to stand.

The judgment on the verdict directed in favor of defendant is therefore affirmed.

(257 Pa. 327)

COMMONWEALTH ex rel. ALEXOVITS
et al. v. MAMATEY et al.

(Supreme Court of Pennsylvania. March 23, 1917.)

APPEAL AND ERROR §1138—**ACADEMIC QUESTION—AFFIRMANCE.**

On appeal from a judgment on a verdict for defendants in a quo warranto proceeding to test their right to hold offices in a corporation, where it appeared that the terms of their offices had expired, the question was merely academic, and the judgment of the lower court will be affirmed, without regard to the merits.

Appeal from Court of Common Pleas, Allegheny County.

Quo warranto by the Commonwealth of Pennsylvania, on relation of Leonard S. Alexovits and others, against Albert Mamatey and others, to test the right of defendants to hold office as directors of a corporation of the first class. Judgment for defendants, motion for judgment n. o. v. denied, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and MES-TREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

C. B. Prichard, of Pittsburgh, for appellants. Thos. S. Brown and R. A. & James Balph, all of Pittsburgh, for appellees.

PER CURIAM. The complaint of the appellants at the time this quo warranto proceeding was instituted was that the appellees were unlawfully holding offices, and the writ was invoked to oust them therefrom. On January 1, 1917, the term of the office to which each of them had been elected expired, and, when this appeal was argued, at a later

date, the question involved was purely academic. The facts are either admitted or undisputed; but we could not enter judgment of ouster, for the reason stated, even if there were merit in appellants' contention.
Judgment affirmed.

(257 Pa. 248)

CLOUD, STILES & WORK, Inc., v. WILLIAMS.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. SET-OFF AND COUNTERCLAIM §34(1) — SUBJECT-MATTER OF SET-OFF.

In an action on a written contract for the construction of a sewer and on verbal contract for goods sold, defendant cannot counterclaim an alleged wage claim, but in fact undivided profits due him as a stockholder in the plaintiff corporation.

2. APPEAL AND ERROR §748(1) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

An appeal will be quashed, where the rules relating to assignments of error are not followed.

Appeal from Court of Common Pleas, Delaware County.

Action by Cloud, Stiles & Work, Incorporated, against John J. Williams. From a verdict for plaintiff, defendant appeals. Appeal quashed.

From the record it appeared that defendant set up a claim for wages alleged to be due him from plaintiff. It appeared that the wage claim was in fact a claim for defendant's share of the undivided profits of the plaintiff corporation in which he was a stockholder. The trial judge withdrew the counterclaim from the consideration of the jury.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

John E. McDonough, of Chester, for appellant. Kingsley Montgomery, of Chester, for appellee.

PER CURIAM. [1, 2] There is no merit in this appeal, and, even if there were, it could not be sustained, in view of the disregard of the rule relating to assignments of error.

Appeal quashed.

(257 Pa. 340)

SINKING SPRING WATER CO. v. GRING.
(Supreme Court of Pennsylvania. March 23, 1917.)

1. JUDGMENT §217—"FINAL JUDGMENT."

No judgment or decree is final that does not terminate the litigation between the parties to the suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.

2. APPEAL AND ERROR §78(1)—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

A decree dismissing exceptions to a petition for the appointment of viewers to assess damages for the taking of property by eminent domain was not final, so that an appeal therefrom would be quashed.

Appeal from Court of Common Pleas, Berks County.

Proceeding by the Sinking Spring Water Company against Catharine Gring. From a decree dismissing exceptions to petition for appointment of viewers, defendant appeals. Appeal quashed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

Cyrus G. Derr, of Reading, for appellant. Edgar S. Richardson, of Reading, for appellee.

PER CURIAM. This appeal is from the dismissal of exceptions to the petition of the appellee for the appointment of viewers to assess the damages, if any, sustained by the appellant in its taking her property in the exercise of an alleged right of eminent domain. The action of the court below is clearly not a final decree. No judgment or decree is final that does not terminate the litigation between the parties to the suit. Pennsylvania Steel Company's App., 161 Pa. 571, 20 Atl. 294. The appeal is therefore quashed, at appellant's costs, without prejudice to her right to raise, in this court, on appeal from a final decree against her in this proceeding, or by a proper independent proceeding to be instituted by her, the question of the right or franchise of the appellant to take her property.

Appeal quashed.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(257 Pa. 254)

POWER v. OVERHOLT.

(Supreme Court of Pennsylvania. March 19, 1917.)

WILLS §=38(3) — VALIDITY — INSANE DELUSION.

Where a testatrix, when executing a will leaving the bulk of her estate to one of her two nieces, was laboring under an insane delusion that the other was guilty of theft from her, and for that reason made no gift to such niece, except the property supposed to have been stolen by her, the will cannot be sustained.

Appeal from Court of Common Pleas, Chester County.

Action by Emma McClellan Power against Susan McClellan Overholt. From a judgment for plaintiff on an issue of *devisavit vel non*, defendant appeals. Affirmed.

The facts appear in the following opinion by Hause, J., sur defendant's motions for a new trial and for judgment *n. o. v.*:

The verdict of the jury in favor of the plaintiff determined that a certain paper writing, dated May 31, 1913, was not the valid will of Miss Thomasine D. Boyer. The document was attacked on two grounds: First, that Miss Boyer lacked general mental capacity when it was executed; and, second, that it was the product of an insane delusion entertained by her toward the plaintiff, her niece. The jury announced that their verdict was based upon the second ground—that concluding that the testatrix was possessed of general mental capacity.

Defendant's request for binding instructions having been refused, and the verdict having been adverse, we are now asked to enter judgment notwithstanding the verdict or to grant a new trial—the latter request being based on the suggestion that the verdict is against the evidence and the weight of the evidence. It is earnestly contended on behalf of the defendant that the situation here presented is ruled by *McGovran's Estate*, 185 Pa. 203, 39 Atl. 816, and *Hemingway's Estate*, 195 Pa. 291, 45 Atl. 726, 78 Am. St. Rep. 815, and that, in the light of those cases, the verdict should be disregarded and judgment entered accordingly.

When the plaintiff attacked the document in question, on the ground that it was the product of an insane delusion, she assumed the burden of satisfying the jury, not only that such delusion exists, but that it was present in the mind of the testatrix when the document was executed, and that it, in fact, controlled the disposition of her property. In *McGovran's Estate*, supra, the contestant wholly failed to show that the feeling entertained by the testatrix toward the contestant was without foundation either in reason or fact, and that it was purely a matter of imagination; and in *Hemingway's Estate*, supra, conceding that the testatrix was laboring under a delusion when the will was made, there was no testimony from which a jury could properly conclude that the will was the result of the delusion. *Alexander's Estate*, 246 Pa. 58, 91 Atl. 1042, Ann. Cas. 1916C, 33, and *Herr's Estate*, 251 Pa. 223, 96 Atl. 464, are, likewise, illustrations of lack of evidence essential to sustain a verdict against a will when challenged on the theory of insane delusions. "A delusion, which will render invalid a will executed as the direct result of it, is an insane belief or a mere figment of the imagination—a belief in the existence of something which does not exist and which no rational person, in the absence of evidence, would believe to exist." *Alexander's Estate*, supra.

Was there, then, in the case before us, sufficient testimony from which, if believed, the jury could properly conclude that there was present in the mind of the testatrix, when the will was made, an insane belief—a belief that no rational person, in the absence of evidence, would entertain—that the plaintiff had, on different occasions prior to the date of the will, stolen articles of personal property from her; and was that belief, if it existed, a controlling factor in the attempted disposition of her property to the prejudice of the plaintiff? The testatrix had made a will in 1904 by which, after some minor bequests, she directed that the residue of her estate should be equally divided between her two nieces, the plaintiff and the defendant, and named them as executors. In 1911, she made a codicil to this will, merely changing two small legacies. By the document in controversy, the entire residue of the estate, after making other dispositions substantially as in her former will, is given to the defendant, and she is named as sole executor. To the plaintiff are bequeathed "one-half dozen silver teaspoons marked 'M. E. B.', one-half dozen silver forks marked 'S. E.', and all table linen and napkins," and some other small items of personality.

To sustain the burden assumed by her the plaintiff introduced evidence of the fact that, shortly prior to the date of the document in controversy, the testatrix, while at plaintiff's house, charged her with having stolen her pocketbook, whereas she had laid it in her bureau drawer and there found it. She accused her of having stolen a bed cover, whereas she had given it to the plaintiff years before. In the latter part of June, 1912, she charged the plaintiff with having taken a pair of sleeve buttons from her room at her boarding house in West Chester, while the plaintiff was visiting her there, and, when the plaintiff returned to her home in Western Pennsylvania, the testatrix wrote her on June 28, 1912, reiterating the charge, and, after referring to the buttons, said, "No one has any right to anything that belongs to me, unless I give it to them, and has anything that belongs to me, if not returned soon by express or some safe way, will have trouble not profitable when a certain time comes, for I have all my affairs arranged some time ago." On July 10, 1912, she wrote again to the plaintiff on the subject, stating that she had not found the buttons, and that she would place her trust in an "All-Wise Providence to show to the one who had been guilty of this crime," etc. In April, 1913, the testatrix visited the plaintiff at her home in Brownsville, Pa., taking with her the spoons and forks heretofore referred to. These she gave to the plaintiff, and the day following she stoutly asserted that the plaintiff had stolen them—had "snatched them out of her hands." That there was any foundation for any of these charges is not pretended. That they were utterly without foundation is beyond question. They were mere figments of a mind disordered on a particular subject. There were no facts upon which any sane person could reach such conclusions, nor is it contended that there were any facts or circumstances present upon which such charges could rest, or from which such conclusions could rationally follow.

Almost immediately following the charges with reference to the spoons and forks, the testatrix left the home of the plaintiff and visited the defendant at her home in Scottsdale, some two miles distant. While there she expressed a desire to have some changes made in her will. She was taken to the office of B. A. Wirtner, Esq., a member of the Westmoreland county bar. She indicated to him the changes she desired to make, and in the course of their conversation she "remarked that her niece [the plaintiff] hadn't treated her properly. She

hadn't treated her the way she thought she ought to be treated." What she had in her mind she did not divulge to the scrivener. A new will—the paper in question—was prepared and executed two or three days following the visit to Wirtner. Later the testatrix returned to West Chester, and April 15, 1914, took up her home with Mrs. Zaldee T. Leedom. Shortly thereafter, in conversation with Mrs. Leedom, the testatrix told her, in substance, that "while she [the testatrix] was there [at plaintiff's home] she [plaintiff] had 'stolen spoons or forks,' the witness could not recollect which, and followed the remark with the statement, 'That was all she would ever get.'"

In the light of this testimony we cannot say that there was not sufficient evidence from which this jury could find that the mind of this testatrix was not controlled by an insane delusion to the detriment of the plaintiff. That she believed that plaintiff had stolen from her is beyond question under the evidence. That no sane mind could entertain this belief in view of the circumstances is too clear for controversy. That she entertained this delusion when she expressed herself about the plaintiff to the scrivener is the only reasonable conclusion to be drawn from the remark she made, especially so when considered in connection with the threat contained in her letter of June 28, 1912, to the plaintiff. That this delusion was a potent factor in her mind when she sought to dispose of her property by the paper in question would seem to be plain, when it is remembered that, after the document was executed and she had returned to West Chester, she repeated the charges to Mrs. Leedom, specifying the articles stolen—spoons and forks—and said, "That was all she [the plaintiff] would ever get." She had then disposed of her estate in substantially this fashion so far as the plaintiff was concerned.

It was clearly the province of the jury, under all the evidence to determine whether there was, in fact, a delusion, and whether it was present in and operative upon the mind of the testatrix, when the will in controversy was made. There was sufficient evidence to sustain the verdict, and we must therefore dismiss the rule for judgment and the rule for a new trial.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER, and
WALLING, JJ.

Arthur Parke, of West Chester, for ap-
pellant. Robert S. Gawthrop, of West Ches-
ter, for appellee.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned court below discharging the rules for judgment non obstante veredicto and for a new trial.

(257 Pa. 307)

**MOUNTAIN CITY WATER CO. OF FRACK-
VILLE v. HARLEIGH-BROOKWOOD
COAL CO.**

(Supreme Court of Pennsylvania. March 23,
1917.)

**WATERS AND WATER COURSES ⇐284—CON-
TRACTS—CONSTRUCTION—INTENT.**

A water company agreed to furnish a coal company with water to the amount of 250,000 gallons per day should there be that much surplus after supplying the residents of a named town, and the contract further provided for a minimum charge of \$900 per year regardless of the amount of water furnished. Thereafter the contract was modified so as to provide for a

greater compensation for the amount of water furnished daily in excess of 60,000 gallons. *Held*, that the coal company was not obligated to receive 250,000 gallons of water per day, but was bound only to receive water measured by the minimum annual rental of \$900.

Appeal from Court of Common Pleas,
Schuylkill County.

Action by the Mountain City Water Com-
pany of Frackville against the Harleigh-
Brookwood Coal Company. From a judg-
ment for defendant, plaintiff appeals. Af-
firmed.

Assumpsit on a contract. Defendant filed
an affidavit of defense which was in effect
a demurrer to the statement of claim.

Bechtel, P. J., filed the following opinion in
the court of common pleas:

This case comes before us on plaintiff's de-
claration and defendant's affidavit of defense,
raising the question of law that the statement of
claim is insufficient to sustain the claim made
by plaintiff. The controversy arises out of a
contract entered into between the plaintiff and
the defendant on the 24th of April, 1912, where-
in and whereby the plaintiff claims that the de-
fendant was bound to receive from him 250,000
gallons of water a day at 5 cents per thousand
gallons. This contract was to run for a period
of 10 years and continued as originally drawn un-
til the 13th of May, 1915, at which time a corre-
spondence began between plaintiff and defendant,
as the result of which it was agreed that the de-
fendant would pay to the plaintiff 10 cents per
thousand gallons for all water used over 60,000
gallons per day; all the other terms and condi-
tions of the contract to remain unchanged. This
amendment went into effect as of date of June
1, 1915. The plaintiff's declaration sets forth
that on December 28, 1915, it was capable of
supplying the defendant company with a daily
supply of 250,000 gallons of water, and on that
date gave notice to the defendant company of
its readiness and willingness to supply the said
quantity of water.

The contract contains the further proviso that
if the quantity of water furnished at the meter
shall not in any one year, during the continu-
ance of this contract at the rate of five cents per
1,000 gallons, amount to \$900 or more, the said
party of the second part shall nevertheless pay
to the said party of the first part the sum of
\$900 for each and every year in which the quan-
tity of water furnished shall not equal or ex-
ceed the said sum of \$900.

The prior obligation of the plaintiff company
to furnish the residents of Frackville with wa-
ter is also recognized in the contract, there be-
ing a proviso contained therein that the water
to be furnished to the defendant company shall
only be furnished in the event of there being
sufficient left after this prior obligation of the
plaintiff has been discharged, and that in the
event that there is no water left for the defend-
ant, the plaintiff shall not be held liable in dam-
ages therefor.

This suit is brought to recover the sum of
\$45,985.33, which is based on the calculation
of a consumption of 250,000 gallons of water
per day from January 1, 1916, to April 24,
1922. The case turns on the question of wheth-
er or not the defendant is obligated by the con-
tract and the correspondence which inter-
vened to receive from the plaintiff 250,000
gallons of water per day.

It will be noted that nowhere in the contract
or the correspondence is there any clause which
obliges the defendant specifically to receive that
amount of water; in fact, the plaintiff is not ob-
ligated to furnish that amount of water unless

there be that much surplus after his prior obligations have been discharged. There is no dispute of the fact that prior to January 1, 1916, defendant was receiving approximately 120,000 gallons of water per day, which was all the plaintiff could furnish. Plaintiff contends that it was compelled to entail considerable expense in increasing its water supply in order to comply with the demands of the defendant for the furnishing of 250,000 gallons of water per day, and that therefore defendant should be obliged to receive it and pay for it. We cannot agree with this contention because the correspondence discloses the fact that the plaintiff wished to raise not only its rate of water, but also the minimum rental which it sought to increase from \$900 to \$3,600 per year. Defendant refused to agree to this proposition, and in the letter of May 27, 1915, which was accepted by plaintiff and formed the basis of the amended contract, appears this sentence: "Our view is that we have an existing contract with you, but one with which you are not satisfied." This letter makes the proposition that defendant will pay ten cents per thousand gallons for all water "which we take from you" in excess of 60,000 gallons per day.

It seems to us too plain for argument that defendant agreed to the increased rate for its water (nearly double what it had been paying before) in order to have plaintiff increase its supply, and that plaintiff did increase its supply in consideration of this concession made by the defendant. It certainly would not appear just to construe this contract as compelling defendant to receive 250,000 gallons of water per day when there is nothing contained therein compelling plaintiff to furnish that amount. It seems to us that it was intended by the parties and was expressed in the contract that the amount which the defendant was obligated to receive was to be measured by the minimum rental, to wit, \$900 per year, and our conclusion in this respect is strengthened by reason of the fact that plaintiff attempted to increase this amount to \$3,600. What was the object of this minimum rental proposition if it was not to guarantee to the plaintiff the consumption of the water represented by it?

In addition to this, plaintiff has brought suit against the defendant for the sum of 250,000 gallons of water per day to April 24, 1922. Whether or not plaintiff can furnish this water is problematical. It says itself that the demands upon its water supply are constantly increasing by those who have the first claim upon it, and it certainly does not seem to us just to compel the defendants to pay for water which it has no guaranty whatever shall be delivered to it. In addition to this, the amended contract, as contained in the letter as hereinbefore quoted, simply obligates the defendant to pay 10 cents per thousand gallons for all water which "it takes" in excess of 60,000 gallons per day. To construe the contract as contended for by the plaintiff would be to require the writing into it of a provision which it does not contain, in addition to which we do not think the obligations would be mutual.

We have therefore reached the conclusion that the plaintiff's declaration filed in this case is insufficient in law to sustain the claim therein alleged, and have therefore entered the decree heretofore filed in this case.

The court entered judgment for defendant. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

C. E. Berger, of Pottsville, and James W. Shull, of New Bloomfield, for appellant. H. S.

Drinker, Jr., and P. C. Madera, Jr., both of Philadelphia, and M. M. Burke, of Shenandoah, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below directing it to be entered.

Judgment affirmed.

(257 Pa. 259)

McMENNIMEN v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. MASTER AND SERVANT §286(4, 27)—INJURY TO SERVANT—TOOLS AND APPLIANCES—EVIDENCE.

In an action by the widow of a deceased employé to recover damages for his death on the ground of the master's failure to furnish reasonably safe appliances and method of work, evidence held to sustain a judgment of compulsory nonsuit.

2. MASTER AND SERVANT §219(1)—ASSUMPTION OF RISK—OBVIOUS DANGER.

Where the danger attending an employé's work is obvious, he assumes the risk.

3. APPEAL AND ERROR §843(2)—ACTION FOR INJURY—NEGLIGENCE—VICE PRINCIPAL.

Whether a track boss was the employer's vice principal was unimportant, where the evidence failed to establish any specific act of negligence on the part of the track boss to which the injury could be attributed.

Appeal from Court of Common Pleas, Schuylkill County.

Trespass by Anna McMennimen against the Lehigh Valley Coal Company, to recover damages for the death of her husband. From the direction of a compulsory nonsuit which the court subsequently refused to take off, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

Edward J. Maginnis, of Girardville, and William Wilhelm, of Pottsville, for appellant. Daniel W. Kaercher, of Pottsville, for appellee.

POTTER, J. In this action of trespass, the plaintiff sought to recover damages for the death of her husband, which she charged was due to negligence for which the defendant was responsible. From the opinion of the court below we gather the facts, as follows: The husband of the plaintiff was employed at Packer No. 4 colliery of the Lehigh Valley Coal Company. On the day of the accident he was engaged in helping to replace upon the track of an inclined plane a coal car which had become derailed. Small cars were used to convey the coal to the breaker, being hoisted up an outside plane by an endless chain on which were a series of hooks slightly curved at the end, which fastened behind the front axle of the cars. Safety catches were provided, the first one being

some 21 feet up the plane, with a triple safety catch at the bottom of the plane. Extending slightly over the latter, at the time of the accident, a car was standing. Another car jumped the track at the foot of the plane, just in front of the standing car. One McIntyre, whose official title seems to be that of track boss, gathered some men, including McMennimen, plaintiff's husband, who was the boss carpenter, and attempted to replace the car. The men worked together at this task, the boss using a jack and several other appliances, but, failing in their efforts, it was suggested, by whom it does not appear, that if the car were drawn a short distance up the plane the task would be easier. This method was pursued. It was not shown who gave the orders to the engineer to raise the car, but, after it had been advanced some 6 feet, another attempt was made to get it on the rails. This was done by several of the men swinging the rear of the car, while other men pushed at the front end, endeavoring to swing it over the guard rail onto the track. During this effort the axle in some unexplained way came out of the hook on the endless chain, the car ran backward the 6 feet to the bottom of the plane, collided with the car that had been left standing over the triple catch, and plaintiff's husband was caught and killed.

[1, 2] Upon the trial, at the close of plaintiff's evidence, a compulsory nonsuit was entered, and from the refusal of the court to take it off, plaintiff has appealed. Her counsel contend that the track boss, McIntyre, as the representative of defendant, "was in charge of, directing and superintending the work of replacing the car upon the track, and that he was negligent in not securing the car in a reasonably safe manner so that, if the chain hook slipped, the car would not plunge back down the plane." It appears from the evidence that there was a chain at the head house which the men might have used if they had seen proper to do so. But plaintiff's witness, O'Donnell, testified that the men frequently put cars on the track in the way they were attempting to do it in the present instance. Sometimes they used the chain and levers. There was no evidence that the method now in question was unsafe. Nor was it shown by whose orders this method was adopted. It appears to have been done by common consent of the workmen. "Some one of the crowd" suggested it. The defendant cannot be held responsible for the failure of the men to use the chain. It was accessible, if they had thought its use would be helpful. At the time of the accident a car was standing partly over the lower safety catch. Had this car been moved further down, the descending car would have been stopped by the safety catch and the two cars would not have come in contact. But it is not alleged that it was negligence to leave the lower car where it was. Any of the men, including

plaintiff's husband, could have moved the car back, if it had occurred to them to do so.

There was no evidence to support the averment that the hook slipped from the axle because it had become worn. On the contrary, plaintiff's witness, O'Boyle, testified that he could not explain how the hook happened to slip out and let the car run back. The attempt to replace the car upon the track was made in an ordinary way, and the slipping of the hook seems to have been an accident which no one was bound to foresee. Whatever danger may have attended the effort was obvious to plaintiff's husband. He was a skilled mechanic, he was familiar with the incline, and it was part of his duty to inspect it daily and to keep it in repair. He could see the other car standing a few feet away, with its bumper extending over the safety catch. He seems to have chosen his own position at the side and near the end of the car.

[3] The track boss, McIntyre, was not charged with committing any negligent act while he was co-operating with the other men in attempting to get the car back upon the track. He was charged with adopting an unsafe method of doing the work, but the evidence did not sustain the charge. Whether McIntyre be regarded as a vice principal or not is unimportant. The evidence failed to establish any specific act of negligence on the part of either McIntyre or the defendant company to which the death of plaintiff's husband can be justly attributed.

The motion to take off the nonsuit was properly refused, and the judgment is affirmed.

(257 Pa. 442)

MANCHESTER TP. SUP'RS v. WAYNE COUNTY COM'RS.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. STATUTES ~~§~~169—REPEAL—REVIVAL—CONSTITUTIONAL PROVISIONS.

County commissioners must keep in repair so much of an abandoned turnpike as passes through a township, as required by Act April 20, 1905 (P. L. 237), and Act April 25, 1907 (P. L. 104), where Act May 10, 1909 (P. L. 499), repealing such prior acts, was itself repealed by Act March 15, 1911 (P. L. 21), since the rule that, where a repealing statute is repealed, the original statute is revived, was not affected by Const. art. 3, § 6, providing that no law shall be revived, amended, or extended by reference to its title only, and that so much as is revived shall be re-enacted and published at length.

2. STATUTES ~~§~~169—REPEAL—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Such constitutional provision is restricted in its application to express statutory revivals of prior statutes, and does not abrogate the common-law rule that, when a repealing statute is itself repealed, the first statute is revived without formal words, in the absence of any contrary intention, expressly declared or necessarily implied from the enactment.

Appeal from Court of Common Pleas, Wayne County.

Petition for mandamus by the Supervisors of Manchester Township against the Commissioners of Wayne County. From a judgment of mandamus, awarded on final hearing, defendants appeal. Judgment affirmed, and appeal dismissed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

Charles A. McCarty and M. E. Simons, both of Honesdale, for appellants. E. C. Mumford and J. O. Mumford, both of Honesdale, for appellees.

STEWART, J. In 1898 the county of Wayne, by proceedings instituted under the act of June 2, 1887 (P. L. 306), which provides for the taking over by counties of turnpike roads, or such parts of them as lay within their respective limits, and freeing the same from tolls, appropriated the Little Equinunk and Union Woods turnpike road, which had been constructed through Manchester township in said county. From that time to the present this turnpike road has been used and maintained as a township road by Manchester township, free of tolls. In 1916 the supervisors of the township presented their petition to the court of common pleas, setting forth the above-stated facts and praying that a writ of mandamus issue, directed to the commissioners of the county, requiring them, in relief of the township, to maintain and keep in repair said appropriated turnpike road. An alternative writ followed, to which the commissioners made answer, admitting the facts to be as stated, but denying the legal liability of the county for the maintenance and repair of the road. After a full hearing of the case, a peremptory writ was awarded. The appeal is from the judgment so rendered. A brief review of the legislation touching the condemnation and appropriation by counties of turnpike roads is necessary to an understanding of the real issue. The condemnation of this particular road was, as we have said, under the general act of June 2, 1887 (P. L. 306). By the eleventh section of this act it is provided that:

"When any turnpike, or portion thereof, shall have been condemned, under the provisions of this act, for public use, free of tolls or toll-gates, and the assessment of damages therefor shall have been paid by the proper county, such turnpike, or portion thereof, shall be properly repaired and maintained at the expense of the proper city, township, or district, as other public roads or streets therein are by law repaired and maintained."

As will be observed, by this act, the burden of the maintenance of such turnpike road, after its taking over, except as to such parts thereof as are within the limits of the city, is placed upon the townships through which the road passes. The act makes the turnpike, when paid for, a public road, to be

kept and maintained as other public roads. The law so continued until 1905, when by the act of April 20, 1905 (P. L. 237), of that year it was provided that:

"When any turnpike, or part thereof, has been, or may hereafter be, appropriated or condemned for public use, free of tolls, under any existing laws, and the assessment of damages therefor shall have been paid by the proper county, such turnpike, or part thereof, shall be properly repaired and maintained at the expense of the county, city or borough in which the said turnpike, or part thereof, lies, or the same may be imposed under any existing laws by the said county, city or borough."

By the second section of the act, all acts or parts of acts inconsistent with the terms of the act were repealed. One certain effect of this act was to relieve the townships of the burden of repair and maintenance of the roads taken over which had been imposed on them by the earlier act. This act of 1905 was a wholly separate and independent piece of legislation. It was not an amendment of any act, nor did it repeal any act; it did not pretend to do either. It did, however, supersede so much of any existing act as was repugnant to any of its provisions. There was but one existing act—the act of June 2, 1887, supra—that could possibly conflict with it, and that only in the one provision in the earlier act that imposed the expense of repair and maintenance upon the township, whereas the later act imposed it on the counties. It follows that the act of June 2, 1887, remained in full force, unaffected by the act of April 20, 1905, except in the particular mentioned. Then followed the act of April 25, 1907, which, as indicated in its title was amendatory of the act of April 20, 1905. But the amendment went no further than to bring within the provisions of the earlier act "abandoned turnpikes and turnpikes belonging to companies or associations which had been dissolved, or may hereafter be dissolved," leaving the burden of repairing and maintenance where the act of April 20, 1905, had placed it, namely, on the counties except in cities and boroughs. This amending act was without other effect on the act of June 2, 1887. Then came the act of May 10, 1909, which in section 1, provided as follows:

"When any turnpike, or part thereof, has been or may hereafter be appropriated, or condemned for public use, free of tolls, under any existing laws, and the assessment of damages therefor shall have been paid by the proper county, or when any turnpike company or association has heretofore abandoned or may hereafter abandon its turnpike, or any part thereof, or when any turnpike company or association, owning any turnpike, has theretofore been dissolved, or may hereafter be dissolved, by proceedings under any existing laws of this commonwealth, such turnpike, or part thereof, shall be properly repaired and maintained at the expense of the township, city, or borough in which the said turnpike, or part thereof, lies."

By the second section of this act, the acts of April 20, 1905, and of April 25, 1907, are expressly repealed; so, too, "all other acts, or parts of acts, in so far as they are inconsistent with the provisions of this act." Next

came the act of March 15, 1911 (P. L. 21), which in its terms expressly repealed, without more, the act of May 10, 1909, leaving the general act of 1887 otherwise unaffected. The effect of this act was to restore to the original act of June 2, 1887, the eleventh section as it had appeared in the original enactment, but which had been superseded by the act of 1905.

[1] The present proceeding was begun on the theory that the act of May 10, 1909, which in express terms repealed the acts of 1905 and 1907, itself having been repealed by the act of March 15, 1911, it necessarily resulted that both these repealed acts were revived and restored. If this be a correct view of the law, it must follow that the case was properly ruled in the court below. It is insisted on the part of appellants that no such effect can be given to the repealing act of 1909, in view of the constitutional provision (section 6 of article 3 of the Constitution) which declares that:

"No law shall be revived, amended, or the provisions thereof [be] extended, or conferred, by reference to its title only, but so much thereof as is revived, * * * extended or conferred, shall be re-enacted and published at length."

If this latter view be correct, then it must result that with the fall of the acts of 1905 and 1907 fell also the act of June 2, 1887, as an efficient and operative piece of legislation, inasmuch as the eleventh section of the latter act, as originally passed, imposed the expense of repair and maintenance on the township, and this section having been repealed by act of 1905, placing the burden on the counties, except as a revival follows of one or other of these acts upon the repealing act of 1909, the burden of repair and maintenance rests nowhere, and the act of 1887 is worse than idle. Certainly it could not have been within the legislative intent to produce such result. While legislative intent is properly a subject for consideration in the interpretation of statutes, it counts for nothing when the matter for consideration is the conformity or want of conformity to constitutional requirements. It is the legal consequences of the repeal of the act of 1909, and that alone, that we have here to consider. Did the repeal of that act operate to revive and renew the several acts which it had repealed? If this question were to be decided on common-law principles, it would be of simple solution, since it is a familiar rule, governing statutory construction under the common law, that, when a repealing statute is itself repealed, the first statute is revived without formal words for that purpose, in the absence of any contrary intention, expressly declared or necessarily to be implied from the enactment.

The contention on the part of appellants, however, is that the constitutional provision above quoted has abrogated this common-law rule, with the result that since the adoption of the Constitution no act can be revived

or renewed, except in the manner there prescribed. That the provision may be so read, without doing violence to the language employed, must be admitted. This, however, is far from conclusive, for if with equal reason a restricted meaning can be derived from the language employed, in the absence of any express repeal of the common-law rule, the presumption that none was intended must prevail. We say this in view of the situation that existed previous to the adoption of the Constitution, suggesting, as it does, the mischief that the provision was manifestly intended to remedy. It is a matter of common knowledge, at least among those whose duties have familiarized them with the history of legislation in the state, that, prior to the adoption of the present Constitution, it was of so frequent occurrence that statutes were revived, or amended, as the case might be, by simple reference to the title, that it became almost a settled custom to so legislate, with the unfortunate result that much legislation was enacted improvidently, without that intelligent consideration and understanding of the matters involved which is so essential to the procurement of wise and wholesome legislation. The purpose of the provision was to put an end to this method of legislating by requiring in every case that the proposed revival or amendment be re-enacted and published at length, to the end that intelligent action might better be secured. "Inseparable from the history of the Constitution and the facts surrounding its creation, and therefore a potent element in the construction of its general terms, is the consideration of the objects and purposes to be accomplished, or the mischiefs designed to be remedied or guarded against. In the interpretation of statutes, these reflections may enlarge or restrict the natural and literal significance of the words used, and they are applicable with the same effect to the interpretation of the Constitution." Endlich on Interp. Stat. § 518.

[2] If we are correct in our statement as to the object and intent to be accomplished by the constitutional provision—and this we think cannot be questioned—it would seem to follow that, notwithstanding the general terms employed in the constitutional provision, the plain intent was that it should be restricted in its application to what may be designated as express statutory revivals as distinguished from revivals by operation of law, since the latter could not fall within the mischief the provision was intended to guard against, nor could its requirements as to re-enactment and publication be at all applicable where the revival was by common law. This particular constitutional provision is not peculiar to our state. In one form or other it appears in most state Constitutions adopted in recent years. The fact that in many of the states which have adopted the provision a legislative enactment has followed forbidding revival of statutes by the common-law

rule shows how general is the conception that more is needed to overcome the common-law rule than such a constitutional provision as we are considering, because of the latter's susceptibility to two different constructions. In Pennsylvania we have no such statutes. A very well considered and entirely convincing opinion is to be found in the case of *Wallace v. Bradshaw*, 54 N. J. Law, 175, 23 Atl. 759. The provision in the Constitution of the state of New Jersey differs in no material respect from the provision in our own, and exactly the same question we have here was there adjudicated in a reversal of the lower court. In the opinion of the court, as delivered by the Chief Justice, this occurs (54 N. J. Law, 176, 23 Atl. 759):

"The phrase that 'no law shall be revived or amended by reference to its title alone' cannot be forced into a signification that will comprehend any revival that is not a statutory one, for there is not, and cannot be, revival by operation of law that can be said to operate on the act revived 'by reference to its title alone.' The clause obviously would have to be interpolated to impart to it that breadth of efficacy claimed for in the decision before us. Thus it would be necessary to transmute it into some such form as this: 'No law shall be revived by operation of law, nor shall it be revived or amended by reference to its title alone.' And the harmony that would exist in the sentence thus constructed, and its freedom from all tautology, would seem to demonstrate that these methods of revival are diverse and distinct things, and that only one of them is embraced in this constitutional expression. I cannot agree to the proposition that because the people, in their Constitution, have declared that a law shall not be revived by a statutory reference to its title, that they have thereby likewise declared that it shall not be revived by the operation of a well-known rule of the common law. And this is plainly the sense in which the provision was expounded."

What is here stated applies with equal force to the provision in the Constitution of this state, since there is no material difference in the language employed, and our conclusion is the same with respect to the latitude to be allowed it.

The judgment is affirmed, and the appeal is dismissed.

(257 Pa. 450)

STERLING TP. SUP'RS v. WAYNE COUNTY COM'RS.

(Supreme Court of Pennsylvania. April 16, 1917.)

Appeal from Court of Common Pleas, Wayne County.

Mandamus by the Supervisors of Sterling Township against the Commissioners of Wayne County. Mandamus awarded, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Charles A. McCarty and M. E. Simons, both of Honesdale, for appellants. E. C. Mumford and J. O. Mumford, both of Honesdale, for appellee.

STEWART, J. This case was heard in the court below, and argued here on appeal, with the case of *Supervisors of Manchester Township v. Wayne County*, 101 Atl. 736, in which

the opinion has just been handed down, affirming the judgment appealed from. The facts are the same in both cases, and the question raised is the same in each. It follows that like disposition is to be made of this.

The assignments are overruled, and the judgment is affirmed.

(257 Pa. 394)

SMITH et al. v. PEOPLE'S NATURAL GAS CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. MINES AND MINERALS §78(7)—OIL AND GAS LEASE—BILL TO ENFORCE FORFEITURE.

Where the lessor of an oil and gas lease executed November 2, 1902, received a quarterly rental for 10 years, and the lessee, who had not entered upon or explored the premises as required by the lease, tendered the rent due on September 5, 1912, which was returned because not tendered in time, with a statement that the lessor did not care to continue the lease, and the lessee tendered the rental for each quarter until the rental of June 4, 1913, which was not tendered when due and was refused, the lessor's bill in equity to forfeit the lease for nonpayment of rent was properly dismissed, as the lessor's conduct admitted that the lease was in existence and had not been rescinded.

2. LANDLORD AND TENANT §111—NONPAYMENT OF RENT—FORFEITURE—EQUITY.

There is a distinction between a proceeding to enforce a forfeiture and one asking for relief from a forfeiture, and while courts of equity will not generally relieve against a forfeiture, except in the case of nonpayment of rent, where full compensation can be made by decreeing the arrears to the lessor, they will not lend their assistance to the enforcement of a forfeiture, but will leave parties to their legal remedies.

3. LANDLORD AND TENANT §111—LEASE—CONDITIONS OF FORFEITURE.

The usual rule is that a lease must state the conditions upon which a forfeiture can be declared, or no forfeiture can be declared.

Appeal from Court of Common Pleas, Clarion County.

Bill in equity by D. B. Smith and others against the People's Natural Gas Company to enforce the forfeiture of an oil and gas lease. From a decree dismissing the bill, plaintiffs appeal. Decree affirmed, and bill dismissed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

John S. Shirley, Don C. Corbett, and H. E. Rugh, all of Clarion, for appellants. F. J. Maffett and H. M. Rimer, both of Clarion, and Christy Payne, of Pittsburgh, for appellee.

STEWART, J. The discussion of this case has taken a much wider range than was necessary under the pleadings. The several questions touching the legal effect to be given the contract out of which the contention arises, and the reciprocal rights and obligations of the parties thereunder, all of which were so elaborately discussed, are not in any way involved in the issue presented. The one question in the case is whether, under

the terms of the particular contract we have to consider, and below in part recited, whether it be a grant, or a lease, or an option, the grantor or lessor is entitled to the intervention of the court to have the estate granted declared forfeited because of nonpayment at the appointed time of a stipulated quarterly installment. The facts are briefly these:

On the 2d of November, 1902, the appellant, with his wife, who was the owner of the land, executed and delivered to William Fairman, and his assigns, an instrument under seal, wherein it is recited that, in consideration of \$1 paid, they have granted, with covenants of general warranty, to the said Fairman and his assigns, all the oil and gas in and under a certain tract of land situate in Limestone township, Clarion county, containing 65 acres. This is followed by a statement of the terms on which the grant is made in separate paragraphs. The first recites that party of the second part agrees to drill a well on said premises within four months from the date of the instrument, or thereafter pay to the party of the first part \$8.06 quarterly in advance until said well shall be drilled, or the property or estate granted is reconveyed or surrendered to the party of the first part; second, that if oil be found in paying quantities the party of the second part shall deliver to the party of the first part one-sixth of the oil so produced; third, that in case gas be found in paying quantities the consideration shall be at the annual rate of \$200 payable quarterly in advance, etc.; the seventh recites that the party of the second part "may at any time remove all its property, fixtures, etc., and may surrender this lease and reconvey to the party of the first part, its heirs and assigns, the premises and estate hereby granted, and thereafter be relieved from further liability under this grant and instrument." The other terms and provisions are without significance and need not be recited. On the 9th of December following, Fairman assigned to the People's Natural Gas Company, the appellee, all his right and interest in and under the contract. Up to the time of filing the present bill no occupancy of the premises had been taken by the appellee, and during this period no attempt had been made to drill a well thereon, but the appellee had continued regularly to pay the stipulated quarterly rental, as rental, of \$8.06 in advance, until September 5, 1912, a period of ten years. On August 27, 1912, appellee sent check to appellant for quarterly rental due on the following September 5th. This check appellant returned to appellee, inclosed in a letter from the former's attorney in which this appears:

"Mr. Smith [appellant] does not care to continue the lease, and therefore returns the rental you sent him in August. He now wants the lease returned to him, and the purpose of this letter is that you return it to him promptly at your earliest convenience."

The rental for each quarter thereafter was tendered until June 4, 1913. The rental then due was not tendered until June 16th, when it, too, was declined. On the following December 9th, appellant caused the following notice to be served on appellee:

"This is to notify you that I hereby declare forfeited the lease given by me and my wife Ella Smith to M. M. Fairman and assigned to your company, on 65 acres, more or less, in Limestone township, Clarion county, Pennsylvania, and that the said lease has been void and of no effect since June 4, 1913, for the reason that you failed at that time to pay the rentals due under the terms of the lease as therein provided."

This was more than two years after the appellant had refused the tender of rental due September 5, 1912, and had demanded a return of the lease.

[1] Appellant filed his bill in May, 1915, in which, after setting forth the above facts, he asked that the lease be declared forfeited, void, and of no effect, and that appellee be directed to deliver up the same. While the failure of appellee to drill a well on the premises within four months from the making of the contract is a matter complained of in the bill, it is not made a basis for the relief asked, as indeed it could not be, in view of the fact that for the ten years following the agreement the appellee had acquiesced, and received the quarterly payments. The acceptance of these quarterly payments, which both parties treated as rental, is wholly inconsistent with, and fully negatives, any claim that the contract had either expired or been rescinded. Up to the time when it is claimed that default was made in the quarterly payments the relation of landlord and tenant unquestionably existed, and the acceptance of the rent during that period concludes the appellant from asserting anything to the contrary. Therefore the bill of complaint suggests no other ground for the relief asked for than the default in the quarterly payment of \$8.06, and it follows, from this, that, as we have already said, it is wholly unnecessary to consider the several questions discussed by counsel on one side and the other as to the nature and character of the original contract between the parties. For present purpose we give the contract the construction the parties themselves put on it. The refusal by appellant to accept the tender of September 5, 1912, is put distinctly on the ground that the tender was not made in time. This is itself a clear admission that up to that time the contract was a subsisting one, and had neither been rescinded nor revoked. The learned court refused the prayer of the petitioner and dismissed the bill. The appeal brings before us the single question we have above indicated.

[2] It is to be remembered that it was affirmative relief that was here sought, the enforcement of a forfeiture. Our cases recognize a clear distinction between a proceed-

ing for the enforcement of a forfeiture and one asking for relief from forfeiture. Says Sharswood, J., in *Oil Creek R. R. Co. v. Atlantic & Great Western R. R. Co.*, 57 Pa. 65, 72:

"He [the chancellor] exercises, upon the question presented, a sound discretion, under all the circumstances of the case, for the most part untrammelled by rule or precedent. If the bargain is a hard or unconscionable one, if the terms are unequal, if the party calling for his aid is seeking an undue advantage, he declines to interfere. Therefore it is that, although a court of equity will not in general relieve against a forfeiture, unless it be in the case of nonpayment of rent, where an exact and just compensation can be made by decreeing to the landlord the arrears of his rent, with interest and costs, yet they never lend their assistance in the enforcement of one, but leave the party to his legal remedies."

The contract in the case just cited in express terms provides for a forfeiture in case of failure to perform any of its stipulations. In the present case, as in the case of *Marshall v. Forest Oil Co.*, 198 Pa. 83, 90, 47 Atl. 927, where the attempt was to forfeit a lease for nonpayment of rental, the contract contains no stipulation for forfeiture. It is there said, by the present Chief Justice:

"There is nothing in the lease providing that it should be forfeited by the nonpayment of the rental. The only forfeiture contemplated is that resulting from an abandonment of the lease and the removal of the lessee's property from the premises; and the lessor could not have rescinded the lease because the lessee failed to pay the monthly rental. He had a right to enforce payment of the same by suit against the lessee for each monthly default, and, upon such default, in a short time any right of the latter in the leased premises would have been divested in proper proceedings by the former."

[3] The usual rule is that a lease must state the condition upon which a forfeiture can be declared, or no forfeiture can be declared. *Vandevoort v. Dewey*, 42 Hun (N. Y.) 68. Other authorities might readily be cited of like tenor, but these given make it unnecessary to pursue the matter further. All we decide in the case is that appellant was not entitled to enforce forfeiture on the ground set up in this bill.

It follows that no error was committed, and the decree is therefore affirmed, and the appeal is dismissed.

(257 Pa. 402)

PERKINS v. HALPREN et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. APPEAL AND ERROR \Leftrightarrow 1008(2)—FINDINGS OF FACT—EFFECT.

The findings of the court below, trying the case without a jury, have the effect of a verdict, and will not be set aside, if there is evidence to support them.

2. SALES \Leftrightarrow 199—DELIVERY—SALE ON CREDIT.

Actual delivery and payment are not necessary to transfer the title to goods sold, as goods may be sold on credit and without delivery, if the parties so intend.

3. SALES \Leftrightarrow 218½ — ACTION FOR PRICE — TRANSFER OF TITLE—SUFFICIENCY OF EVIDENCE.

In assumpsit for goods sold and delivered, evidence held to sustain a finding that the title passed to defendants when the goods were billed to them and they were permitted to withdraw the goods from a warehouse on payment of the duty.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for goods sold and delivered by James A. Perkins, to the use of the Bank of Commerce, against Jacob Halpren and Harry Mittleman, trading as Halpren & Mittleman. Judgment for plaintiff for \$2,232.27, on the findings of the court sitting without a jury, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

J. B. Colahan, 3d, and Frank P. Prichard, both of Philadelphia, for appellants. M. Hampton Todd and Levi & Mandel, all of Philadelphia, for appellee.

FRAZER, J. This action, by the assignee of a book account, is for goods alleged to have been sold and delivered by the legal plaintiff to defendants, who refused payment, averring the title had not passed, nor had there been actual delivery made to them, but, on the contrary, the goods were sold and delivered to a third person. There were two actions depending upon the same facts, by agreement tried together without a jury. The trial judge concluded the testimony ample to establish a sale, and entered judgment for plaintiff.

Plaintiff, an importer of dress goods, entered into an arrangement with defendants, who were jobbers in the same line of merchandise, by which the latter agreed for a commission to guarantee the account of plaintiff at the Philadelphia National Bank, which institution undertook to accept drafts drawn on England and accompanying shipments of goods ordered by plaintiff. Conformable to this arrangement, a letter of credit, signed by the bank and defendants, was forwarded to a foreign merchant, who thereupon shipped the goods, attaching to the bill of lading a draft drawn on the Philadelphia National Bank, and, on arrival of the shipment, the bank accepted and stored the goods in a United States bonded warehouse, in the name of brokers, for account of plaintiff. A written acknowledgment, termed a "trust receipt," was executed by plaintiff to the bank, in which the former agreed to hold the merchandise in trust as the property of the bank, with liberty, however, to sell the same for its account, collect the proceeds, and deliver the amount received to the bank, to be applied against its acceptance of the draft in favor of the foreign merchant. Plaintiff sub-

sequently forwarded to defendants invoices describing the character of the merchandise, and stating the price, terms, and date of payment; the price including the duties and carrying charges. Instead of delivering the accounts to the Philadelphia National Bank, in accordance with his agreement under the trust receipt, plaintiff assigned same to the Bank of Commerce, the use plaintiff, by indorsing on the invoices the following memorandum:

"For value received, the above claim is sold, assigned, and transferred to Bank of Commerce, * * * to whom it is payable when due."

No claim is made that the Bank of Commerce was not a bona fide purchaser. The money received by Perkins from the use plaintiff was applied toward the payment of duties, minor incidentals, drafts, and the balance turned over to the Philadelphia National Bank. Plaintiff's account at the Philadelphia National Bank became in arrears, whereupon the latter directed the warehouseman to hold all goods deposited there on account of plaintiff, subject to its written instructions. Later the goods so held, including those billed to defendants and assigned to the Bank of Commerce, were sold by the Philadelphia National Bank, and the proceeds of the sale applied to the credit of the plaintiff. Defendants refusing to pay for the goods, these actions were brought.

There is evidence to the effect that the method of procuring credit adopted in this case is the usual and customary one in the importing business. Plaintiff testified that, before the letter of credit was procured, he usually obtained from the defendants an order for certain goods, and secured a letter of credit covering their value, and that, in this particular instance, he received a verbal order from defendants to the extent of £3,000 of merchandise, whereupon the letter of credit for that amount was procured, being practically confirmatory of the verbal order for goods. The order, as given, included the price and quantity, as appears from the following extract from the testimony:

"By the Court: Q. It was a verbal order for a definite kind of merchandise, to wit, poplins and artificial silk, and was of a quantity sufficient in yards to equal £3,000 approximately? A. Yes, sir."

Plaintiff also testified:

"All my goods were sold on the basis of that letter of credit. That practically made the sale."

This evidence was ample to warrant the finding of an existing order, or agreement, to purchase the goods. The further question remains as to whether there was such actual or constructive delivery sufficient to pass title to the purchaser.

The merchandise, upon reaching port, was immediately delivered to Murphy & Co., and deposited by them in the warehouse for the account of plaintiff, who gave a trust receipt, by which he was authorized to make sales of

the goods and account to the bank for the proceeds. Plaintiff immediately billed the goods to defendants under date of June 21st and August 9th, at stated terms, by which payment was not required until November 1st and December 1st, following. The status of the goods subsequent to June 21st is indicated by the following testimony:

"Q. What control did Halpren & Mittleman have over that merchandise in the hands of Alexander Murphy? A. Practically absolutely full control. Q. Could they go there and get them? A. Indirectly. Q. What do you mean by indirectly? A. When they wanted to withdraw those cases they would give the money for the duty, a check made payable to Alexander Murphy & Co. for the withdrawal of those cases. They were put in bond, subject to the payment of the duty. * * * Q. Who paid the duty on the goods? A. Halpren & Mittleman. Q. How often did they pay duty on goods? A. Whenever they wanted the case. Q. To whom did they pay the duty? A. Alexander Murphy & Co."

The goods were billed to include duty and hauling, and, upon defendant desiring to withdraw a portion of the shipment, they gave to plaintiff a sum sufficient to cover the duty, which amount would be credited on the bill, and plaintiff at his expense thereupon removed the goods from the warehouse to defendants' place of business. Part of the merchandise included in the shipment was delivered in this manner and paid for by defendants.

The articles for which suit was brought were permitted to remain in the warehouse until September, at which time defendants drew a check in payment of the duty; in the meantime, however, the bank notified Murphy & Co. not to surrender the goods, except upon its written order. Defendants were aware at all times that the accounts had been assigned to the Bank of Commerce, notwithstanding the trust agreement, since notice of that fact was indorsed on the face of the invoices sent them, and no objection was made by them to the assignment on account of their guaranty of plaintiff's account at the Philadelphia National Bank.

[1] The court below found from the foregoing facts that the parties intended and did definitely complete the sale at the time the goods were billed to defendants, and the accounts assigned to the Bank of Commerce. This finding has the force and effect of the verdict of a jury, and will not be set aside if there is evidence to support it. *Brown, Early & Co. v. Susquehanna Boom Co.*, 109 Pa. 57, 1 Atl. 156, 58 Am. Rep. 708; *Com. v. Westinghouse Electric & Mfg. Co.*, 151 Pa. 265, 24 Atl. 1107, 1111. Whether or not title passed to defendants in this specific instance depends upon the intention of the parties as indicated by the course of dealing with each other.

[2] Actual delivery and payment is not necessary, as merchandise may be sold on credit and without delivery, if the parties so intend. The rule on the subject was fully stated in *Com. v. Hess*, 148 Pa. 98, 23 Atl.

977, 17 L. R. A. 176, 33 Am. St. Rep. 810, which was a prosecution for selling liquor without a license; the question turning on the time of sale. In that case, defendant, a wholesale liquor dealer in the city of Philadelphia, received orders at his place of business from outside the county; upon receipt of such orders the liquors were set apart and charged to the purchaser on defendant's books, the sale being made on credit. The articles purchased were subsequently delivered to the purchaser by defendant, either by wagon or railroad. The dealer was charged with selling liquor without a license in the county in which the purchasers resided, and we there held the sale was made at defendant's place of business, and not in the county of the purchaser. In discussing the legal principles, applicable to such sales, this court said (148 Pa. 105, 23 Atl. 979, 17 L. R. A. 176, 33 Am. St. Rep. 810):

"As before stated, when the defendant received the orders from his customer, the goods were set apart for the latter, and charged to him. Had the order been accompanied by the cash, and the goods thus set apart, no one would contend that the sale was not complete as between the parties. Can it make any possible difference that the liquors were charged to the purchasers upon the books of the defendant? The giving of a credit was as effective in passing the title as the payment of the money when the order was given. The acceptance of the order, in either case, is effective to pass the title as between vendor and vendee. In such case, the vendee has the right of property with the right of possession. Under all the authorities, the vendor acts as bailee, and not owner, in carrying or delivering the goods. This is the rule, where the rights of creditors, or bona fide purchasers without notice, do not intervene. There is abundant authority for this principle. The general rule is that it is the contract to sell a chattel, and not payment or delivery, which passes the property. Benjamin on Sales, 357. The rule that the contract of sale passes the property immediately, before payment or change of possession, has been universally recognized in the United States. *Id.* 329. There may be a bargain and sale of goods sufficient to transfer the title, and thus to support an action for goods bargained and sold, without such transfer of delivery as will amount to a transfer of possession. *Frazier v. Simmons et al.*, 139 Mass. 531 [2 N. E. 112]. 'When the terms of sale are agreed upon, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale,' says Chancellor Kent, 'becomes absolute as between the parties, without actual payment or delivery, and the property, and the risk of accident to the goods, vests in the buyer.'"

In *Cope's Estate*, 191 Pa. 589, 43 Atl. 473, it was held that where a customer selected engravings from time to time, as invoices of such articles were received and the selections so made were set apart by the vendor on his premises, and charged to the customer's account, and subject to his call at any time delivery was desired, the title to the articles passed at the time of their being set aside, even though bills were not rendered in the course of dealing until the prints were actually removed by the customer. We there said (191 Pa. 593, 43 Atl. 474):

"The conduct of appellants [vendors] was uniform in treating the transaction as a sale. In every case, the selected engravings were marked with their respective prices, separated from the common stock, and made accessible to the decedent and Mr. Barr [the vendor's salesman] alone, then charged to him [the decedent], and never thereafter carried into the general stock. The learned auditing judge attached too much importance to the fact that the bills were not rendered until the goods were taken away. There is nothing in that circumstance that is inconsistent with an absolute sale, especially when we consider the uniform course of dealing, which the decided weight of the evidence shows the parties themselves adopted."

A case somewhat similar on its facts is *Monticello Distilling Co. v. Dannenhauer*, 46 Pa. Super. Ct. 485, where there was an agreement to purchase whisky "in bond" from a distilling company, followed by a transfer of warehouse receipts for the goods, and it was held the acceptance by the vendor of notes of the purchaser for the price constituted a complete sale, even though the goods were subject to a payment of a federal tax and were never actually delivered to the vendee.

[3] Many other cases sustaining the same principle might be cited. The above, however, are sufficient to illustrate the rule and sustain the conclusion reached by the trial judge on the facts in the present case. The course of dealing between the parties, the method of purchase, and subsequent disposition of the merchandise on its arrival in a bonded warehouse, wherein it was set apart subject to withdrawal at the pleasure of defendants, and the actual withdrawal of part, together with the delivery of the invoices, all tend to support the conclusion of the trial judge, and furnish ample foundation to sustain his decision.

The fact that plaintiff failed to transfer the proceeds of sale to the Philadelphia National Bank, conformably to his obligation under the trust receipt to deliver to the latter, has no bearing on the present discussion. The trust receipt authorized plaintiff to sell the merchandise; consequently an exercise of the power of sale, so far as the purchaser is concerned, divests the title of the bank. *Canadian Bank of Commerce v. Baum & Sons*, 187 Pa. 48, 40 Atl. 975. While the knowledge of defendants of the misuse of the funds by plaintiff, in violation of the trust agreement, might have prevented them from claiming to be bona fide purchasers for value, in a proceeding by the Philadelphia National Bank to regain possession of the goods (*Canadian Bank of Commerce v. Baum & Sons*, supra), that bank is not here making claim to any portion of the property, and has apparently received satisfaction of its account.

A motion to quash the appeal was made by plaintiffs. In view of the disposition of the case on its merits, consideration of that motion becomes unnecessary.

The judgment of the court below is affirmed.

(257 Pa. 411)

SOTTER et al. v. COATESVILLE BOILER WORKS et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. CORPORATIONS §=308(1)—DIRECTORS—COMPENSATION.

The directors of a corporation may serve the company in the capacity of officers or employees, and receive compensation for such services, if legally employed by the company.

2. CORPORATIONS §=317(1)—DIRECTORS—CONTRACT WITH CORPORATION—COMPENSATION.

Directors may contract with agents or employees of their corporation, who are likewise directors; and such contracts, though subject to close scrutiny, are not ipso facto void, but, when fair and reasonable, will be sustained.

3. CORPORATIONS §=426(7)—DIRECTORS—CONTRACT FOR COMPENSATION—RATIFICATION.

A contract by the directors of a corporation with its agents or employees, looking to additional compensation to the directors, may be ratified and validated by acquiescence of the stockholders.

4. CORPORATIONS §=320(6)—DIRECTORS—SALARIES—RATIFICATION—EQUITY.

A vote of a board of directors of excessive salaries to certain of its members, who are also officers or employees of the corporation, even though subsequently ratified at a stockholders' meeting, is reviewable by a court of equity at the instance of minority stockholders, and the court, if finding that salaries are exorbitant, may determine the value of the services rendered and restrain the corporation from paying any excess; but the court has no power to restrain the payment of such salaries in future years, when the circumstances may change, though exceptional cases may arise where, in contemplation of a continuance of an ascertained state of facts, the court may determine their future compensation.

5. CORPORATIONS §=320(13) — DIRECTORS — VOTE FOR EXTRA COMPENSATION—VALIDITY—INJUNCTION.

A corporation voted salaries to three of its directors, who were also its executive officers, and who performed special services for the company, resulting in its financial success, and thereafter the directors, in addition to their salaries, voted them 50 per cent. annually of the net gain on the stock of the company after its regular dividend was set aside, which vote was participated in by interested directors and was ratified at a stockholders' meeting. *Held*, on a bill by dissenting stockholders to restrain the corporation from paying such additional compensation to its directors, that the payment to them for that year should be limited to the amount found by the court to be reasonable, and that the court could not enjoin payment of extra compensation to employees not parties, or enjoin payments in future years, when the circumstances might change, though, in exceptional cases and in contemplation of a continuance of an ascertained state of facts, it might do so.

6. CORPORATIONS §=308(3) — COMPENSATION OF OFFICERS—CONTRACT—RESOLUTION.

Where a corporation by resolution fixed extra compensation for its officers, no formal contract between it and its officers was required to fix the corporation's liability; but such a resolution, when acted on, was in itself sufficient evidence of the contract.

Appeal from Court of Common Pleas, Chester County.

Bill for injunction by Frederick Sotter and others against the Coatesville Boiler Works and others. From a decree awarding an in-

junction in part, plaintiffs appeal. Remitted, with directions to modify the decree.

The court entered the following decree:

"The Coatesville Boiler Works, one of the defendants, and all of its agencies, are restrained from making any payment under its directors' resolution of November 7, 1904, subsequently ratified by its stockholders, of any part of its net profit of \$102,456.60 for the fiscal year ending in 1915 to Fred E. Moore; and this fund will not be depleted, by virtue of the recited resolution and its ratification, beyond the payment of one-third of 50 per cent. of it to Charles Edgerton and one-third of 50 per cent. of it to Nelson H. Genung. Annually hereafter, out of the so-called net profits, the Coatesville Boiler Works is restrained from paying to Edgerton and Genung greater sums than, with their fixed salaries, will give to each \$12,000. It is further directed that the Coatesville Boiler Works shall pay the costs of this suit."

Plaintiffs appealed. Errors assigned were in dismissing exceptions to various findings of fact and law and the decree of the court.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

Horace M. Rumsey and J. Barton Rettew, both of Philadelphia, and Rettew & Sprout, of West Chester, for appellants. W. Horace Hepburn, of Philadelphia, and A. M. Holding, of West Chester, for appellees.

MOSCHZISKER, J. October 15, 1915, Frederick Sotter filed a bill in equity, praying, *inter alia*, that the Coatesville Boiler Works be restrained from giving certain of its officers, named as codefendants, any compensation in excess of their regular annual salaries; further, that these latter should be ordered to account for all moneys theretofore received by them over and above such salaries. Subsequently two other stockholders intervened as plaintiffs. After answer and replication, the case came to trial. The decree favored the defendants, and the plaintiffs have appealed.

The defendant company has a capital of \$100,000, divided into 1,000 shares, at a par value of \$100. When the bill was filed, Mr. Sotter owned 100 of these shares, and the other two plaintiffs 31 shares between them. The individual defendants then held stock as follows: Charles Edgerton, 300 shares; Nelson H. Genung, 208 shares; and Fred E. Moore held 18 shares in his own right, but none as executor. In November, 1900, Edgerton was elected president, Genung vice president, and Edwin T. Moore secretary and treasurer of the corporation; each of them being re-elected annually till the death of the latter, in September, 1913, when he was succeeded by Fred E. Moore. December 10, 1901, the board of directors fixed the salaries of the three "executive officers" at \$400 per month each, and they received that compensation until January 1, 1905; but in 1904 all of them, being dissatisfied, had threatened to resign.

In addition to the routine duties of their respective positions, Edgerton had charge of the Philadelphia headquarters of the company, at the same time earning on the outside about \$6,000 a year as a mechanical engineer; Genung was in charge of the New York office, and gave his entire time thereto; and Moore devoted his attention to the finances of the concern, superintending the manufacture of its product and the sale thereof from the Coatesville office. Edgerton and Genung were expert engineers, and Moore was especially valuable in his line; under their direction, the company was making a decided success.

After consultation the board of directors agreed that, if these three men would remain with the company and give their undivided attention to its interests, they should receive additional compensation over and above their fixed salaries as executive officers. To carry out this understanding, on November 7, 1904, the following resolution was passed:

"That, in addition to their present salaries, the managers of the company, comprising Charles Edgerton, Nelson H. Genung, and Edwin T. Moore, participate from year to year in the net earnings as shown by the books at the close of each business year. The proportion so distributed to be 50 per centum of the net gain after the regular 8 per cent. dividend to the stockholders has been set aside, and is to be equally divided between them. The remaining 50 per centum of profit to be proportioned to 'wear and tear of plant and machinery,' and to a surplus or undivided profit account, as may be determined by the board of managers."

Thereafter all three officers gave their whole time and attention to the duties of their respective positions and the management of the corporation, receiving compensation in accordance with the terms of this resolution till the fiscal year ending September, 1914, when there was no net gain.

The board of directors consisted of seven members, and when the resolution was passed in November, 1904, there were present the three executive officers and two others. Edgerton and Genung are still directors, and Edwin T. Moore was a member of the board until his death. Although the extra compensation here in question was voted upon by these three personally interested directors, yet, on November 2, 1908, at a meeting of stockholders of the defendant corporation, the subject of this resolution was brought up, and a motion adopted "that we ratify the action of the board of directors * * * whereby bonuses are being distributed to certain of the employes and members of the executive committee, based on the output and earnings of the company"; and, at a similar meeting in November, 1910, the matter was again considered, a resolution being then passed "discontinuing the payment of bonuses to employes who are not officers of the company," thereby impliedly sanctioning payments to those not included in this prohibition.

At the last-mentioned meeting, Mr. Sotter was present and took an active part; but

not until September, 1914, did the latter complain of the extra compensation received by the officers of the company, and, in consequence, May 17, 1915, a special meeting of the stockholders was called, when a complete report of the whole matter in controversy was made, and this resolution passed:

"Resolved, that the action of the board of directors in paying to Charles Edgerton, Nelson H. Genung, and Edwin T. Moore, as managers of this company, a share of the profits of the business of this company equal to 50 per cent. of the net profits of the business at the end of each year from 1904 to 1914, inclusive, in accordance with the resolution of the board of directors adopted at the meeting of November 7, 1904, which reads as follows: [Here the resolution of 1904 is quoted in full]—be and the same is hereby ratified and approved, and that the method of arriving at the amount of net profits by the board at the end of each year is hereby approved."

All those present at this meeting, excepting the proxy of Mr. Sotter, voted for the resolution; 694 shares being cast in the affirmative, and 100 in the negative. At this time Edgerton and Genung together owned a majority of the stock of the corporation; but when the ratifying resolution was passed in 1908, even in conjunction with Edwin T. Moore, they did not hold a controlling interest. Following the resolution already referred to, at the meeting in May, 1915, another was passed authorizing and directing the board to enter into an agreement "with Charles Edgerton, Nelson H. Genung, and such other employes of the company as they may deem proper, for the payment (in addition to their present salary) from year to year of 50 per cent. of the net earnings * * * after the regular 8 per cent. dividend to stockholders has been set aside," this fund to be divided, $\frac{1}{4}$ to Edgerton, $\frac{1}{4}$ to Genung, and the remaining $\frac{1}{2}$ "to such of the employes of the company as the board of directors may from time to time determine upon." This resolution was carried by the same vote as the other one, quoted in the preceding paragraph.

In addition to the above-recited facts, the court below found there was no executive committee of the directorate of the defendant company; that Messrs. Edgerton, Genung, and Moore were "the executive officers, not of the board, * * * but of the corporation, and as such were its working managers"; that they were "recognized and treated as the executives or managers, not of the board of directors, but of the company"; that they performed service outside of their obligations as directors, and in addition to their respective official duties; that "the proportion of net earnings paid yearly to Edgerton, Genung, and Moore" was to cover these latter services, and, each year, "the technical net gain * * * was fixed after the deduction of their percentages"; that all three of these men were of "exceptional ability in their line, and, as a result of their efforts, the company had paid an [annual]

8 per cent. dividend * * * and accumulated a surplus of \$238,000"; that "the board of directors of said company had authorized, under the resolution or motion of November 7, 1904, the payment of 50 per cent. of \$102,456.60, representing the net gain * * * for the fiscal year ending September, 1915, as follows: To Charles Edgerton \$17,076.10, to Nelson H. Genung \$17,076.10, to Fred E. Moore \$7,076.12," and to three other employés, naming them, \$2,000, \$3,000, and \$5,000, respectively; that, figuring the above awards, the average annual payment to each of the three managers of the defendant corporation, including their salaries as executive officers, would be approximately \$12,000 for the period from 1905 to 1915, inclusive, and that this was proper and reasonable compensation; finally, that there was no purpose to overreach, or actual fraud, in any of the corporate acts here involved.

On, inter alia, the findings and conclusions as we have stated them, the court below entered a final decree restraining the defendant corporation, and "all of its agencies," from making payments out of the fund set aside from profits of the fiscal year ending in 1915, beyond "one-third of 50 per cent. of it to Charles Edgerton, and one-third of 50 per cent. of it to Nelson H. Genung," and ordering that "annually hereafter * * * the Coatesville Boiler Works is restrained from paying to Edgerton and Genung greater sums than, with their fixed salaries, will give to each \$12,000." This decree is attacked on many grounds, most of which need not now be discussed, for they are conclusively ruled against the contentions of the appellants in *Russell v. H. C. Patterson Co.*, 232 Pa. 113, 81 Atl. 136, 36 L. R. A. (N. S.) 199.

[1] The case just referred to is much like the one at bar. There, as here, certain officers of a private business corporation held a considerable majority of its capital stock, and also constituted the greater number of its directors. The latter body increased the compensation of these officials, as president, vice president, secretary, and treasurer; and this action was subsequently ratified at a meeting of stockholders, the beneficiaries all voting for the ratification motion. A minority stockholder filed a bill in equity, averring, inter alia, that the salaries as raised "were exorbitant, unreasonable, and unfair, and that the increase was illegal, because it could not have been made without the votes of * * * the incumbents of the offices." The trial court sustained the contentions of the complainant, and granted relief accordingly; but, on appeal, we reversed, holding that "the directors had a right to serve * * * in the capacity of officers or employés and to receive compensation for such services, if legally employed by the company" (Act May 14, 1891 [P. L. 61]; Act May 20, 1891 [P. L. 101]), and, since the chancellor

had found that the increase of salaries was "not more than reasonable compensation for the services rendered," we dismissed the bill. In the course of our opinion in that case, speaking by Mr. Justice Mestrezat, we held, as a matter of law, that the action of the board of directors in raising the remuneration of the officers in question, who were members of the board and voted for the increase, was voidable, but not void; hence that, in the absence of evidence showing overreaching or actual fraud, even though "the voting of the salaries by the directors constituted a technical or constructive fraud," the action could be and was in fact duly ratified by the stockholders, and this, notwithstanding the majority of the stock was held and voted by the beneficiaries of the act approved. We also there distinguish *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 218 Pa. 298, 67 Atl. 417, 11 Ann. Cas. 772, relied upon by appellants.

In all essential particulars, save three, the rulings in *Russell v. Patterson*, supra, amply cover and govern the points raised at bar; and, on that authority, we dismiss most of appellants' contentions, without further discussion. The three material particulars, however, wherein the present case differs from *Russell v. Patterson*, are these: Here, after determining \$12,000 each per annum to be a just and proper compensation for all the services rendered by Mr. Edgerton and Mr. Genung, the court below awarded each of them, for the fiscal year 1915, \$21,876.10; next, the final decree entered stipulates that hereafter, without limit of duration, the defendant company is restrained from paying either one of these defendants "greater sums than, with their fixed salaries, will give to each \$12,000" per annum; finally, the injunction, in effect, forbids any payments over and above fixed salaries, to the successor of Edwin T. Moore and the three other employés voted extra compensation by the second resolution of May 17, 1915, although none of the latter are included as defendants, and no finding is made by the court below that their respective services did not merit the amounts awarded them by the board of directors of the defendant corporation, or that such sums were more than reasonable compensation. These three matters raise questions which call for further consideration.

On the first of the above-suggested points, it appears that Mr. Edgerton, Mr. Genung, and Mr. Edwin T. Moore, from 1905 to 1913, inclusive, together with their regular salaries, each received an average compensation of about \$11,000 per annum; but in 1914 they were paid only their salaries, there being no extra profits to divide. In 1915 the business of the boiler works was very prosperous, and the court below, by its decree, allows to Mr. Edgerton and Mr. Genung, respectively, \$21,876.10 out of the profits of that year; and this is done on the theory

that, when the amounts in question are spread over the whole period involved, including 1914, when no bonuses were paid, they give to each of these defendants only \$12,000 per annum, the compensation which the chancellors found to be right and proper. The weakness of this position, however, is that the resolution of 1904 expressly stipulates the beneficiaries therein named shall, in addition to their regular salaries, "participate from year to year" in the net earnings of the corporation, "as shown by the books at the close of each business year." It appears that divisions were made from year to year in strict accordance with the terms of this resolution, and that the shares awarded to Messrs. Edgerton, Genung, and Moore were, on each occasion, accepted by them. Under these circumstances, the question of compensation for past years, so far as the recipients are concerned, was closed; and the only issue which the trial court properly had before it was as to the compensation proposed to be paid them, or any of them, for the year 1915. As already stated, the finding on that score was that \$12,000 per annum represented the amount earned by each of these defendants, and since, on the facts at bar, it was within the power of the court to make this finding, which was unappealed from, that sum marked the limit of the allowance of remuneration for the fiscal year 1915 which should have been made to Mr. Edgerton and Mr. Genung; hence, to this extent, at least, the decree complained of must be modified.

[2-4] On the question of the right of the learned court below to fix compensation for services to be rendered in the future, and to restrain the defendant corporation from paying to certain designated persons more than a stipulated sum per year for such future services, we find no authority for the decree as entered. It is well established that directors may contract with agents or employes of their corporation, who are likewise directors, and that, though always subject to close scrutiny, and voidable for fraud or overreaching, such contracts are not ipso facto void (*Union Pacific R. R. Co. v. Credit Mobilier of America*, 135 Mass. 367, 376; *Nye v. Storer*, 168 Mass. 53, 55, 46 N. E. 402); that when for compensation, and the latter is fair and reasonable, these contracts will be sustained (*Fillebrown v. Hayward*, 190 Mass. 472, 478, 77 N. E. 45; *Fraker v. A. G. Hyde & Son*, 135 App. Div. 64, 119 N. Y. Supp. 879; *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8, in Supreme Court of Indiana); further, that a contract of this kind may be ratified and made valid by acquiescence of the stockholders (*Kelley v. Newburyport & Amesbury Horse R. R. Co.*, 141 Mass. 496, 499, 6 N. E. 745); finally, that where a board of directors votes excessive salaries to certain of its members, who are also officers or employes of the corporation, even though such action may subsequently be rat-

ified at a stockholders' meeting, when called in question by a minority stockholder, the action of the board is subject to review by a court in equity, and, if the finding of the latter tribunal is that the salaries in question are exorbitant, it may determine the value of the services rendered by the officers or employes in question, and restrain the corporation from paying in excess thereof (*Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 310, 60 Atl. 941, et seq.; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 254, 58 Atl. 188; *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 379, 27 N. E. 487; *Fillebrown v. Hayward*, 190 Mass. 472, 478, 77 N. E. 45). This rule is fully recognized by us in *Russell v. Patterson*, supra; but, of course, in such instances, ordinarily, there is no way of satisfactorily determining the value of services to be rendered in the future, when conditions, ex necessitate, may be essentially different from those in the past. Therefore, generally speaking, in cases of this character, a court of equity may deal only with the facts presently before it, and thus determine the reasonable compensation actually earned. Exceptional cases may arise, however, where, contemplating a continuance of an ascertained state of facts, and guarding their decree accordingly, judicial tribunals may determine compensation to be paid in the future; but we see nothing in the case at bar to take it out of the general rule.

[5] If courts may depart at will from the rule just stated, and substitute their judgments for the legally exercised discretion of the directors of private business corporations, in determining the question of future compensation to be paid to the latter's employes, then there is no reasonable limit to the right of judicial interference with corporate management; but, fortunately, this is not the law. Perhaps it may be said that the question of the right of the court below to fix the compensation to be paid in the future to Mr. Edgerton and Mr. Genung, is not raised by the appellants; but since, as already indicated, we must remit the record for modification of the decree along other lines, we deem it proper to call attention to this feature of the case.

The last question, as to the restraint which the decree, in effect, places upon the directors of the defendant corporation, in respect to the payment of extra compensation for the year 1915, to employes other than Mr. Edgerton and Mr. Genung, is raised by at least one of the assignments of error. In reference thereto, it is sufficient to say that, while the court below may have been fully justified in refusing to sanction payment of the full amount voted to Fred E. Moore, the successor of Edwin T. Moore, deceased, yet we see no warrant for absolutely prohibiting the payment of any extra compensation whatever to Mr. Moore and the other three em-

ployés, in no way included as defendants, to whom the directors likewise voted bonuses for the year 1915. On the present record, the decree as formulated seems too comprehensive in this regard.

[6] At this point we take occasion to say there is no merit in the contention that the second resolution passed at the meeting in May, 1915, requires a formal contract to be entered into with those who are to receive extra compensation thereunder. Such a resolution, when acted upon, is in itself sufficient evidence of the fixed understanding between the corporation and its employés. *McGowan v. Lincoln Park & Steamboat Consol. Co.*, 181 Pa. 55, 58, 61, 37 Atl. 1119; *Fraker v. A. G. Hyde & Son*, 135 App. Div. 64, 119 N. Y. Supp. 879; *Young v. U. S. Mtge. & Trust Co.*, 214 N. Y. 279, 287, 108 N. E. 418. We further add that most of the criticisms made by counsel for the appellants upon the form of the adjudication as stated by the court below are fully justified. The learned chancellors failed strictly to follow our equity rules, and this has added to our labors on review; but, since we have been able to get a workable understanding of all the material points involved, it would serve no good purpose to require a recasting of the adjudication.

The assignments of error which complain of rulings in conflict with the views here expressed are sustained, and the record is remitted to the court below, with directions to modify its decree accordingly; the costs to be paid by the defendant corporation.

(257 Pa. 354)

WILLIAMS v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. April 9, 1917.)

1. SUNDAY §19(1) — EXECUTED CONTRACT — RELIEF.

The law will not lend its aid to enforce an executory contract made on Sunday; but the parties to a contract fully executed on that day will be left where the law finds them, and no relief given to either.

2. SUNDAY §19(1) — EXECUTED RELEASE — VALIDITY.

Where a release of damages for personal injury was executed and delivered and the consideration paid on Sunday, the contract was executed and binding upon the parties, and, if otherwise valid, discharged the party liable.

3. EVIDENCE §555 — OPINION EVIDENCE — MENTAL CAPACITY.

In an action by a passenger for personal injury, the admission of the opinion of the physician, who examined plaintiff the day after his release of damages was signed, as to his mental condition at the signing of the release, was erroneous, where there was nothing to show upon what information such opinion was based.

4. CARRIERS §316(4) — PERSONAL INJURY — NEGLIGENCE — PRESUMPTION.

There is a prima facie presumption of negligence on the part of a street railway, where a passenger is hurt by a collision of its cars; so that a passenger, injured in such collision and who has not released his right of action, is prima facie entitled to recover.

5. DAMAGES §208(2) — PERSONAL INJURY — QUESTION FOR JURY.

In a passenger's action for personal injury from a collision of street cars, the nature of his malady and the extent to which it is referable to the accident are questions for the jury.

6. DAMAGES §208(3) — PERSONAL INJURY — PAIN AND SUFFERING — QUESTION FOR JURY.

In a passenger's action for personal injury, the submission to the jury of the question of damages for future pain, suffering, and inconvenience held not error.

7. DAMAGES §208(2) — PERSONAL INJURY — EFFECT — QUESTION FOR JURY.

In a passenger's action for personal injury, evidence of mental and nervous impairment as a result of the accident, though improbable and strongly contradicted, makes a question for the jury.

Appeal from Court of Common Pleas, Delaware County.

Trespass by Malden S. Williams against the Philadelphia Rapid Transit Company for damages for personal injury. Verdict for plaintiff for \$1,754, and judgment thereon, and defendant appeals. Reversed, and venire facias de novo awarded.

Argued before BROWN, O. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

William I. Schaffer and John J. Stetser, both of Chester, for appellant. William C. Alexander, of Media, for appellee.

WALLING, J. [1] On October 16, 1915, plaintiff, while a passenger on one of the defendant's electric street railway cars, was injured by a collision which occurred near the city of Chester between the car and another car on the same track. Plaintiff was standing in the aisle, and the collision caused him to fall, by which he sustained some injury to his arm and head. On the next day, Sunday, one of the defendant's claim agents called on plaintiff at his home in Milmont and secured from him, for the consideration of \$15, what purports to be a full and complete release for all damages resulting to plaintiff from the accident. The release, admittedly signed by plaintiff, was supported by the testimony of the claim agent, which was to the effect that after some negotiations they agreed upon \$15 as the amount of damages, which was paid to plaintiff and the release executed. The agent and a daughter-in-law of plaintiff signed same as witnesses. At the argument some doubt was expressed as to the validity of the release, because given on Sunday; but, if the transaction was completed by the execution and delivery of the release and payment of the consideration, it became an executed contract and binding upon the parties. The law will not lend its aid to enforce an executory contract made on Sunday; but, if fully executed on that day, the law leaves the parties where it finds them, and gives no relief to either. "An executed contract is a contract which has been fully performed since it was made, or which was performed

at the time it was made, so that nothing remains to be done on either side." 9 Cyc. 244. A judgment entered upon a warrant of attorney contained in a note given on Sunday will not be opened. *McKee v. Verner*, 239 Pa. 69, 86 Atl. 646, 44 L. R. A. (N. S.) 727; *Baker v. Lukens*, 35 Pa. 146. Where property is sold, delivered, and paid for on Sunday, the transaction is valid. *Chestnut v. Harbaugh et al.*, 78 Pa. 473. The delivery on Sunday of a deed previously made will pass title to the property. *Shuman v. Shuman*, 27 Pa. 90.

[2, 3] According to the evidence for defendant, the release here in question was executed and delivered and the consideration paid; and, if so, nothing further remained to be done, and the transaction was closed. Under such circumstances in our opinion the contract, although made on Sunday, is executed and binding upon the parties, and, if otherwise valid, discharged the defendant from liability to the plaintiff on account of the matters therein stated. However, plaintiff seeks to avoid the effect of such release by the averment, supported by some testimony, that he was on that day mentally incompetent to execute a release, and that as a result of said injury to his head he became so dazed and mentally confused as to wholly incapacitate him from doing any business, and that such condition long continued. Some of the medical evidence on behalf of the plaintiff tends to show that he is still suffering from traumatic hysteria or traumatic neurosis. Admittedly he had prior to the accident, and now has in a more advanced stage, arterio-sclerosis; and defendant's medical evidence tends to show that his mental impairment is the natural result of that disease. Dr. Taylor, the family physician, was called to see plaintiff on the next day after the release was signed. He was a witness for plaintiff, and during the course of his examination in chief was interrogated as follows, viz.:

"Q. Between 3 and 4 on Sunday, the 17th—from the history of the case, as you have it, and from the testimony of the witnesses on the stand, and from what you learned that day and saw of him that day, from your examination, was or was not Mr. Williams mentally capable on Sunday, the 17th, to know the contents of a paper?"

"By Mr. Schaffer: That is objected to. * * *

"By Mr. Alexander: In your opinion, Doctor, was Mr. Williams on the 17th of—taking into consideration what you know about the case—

"By the Court: You have already preceded that with what occurred, and what he saw.

"By Mr. Alexander: And what is the testimony here as to his condition—was he able to comprehend by reading a paper, or by having somebody read it to him, the contents, the purports of a paper? * * *

"By the Witness: On Monday, the 18th, at 5:30, when I examined him, I should say he was not responsible.

"By the Court: You mean he was not responsible? A. He was not responsible, to know what he would be reading or signing. I saw him at 5:30 on Monday. Q. That is not quite the question that is asked you. Mr. Alexander

asks you, from what you saw of him then, observing his mental condition, and from what you have heard of this testimony here, whether or not you are able to say—express any opinion about his capacity to understand a paper read to him, or submitted to him to be read by himself. A. I should say he was not. * * *

"By Mr. Alexander: That is, you say, on the 17th, he was not? A. In my judgment."

This examination was taken under objection and exception, and constitutes the third assignment of error. Plaintiff's mental ability to transact business at the time he signed the release was a vital question in the case, and was for the jury under the evidence; and yet, as to that, the doctor was permitted to express an opinion under such circumstances as to render it impossible to know upon what such opinion was based. From the course of the examination it may have been upon information communicated to the doctor on the day of his visit; we do not know what, nor by whom; it may have been upon some evidence which he heard in court; we do not know to what part, if any, of the evidence he had listened; or it may have been upon his own professional examination of the plaintiff. A question calling for an opinion should be so framed as to indicate the basis upon which the opinion is sought, so that the court may determine its competency and the jury its value. In such case, questions including both competent and incompetent sources of information as the basis of the opinion sought are bad. It follows that the admission of the opinion of Dr. Taylor, under the circumstances disclosed, was prejudicial error.

[4, 5] The learned trial judge was right in holding that if plaintiff was injured in the collision, and had not released his right of action, he was entitled to recover, as there is a prima facie presumption of negligence against a street railway company where a passenger is hurt by a collision of its cars. *Madara v. Shamokin & Mt. Carmel Elect. Ry. Co.*, 192 Pa. 542, 43 Atl. 995; *Abel v. Northampton Traction Co.*, 212 Pa. 329, 336, 61 Atl. 915. The nature of plaintiff's malady, and to what extent, if at all, it is referable to the accident, are questions for the jury. Of course, under no aspect of the case can defendant be held liable for the arterio-sclerosis with which plaintiff was afflicted before the accident, nor for its natural progress thereafter.

[6, 7] There was some evidence that the accident had left plaintiff in a hazy mental condition, from which at the time of the trial he had not recovered, and also that as a result of the accident he had the nervous trouble above mentioned, and that his prospects for recovery were not favorable. While this was strongly contradicted, we cannot say that the court erred in submitting to the jury the question of damages for future pain, suffering, and inconvenience. In an action for personal injuries, evidence tending to show mental and nervous impairment, as a result of the accident complained of, is for the jury.

although it may seem improbable and be strongly contradicted.

That part of the charge embraced in the eighth assignment of error, referring to the question of damages, is subject to criticism. The thought in the mind of the court does not seem to find expression in the language as reported. However, that and any inadequacy in the charge can be corrected on another trial. The assignments of error, except as herein stated, are not sustained.

The judgment is reversed, and a *venire facias de novo* awarded.

(257 Pa. 432)

GRIFFIN et al. v. DELAWARE & HUDSON CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. TRESPASS ⇨20(1) — TRESPASS QUARE CLAUSUM FREGIT—POSSESSION.

At common law an action of trespass quare clausum fregit cannot be maintained by one neither in actual nor constructive possession of the land.

2. TRESPASS ⇨18 — GROUNDS OF ACTION — STATUTE.

Practice Act May 25, 1887, § 3 (P. L. 271), providing that certain actions ex delicto should be brought under the one name of trespass, did not change the fundamental grounds upon which the right to recover rests, or give an action of trespass where no action for the same cause would arise at common law.

3. MINES AND MINERALS ⇨55(8)—ADVERSE CLAIM TO MINERALS—EVIDENCE.

An adverse claim to the minerals in freehold lands must be distinctly established against the owner of the surface, which may be done by documents showing that the minerals had been conveyed, excepted, or reserved, so as to vest in the claimant.

4. MINES AND MINERALS ⇨51(1)—TRESPASS FOR REMOVAL OF COAL—POSSESSION.

An action of trespass for the unlawful mining of coal from plaintiff's land could not be maintained, where plaintiff had never been in actual or constructive possession of the surface, which was in the possession of parties holding adversely, and under whose lease defendant had removed the underlying coal, as plaintiffs, never having severed the coal, were not in constructive possession thereof.

Appeal from Court of Common Pleas, Lackawanna County.

Trespass by Edmund R. Griffin and others against the Delaware & Hudson Company for removing coal from land claimed by plaintiffs. From an order dismissing exceptions to the report and supplemental report of a referee, defendant appeals. Reversed, and judgment entered for defendant.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

James H. Torrey and Charles H. Welles, both of Scranton, and Walter C. Noyes, of New York City, for appellant. Thos. F. Wells, M. W. Stephens, and F. L. Hitchcock, all of Scranton, for appellees.

POTTER, J. This was an action of trespass brought by Edmund R. Griffin et al. against the Delaware & Hudson Company, to recover damages for the entry by defendant on land of which plaintiffs claimed ownership, and for mining coal and taking it from such land. It is averred in plaintiff's statement of claim that 100,000 tons of coal were unlawfully removed by defendant between the year 1867 and the date of suit. The pleas were not guilty and the statute of limitations.

By agreement of the parties the case was referred to Hon. R. W. Archbald, who, after a full hearing, filed a report, with findings of fact and law, in which he held that the plaintiffs never had actual or constructive possession of the coal in controversy, and were not, therefore, in a position to maintain this action, and that judgment should be entered for defendant. Exceptions were filed to the report, whereupon the case was opened, additional testimony was taken, and the findings reconsidered by the referee. He then filed a supplemental report, with new findings of fact and law, in which he reversed his former ruling, and directed that judgment be entered in favor of plaintiffs for the sum of \$41,925. Exceptions were filed by both parties to the suit, which were dismissed by the court, and judgment was entered in accordance with the recommendation of the referee in his supplemental report. Defendant has appealed.

According to the referee's findings, the material facts were substantially as follows: The coal in controversy underlay a tract of land in Providence township, Lackawanna (formerly Luzerne) county, which is now part of the city of Scranton, and comprised 3 acres and 56 perches of ground. This land was included in a larger tract for which a patent was granted, on June 15, 1828, by the commonwealth to Thomas Griffin. Prior to that date, on February 10, 1828, Isaac Griffin, a son of the subsequent patentee, had made and delivered to Silas B. Robinson a general warranty deed for a portion of the land patented by his father, and Robinson took possession under such deed. A year later, on February 6, 1829, Thomas Griffin made and delivered to Isaac Griffin a deed for the same land that Isaac had already conveyed to Robinson. The deed of Isaac Griffin to Robinson was identical with that of Thomas Griffin to Isaac Griffin, with the exception of the length of the north line of the tract, and it is from that difference that the controversy in this case arises. The land conveyed by Isaac Griffin to Robinson began at the Lackawanna river, and extended thence northwest for a distance of 246 perches, while in the deed from Thomas Griffin to Isaac Griffin the tract was described as beginning at the same point, and extending by the same course a distance of 264½ perches,

being $18\frac{1}{2}$ perches longer than the corresponding line in the deed from Isaac Griffin to Robinson. The difference appears clearly from the diagrams in the referee's supplemental report. The courses and distances on the west and south were the same in both deeds, but in neither one was the distance given on the next to the final course, which terminated at the Lackawanna river.

Plaintiffs are the heirs at law of Isaac Griffin, and claim to be the owners of the westernmost end of the tract, which they allege was not included in the deed of their ancestor to Silas B. Robinson. The portion which they claim, extends from a point distant 246 perches from the river to a point $264\frac{1}{2}$ perches distant therefrom, being $18\frac{1}{2}$ by 30 perches in area, containing, as stated, 3 acres and 56 perches. In the eighteenth finding of fact the referee found that:

"Silas B. Robinson, after the conveyance to him by Isaac Griffin and wife, entered into the actual possession of the 52 acres and 58 perches, with the allowance of 3 per cent., and he and those claiming under him in line of title have fenced and lived upon and occupied the said land, using it for farming purposes, cultivating the same, pasturing cattle thereon, cutting timber therefrom, mining and removing coal, plotted it into building lots, sold building lots covering a portion of the land in dispute, and parties purchasing the said lots have built houses and other buildings thereon, and are now in the actual, open, notorious possession of the same."

In his first report the referee found as a fact:

"The plaintiffs have never been in the actual possession of the land in dispute and have not severed the coal from the surface. The Robinsons and Griffins and Von Storches have been in the actual possession of the whole tract of land running from the Lackawanna river back $264\frac{1}{2}$ rods to a point about 30 feet beyond the Keyser Valley Branch, and to the corner of what is known as the Philip O. Griffin tract, and, being so in possession, leased the coal to the Delaware & Hudson Canal Company in 1867, and the possession of the Griffins and the Delaware & Hudson Company has continued from that time to the present, and has been open, notorious, and visible."

In the supplemental report this finding was modified, so as to exclude a small portion of the piece occupied by a railroad. The defendant company, under a claim of ownership through leases given to them by the successors in title of Silas B. Robinson, has mined and removed the coal from the tract claimed by plaintiffs, and it was to recover damages for this alleged trespass that the present suit was brought.

Four grounds of defense were set up: (1) A valid paper title to the coal in question. (2) Title by adverse possession. (3) That plaintiffs were never in possession of the locus in quo, and therefore were not entitled to maintain an action of trespass *quare clausum fregit* for the removal of the coal. (4) That any right claimed by plaintiffs was barred by the statute of limitations. Upon the third question, the right of plaintiffs

to maintain the action, the referee reversed himself. In his original report he said:

"On the whole case, therefore, whatever the state of the title, the plaintiffs, as I view it, are not in a position to maintain the action, never having had actual or constructive possession of the coal in controversy. This is decisive of the case, and judgment must therefore be entered for the defendant."

But in his supplemental report the referee reached the conclusion that plaintiffs had constructive possession of the coal, whatever may have been the situation as to the surface, and that therefore they might maintain their action.

[1] It is conceded that plaintiffs were never in actual physical possession of the tract of land here in question. The referee affirmed, without qualification, defendant's seventh, thirty-first, and thirty-seventh requests for findings of fact, which were to that effect, and no exception was taken to such affirmance. It is admitted that the common-law action of trespass *quare clausum fregit* could not be maintained by one not in possession of the land. But it is contended that this rule was changed by the practice act of May 25, 1887 (P. L. 271), by which all distinctions between actions of trespass are said to have been abolished.

[2] In *Welsfield v. Beale*, 231 Pa. 39, 42, 79 Atl. 878, 879, we said:

"Under the act of May 25, 1887 (P. L. 271, § 3), all actions *ex delicto*, whether trespass, trover, or trespass on the case, are now brought under the one name of trespass. The distinction, therefore, between trespass *quare clausum fregit*, in which actual or constructive possession in the plaintiff was necessary, and trespass on the case, in which it was not, is no longer of importance."

That related, however, only to the form of procedure. It was intended to point out that, under the statute, recovery might be had in an action of trespass, where formerly upon the facts the only remedy would have been in an action upon the case. But the fundamental requirements, upon which the right to recover rests, have not been changed. The act of 1887 "was intended to dispense with formality, but to insist on matters of substance, indispensable to an intelligent and just judgment between the parties." *Winkleblake v. Van Dyke*, 161 Pa. 5, 28 Atl. 937.

In the case at bar plaintiffs claimed direct damages for an unlawful and forcible entry upon their premises and removal of the coal therefrom. In their statement they aver that they were in possession of the premises, and that defendant did "with force and arms enter upon and into the said parcel of land beneath the surface thereof" from its own land adjoining, and did mine a large quantity of coal therefrom and convert it to its own use. If plaintiffs can recover at all, it must be in an action in the nature of *quare clausum fregit*. The authorities are clear that, in order to maintain

such an action, a plaintiff must have been in possession, either actual or constructive, at the time the trespass was committed. *Greber v. Kleckner*, 2 Pa. 289; *King v. Baker*, 25 Pa. 186; *Collins v. Beatty*, 148 Pa. 65, 23 Atl. 982; *Wilkinson v. Connell*, 158 Pa. 126, 27 Atl. 870; *Busch v. Calhoun*, 14 Pa. Super. Ct. 578; *Vanderslice v. Donner*, 26 Pa. Super. Ct. 319. The referee so found in his third finding of law. He further found as a fact that there never had been actual possession by plaintiffs, or any of them. He was also of opinion that plaintiffs had not shown that they were at any time in constructive possession of the surface. But in his supplemental report he held that there was constructive possession of the coal, and on that ground he awarded damages to plaintiffs. He based this conclusion on the ground that there had been a severance of the coal from the surface. He said:

"When the coal is severed from surface, and a separate estate created in it, there is no good reason why, as to such coal, ownership of the title should not draw to it the constructive possession, so as to protect the real owner against any one trespassing and mining from it."

He had previously said:

"It may be that constructive possession of the coal, as distinct from the surface, is not permitted where coal and surface remain under one title, and the surface is in the actual possession of another."

In this connection the referee in his first report said, most convincingly:

"While by the leases in evidence there is a severance of the coal for mining purposes, it is not absolute or complete; a reversionary interest, as noted above, being retained in the lessors, contingent on the termination of the leases for any reason. But more than that: Having regard to the effect given to the severance, in the rule invoked, the purpose being to protect the mineral estate from an adverse possession of the surface, that which was intended to protect that estate cannot be made the basis of encumbering it. It is in fact no concern of the plaintiffs as to what has been done with the coal, or how it has been treated by others. Whatever has happened to it is not of their doing, and neither adds to nor detracts from their rights with respect to it, nor can they predicate anything upon it."

The only severance was under the leases from the holders of the Robinson title to defendant. These leases are not recognized by plaintiffs, as affecting their rights in any way, and they cannot be used to aid them in establishing constructive possession of the coal. We can see nothing in the facts to justify the referee in changing his conclusion in this respect. Had the plaintiffs or their ancestors severed the coal from the surface, a different situation would be presented.

[3] The only case cited by counsel for appellees upon this point is *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853, and there the severance was made by the undisputed owner of the land from whom both parties claimed title. In the present case there was nothing to show any entry by plaintiffs into possession of the

subsurface estate. The correct principle is stated in *Bainbridge on the Law of Mines & Minerals* (4th Ed.) 28, where it is said:

"In all freehold lands an adverse claim to the mineral must be distinctly established against the owner of the surface. This may be effected by the production of documents showing that the minerals have been conveyed, excepted or reserved, so as to have become vested in the claimant."

[4] Nothing of the kind was shown in the case at bar, and, as these plaintiffs were in neither actual nor constructive possession of the surface, they cannot be held to have been in constructive possession of the coal. The alleged severance was not by any act of theirs, but the leases were made by persons who, according to plaintiffs' contention, had no title to either estate, and no power to sever them. If plaintiffs should concede that these leases effected a valid severance, it would follow that defendant thereby acquired the right to mine the coal, and this action of trespass could not be maintained.

We think the referee very properly determined, in his first report, that, as plaintiffs had neither actual nor constructive possession of the coal in dispute, they were not in a position to maintain this action. As this is decisive of the case, it becomes unnecessary to consider other questions raised. It is, however, by no means clear that, under a fair and reasonable construction of the deed from Isaac Griffin to Silas B. Robinson, the defendant and its predecessors were without a paper title to the premises in dispute. It requires a strained inference, to say the least, to support the conclusion that Isaac Griffin, in the year 1828, intended to retain a small piece of isolated ground, 18½ by 30 perches, at the rear of the tract he conveyed to Robinson. All the facts point strongly to the conclusion that all parties interested believed that Robinson acquired all of Isaac Griffin's interest in that particular piece of land in 1828, and that they all acted in accordance with that belief from that time on. All the lines and angles and distances in the deed from Thomas to Isaac Griffin, and in that from the latter to Robinson, are identical, except that of the northerly line; and taking into consideration the monuments upon the ground, and the acreage intended to be conveyed, the longer line, running 264½ perches from the river, seems to be imperatively required to meet the conditions. No reasonable explanation was offered for the discrepancy in the length of the northerly line as it appears in the deed made by Isaac Griffin to Robinson. Possibly the length of the line was first noted by the surveyor in figures, which afterwards were accidentally transposed, so that 264 perches appeared as 246 perches. Conjecture as to this, however, is useless.

But, leaving out of consideration the question of paper title, and without reference to the additional claim that defendant and

its predecessors had acquired title to the coal by possession, and to the further claim that the action was barred by the statute of limitations, it is quite sufficient to rest the case upon the conclusion first reached by the referee that, in the absence of actual or constructive possession of the coal, plaintiffs had no standing to maintain this action.

The judgment is reversed, and is here entered for defendant.

(257 Pa. 276)

SHEAFER et al. v. WOODSIDE et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. PAYMENT § 66(5) — PRESUMPTION AND BURDEN OF PROOF.

The rule that after the lapse of 20 years debts by specialty are presumed to be paid does not bar the debt, but is merely a rule of evidence affecting the burden of proof, and within that time the burden of proving payment is on the debtor, and after that time it is upon the creditor. The presumption is rebuttable by any competent evidence tending to show that the debt was not in fact paid, though it should be clear and convincing, especially where suit is not brought until after the debtor's death.

2. MORTGAGES § 319(3) — PAYMENT — SUFFICIENCY OF EVIDENCE.

Evidence upon a *scire facias* issued in August, 1915, upon a mortgage executed in 1876, wherein the administrator of the estate of the last surviving mortgagor pleaded payment, and relied upon the presumption of payment arising from the lapse of more than 20 years, held sufficient to overcome the presumption of payment, so as to make payment a question for the jury.

Appeal from Court of Common Pleas, Schuylkill County.

Scire facias sur mortgage by A. W. Sheaffer and another, surviving executors of the estate of Peter W. Sheaffer, deceased, against A. B. Woodside and others. Judgment for defendants non obstante veredicto, and plaintiffs appeal. Reversed, and record remitted, with direction to enter judgment on the verdict.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

John G. Johnson, of Philadelphia, and Woodbury & Woodbury, of Pottsville, for appellants. John Robert Jones, of Pottsville, for appellees.

FRAZER, J. In 1876 Mrs. A. B. Woodside and her three daughters, Virginia, Geraldine, and Fannie, executed a bond and mortgage to Peter W. Sheaffer, to secure the payment of \$2,850 in two years, covering property owned by them in the borough of Pottsville. The mortgage was duly recorded in the office for recording deeds in Schuylkill county on June 24, 1876, in Mortgage Book 1 A H, page 395. Peter W. Sheaffer, the mortgagee, died in 1891, leaving a will in which Arthur W. Sheaffer and Henry W. Sheaffer were named as executors. At the time of his

death the bond and mortgage above referred to were found among his papers; the bond having indorsed thereon, in the writing of Peter W. Sheaffer, a payment of \$56, under date of December 22, 1877. There is no evidence that demand for payment of the indebtedness secured by the mortgage was made until after the death of the last survivor of the mortgagors, when the executors of the estate of Peter W. Sheaffer, on August 25, 1915, issued a *scire facias*, to which the administrator of the estate of Geraldine Woodside, the last survivor, pleaded payment, and, in support of this plea, at the trial relied upon the presumption of payment by lapse of time, and presented a point for binding instructions for defendant. The trial judge reserved the point, and submitted to the jury the facts presented by plaintiff to rebut presumption of payment. A verdict was rendered in plaintiff's favor for the amount of the mortgage, with interest, aggregating, after deducting the payment indorsed on the bond, the sum of \$8,727.87. Judgment was subsequently entered in favor of defendant non obstante veredicto, whereupon plaintiff appealed.

A period of 36 years elapsed from the maturity of the mortgage until the beginning of foreclosure proceedings. Dr. O'Hara, a practicing physician in Pottsville for 20 years, called by plaintiff, who had been a family physician of the Woodsides, although only Fannie and Geraldine were living when he first attended them, testified that in 1914, shortly after the death of Fannie, Geraldine, the survivor, spoke to him in reference to the mortgage due the Sheaffer estate, and, while the witness was unable to recall the exact language of the conversation, he stated:

"She told me she did not know what would happen to them, or what would happen to her, or would become of her; I do not exactly know the verbatim statement, but she wept, and so forth, and she said that the Sheafers held a mortgage, or that she was in a great debt to them, in other words."

He testified further she told him:

"She did not know what would become of them now; she did not know whether Sheafers will push the mortgage or not, and she was in a very nervous state, not knowing what would become of her."

He also testified the family had been in straitened financial circumstances, and had received assistance from neighbors, and further that Geraldine requested him to speak to the Sheafers about the mortgage, which he subsequently did by informing Lesley Sheaffer that—

"one of those Miss Woodsides is worried to death about what will become of her now, since the other sister is gone; she did not know what will become of the place now."

Lesley Sheaffer, called as witness by plaintiff, corroborated Dr. O'Hara's testimony as to the conversation in relation to the Woodside mortgage, and testified to bringing the

subject to the attention of A. W. Sheaffer, one of the executors of the Sheaffer estate, who, following that conversation, on December 22, 1914, wrote Miss Woodside, as follows:

"Dear Miss Woodside: Information has come to us through Dr. O'Hara that you are worried in regard to the mortgage which we hold on your property at 219 South Center street. We therefore take this opportunity of assuring you that we have no intention of in any way endeavoring to collect this mortgage or any interest thereon during your lifetime, or so long as it remains your property. We trust, therefore, that you will not allow this matter to trouble you in the least. Extending to you our sympathy in your recent bereavement, we are, yours very truly, A. W. Sheaffer, for the Executors of Estate of P. W. Sheaffer, Deceased."

A copy of this letter was also sent to Dr. O'Hara, who subsequently saw Miss Woodside, and was informed by her of having received the letter from Mr. Sheaffer, and that it gave her much relief.

[1] The above is the evidence relied upon by plaintiff to rebut the presumption of payment arising from lapse of time. The rule that after the lapse of 20 years debts of every kind are presumed to be paid is a rule of convenience and policy, resulting from a necessary regard for the peace and security of society, and also for the debtor, who should not be called upon to defend stale claims at a time when witnesses are dead, and papers lost or destroyed. *Foulk v. Brown*, 2 Watts, 209; *Eby v. Eby's Assignee*, 5 Pa. 435. This presumption does not bar the debt, however. Unlike the statute of limitations, it is merely a rule of evidence affecting the burden of proof, and no new promise is required as the basis of an action. *Eby v. Eby's Assignee*, supra. Within 20 years the burden of proving payment is on the debtor; after that time it shifts to the creditor. *Reed v. Reed*, 46 Pa. 239. To rebut the presumption, any competent evidence tending to show the debt is not in fact paid will be received. Although it need not be of the same quality as required to remove the bar of the statute of limitations (*Gregory v. Commonwealth*, 121 Pa. 611, 15 Atl. 452, 6 Am. St. Rep. 804; *Devereux's Estate*, 184 Pa. 429, 39 Atl. 225), it should, however, be clear and convincing, especially where suit is not brought until after the death of the debtor, as in the present case (*Fidelity Title & Trust Co. v. Chapman*, 226 Pa. 312, 75 Atl. 428). In *Foulk v. Brown*, 2 Watts, 209, the rule was stated as follows:

"Within the 20 years, the onus of proving payment lies on the defendant; after that time it devolves on the plaintiff to show the contrary, by such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment. And if these facts are sufficient satisfactorily to account for the delay, then the presumption of payment, not being necessary to account for it, does not arise. Slighter circumstances are sufficient to repel the presumption than are required to take the case out of the statute of limitations—the latter being a positive enactment of the Legislature;

the former merely an inference on which legal belief is founded."

In *Reed v. Reed*, 46 Pa. 239, 242, it was said:

"The presumption is rebutted, or, to speak more accurately, does not arise where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

[2] Whether the proof is ample to rebut the presumption of payment must necessarily depend on the particular circumstances of each case, and it is primarily for the court to decide whether the facts, if true, are adequate for the purpose for which offered, and whether the facts relied upon are true is a question for the jury. *Fidelity Title & Trust Co. v. Chapman*, supra. In *Gregory v. Commonwealth*, supra, the plaintiff, to rebut the presumption of payment, relied upon acknowledgments by the debtor, made to third persons at various times, to the effect that there was something between him and plaintiff which "had never been thoroughly settled." It appeared, however, that the reference might have been to the settlement of certain other matters concerning an estate in which the debtor was interested, and it was held the testimony was too uncertain and equivocal in meaning to rebut the presumption of payment; the court saying:

"Any competent evidence which tends to show that the debt is in fact unpaid is admissible for that purpose. The evidence may consist of the defendant's admission made to the creditor himself (*Eby v. Eby's Assignee*, 5 Pa. 435), or to his agent, or even to a stranger (*Morrison v. Funk*, 23 Pa. 421; *Reed v. Reed*, 46 Pa. 239); but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to demand for a debt (*Bentley's App.*, 99 Pa. 500). It is of no consequence that the admission of nonpayment is accompanied by refusal to pay; the action is not founded on a promise, but on the original indebtedness; the question, as against the presumption, is whether or not the debt is in fact unpaid."

In *Runner's Appeal*, 121 Pa. 649, 15 Atl. 647, statements made by the debtor of an intention to pay were held sufficient for the purpose of rebutting the presumption of payment. In *Smith v. Schoenberger*, 176 Pa. 95, 34 Atl. 954, declarations by defendant to the effect that the debt was not paid, made in the presence of plaintiff, was held enough to take the case to the jury. In *White v. White*, 200 Pa. 565, 50 Atl. 157, an admission by the debtor, in the presence of a witness, that he had no money to pay the interest on the debt in question, was held ample to overcome the presumption of payment. In *O'Hara v. Corr*, 210 Pa. 341, 59 Atl. 1099, it was held that the case was for the jury, where witnesses for the plaintiff testified that the deceased mortgagor stated he had purchased the mortgaged premises, but could not pay the mortgage, and would have to let the property go. It has also been held that proof of the inability of the debtor to pay during the whole period

of the existence of the debt is such circumstance as would explain the delay, and prevent the presumption of payment arising. For instance, in *Taylor v. Megargee*, 2 Pa. 225, 226, it was said that mere poverty, or insolvency alone, was insufficient to overthrow the presumption of payment, arising from lapse of time, "unless it be such as to have created an abiding inability to pay during all the time"; and in *Devereux's Estate*, supra, it was said:

"The ability of the obligor to pay and the pressing need of the obligee for money have been recognized as circumstances which aid the presumption of payment. *Hughes v. Hughes*, 54 Pa. 240. On the other hand, it was held in *Tilghman v. Fisher*, 9 Watts, 441, that one of the intervening circumstances which may rebut the presumption is the inability of the debtor to pay within 20 years, and proof of a continued inability to pay was recognized in *Taylor v. Megargee*, 2 Pa. 225, as sufficient to rebut the presumption. There are convincing reasons for the ruling that proof of the insolvency of the debtor alone will not rebut the presumption. An insolvent may be possessed of property or be in receipt of an income, and have the means of payment; but proof of positive inability to pay is in effect that payment could not have been made."

In the present case we have proof of a long-continued inability of the debtors to pay; that the surviving debtor recognized the existence of the indebtedness in 1914, stating in effect her inability to pay, and requesting the witness to see the creditor and ask indulgence; that the witness complied with the wishes of the mortgagor, and, as a result of the interview, the debtor received the letter in evidence, informing her that no steps to enforce payment of the indebtedness would be taken during her lifetime, or so long as the property remained in her possession. This evidence the jury accepted as true, and was sufficient, under the decisions, to overcome the presumption of payment arising from lapse of time.

The judgment is reversed, and the record remitted, with direction that judgment be entered on the verdict.

(257 Pa. 451)

SCHMITT v. CITY OF CARBONDALE et al.
(Supreme Court of Pennsylvania. April 16, 1917.)

1. EVIDENCE §372(11) — ANCIENT DOCUMENTS—MAP.

A map found in the office of a corporation, which had conveyed land shown thereon, was admissible as an ancient document, where it was more than 50 years old, and appeared to be genuine, and had been acted upon.

2. ADVERSE POSSESSION §8(1) — ENCROACHMENT ON PUBLIC PARK—EFFECT.

A citizen acquires no rights as against the public by the maintenance of a fence in a public park, as the public's rights are not lost by encroachment, however long continued.

3. DEDICATION §50 — PUBLIC PARK — EX-TENT.

A city's acceptance and use of a park embraces all the land dedicated for that purpose,

although some parts thereof along the border lines may not have been actually used therefor.

4. ESTOPPEL §68(5) — EMINENT DOMAIN — PUBLIC PARK.

Where a building has been erected on land dedicated as a public park, an ordinance providing for the condemnation of the land occupied by the building does not estop the municipality from claiming the property, especially where no viewers were appointed, and nothing further was done in reference to the ordinance.

Appeal from Court of Common Pleas, Lackawanna County.

Bill in equity for an injunction by W. H. Arthur Schmitt against the City of Carbon-dale and others. From a decree on final hearing, dismissing the bill, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POT-TER, STEWART, FRAZER, and WAL-LING, JJ.

A. A. Vosburg, of Scranton, and J. B. Jen-kins, of Carbondale, for appellant. J. E. Brennan, of Carbondale, for appellees.

WALLING, J. This suit in equity in-volves the question of the location of the line of a public highway. Prior to 1843, the Delaware & Hudson Canal Company was the owner of a tract of land in the village (now city) of Carbondale, and in plotting the same a triangular piece of land was left open for public use as a park, and known as "the Pa-rade." It is shown, with well-defined bound-aries, on an ancient map in the possession of the company. Lots appear on the map, which were conveyed bounded by the Parade. For nearly 50 years, prior to 1890, the Pa-rade was used generally by the public as a passageway and for all purposes of a pub-lic common. Meantime streets had been opened on the borders of the Parade; Main street on the west, Sixth avenue on the south, and Park Place on the northeast. In or about the year last mentioned the city constructed an iron fence around that part of the Parade inclosed by these streets, and therein was placed a monument and a foun-tain; and, at about the same time, the cart-way in Sixth avenue was paved. Church street extends in a northerly and southerly direction, and is a short distance east of the intersection of Park Place and Sixth avenue. It is about 455 feet from Main and Church streets, and the land facing on the south side of the Parade (now Sixth avenue) was subdivided into lots as a part of the origi-nal plot.

In 1843 the company sold one of the lots facing 65 feet on the Parade to James Clark-son, a part of which by sundry conveyances is now owned by plaintiff, and thereon is a two-story frame building, which stands about one foot back from the south line of the Parade as originally dedicated. However, from the time of or shortly after the pur-chase by Clarkson down to this time the owners of the lot have had adverse posses-

sion of a strip of land some 5 feet in width extending in front of the lot and within the lines of the Parade as dedicated. This strip of land was inclosed for many years as part of the lot by a fence, and near the west end thereof was formerly a well, and toward the east end for about 30 years last past a porch stood thereon in front of the building, and some of the strip of land has been used as a lawn and flower bed. The owners of some of the other lots have also made encroachments upon the south side of the Parade. The original deed to Clarkson describes his lot as being 130 feet in depth, from the Parade south, which it is exclusive of said 5 feet. While there is some controversy, yet, taking the case as a whole, it fully warrants the finding that plaintiff's paper title does not include the disputed land; and it appears with equal clearness that plaintiff and those through whom he claims title have had exclusive possession thereof for much more than 21 years.

In 1897 the city passed an ordinance providing, as we understand the facts, for the condemnation, *inter alia*, of the land here at issue, and a report was made that an agreement with the property owners as to the damages and benefits could not be had; but no viewers were appointed, and nothing further done with reference thereto. In 1915 plaintiff, in remodeling his building, was proceeding to add a new store front thereto, which would occupy a portion of said 5 feet, when he was prevented by the officials of the city, and filed this bill to restrain their interference. After a full hearing the court below entered a final decree dismissing the bill, from which plaintiff took this appeal.

[1] The record seems free from error. The map in the office of the Delaware & Hudson Canal Company was found in the proper custody, was shown to be more than 30 years old, was to all appearances genuine, had been acted upon, and was competent as an ancient document. *Commonwealth v. Alburger*, 1 Whart. 469; *Huffman & Foreman v. McCrea*, 56 Pa. 95; *Smucker v. Penna. R. Co.*, 188 Pa. 40, 41 Atl. 457. And see *Barnett v. Yeadon Borough*, 37 Pa. Super. Ct. 97.

[2] Plaintiff's claim by adverse possession would be well founded as against private parties, but cannot prevail against the public, whose rights are not lost by encroachment, however long continued. *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599; *McGuire v. Wilkes-Barre*, 36 Pa. Super. Ct. 418.

[3] It scarcely requires the citation of authorities to support the proposition that a citizen acquires no rights as against the public by the maintenance of a fence or building in a highway, and the same rule applies to a public park. The acceptance and use by the public of the Parade in question as a

park embraced all the land dedicated for that purpose, although some parts thereof along the border lines may not have been actually used as such. It is like a dedicated street, the acceptance of which constitutes it of the full width, although only the traveled portion may be used by the public. See *State Road*, 236 Pa. 141, 84 Atl. 686. The disputed land being in the Parade, the fact that it is not within Sixth avenue as opened on the ground is not controlling.

As plaintiff's lot in the original deed was bounded on the north by the Parade, he is not helped by the fact of a surplus in that block. If he is entitled to that, or any part of it, he must find it within the lines of the block, and not in the public park or street.

[4] The passage of the ordinance does not estop the city from claiming the land in question; and the fact that the proceedings thereunder were apparently abandoned would suggest that they may have been started under a misapprehension. The facts found by the learned chancellor are in accordance with the evidence and his legal conclusions seem to be entirely accurate.

The assignments of error are overruled, and the decree is affirmed, at the cost of the appellant.

(257 Pa. 335)

EWALT v. DAVENHILL et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. TRUSTS §9 — SPENDTHRIFT TRUST — CESTUIS.

A spendthrift trust may be created as well for a woman as for a man.

2. TRUSTS §9 — SEPARATE USE TRUSTS — VALIDITY.

A testator, dying in 1846 devised land to his son J. for life, with remainder in trust for J.'s children and their heirs, and gave J. power to revoke such trusts by will and to create other trusts; and J., dying in 1870, by will revoked all such trusts, and devised the estate in trust to pay an annuity to his wife and the balance of the income to his son W., born in the lifetime of his grandfather, and on his death the balance in trust for his children in such shares as they would be entitled to if he had died intestate, and gave W. power to appoint the shares of his children in trust for the sole and separate use of such children and to the issue of any deceased child; and W., dying in 1877, directed that the share of each of his three daughters be held in trust for them until they reached 21, and created sole and separate use trusts and spendthrift trusts for them, and directed that on the death of any daughter her share should be paid to her issue during the life of the surviving daughters, and if there was no issue then to the survivors for life, and on the death of the last survivor then to their issue. *Held*, that the sole and separate use trusts were void, because the daughters were not married or in contemplation of marriage at the time of the creation of such trusts.

3. POWERS §36(1) — CONSTRUCTION — CREATION OF SPENDTHRIFT TRUSTS.

Such spendthrift trusts for the daughters of the last testator were within the scope of the power of appointment conferred upon him by the will of his deceased father.

4. WILLS §634(9)—VESTED INTERESTS—TIME OF VESTING.

The interests of such last testator's three daughters vested upon the death of their grandfather, the creator of the power.

5. PERPETUITIES §4(15)—REMAINDERS—VALIDITY.

Such gift to the issue of the daughters of the last testator violated the rule against perpetuities.

6. PERPETUITIES §4(22)—PARTIAL INVALIDITY—SEVERABLE GIFT.

The gifts for the lives of such last testator's daughters were severable, and were not affected by the invalidity of a gift of the remainders to their issue.

7. TRUSTS §52—PARTIAL INVALIDITY—GIFT OVER—EFFECT.

Where an active trust is created to pay the income to one for life, it will not be defeated because of the failure or invalidity of the gift over of the corpus of the estate.

8. PERPETUITIES §4(3)—NATURE OF RULE.

The rule against perpetuities is directed against future contingent estates, and has no reference to vested estates.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for partition by Henry C. Ewalt against Catharine M. Davenport and others. Bill dismissed on demurrer, and plaintiff appeals. Decree affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHISKE, FRAZER, and WALLING, JJ.

M. T. McManus, of Philadelphia, for appellant. Henry Preston Erdman, of Philadelphia, for appellees.

WALLING, J. This case involves the question as to whether certain real estate situate on the southeast corner of Seventh and Chestnut streets, Philadelphia, is now so held in trust as to prevent its partition. This land was formerly owned by William Swaim, Sr., who died in 1846, and by his last will devised the property in trust for his son James for life, and then in trust for the latter's children and their heirs, giving James power, however, to revoke by will all trusts and interests expressed by the testator, and to direct or to appoint such new or other trusts with respect to said property as to him might seem proper. James Swaim died in 1870, leaving a last will in which he referred to the power given him in his father's will, and in execution thereof revoked all the trusts and interests so created by his father, and devised the estate in trust to pay an annuity to his wife for life and balance of the net income to his son William Swaim, Jr., free from the control of his creditors, and provided, further, that after the son's death the property should be held "in trust for the children of the said William Swaim and the issue of such as may be deceased, in such parts, shares and proportions, and for such estates as they would be entitled to, if the said William Swaim had died intestate." William Swaim, Jr., was then given the power

by will to appoint the shares of his children or of the children of any deceased child to trustees, "in trust for the sole and separate use of said child or issue of said deceased child, and under such limitations and restrictions as in his discretion he may deem best, so as to secure the same to the said child or issue of deceased child, for his, her or their sole and separate use, maintenance and enjoyment."

William Swaim, Jr., died in 1877, testate, and left surviving him three daughters, who at the time of the execution of his will were minors, unmarried, and not in contemplation of marriage, although they did subsequently marry, and two of them are still living. In his will, William Swaim, Jr., pursuant to the power vested in him under the will of his father, directed that the share of each of his children, or the children of any deceased child, be held in trust for them until they reached the age of 21 years, "and as and after each of my said children respectively arrive at the age of twenty-one years, to pay her said part and share of the said rents, issues, profits, income, and dividends to her directly whether she be covert or sole, during all the period of her natural life, for her separate use and benefit, the said income to be and at all times to remain free and exempt from the power and control of any husband, and from liabilities for any debts or engagements. The receipts of my children for such payments to them, whether covert or sole, shall be deemed and taken to be good and sufficient vouchers and acquittances for the said trustees or either of them, in the settlement of their accounts." The will also provided that, in the event of the death of any of the children, her share should be paid to her issue during the life of the surviving children, or in case there should be no issue, then to the survivors for life, and, upon the death of the last survivor of the children, then to their issue, or, if no issue, then to the persons who would be entitled under the provisions of his father's will. William Swaim, Jr., was born before the death of his grandfather.

Plaintiff is the owner by purchase of the interest of one of the daughters of William Swaim, Jr., in the premises, and as such filed his bill for partition in this case; and from the decree of the court below, sustaining defendants' demurrer and dismissing the bill, this appeal was taken.

The action of the court below was based upon the construction previously placed upon the wills in question by the orphans' court of said county, where the questions were exhaustively and ably considered, and in our opinion correctly decided. The trusts created by the last will of James Swaim were unquestionably valid as a due execution of the power contained in the will of his father, and created a spendthrift trust for the life

of William Swaim, Jr., with remainder over as therein provided. The real question is as to the effect of the trust provisions in the will of William Swaim, Jr. So far as making a testamentary disposition of the property, James Swaim was practically the owner in fee; and the testamentary trusts so created and powers so conferred by him must be given effect.

[1] A careful reading of his will shows that he conferred upon William Swaim, Jr., a power sufficiently broad to enable the latter to create for his children a spendthrift trust, as well as a separate use trust. True, when the will of James Swaim was executed, the children of William Swaim, Jr., consisted of three daughters, yet there was nothing to indicate that sons might not thereafter be born to him. The words of the will above quoted, empowering his son William by his last will to place such property "in trust for the sole and separate use of said child or issue of said deceased child, and under such limitations and restrictions as in his discretion he may deem best, so as to secure the same to the said child or issue of deceased child, for his, her, or their sole and separate use, maintenance and enjoyment," seem to indicate an intent to authorize the creation of both separate use and spendthrift trusts. And William Swaim, Jr., fully executed such power in his last will as above quoted. A spendthrift trust may be created as well for a woman as for a man. *Ashhurst's Appeal*, 77 Pa. 464; *Hughes-Hallett v. Hughes-Hallett*, 152 Pa. 590, 594, 26 Atl. 101.

[2] While the separate use trusts were ineffective, because the daughters were neither married nor in contemplation of marriage, yet by said wills spendthrift trusts were created in favor of the daughters of William Swaim, Jr., and valid during their lives. No set form of words is necessary to the creation of a spendthrift trust. *Graeff v. De Turk*, 44 Pa. 527, 531; *Winthrop Co. v. Clinton*, 196 Pa. 472, 46 Atl. 435, 79 Am. St. Rep. 729. See, also, *Shower's Estate*, 211 Pa. 297, 60 Atl. 789; *Dunn & Biddle's Appeal*, 85 Pa. 94.

[3-6] So far as creating a trust for his own children, or for the issue of any of his children who may have died in his lifetime, William Swaim, Jr., was acting within the powers conferred upon him by the will of his father; but he went further, and attempted to continue the trust for various uses and purposes for an indefinite time beyond the lives in being at his death. To that extent the trust so created is invalid, as transgressing the rule against perpetuities, and because no such power was vested in him by the will of James Swaim. However, the trust so designated in the will of William Swaim, Jr., is severable, so that the trust created for his children may stand, and that attempted to be created for others beyond fail. *Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062.

[7] Where an active trust is created to pay the income to one for life, it will not be defeated because of the failure or invalidity of the gift over of the corpus of the estate. On the death of William Swaim, Jr., the title to the property in question vested in his children as devisees under the will of their grandfather, James Swaim, but their enjoyment thereof was subject to the trust created by their father's will.

[8] The rule against perpetuities is directed against future contingent interests and has no reference to vested estates: *Johnston's Est.*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621. As the children's estate vested on their father's death, and as he was in being at the death of William Swaim, Sr., so far as concerns them the rule against perpetuities has not been violated. It is the vesting of the estate within the life in being and 21 years thereafter that fixes its status. The fact that, when vested, it may continue beyond that period, is not material. And computing the time from the creation of the power by the will of James Swaim, it is still more apparent that the rule has not been transgressed. In our opinion the will of William Swaim, Jr., creates an active trust during the lives of his daughters, and the real estate embraced therein cannot now be partitioned.

The assignment of error is overruled, and the decree is affirmed, at the cost of appellant.

(257 Pa. 468)

IN RE POTTER'S ESTATE.

Appeal of HALLSTEAD.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. WILLS \Leftrightarrow 452—DISINHERITANCE—INTENT.

Every doubt must be resolved in favor of the heir at law, who cannot be disinherited except by express words or by necessary implication.

2. WILLS \Leftrightarrow 440—PRESUMPTION AGAINST INTENT.

The presumption is that a testatrix intended to dispose of her residuary estate.

3. WILLS \Leftrightarrow 509—REVOCATION OF RESIDUARY CLAUSE—EFFECT.

The revocation by codicil of a residuary clause in favor of a legatee, effecting a gift over to the next of kin of the testatrix, did not preclude such legatee from sharing in the gift to the next of kin of which he was one, where he was not excluded by express language or by necessary implication.

Appeal from Orphans' Court, Lackawanna County.

Appeal by Jesse Wilkins Hallstead, by his mother and next friend, Maud Hallstead, from a decree dismissing exceptions to adjudication in the estate of Lucy A. Potter, deceased. Reversed, and record remitted to the court below for distribution of estate.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

J. E. Sickler and H. D. Carey, both of Scranton, for appellant. W. L. Schanz and C. B. Gardner, both of Scranton, for appellee.

WALLING, J. Lucy A. Potter made her will in 1906, and in the eighth and ninth paragraphs gave her nephew, Erwin M. Hallstead, certain furniture and household effects, and the fourteenth paragraph thereof is:

"Fourteenth. I order and direct that after the payment of all debts, legacies, expenses and charges herein mentioned, the money arising from my estate shall be safely invested by my executor in bank or real estate securities, and the income therefrom paid only annually to my said nephew, Erwin M. Hallstead, during the term of his natural life. Should the said Erwin M. Hallstead die leaving children, all my remaining estate shall go to said children, absolutely, share and share alike, and should he die leaving one child to survive him, then all the said estate to go to said child absolutely. But should the said Erwin M. Hallstead die without leaving any child to survive him, then all my said remaining property, and estate is to go to, and be divided amongst my next of kin in accordance with the intestate laws of the state of Pennsylvania, in same manner as though I had not made any will, except that my brother, C. W. Moredock, shall not participate in said distribution, or receive any part of my estate, as I feel that I have already helped him in various ways to as much as he would be fairly entitled to receive."

Mr. Hallstead was married in 1907, and died in 1912, leaving a posthumous child, Jesse Wilkins Hallstead, the appellant. In 1914 Mrs. Potter made a codicil to said will, which is, *inter alia*, as follows:

"First. My nephew, Erwin M. Hallstead, having died since said will was executed, I hereby revoke all portions of the eighth, ninth and fourteenth paragraphs of said will, by which any property, or the use thereof, was given or bequeathed to said Erwin M. Hallstead, or to his children or child should any survive him. * * *

"Ninth. All the terms and conditions of said will are to be and remain in full force except as revoked or modified by this codicil."

Testatrix died childless shortly after the execution of the codicil, leaving as her next of kin her said brother, now deceased, two nieces, daughters of a deceased sister of testatrix, and appellant, the grandson and only lineal descendant of another deceased sister.

[1] Mrs. Potter's executor filed an account showing a fund for distribution, no claim to which was made on behalf of the brother or his children; and from a decree of the orphans' court awarding same to the two nieces, to the exclusion of appellant, this appeal was taken on his behalf. Admittedly, as between him and the nieces, he is entitled to one-half of the fund, unless excluded therefrom by the terms of the will and codicil. After a careful examination, we are of the opinion that there is no such exclusion, and that appellant as next of kin is entitled to share in the distribution in accordance with the intestate laws. Every doubt must be resolved in favor of the heir at law, who cannot be disinherited except by express

words or necessary implication. *Bender v. Dietrick*, 7 Watts & S. 284; *Brendlinger v. Brendlinger*, 26 Pa. 131; *France's Estate*, 75 Pa. 220; *Bruckman's Estate*, 195 Pa. 363, 45 Atl. 1078.

[2, 3] The presumption is that testatrix intended to dispose of her residuary estate, and construing together the will and codicil, it may fairly be determined that she did so. The original residuary bequest to Mr. Hallstead and his child contained in the will was revoked by the codicil, and thereupon the alternative residuary bequest to the next of kin took effect. This thought is emphasized by paragraph 9 of the codicil, wherein testatrix expressly continues in full force all of the terms of the will except as revoked or modified. Now the codicil revoked all portions of paragraph 14 of the will, by which any property was given or bequeathed to Mr. Hallstead or to his surviving child, which revoked all of the paragraph down to and including the words "then all of said estate to go to said child absolutely," and thereby he was deprived of the bequest as sole residuary legatee. But only so much of the paragraph was revoked as gave something to Hallstead or his child. The original will gave them nothing as next of kin; for by its express terms nothing was given to the next of kin until after the death of both Hallstead and his child. The codicil by its terms revoked only what had been given in the will, and did not attempt to revoke the rights of the next of kin, which arose by virtue of the codicil itself and had no prior existence. She did not revoke that which had no existence until after the revocation. Whatever rights the next of kin have as residuary legatees had their inception in the codicil, because the will gave them nothing as such except upon a condition that never occurred, to-wit, the death of Hallstead and his child during the life of testatrix. But the codicil was a republication of the will as modified, and thereby the residuary estate was given to all the next of kin as they would have taken under the intestate laws, with the single exception that the brother was excluded therefrom. At the time of such republication Mrs. Potter undoubtedly knew that appellant was one of her next of kin, and had she desired to exclude him could have so stated, or, had she then intended to give all of her residuary estate to the two nieces, that could have been stated in the codicil. But the mere fact that testatrix revoked the clause making appellant sole legatee, without more, does not preclude him from sharing in the gift to the next of kin of which he is one. Construing the will and codicil by the language used, we find nothing to prevent appellant from so sharing. He is excluded neither by express language nor by necessary implication: in fact, as the express exclusion includes the brother only, the implication would be the other way, as it

also would because of the fact that the residuary estate is given to the next of kin as a class and not to any particular individuals. Because Mrs. Potter did not desire appellant to have the entire residuary estate does not change his status as next of kin or deprive him of the right to share with the others as such. See *Hitchcock v. Hitchcock*, 35 Pa. 393; *Wain's Estate, Vaux's Appeal*, 156 Pa. 194, 27 Atl. 59; *Gorgas's Estate, Robinson's Appeal*, 166 Pa. 269, 31 Atl. 86; *Fuller's Estate*, 225 Pa. 626, 74 Atl. 623.

The cases above cited seem to support our conclusion although no two wills are exactly alike.

McGovran's Estate, 190 Pa. 375, 42 Atl. 705, relied on by the court below, is not in point, except as applicable to the brother. There the residuary bequest was, "The rest and residue of my estate I direct to be distributed by my executor hereinafter named under the intestate laws of Pennsylvania, but in no event is Mrs. Murdock, widow of Campbell Murdock, or her three children, and Mrs. Kate Johnson, or her two children, to receive any portion of my estate in any shape or form," and it was held that those so expressly excluded were not entitled to share in the distribution; whereas in our case there is no express exclusion of appellant.

The assignments of error are sustained, the decree is reversed at the cost of appellees, and the record is remitted to the court below that distribution may be made in accordance with this opinion.

(257 Pa. 349)

C. G. GAWTHROP CO. v. FIBRE SPECIALTY CO. et al.

(Supreme Court of Pennsylvania. April 9, 1917.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§298—RIGHTS OF CREDITORS—TIME.

The rights of creditors are fixed as of the date of an assignment for the benefit of creditors.

2. PRINCIPAL AND SURETY §194(1) — **CONTRIBUTION—CLAIM OF COSURETY.**

Except as to the right and property connected with the transaction, the claim of a cosurety for contribution is no higher than that of any other claim.

3. SUBROGATION §1—**GROUND—EQUITY.**

Subrogation, which is founded upon equity, will never be granted to the prejudice of other rights of equal or higher rank.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§298—CLAIMS—EQUITIES.

Claims against an insolvent estate existing at the date of an assignment for the benefit of creditors are at least as strong in equity as a claim thereafter arising, even though the obligation out of which it arose antedated the assignment.

5. SUBROGATION §21—**PAYMENT—GROUND.**

It is not a liability to pay, but an actual payment to the creditor, which raises the equitable right to be subrogated to his remedies.

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§215—STATUS OF ASSIGNEE.

An assignee for the benefit of creditors stands in the place of the assignor.

7. CORPORATIONS §566(1) — **INSOLVENCY — RIGHTS AS BETWEEN SURETIES — GENERAL CREDITOR.**

A surety on the bond of the treasurer of the corporation loaned \$5,000 to the corporation on its note, and subsequently made an assignment of his property, including the note, to a trustee for the benefit of his creditors, and the estate of a cosurety paid the corporation the amount of the treasurer's default and claimed subrogation to the rights of the first surety for the amount of the dividend awarded him against the corporation in receivership, in preference to his general creditors whose claims arose before the treasurer's default. *Held*, that the estate was only a general creditor.

8. APPEAL AND ERROR §1170(12)—**DECREE ON EXCEPTIONS TO AUDITOR'S REPORT—REVERSAL.**

Where the lower court's decree sustains exceptions to an auditor's report, and the controlling exceptions are well taken, and the decree is properly entered, it will not be reversed because it apparently sustains some minor exceptions not well founded, nor because of minor inaccuracies in the opinion filed with the decree.

Appeal from Court of Common Pleas, Chester County.

Proceeding by the C. G. Gawthrop Company against the Fibre Specialty Company, George W. Taft, president, and J. W. Brainard, secretary. From a decree sustaining exceptions to the auditor's report and directing the disposition of dividends, D. Duer Phillips and others, executors of James M. Worrall, deceased, appeal. *Affirmed.*

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and WALLING, JJ.

Isabel Darlington and Thomas S. Butler, both of West Chester, for appellants. A. M. Holding, of West Chester, for appellee.

WALLING, J. This is a question of distribution in an insolvent estate. On April 28, 1913, receivers were appointed for the Fibre Specialty Company, a corporation. Prior thereto, on July 23, 1912, the company for value gave George W. Taft a demand note for \$5,000. J. W. Brainard was official treasurer of the company, and in 1903 gave a bond in \$5,000, with Taft and James M. Worrall (now deceased) as sureties, conditioned for the faithful performance of his duties as such treasurer. June 26, 1913, Mr. Taft made an assignment of his estate, specifically including the \$5,000 note, to Harry W. Chalfant, for benefit of creditors. In 1914 the receivers filed an account, and an auditor was appointed to make distribution thereof, to whom the Taft note was presented by the assignee, and a dividend amounting to \$2,157.15 awarded thereon. Mr. Brainard, while treasurer of the company, made default, by reason of which the receivers brought suit against him and his sureties on the bond in the court of common pleas of Chester county, at the January term, 1915, and recovered a verdict for \$3,809.02, on which judgment was entered, and affirmed by this court in case of *Marshall v. Brainard*

253 Pa. 35, 97 Atl. 1057. Brainard and Taft being insolvent, this judgment was, on April 20, 1916, paid by appellants as executors of James M. Worrall, deceased, to whom one-half of the judgment was thereupon assigned.

After the award of the dividend to Chalfant on the Taft note, the claim against Brainard and his sureties on the bond having been brought to the attention of the court below, it was there ordered that the dividend be retained by the receivers until the final determination of the action on the bond, which was done. The receivers in a subsequent final account charged themselves with the \$2,157.15 dividend, which the auditor thereafter awarded appellants by way of contribution from Taft as their cosurety. The learned court below sustained exceptions to the auditor's report, and by final decree ordered the dividend paid to Chalfant on the Taft note; and from that decree this appeal was taken.

The \$5,000 note was a matter entirely separate and apart from the treasurer's bond, and had no connection with Mr. Brainard or his account with the company. Appellants' right to contribution or subrogation arose when they paid the judgment. Then they were equitably entitled to an assignment of the judgment, and also of any collateral or other property held by the receivers to secure the payment of the bond. But they were not entitled to the dividend awarded to the Taft note, as that was an entirely separate matter. The note was a part of Taft's general estate, and appellants had no special equity in that. Except as to matters connected with the bond, appellants are merely creditors of Taft to one-half the amount they paid on account of the surety bond; and they only became such creditors when they paid the judgment on April 20, 1916. Prior to that time they had no claim against Taft. See 8 Modern American Law, p. 224.

[1-6] It is not easy to see how appellants can secure preference over other creditors whose claims were in existence at the time of the assignment, for as a general rule the rights of creditors are fixed as of that date. Sweatman's Appeal, 150 Pa. 369, 24 Atl. 617; Jamison & Co.'s Assigned Estate, 163 Pa. 143, 29 Atl. 1001; Potter v. Gilbert, 177 Pa. 159, 35 Atl. 597, 35 L. R. A. 580; Chestnut Street Trust & Saving Fund Co.'s Assigned Estate, 217 Pa. 151, 66 Atl. 332, 118 Am. St. Rep. 909. Except as to rights and property connected with the transaction, the claim of a cosurety for contribution is no higher than that of any other claim; and subrogation, which is founded upon equity and benevolence, will never be granted to the prejudice of other rights of equal or higher rank. Fritch v. Citizens' Bank, 191 Pa. 283, 43 Atl. 394; Knouf's Appeal, 91 Pa. 78; Grand Council of Penna. Royal Arcanum v. Cornelius, 198 Pa. 46, 47 Atl. 1124; Shimp's Assigned Es-

tate, 197 Pa. 128, 46 Atl. 1037. Claims against an insolvent estate which were in existence at date of the assignment, would seem at least to have as strong an equity as one thereafter arising, even though the obligation out of which it arose antedated the assignment. "It is not a liability to pay, but actual payment to the creditor, which raises the equitable right to be subrogated to his remedies." Kyner v. Kyner, 6 Watts, 221; Hoover v. Epler, 52 Pa. 522; Forest Oil Company's Appeals, 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584. Subrogation will never be enforced to defeat a superior or even an equal equity. Robeson's Appeal, 117 Pa. 633, 12 Atl. 51. A case quite similar to this in principle is that of Farmers' & Drovers' Bank v. Sherley et al., 12 Bush (75 Ky.) 304.

[6, 7] Creditors of Taft acquired no special rights because of the transfer of the note to Chalfant, as an assignee for benefit of creditors stands in the place of the assignor (Potter v. Gilbert, 177 Pa. 159, 35 Atl. 597, 35 L. R. A. 580), and not in that of a bona fide holder for value. In Marshall v. Brainerd, supra, it is held that the Taft note could not be interposed as a set-off against the suit on the treasurer's bond. Whether or not such bond should have been set off against the claim on the note does not seem now important; in any event, it was not so used; and the real question here is as to the equitable rights to the fund in question between the Worrall estate and other creditors of Taft. The question as to the validity of the assignment to Chalfant is not before the court. The other assignments of error do not seem to require special consideration.

[8] Where the lower court makes a general decree sustaining exceptions to an auditor's report, and the controlling exceptions are well taken, and the right decree is entered, an appellate court will not reverse because such general decree seemingly sustains some minor exceptions that were not well founded, nor because of minor inaccuracies in the opinion filed with the decree. However, the opinion in this case indicates a correct understanding of the facts and legal principles applicable thereto.

The decree is affirmed, at the costs of appellants.

(357 Pa. 425)

SCHUYLKILL COUNTY v. WIEST,
County Treasurer.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. COUNTIES ~~66~~72—COUNTY CLERK—SALARY
— CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 14, § 5, providing that compensation of county officers shall be regulated by law, and that county officers shall pay all fees received into the county or state treasury as directed by law, and Act March 31, 1876 (P. L. 13) § 1, requiring county officers to receive all fees for the use of the county, except those

levied by the state which shall be payable to it, and that they shall receive no fees for any official services, and section 15, declaring the salary of such officers to be in lieu of any fees and perquisites, show a fixed intention to confine salaried county officers to their salary as compensation for all official services.

2. COUNTIES \S 80(2)—COUNTY TREASURER—DISPOSITION OF FEES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. art. 14, § 5, regulating the salary of county treasurers and their disposition of fees received in their official capacity, and Act March 31, 1876 (P. L. 13), enacted to carry such provision in effect in counties containing over 150,000 inhabitants, the treasurer of such a county is not entitled to retain the fees collected by him for issuing hunters' licenses under Act April 17, 1913 (P. L. 85), but is required to pay them into the county treasury.

3. OFFICERS \S 94—COMPENSATION FOR SERVICES—PRESUMPTION.

The presumption is that, when an officer receives money for services rendered in his official capacity, it is as compensation for the performance of duties as such officer.

Appeal from Court of Common Pleas, Schuylkill County.

Assumpsit for money had and received by the County of Schuylkill against Fred J. Wiest, County Treasurer. Judgment for plaintiff on the case stated, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-LING, JJ.

John B. McGurl, of Minersville, for appellant. Edmund D. Smith, Sp. Counsel, C. E. Berger, Sol. for Controller, and C. A. Snyder, Co. Sol., all of Pottsville, for appellee.

MESTREZAT, J. This is an action of assumpsit brought by the county of Schuylkill to recover fees collected by the defendant, as county treasurer, for hunters' licenses issued by him under the provisions of the act of April 17, 1913 (P. L. 85). The treasurer claims that the fees belong to him personally, and that he is entitled to retain them for his own use, while the county contends that they belong to it and must be accounted for by the treasurer. The facts were agreed upon by the parties and submitted to the court in a case stated. The court was of opinion that the license fees collected by the treasurer belong to the county, and entered judgment against the defendant. He has taken this appeal.

The act of 1913 was passed, as its title shows, for the better protection of wild birds and game within the state. It authorizes the county treasurer to issue a "resident hunter's license" granting permission to hunt for birds and game within the state and provides penalties for a violation of its provisions. The eighth section of the statute enacts as follows:

"Said county treasurers are herewith authorized to retain for services rendered the sum of ten cents from the amount paid by each licensee, which amount shall be full compensation for

services rendered by him in each case under the provisions of this act, and shall remit all balances arising from this source, at least once a month, to the state treasurer, for the purposes otherwise provided for in this act."

[1] The county of Schuylkill contains over 150,000 inhabitants, and therefore is within section 5, art. 14, of the Constitution of Pennsylvania, which provides, inter alia, as follows:

"The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary."

To carry into effect this provision of the Constitution the Legislature passed the act of March 31, 1876 (P. L. 13), section 1 of which provides that in counties containing over 150,000 inhabitants—

"all fees limited and appointed by law to be received by each and every county officer * * * or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed; and it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state, which shall be to and for the use of the state; and none of said officers shall receive for his own use, or for any use or purpose whatever except for the use of the proper county or for the state, as the case may be, any fees for any official services whatsoever."

The act fixes the salary of the treasurer and other county officers, and then provides in section 15 as follows:

"The salaries fixed and provided by the foregoing provisions shall be in lieu of all or any moneys, fees, perquisites or mileage which are now or may hereafter be received by any officer named in this act; and all said moneys, fees, mileage or perquisites, received by any of them as compensation, fees or perquisites, from any source whatever, shall in all cases belong to the county, and shall be paid into the treasury (except where required to be paid to the state), as provided in this act."

We think there is no difficulty in sustaining the judgment entered for the plaintiff by the learned court below. The constitutional mandate and the legislative enactment passed to make it effective are so explicit that they do not require judicial construction. In fact, as was well said by Judge Thayer in *Pierie v. Philadelphia*, 139 Pa. 573, 578, 21 Atl. 90:

"The prohibition of the receipt of fees for their own use, and the regulation of their compensation by fixed salaries exclusively, could hardly have been expressed in plainer language than that which is written in the Constitution. It is impossible for any ingenuity to prevail against it. There is nothing left for construction or interpretation. It interprets itself as plainly as any words in the English language can do so, and there is no hook upon which to hang a query or a doubt."

In making this assertion we are not unmindful of the several attempts made by county officers, as disclosed by the numerous

cases in this court, to defeat the constitutional and statutory enactments by appropriating to their use fees received in their official capacity. This provision of the Constitution has never been satisfactory to county officials, who, by the assistance of able and ingenious counsel, have omitted no opportunity to evade its mandatory provisions.

An analysis of the enactments, constitutional and legislative, will clearly show the fixed intention to confine a salaried county officer to his salary as compensation for all services rendered in his official capacity. The Constitution declares that he "shall pay all fees" which he may be authorized to receive into the treasury of the county or state. The first section of the act of 1876 provides that "all fees limited and appointed by law" to be received by county officers shall be received "to and for the use of their respective counties," and declares that "none of said [county] officers shall receive for his own use, or for any use or purpose whatever except for the use of the proper county or for the state, * * * any fees for any official services whatsoever." Section 15 seeks to emphasize, if it can be made more emphatic, the provision of section 1 by declaring that salaries fixed by the act "shall be in lieu of all or any moneys, fees, perquisites or mileage, which are now or may hereafter be received by any officer; * * * and all said moneys * * * received by any of them as compensation, fees or perquisites, from any source whatever, shall in all cases belong to the county, and shall be paid into the treasury (except where required to be paid to the state), as provided in this act." As to this exception and in explanation of it, Mr. Justice Dean, speaking for the court, said in *Commonwealth v. Mann et al.*, 168 Pa. 290, 299, 31 Atl. 1003, 1006:

"This would have been but little more significant if it had said 'except collateral inheritance taxes, state tax on writs, wills, commissions and license fees.'"

Section 9 of the act requires county officers to make monthly returns to the state treasurer of such taxes and all fees otherwise due the state, and pay the same quarterly into the state treasury, and provides that: "All commissions on the collection of such taxes as are now or may hereafter be allowed by law shall be deemed and taken as part of the regular fees of the officer collecting the same, and shall be accounted for accordingly."

The present controversy is between an individual, who is county treasurer, and the county. The state is not claiming the fees for which this suit was brought nor is she interested in who gets them.

[2, 3] The county of Schuylkill has a population of over 150,000, and the treasurer of the county is therefore a salaried officer. He receives \$5,000 a year for his services. It is difficult to see, in view of the constitutional and legislative provisions, what claim the defendant, Wiest, county treasurer, as an in-

dividual and for his own use, can have on the fund in controversy. He, through his counsel, contends in support of his claim that the services performed by him in collecting the hunters' license fees under the act of 1913 were rendered to the state, and were no part of his duties as county treasurer, but separate and distinct therefrom. This contention cannot be sustained. The act of 1913 did not make Wiest a state officer, as will be conceded, nor did he have any functions as such to perform in the collection of the license fees. He did not receive the fees in controversy by authority conferred on him as a state official. The act deals with him as a county, and not a state official, and not as an individual. The Constitution of the state fixed his status as a county officer. The county treasurer, as provided in the act, is authorized to issue hunters' licenses, to collect \$1 from each applicant, to retain 10 cents from the amount paid to the licensee, and remit the balance to the state treasury. The act therefore confers its authority on the county treasurer, and not on the individual who happens at the time to be the incumbent of the office. Each step he takes to carry out the provisions of the act is in his official capacity as county treasurer. The license is issued and signed by the county treasurer in his official, and not his personal, capacity. By virtue of his office, and not as an individual, he collects the license fee and retains the amount for services designated in the act. It is true that the license fees are levied for and are to be paid to the state, but it does not follow that the compensation for the services rendered in issuing the licenses and collecting the fees therefor is to be paid to and for the use of the individual who at the time is the officer authorized in his official capacity by the statute to perform the service. On the contrary, section 9 of the act, as will be observed, provides that the commissions for collecting state taxes and fees shall be deemed "part of the regular fees of the officer collecting the same, and shall be accounted for accordingly." The act does not appoint county treasurers as agents of the commonwealth to collect the license fees, nor does it authorize them to apply to their own use the money retained for such services. The presumption is that, when an officer receives money for services rendered in his official capacity, it is as compensation for the performance of duties as such officer. If Wiest had not held the office of county treasurer, he could not have issued the hunters' licenses or collected the license fees, and necessarily could not have retained the designated fees for the services. He therefore holds the fees, received as compensation, in his official capacity as county treasurer, and under the constitutional and legislative mandates he must account for them to the county of Schuylkill.

In construing the act of 1876 and holding that the prothonotary of Schuylkill county, a

salaried officer, is not entitled to the fees authorized by the act of Congress to be retained by him for the naturalization of aliens, *Mr. Justice Stewart*, speaking for the court in the recent case of *Schuylkill County v. Reese*, 249 Pa. 281, 286, 95 Atl. 77, 78, said:

"These fees for services in connection with naturalization proceedings, though prescribed by federal statute, and by such statute directed to be paid to a clerk of a state court, are quite as clearly limited and appointed by law to be collected by such official as any fees prescribed by state enactment. * * * It was only by virtue of his official character, and not as an individual, that he was authorized to collect and receive these fees; he is not designated as an individual, but as an official."

The Supreme Court of the United States, in *Mulcrevy & Fidelity & Deposit Co. v. City and County of San Francisco*, 231 U. S. 669, 34 Sup. Ct. 260, 58 L. Ed. 425, in construing a provision of the city charter of San Francisco similar to the provision of our act of 1876 and applying this act of Congress, came to the same conclusion, and held that the clerk should account to the county for the fees received by him. *Mr. Justice McKenna*, speaking for the court, said (231 U. S. 674, 34 Sup. Ct. 262, 58 L. Ed. 425):

"If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was not earning them otherwise, or receiving them otherwise, but under compact with the city to pay them into the city treasury."

The judgment is affirmed.

(257 Pa. 391)

KETCHAM v. LAND TITLE & TRUST CO.
(Supreme Court of Pennsylvania. April 16, 1917.)

MORTGAGES §151(3)—PRIORITY—MECHANIC'S LIENS—DEMOLITION OF BUILDING—"VISIBLE COMMENCEMENT UPON THE GROUND OF THE WORK OF BUILDING."

Where it was necessary to tear down a dwelling house before an apartment house could be constructed upon a lot and the demolition was performed under the same contract as the construction, such demolition constitutes a "visible commencement upon the ground of the work of building" within Mechanic's Lien Act (Act June 1, 1901 [P. L.] 431) § 18, defining the priority of liens, so that a mechanic's lien filed for work, labor, and materials in the construction dated from the commencement of such demolition, and was prior to a mortgage executed and recorded after the demolition has been completed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Visible Commencement of Work.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on a policy of title insurance by O. W. Ketcham against the Land Title & Trust Company. From a final order dismissing exceptions to the report of a referee, defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHIZSKER, FRAZER, and WALLING, JJ.

John G. Johnson, Ormond Rambo, and J. Quincy Hunsicker, Jr., all of Philadelphia, for appellant. Alex. Simpson, Jr., and Joseph G. Magee, both of Philadelphia, for appellee.

BROWN, C. J. On July 9, 1912, Samuel Shoemaker acquired title to a lot of ground situated at the northeast corner of Schoolhouse lane and Wayne avenue, Germantown, on which there was a suburban dwelling house. Shoemaker purchased the lot for the purpose of erecting an apartment house upon it on the site of the dwelling house. On August 5, 1912, he executed a mortgage on the premises to Frank H. Moss for \$150,000, and the money so raised was expended in the erection of the new building. The Land Title & Trust Company, the appellant, issued its policy of insurance to Moss, the mortgagee, insuring the completion of the apartment house discharged of liens. O. W. Ketcham, the appellee, filed a mechanic's lien against it for materials furnished to Shoemaker for the erection of it. In proceedings on the Moss mortgage the premises were sold at sheriff's sale, and Ketcham, claiming that his mechanic's lien had priority over the mortgage, took a rule on the sheriff to pay the entire purchase price for the property, \$150,000, into court. This rule was subsequently abandoned by Ketcham, he and the Land Title & Trust Company having agreed in writing that the question of the priority of his lien over the mortgage should be referred to Francis B. Bracken, Esq., under the act of May 14, 1874 (P. L. 166). In pursuance of the terms of this agreement, Ketcham brought suit against the Land Title & Trust Company, and from the report of the referee, confirmed by the court below, holding that the mechanic's lien had priority over the mortgage, the present appeal was taken.

The facts in the case are not in dispute. The amount claimed by the appellee on his mechanic's lien—\$15,056—is admitted to be correct. His claim for its priority over the mortgage is resisted solely on the ground that the mortgage was recorded before there was "the visible commencement" of the apartment house within the meaning of the Mechanic's Lien Act of June 4, 1901 (P. L. 431, § 13). The only work done on the premises prior to August 5, 1912, the date of the execution and recording of the mortgage, in connection with the contemplated erection of the apartment house, was the demolition of the dwelling house. This work, which was commenced on July 15th, was completed on or about the third of the following month, two days before the recording of the mortgage, and the question before the referee and court below was whether its demolition was "the visible commencement upon the ground of the work of building" the apartment house.

The demolition of the dwelling house was a necessary precedent condition to the erection of the apartment house. The latter could not be built until the former was out of the way. The tearing down of the old house was more essential to the building of the new than would have been the digging of a cellar, for the new house might have been built without a cellar. The first step to be taken for its erection was the removal of the old dwelling which stood on the site selected for it. The situation here presented is not that of the removal of an old building having no connection with the construction of a new one, for the removal was so linked with the work upon the new building as to become a part of one single operation, and this conclusively appeared to the appellant before it issued its policy of insurance to Moss. The architect who designed the new building and drew the specifications for it to be submitted to contractors, included in them the following:

"Demolition. Remove the buildings now on the site together with all foundations, sidewalks and curbing, and prepare the site to receive the new building."

J. Willson Smith, the manager of the building operation department of the appellant, admitted in his testimony before the referee that these specifications were on file with his company before it issued its policy to Moss, and the learned court below, in dismissing the exceptions to the report of the referee, properly said:

"The defendant had actual knowledge that the work of demolition was done for constructive purposes, that is, as part of the work necessary to the new building. The specifications recited the work of demolition and construction as part of the same contract, and it was these specifications which the defendant insured should be carried out. Moreover, the money to pay for the whole was deposited with the defendant for distribution. It therefore had knowledge of the unity of the operation."

We find none of the authorities cited by learned counsel for appellant in conflict with the correct conclusion of the learned referee that, under the undisputed facts in the case, the demolition work incident to the erection of the apartment house on the lot of ground subject to the mortgage insured by the defendant was a "visible commencement" of the work of building the apartment house, within the meaning of the mechanic's lien act. In none of our own cases was the question now before us passed upon. It incidentally arose in *McCristal v. Cochran*, 147 Pa. 225, 23 Atl. 444, and, in declining to pass upon it, Mr. Chief Justice Paxson said:

"Most of the items contained in the bill of particulars were for tearing down an old building preparatory to the erection of the new building, for which the claim was filed. Whether such demolition is part of the erection of a new building is a question which we do not find decided by this court in any reported case. We are not required to do it now, as the first item in the bill of particulars is sufficient to sustain

the claim. It is not a good ground to strike off a claim that some of the items are insufficient. If it contains one good item, which is the subject of a lien, it is enough."

Among the cases in other jurisdictions sustaining the referee are *Whitford v. Newell*, 2 Allen (84 Mass.) 424; *Bruns v. Braun*, 35 Mo. App. 337; *Pratt v. Nakdimen*, 99 Ark. 293, 138 S. W. 974, Ann. Cas. 1913A, 872. "Where improvements for which a lien can properly be obtained are made, the lien may include the work of tearing down old structures or parts thereof which was a necessary part of the making of the improvements," 27 Cyc. 38. In Ann. Cas. 1912B, 15, there is a note on the subject now under consideration, and, after citing authorities which hold that, for the removal or demolition of a building, no lien will be sustained, it proceeds as follows:

"Where an old building is torn down for the purpose of erecting a new one, obviously a different case is presented. The demolition becomes part of the work of erection, construction, or repair, and the laborer is entitled to a lien. *Ward v. Crane*, 118 Cal. 676, 50 Pac. 839; *Bruns v. Braun*, 35 Mo. App. 337."

The assignments of error are overruled and the judgment is affirmed.

(257 Pa. 515)

IN RE BRINGHURST'S ESTATE.

Appeal of FLANAGAN.

(Supreme Court of Pennsylvania. April 16, 1917.)

WILLS \Leftrightarrow 601(7)—DEVISE TO MARRIED WOMAN—TRUST.

A will devising a residuary estate to a daughter for her sole and exclusive use free from the control of her husband, to be used by her as if she were sole and unmarried, intended a trust for her separate use, so that her petition to vacate her appointment as trustee for herself, filed during the lifetime of her husband, was properly dismissed.

Appeal from Orphans' Court, Philadelphia County.

Petition by Mary Bringhurst Flanagan, trustee, to annul and vacate a decree appointing her trustee in the estate of Alice R. Bringhurst, deceased, and directing the entry of security. From an order dismissing the petition, petitioner appeals. Affirmed.

The facts appear from the following opinion of Lamorelle, J., in the orphans' court:

This is a petition to annul and vacate a decree appointing a trustee and directing the entry of security. Alice R. Bringhurst, who died in the year 1906, bequeathed and devised her residuary estate unto her daughter, Mary Bringhurst Flanagan, in the language following:

"Sixth. All the rest of residue and remainder of my estate real and personal and mixed of whatsoever kind and wheresoever the same may be situate I give and devise and bequeath to my daughter Mary Bringhurst Flanagan to be for her sole separate and exclusive use notwithstanding any coverture free and clear of interruption intervention or control of her husband or any husband she may have and without the said property and estate shall be held and used and enjoyed by the said Mary Bringhurst Flana-

gan in all respects and in as full and ample a manner notwithstanding her coverture as if she were sole and unmarried."

In 1907 Mary Bringham Flanagan, the daughter, being desirous of selling some of the realty forming part of the residue of the estate, petitioned this court for leave to appoint her trustee for herself to make such sale, and to give her own bond. In due course she was appointed such trustee, her request to give her own bond refused, and security was directed to be entered in the sum of \$12,500.

The surety on the bond is now deceased, and the purpose of the present petition is to terminate the trust, release the bondsman, and receive from the executors of her will the sum of some \$6,500 which he in his lifetime held as counter indemnity. As we view the will, we cannot grant the prayer of the petition.

At the time of the execution of the will Mary Bringham Flanagan was married, and her husband survives. It was the manifest intention of testatrix that her daughter should hold the estate for her sole, separate, and exclusive use, and while the latter part of the clause wherein and whereby the gift is made is not altogether in harmony with the gift itself, we do not feel that there is such a contradiction as will enable us to ignore the legal effect of the technical language used by the testatrix.

The lower court dismissed the petition. The trustee appealed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER and WALLING, JJ.

E. Hunn, Jr., of Philadelphia, for appellant.

PER CURIAM. Though the last clause of the sixth paragraph of the will of testatrix is apparently contradictory of what immediately precedes it, her main intent that a trust should be created for her daughter's sole, separate, and exclusive use is clearly stated, and the decree is affirmed, at appellant's costs, on the opinion of the court below directing it to be entered.

(257 Pa. 517)

MILLER v. WEST JERSEY & S. S. R. CO.
(Supreme Court of Pennsylvania. April 16, 1917.)

RAILROADS ¶327(3)—**GRADE CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.**

One who before stepping upon a track at a grade crossing had an unobstructed view for 967 feet, and who, if he had then looked, must have seen the approaching electric express train by which he was struck, was negligent.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Elizabeth H. Miller, administratrix of the estate of Franklin C. Miller, deceased, against the West Jersey & Seashore Railroad Company, to recover for the death of plaintiff's husband. Verdict for the plaintiff for \$25,000, judgment for defendant non obstante veredicto, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Jacob Singer, David Bortin and Emanuel Furth, all of Philadelphia, for appellant. Sharswood Brinton, of Philadelphia, for appellee.

PER CURIAM. Upon a review of the evidence in this case the court below could not have avoided the conclusion that the carelessness of the deceased, when about to cross the railroad tracks, was responsible for his death, and the judgment non obstante veredicto is affirmed on the following from the opinion directing it to be entered:

"If the deceased did not see the electric train in time to save himself, it was because he did not look. Where a person fails to see that which was plainly obvious, such person is clearly guilty of contributory negligence. The deceased must either have seen the electric train and have taken his chances of crossing in front of it, or he did not look. All the facts in the case evidence that the electric train was not one which came into view after the deceased was committed to the act of crossing; it was in plain view at the time that he stepped upon the tracks. The deceased was not a stranger at this railway crossing, as has already been shown, and his knowledge charged him with the necessity of exercising special care in crossing the tracks. It was shown that at the time he attempted to cross the train that he expected to take would not reach the station for some eight minutes. Another point which would appear to be perfectly clear is that for the whole length of the picket fence which separated the middle south-bound track from the north-bound track there was positively no obstruction of vision. This fence by measurement was 967 feet. When the deceased and the witness Avis stood west of the first outbound track, after leaving the news stand and before stepping upon the track, and also when they stood in the 15 feet clear space between the two south-bound tracks, they had an admittedly perfect, unobstructed view of the length of the fence, the 967 feet."

Judgment affirmed.

(257 Pa. 249)

COMMONWEALTH v. KEYSTONE GRAPHITE CO. et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. JUDICIAL SALES ¶1—**MORTGAGES—SALE—"JUDICIAL SALE."**

Where a corporation mortgaged its property to a trust company to secure a bond issue, a sale by the mortgage trustee under a power of sale contained in the mortgage to certain trustees for the bondholders, made after the corporation had sold its interest in the mortgaged premises, was not a "judicial sale."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

2. TAXATION ¶682—**TAX LIEN—ENFORCEMENT AGAINST PURCHASER AT MORTGAGE FORECLOSURE SALE.**

Where a lien for unpaid capital stock taxes was entered against the corporation purchaser of corporation property mortgaged to secure a bond issue, and the property was subsequently sold by the mortgage trustee under a power of sale contained in the mortgage to certain trustees for bondholders, the tax lien was not thereby divested, and the proceeds of the sheriff's sale

under such lien were properly awarded to the commonwealth, to the exclusion of the trustees for bondholders.

Appeal from Court of Common Pleas, Chester County.

Scire facias to remove the lien of a mortgage by the Commonwealth of Pennsylvania against the Keystone Graphite Company, with notice to Hiram C. Himes and others, trustees for the bondholders of the New Philadelphia Graphite Company, terre-tenants. On exceptions to the report of an auditor distributing the proceeds of a sheriff's sale of real estate. Dismissed, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER, and
WALLING, JJ.

Edmund Bayly Seymour, Jr., of Philadelphia and Arthur P. Reid, of West Chester, for appellants. Isabel Darlington and Thomas S. Butler, both of West Chester, for the Commonwealth.

WALLING, J. In 1905 the New Philadelphia Graphite Company, a New Jersey corporation, took title to certain real estate in Chester county, Pa., and at the time executed a deed of trust in the nature of a mortgage to the Union Trust Company (now Merchants' Union Trust Company) to secure an issue of bonds to the amount of \$50,000. In 1907 the Keystone Graphite Company, a Delaware corporation, purchased the property from the New Philadelphia Graphite Company, subject to the mortgage. On December 14, 1910, the commonwealth entered its lien for capital stock taxes for the years 1907 to 1910 against the Keystone Graphite Company. On December 21, 1910, the trust company, pursuant to authority contained in the mortgage, sold the property at public auction for \$5,000 to certain parties as trustees for the bondholders. In 1912 the commonwealth issued a scire facias on its lien, and the last-named trustees, being served as terre-tenants, made defense on the ground that plaintiff's lien had been divested by the public sale. Such defense was held insufficient, and judgment was entered for the commonwealth in the court below, which was affirmed by this court in *Com. v. Keystone Graphite Co.*, 248 Pa. 344, 93 Atl. 1071. It is there held that the sale on the mortgage, not being a judicial sale, did not divest the plaintiff's lien.

[1, 2] In 1915 the commonwealth issued a *levari facias* on the judgment, by virtue of which the sheriff sold the real estate to trustees for the bondholders for \$1,860. The court below confirmed the auditor's report awarding the fund, less costs, etc., to the commonwealth on its judgment. From this decree the trustees for the bondholders took this appeal. The fund was rightly distributed. The public sale on the mortgage divest-

ed its lien and left that of the commonwealth the first lien against the property. The sheriff sold the land as the property of the Keystone Graphite Company, and his deed conveyed whatever interest the company had in the land when the lien of the commonwealth was filed; and, so far as relates to this distribution, it is not important whether his deed carried a fee or merely an equity of redemption. The sheriff's sale certainly did not divest the lien of the mortgage, and hence the holders of the bonds thereunder have no claim on this fund. It is *res adjudicata* that the commonwealth's lien was not divested by the sale on the mortgage, and hence the purchasers of the land at that sale have no claim here. One who buys land subject to a lien does not thereby become entitled to the proceeds derived from a subsequent judicial sale of the same property on such lien.

There is nothing in the record to support a claim by the purchasers at the sheriff's sale to recover back in this distribution the consideration they there paid for the property. The rule of caveat emptor applies to such sale; and, aside from that, there is nothing to indicate that the sheriff's vendees did not acquire a valid title. In our opinion the question of the statutory right of the commonwealth to enforce liens filed for such taxes, to the prejudice of the holders of prior mortgages whether given for purchase money or otherwise, is not involved in this case.

The assignment of error is overruled, and the order of distribution is affirmed, at the costs of the appellants.

(257 Pa. 344)

LAPINCO v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 9,
1917.)

1. RAILROADS \S 346(1)—CROSSING ACCIDENT
—NEGLIGENCE—EVIDENCE.

In action against railroad for personal injury when struck by locomotive, evidence held insufficient to overcome presumption that defendant was not negligent in failing to provide proper headlight, so that trial judge should have directed finding that headlight was burning.

2. RAILROADS \S 333(1)—CROSSING ACCIDENT
—CONTRIBUTORY NEGLIGENCE.

Where plaintiff stopped, looked, and listened at a track next to the one on which the train which struck him approached, and did not see the engine, though he had an unobstructed view for 160 feet, and immediately started across the track, and was struck, he was contributorily negligent.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Jachim Lapinco against the Philadelphia & Reading Railway Company to recover damages for personal injury. Verdict for plaintiff for \$4,500, and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRAZER, JJ.

William Clarke Mason, of Philadelphia, for appellant. William T. Connor and John R. K. Scott, both of Philadelphia, for appellee.

BROWN, C. J. The plaintiff was struck by an engine of the defendant on November 29, 1913, about 5 o'clock in the afternoon, at what the jury found was a permissible crossing in the city of Coatesville. For the injuries sustained he recovered a verdict; the jury having found that the defendant had negligently operated its engine at the point where he was hurt, and that he had exercised due care in attempting to cross the track. On this appeal from the judgment on the verdict the contention of the appellant is that its motion for a nonsuit ought to have prevailed, or a verdict should have been directed in its favor, as no negligence on its part had been shown, and the contributory negligence of the plaintiff was so clear that the trial judge should have declared it to be a bar to his right to recover.

[1,2] Alongside the track on which the plaintiff was struck there are two sidings. After crossing over the first, he stepped on the second and looked up and down the main track. It was dark, but lights were burning, and the plaintiff testified he could see a distance of 160 feet in the direction from which the engine was coming. He stated distinctly that there was nothing to obstruct his view down the track for that distance. According to the testimony of witnesses called by the defendant, the distance of the unobstructed view, from actual measurements on the ground, was much greater. With the unobstructed view of at least 160 feet before him, the plaintiff started toward the third or main track, and the instant he put his foot on the first rail the engine ran over it. He testified that from the time he started from the siding or second track he kept on looking and listening, but neither heard nor saw the approaching engine. On the testimony which he submitted as to its speed and the failure to give notice of its approach, by bell or whistle, it may be conceded that the question of the defendant's negligence was for the jury; but, as the plaintiff was bound not only to listen, but to look, the only rational conclusion deducible from all the testimony in the case is that he failed to look as he approached the track on which he was struck. If he had looked, he must have seen the engine coming towards him. Nel-

ther he nor either of his two witnesses who saw the accident testified that there was not a headlight burning on the locomotive. Neither of them said anything about a headlight, and their testimony, given its full effect, was merely that they had not seen the engine. There was no presumption that the defendant had failed to have a burning headlight on it, and the burden of showing negligence in this respect was upon the plaintiff. *Hanna v. Philadelphia & Reading Ry. Co.*, 213 Pa. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344.

The negative testimony of plaintiff and his witnesses, to which we have referred, was not sufficient to make out a charge of negligence as to the headlight, and a finding by the jury that one was not burning on the engine at the time of the accident was not only without evidence on the part of the plaintiff to sustain it, but was in the teeth of unimpeached evidence submitted by the defendant that the engine was equipped with a proper light. Nalin, the engineer, testified that there was a burning headlight on his engine, in front of a reflector; Gray, his fireman, said the headlight was burning brightly; and Thompson, the conductor, said he saw it burning. The testimony of these three witnesses was unequivocally corroborated by Harnish, Bivans, and Williams, three of defendant's brakemen. These six witnesses were in a position to see, and did see, and, in view of their positive and affirmative testimony that the headlight was burning, with no proof offered by the plaintiff to rebut the presumption that the defendant was not negligent as to this, the trial judge should have directed the jury to find that it was burning. *Knox v. Philadelphia & Reading Ry. Co.*, 202 Pa. 504, 52 Atl. 90; *Kelser v. Lehigh Valley R. R. Co.*, 212 Pa. 409, 61 Atl. 903, 108 Am. St. Rep. 872; *Anspach v. Philadelphia & Reading Ry. Co.*, 225 Pa. 528, 74 Atl. 373, 28 L. R. A. (N. S.) 382; *Charles v. Lehigh Valley R. R. Co.*, 245 Pa. 496, 91 Atl. 890; *Leader v. Northern Central Ry. Co.*, 246 Pa. 452, 92 Atl. 696.

Under *Carroll v. Penna. R. R. Co.*, 12 Wkly. Notes. Cas. 348, and the long line of cases following it down to *Stoker v. Philadelphia & Reading Ry. Co.*, 254 Pa. 494, 99 Atl. 28, it was the clear duty of the court below to enter judgment for the defendant non obstante veredicto.

The fourth assignment of error is sustained, and judgment is here entered for the defendant.

(91 Vt. 495)

BAKER v. RUSHFORD et al.(Supreme Court of Vermont. Franklin.
Sept. 4, 1917.)**1. INSURANCE — 580(1) — VENDOR AND PURCHASER — RIGHTS OF PARTIES — INSURANCE MONEY.**

Where premises were sold, title to be transferred on the making of certain payments and a contemporaneous mortgage to the vendor to secure the balance of the consideration, the rights of the parties in respect to insurance money accruing from destruction by fire of a building on the premises were the same as they would have been if the fire had occurred after conveyance, the buyer being in possession and having performed all his obligations under the contract to date.

2. VENDOR AND PURCHASER — 54 — ESTATES OF VENDOR AND VENDEE.

An executory contract for the sale of land left the legal estate in the vendor, but, except for his interest in the property as security, the vendor held the title in trust for the vendee, regarded by equity as the owner.

3. VENDOR AND PURCHASER — 54 — RIGHTS OF PARTIES AFTER TRANSFER OF TITLE.

After title to land was sold under an executory contract, the vendee before he broke any condition of the contract was holder of the legal title and estate, and the vendor had his security in the form of a mortgage given him.

4. VENDOR AND PURCHASER — 182 — PAYMENT OF PRICE — TIME — OPTION OF VENDEE.

Where installments of the purchase price of land were all payable on or before the dates specified, the entire indebtedness was payable at once at the vendee's option.

5. INSURANCE — 580(1) — PROCEEDS — VENDOR AND PURCHASER — RETENTION OF SECURITY — CHANGE IN FORM.

Where a farm and personal property were sold, the vendee giving the vendor a chattel mortgage on all the personalty to secure payment of the first \$1,500 of the price, the contract providing that when such payment was completed and all conditions performed the vendor should give the vendee a warranty deed of the land, and receive a mortgage for the balance, payable on or before specified dates, the vendee to keep the buildings and contents insured for \$1,400 for benefit of the vendor, the insurance money arising from loss by fire stood in the place of the property destroyed, to be held for application by the vendor which would complete payment of the debt, and the vendee could not require application thereof to the discharge of the chattel mortgage.

Appeal in Chancery, Franklin County; L. P. Slack, Chancellor.

Suit by David Baker against Calvin Rushford and Ella Rushford. From a decree for plaintiff, defendants appeal. Decree reversed, and cause remanded, with direction that the complaint be dismissed.

Argued before MUNSON, C. J., and WATSON, HAZELTON, POWERS, and TAYLOR, JJ.

P. H. Coleman, of Montgomery, and A. B. Rowley, of Richford, for appellants. Gaylord F. Ladd, of Richford, for appellee.

MUNSON, C. J. The defendants are the vendors, and the plaintiff the assignee of the vendee, of a farm and personal property, the sale of which was evidenced by a writ-

ten contract, dated July 10, 1911. The price was \$3,000; \$200 of which was to be paid on or before July 10, 1912, and \$200 on or before the 10th of July in each year thereafter until all was paid. At the date of the contract, the vendee, Mary Martin, gave the defendant Calvin a chattel mortgage of all the personal property described in the contract, to secure the payment of the first \$1,500 of the purchase price. When this payment was completed, and all conditions performed, the vendors were to give the vendee a warranty deed of the land and premises, and receive a mortgage deed of the same to secure the balance of the annual payments, and the other conditions of the contract. By the terms of the contract the vendee was to pay all taxes afterwards assessed on the property, and keep the buildings and contents insured for \$1,400 in a specified company for the benefit of the vendors. The vendee and her husband took possession of the property soon after the execution of the contract, and remained in possession until October 14, 1912, on which day they assigned their interest in the contract to the plaintiff, who thereupon took possession. The dwelling house on the premises was destroyed by fire February 21, 1915, without the fault of either party. It was insured in the required company for \$1,000, by a policy procured by the plaintiff and made payable to the plaintiff and the defendant Calvin; and on the 20th of March the loss was adjusted at \$990, and covered by a check made payable to both the insured. The plaintiff indorsed the check and delivered it to Calvin, who deposited it in a bank in his name as trustee, where it has since remained. There was nothing due under the contract at the time of the fire, and \$95 had been paid on the installment next to become due; and all tax assessments had been paid. It would cost between \$1,500 and \$1,800 to replace the building. Each party has refused to take the money and rebuild. The value of the land without the building is \$800. On the 25th of March, 1915, the plaintiff gave the defendants written directions to make an immediate application of the insurance money on the payments to become due under the contract. The bill prays to have the money so applied, and the defendants ordered to make conveyance of the premises and discharge the chattel mortgage. The defendants have filed a cross-bill, praying that the plaintiff be foreclosed of his equity in the premises. The decree below is for the plaintiff. It was held in *Thorp v. Croto*, 79 Vt. 390, 65 Atl. 562, 10 L. R. A. (N. S.) 1163, 118 Am. St. Rep. 961, 9 Ann. Cas. 58, on the facts there presented, that the mortgagee should hold the insurance money and apply it to extinguish the mortgage debt, including interest, as fast as the same became due. The plaintiff claims that this decision is conclusive in his favor. The defendant does not

question the correctness of the decision, but contends that the two cases are clearly distinguishable.

[1-3] The relations of these parties at the time of the fire were those of vendor and vendee, under a contract of sale which provided for a subsequent transfer of the title on the making of certain payments, and a contemporaneous mortgage of the premises to the vendor to secure the balance of the consideration. But the rights of the parties are the same as they would have been if the fire had occurred after the conveyance; other conditions remaining the same. This was in law an executory contract, which left the legal estate in the vendor; but, except for his interest in the property as security, the vendor held the title in trust for the vendee, whom equity regards as the owner. But after the transfers, and before condition broken, the vendee would be the holder of the legal title and estate, and the vendor would have his security in the form of a mortgage. So the case is not distinguished from *Thorp v. Croto* by the fact that the latter was a suit between mortgagor and mortgagee.

But there are obvious differences between the case at bar and *Thorp v. Croto*. The facts presented in the *Thorp* Case disclose nothing as to the adequacy or inadequacy of the security, and no question as to the sufficiency of the security seems to have been raised. Nothing is said in either the majority or the minority opinion regarding the question of adequacy as a matter bearing upon the decision rendered. Here, the defendants refer to the facts reported as showing an inadequacy of security, and claim that this inadequacy distinguishes the case from the *Thorp* Case.

[4] The defendants say further of the *Thorp* Case that "both the mortgagor and mortgagee were willing that the money should be applied as payment, and the court treated it as the parties did." But the dissent was put upon the ground that the mortgagee was entitled to hold the insurance money in place of the property destroyed; so this aspect of the subject must have entered into the court's consideration of the case. The cases are alike in that no part of the debt was due when the insurance money was received, but they differ as to the terms of payment. In the *Thorp* Case there was no provision enabling the mortgagor to require an acceptance of payment in advance of its becoming due. Here the installments of the purchase money were all payable on or before the dates specified, so that the entire indebtedness was payable at once at the option of the vendee; and the vendors were directed "to immediately apply said sum * * * upon the payments to become due under said contract."

There is another difference to be consid-

ered in connection with the vendee's option. In the *Thorp* Case there was no intermediate condition on the fulfillment of which the debtor was entitled to a change in the form and substance of the security. Under this contract, the payment of \$1,500 of the purchase price would entitle the vendee to a discharge of the mortgage on the chattels, and to a conveyance of the title to the realty upon his giving a mortgage of the same to secure the balance of the debt. So this provision for an exercise of the vendee's option divides the principal into two parts, as to which the rights of the vendor touching the security are not identical.

[5] In the absence of an agreement for a release of some part of the security on the payment of a portion of the debt secured, the creditor is entitled to retain the entire security until the debt is fully paid. If the insurance money stands in place of the property destroyed it goes with the land, and retains in equity the quality of indivisibility; and the creditor is entitled to retain the entire security notwithstanding the change in form of a part of it. This would require that the insurance money be held for an application which would complete the payment of the debt. The question then arises whether the vendee's right to a transfer of the title and discharge of the chattel mortgage on the payment of a sum less than the entire debt, in connection with his privilege of paying a part or all of the notes at any time before their maturity, entitles him to use the insurance money to complete such partial payment. We think not. A part of the notes could not be paid by a tender of funds which the creditor was entitled to hold as security for the payment of all the notes. This view accords with the terms and nature of the provision regarding insurance. The vendee is to keep the buildings insured for the benefit of the vendor. The insurance is for the benefit of both parties, but is primarily for the benefit of the vendor as security holder of the property insured, and inures to the benefit of the vendee through the reduction of his debt. The vendee cannot require an application of it which would give him the primary benefit and leave the vendor inadequately secured. The application must be such as will preserve the equities of the vendor or mortgagee in the given case. Our disposition of the question presented here is not inconsistent with the decision in *Thorp v. Croto* as limited by the facts of that case; and it accords with the court's view, elsewhere expressed, that the proceeds of a policy of insurance on mortgaged property are to be substituted for the property destroyed. *Powers v. N. E. Fire Ins. Co.*, 69 Vt. 494, 38 Atl. 148.

Decree reversed and cause remanded, with direction that the complaint be dismissed.

(21 Md. 91)

CARTER v. SUBURBAN WATER CO.
(No. 56.)

(Court of Appeals of Maryland. June 28, 1917.)

1. WATERS AND WATER COURSES ⇨203(13)—
SHUTTING OFF WATER SUPPLY — INJUNCTION.

An injunction is the proper remedy to prevent the shutting off of water by a water company where the consumer denies in good faith the amount of the charge.

2. WATERS AND WATER COURSES ⇨203(13)—
WATER COMPANY—RIGHT TO SHUT OFF WATER.

Although a water company may adopt a rule that water may be shut off for nonpayment thereof, it cannot arbitrarily shut off the consumer's supply where the amount claimed is a matter of just dispute.

3. WATERS AND WATER COURSES ⇨208(6)—
WATER COMPANIES—PUBLIC SERVICE COMMISSIONS—JURISDICTION.

The Public Service Commission, under Acts 1910, c. 180, is not invested with power to determine controversies between defendant water company and plaintiff consumer as to correctness of the bills rendered.

4. WATERS AND WATER COURSES ⇨203(13)—
REFUSAL TO SUPPLY WATER—JURISDICTION.

Although it be conceded that the Public Service Commission has jurisdiction in cases involving the correctness of charges for water, it could not deprive a court of equity of its original jurisdiction to grant an injunction for refusal to supply water.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Bill by John F. Carter against the Suburban Water Company. From an order dismissing plaintiff's bill and dissolving the injunction issued, he appeals. Reversed, with costs, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert Biggs, of Baltimore, for appellant. Daniel R. Randall, of Baltimore (R. E. Lee Marshall, of Baltimore, on the brief), for appellee.

BURKE, J. John F. Carter, the appellant, is the owner of 71 dwelling houses, which are located in West Arlington, Baltimore county, Md., on certain avenues and roads mentioned in the bill filed in this case. The appellee is a public service corporation, having its principal office in Baltimore city, and is engaged in the business of furnishing water to the appellant and many other property owners in and about West Arlington. The 71 houses of the appellant are connected with the water mains of the appellee, and secure their supply of water for drinking and household purposes from them, and have no other source of supply from which water for drinking and household purposes may be secured. During the quarter ending October 30, 1916, the defendant repeatedly failed to supply said houses with a suitable quantity of water, and the appellant was subjected to damage

and loss as the result of the irregular supply of water furnished by the appellee to said houses. On the 1st day of October, 1916, the appellee furnished the appellant a bill, amounting to \$291.42, for water furnished said houses. The appellant disputed the bill, and claimed the legal right to deduct therefrom the losses sustained by him as the result of the failure of the appellee to furnish an adequate supply of water for drinking and household purposes—

“but expressed his willingness to adjust the said accounts with the defendant and to pay it such sum of money as would reasonably and fairly represent the proper charges for the services rendered by the defendant; that the said defendant, however, positively refused even to consider the claim of your orator, and also notified your orator that unless the said bills as rendered are paid on or before 10 o'clock on Tuesday the 10th day of October, 1916, it would cut off the supply from all the said houses, and leave them and the tenants therein without any supply of water for any purpose whatever.”

The appellee is insolvent.

The bill in this case was filed on October 9, 1916, and set out substantially the facts above stated, and prayed for an injunction against the appellee, its officers, agents, and servants, restraining them from cutting off the supply of water from the houses or any of them, and for other and further relief. An injunction was issued on October 9, 1916, as prayed; the appellant first having filed an approved bond in the penalty of \$2,000 as required by the order of court. On December 2, 1916, the defendant demurred to the bill upon the ground that the plaintiff “has a plain, adequate, and complete remedy at law.” On the 6th day of February, 1917, the court passed an order dismissing the bill and dissolving the injunction, and from that order this appeal was taken. The appellant filed an approved appeal bond which operated to suspend the effect of the order.

[1] The single question presented by the appeal is this: Upon the facts stated in the bill, was the plaintiff entitled to the injunction prayed for? It is to be observed that this is not a simple, and perhaps a common case, where a water company shuts off or threatens to shut off the supply of water from a consumer for nonpayment of the amount due for water supplied.

[2] It is now well settled that a water company may adopt, as a reasonable regulation for the conduct of its business, a rule providing that the water supplied to a customer may be shut off for nonpayment therefor. City of Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 92 N. E. 238, 31 L. R. A. (N. S.) 301, 19 Ann. Cas. 842; Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; McDaniel v. Springfield Waterworks Co., 48 Mo. App. 273; Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432. But it is a case of dispute as to the

amount due, where the appellant had expressed himself ready and willing to adjust and pay the amount for which he is liable, and where the company declines to accept anything less than the amounts of the bills rendered, and threatens to shut off the water on a certain day unless the bills are paid. The courts appear to be quite uniform in holding that a water company cannot arbitrarily shut off the consumer's supply when the amount claimed is a matter of just dispute. *Cox v. City of Cynthiana*, 123 Ky. 363, 96 S. W. 456; *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376; *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432.

In *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, the court said:

"While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term."

The same principle is announced in *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390. That an injunction is the proper remedy to prevent the shutting off of the water in cases where the consumer denies in good faith either his liability or the amount of the charge appears to be well established by the authorities. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *American Conduit Co. v. Kensington Water Co.*, 234 Pa. 208, 83 Atl. 70.

The occupants of these houses must have water daily and hourly. It is a prime necessity of comfort and health, and to suddenly shut off the water in order to coerce the owner to pay an unjust or a disputed bill would be not only a violation of his legal rights, but would subject him to serious injury, and such injury as the owner would likely sustain before he could be compensated in an action at law even against a solvent corporation is sufficient to furnish the equity for an application for an injunction. In *Sickles v. Manhattan Gas Light Co.*, 64 How. Prac. (N. Y.) 33, it appears that Gen. Sickles applied for an injunction to restrain the defendant from cutting off the supply of gas from his residence. He alleged that an improper bill had been presented to him, and that he had offered to pay for the gas consumed, but that the company refused to accept and threatened to remove the meter and shut off the gas. Upon these facts the court

held that he was entitled to a preliminary injunction.

[3, 4] It is contended that the Public Service Commission, under Acts 1910, c. 180, has exclusive jurisdiction over the subject-matter of this suit, and has the power to grant the plaintiff full and complete relief. We do not find that the Public Service Commission is invested with the power to hear and determine the controversy between the parties as to the correctness of the bills rendered, or to determine what amount the plaintiff owes. But if that power be conceded, the court of equity would not for that reason be deprived of its original jurisdiction to grant the injunction. It has been long since settled that, where a court of equity has original jurisdiction, and a statute confers upon the common-law courts a similar power, the jurisdiction of equity is not thereby ousted. *Barnes v. Compton*, 8 Gill, 398; *Shryock v. Morris*, 75 Md. 72, 23 Atl. 68.

Order reversed, with costs, and cause remanded.

(181 Md. 291)

HUBBARD v. HUBBARD. (No. 48.)

(Court of Appeals of Maryland. June 28, 1917.)

1. HUSBAND AND WIFE \S 297—ACTION FOR ALIMONY—EVIDENCE—SUFFICIENCY.

In a suit for alimony, *held*, under the evidence, that after the dismissal of a prior bill for divorce there was at least a partial reconciliation followed by the husband's leaving and not returning.

2. HUSBAND AND WIFE \S 288 — SUIT FOR ALIMONY—DEFENSE.

That the wife had her husband arrested, and when they were before the magistrate had asked, in anticipation of the husband's returning to their home, to be afforded police protection, would not justify a total failure to make any provision for the support of the wife barring her suit for alimony.

3. HUSBAND AND WIFE \S 288(3)—EXCESSIVE ALLOWANCE OF ALIMONY.

Where a husband had a weekly drawing account as salary of \$20 a week, an allowance to the wife of \$3 a week permanent alimony cannot be said to be unreasonable.

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Bill by Florence Hubbard against William J. Hubbard, Sr. Decree for plaintiff, and defendant appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URBNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry C. Kalben and David Ash, both of Baltimore, for appellant. James Fluegel, of Baltimore, for appellee.

STOCKBRIDGE, J. On the 27th of May, 1915, a decree was passed in a case between the same parties as those who are parties to this record, upon a bill filed originally as a bill for alimony, and subsequently by amend-

ment converted into a bill for divorce a mensa et thoro. Three days after the entry of the decree in that case an appeal was taken to this court, and, the case having been heard here, the decree of the circuit court No. 2 of Baltimore city was affirmed on January 21, 1916.

Shortly following the decree of the circuit court No. 2 of Baltimore city, to which reference has just been made, namely, on July 1, 1915, Mrs. Hubbard swore out a warrant for the arrest of her husband, charging desertion and nonsupport. Mr. Hubbard was absent from the city at the time, and did not return to Baltimore until about the middle of that month. Immediately upon his return he surrendered himself, and the case was set for a hearing on the 19th or 20th of July. When the matter was taken up before the magistrate there appears to have been some discussion relative to a possible reconciliation between the parties, and without final action there, either upon the theory of a lack of jurisdiction on the part of the magistrate or for some other reason, the case was sent to the grand jury, which subsequently found an indictment. The criminal proceeding does not appear to have been pushed to a conclusion, but was settled by the state's attorney without prejudice to the assertion of the rights of the parties in an equity court.

On September 28, 1916, the bill of complaint in this case was filed. It contains three prayers: The first, for alimony pendente lite and permanent alimony; the second, for an injunction to restrain Mr. Hubbard from disposing of certain household effects and furniture; and, third, the general prayer for relief.

The evidence consists largely of the testimony of the parties to this suit, and is contradictory on material points. It would be idle to attempt to reconcile their stories, or account for the discrepancies by any supposed lapse of memory. The alleged foundation for Mrs. Hubbard's suit is this: That some time during the month of July, 1915, or approximately two months after the dismissal of her former bill for a divorce, and after the hearing before the magistrate of the proceeding instituted because of the nonsupport, Mr. Hubbard did return to the house on Madison avenue, which belonged to the parties, and although not occupying the same room with his wife, did during some week or ten days take his meals or some of them with his wife and others who were staying at the house, thereby effecting at least a partial reconciliation of the parties.

Mr. Hubbard, on the other hand, denies most emphatically that he ever took a meal at the house or stayed in the house over night, and insists that the various witnesses who testified to his presence there were mistaken in their estimates of time by at least one year. He does admit that he paid a brief visit to the house for the purpose of

getting some of his clothing, but insists that that was all, and that the total length of time that he was so in the house was very brief.

In the course of the examination it was admitted (record, page 28) by the counsel for Mr. Hubbard that there was nothing to prevent him from going home. Of the conflicting statements made by Mr. and Mrs. Hubbard, there is no corroboration of Mr. Hubbard's version. On the other hand, Mrs. Hubbard is supported by the testimony of the son of the parties, though apparently some animus existed between the father and son.

There is further corroboration from three apparently disinterested witnesses, a Mrs. Overley, who spent a considerable length of time in the house in 1915, and who details with particularity the events and actions of Mr. Hubbard in the house during that week or ten days, at the expiration of which he left and did not thereafter return.

Mr. and Mrs. Haas were neighbors, living on Madison avenue. Their testimony is to the effect that, while neither of them saw Mr. Hubbard in the house, yet Mrs. Haas saw him entering the house, and Mr. Haas saw him in the immediate neighborhood and had a short conversation with him.

[1] The preponderance of testimony therefore is to the effect that after the dismissal of the prior bill there was at least a partial reconciliation of the parties, followed by Mr. Hubbard's leaving the home, and that he has not since returned to it.

Upon one point the evidence of the parties to the case is in entire accord, namely, that since the decree of May 27, 1915, Mr. Hubbard has contributed nothing whatever to the support or maintenance of his wife.

The right of a wife to look to her husband for support, and to maintain a bill in equity therefor, where the parties are not living together, and that through no fault of the wife, is too firmly established in the law of this state to call at this time for any discussion or extended citation of authorities. *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717.

[2] The only pretext upon which Mr. Hubbard relied in his testimony to justify his failure to return to his wife, or to fail to provide her with a proper allowance for her support, was that she had had him arrested, and that when the parties were before the magistrate she had asked in anticipation of his returning to their home to be afforded police protection, but such reasons, however galling they may have been to the husband's pride, cannot be relied upon as justifying a total failure to make any provision whatever for the support of the wife.

[3] A large amount of the testimony taken at the trial of this case was directed to the capacity of the husband to support his wife, and the details of his business and the

amount received by him from it were gone into at great length. The facts upon the uncontracted evidence of this branch of the case show that he was conducting a relatively small business in the shipping and selling of oysters, and that the profits at the close of the year were trifling in amount. In reaching this result there were deducted as a part of the expenses of the business weekly payments to the defendant as salary of \$20, to his bookkeeper of \$18, a foreman, \$15, and a driver, \$11. Without stopping to consider or discuss whether this weekly salary list was or was not out of proportion to the amount of business done, the important fact is that Mr. Hubbard had a weekly drawing account as salary of \$20.

The decree from which this appeal was taken awards Mrs. Hubbard the sum of \$3 per week as permanent alimony, less than one-fourth of the earning capacity of the husband, as shown by the salary which he was drawing. Such an allowance of alimony cannot be said to be unreasonable (*Ricketts v. Ricketts*, 4 Gill, 105; *Harding v. Harding*, 22 Md. 337); and since an allowance for alimony is subject to be increased or diminished by the court making it, according to the altered condition of the parties as they may from time to time exist, no reason is apparent for disturbing the decree of the circuit court for Baltimore city, and that decree will accordingly be affirmed.

Decree affirmed, with costs.

(131 Md. 330)

BRADFORD et al. v. MACKENZIE et al.
(No. 70.)

(Court of Appeals of Maryland. June 28, 1917.)

1. WILLS §597(1)—CONSTRUCTION—FEE.

Under a will devising the residue of testator's property equally among his wife and his seven surviving children, "their heirs, executors and assigns," share and share alike, the use of such words was not controlling as to whether the devisees took a fee simple.

2. WILLS §622—REMAINDERS—PRECEDENT ESTATE—FEE.

A remainder cannot be limited upon a fee simple.

3. WILLS §625—EXECUTORY DEVISE—PRECEDENT ESTATE.

An executory devise can be limited after a fee simple.

4. WILLS §548—CONSTRUCTION—EXECUTORY DEVISE.

Under a will devising a residue to testator's wife and his seven surviving children, their heirs, executors, and assigns, and on the death of any child intestate and without living issue devising his share over to the surviving devisees, the share of a son so dying vested in the testator's surviving children, to the exclusion of the children of a daughter dying intestate before the son.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Bill by Thomas Mackenzie, committee, and others against Samuel W. Bradford and others. Decree for plaintiffs, and defendants

appeal. Decree reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry S. Carver, of Bel Air, for appellants. Ralph Robinson, of Baltimore, and Edward H. Burke, of Towson, for appellees children of Mrs. McElderry. Gerald F. Kopp, of Baltimore, for Emeline K. Bradford. Thomas Mackenzie, of Baltimore, for committee and trustee.

BOYD, C. J. The main question involved in this case is the proper construction of the residuary clause of the will of the late Augustus W. Bradford, a former Governor of this state. That clause is as follows:

"A. I give and bequeath all the rest and residue of my property, real, personal and mixed, after the payment of any debts I may be owing at the time of my death, to be equally divided among my wife aforesaid and my said seven surviving children, to wit: Emeline K. Bradford, Jane B. Bradford, Augustus W. Bradford, Junior, Charles H. Bradford, Elizabeth Bradford, Thomas Kell Bradford and Samuel Webster Bradford, their heirs, executors and assigns share and share alike.

"B. I do hereby further direct and declare that so far as concerns the female devisees above mentioned the portions so devised to them respectively shall be for the sole and separate use of each of them and absolutely free and discharged from any interest or estate therein of any husband whom either of them may hereafter marry and in no way subject to his direction or control or liable for his debts or engagements.

"C. I do further will and declare that should either of my said seven children included in the aforesaid devise die intestate, whether in my lifetime or afterwards, and leaving no issue living at the time of their death, or should my wife die intestate, then the share or portion of the one so dying shall survive to and vest in the surviving devisees aforesaid share and share alike."

For convenience of reference we have marked those paragraphs in the residuary clause A, B, and C, although those letters do not appear in the will. By prior provisions in his will the testator had left to his wife his house and lot on Eutaw place in the city of Baltimore, together with all the household furniture, linen, pictures, and plate therein contained (excepting a set or plate described) for life, and after her death to pass into the residue of his estate and be with that residue equally divided as directed. He then made bequests to three of his sons of personal property and \$50 to each of his three daughters and the same amount to his son Charles H.

Gov. Bradford died March 1, 1881, leaving a widow and the seven children named in the residuary clause. Mrs. Bradford (the widow) died December 27, 1894, leaving a last will and testament. Jane B. Bradford died unmarried and without issue on February 27, 1905, but left a will. Thomas Kell Bradford died July 14, 1906, intestate, unmar-

ried, and without issue. Elizabeth Bradford married Thomas McElderry, who predeceased his wife, and she died June 9, 1915, intestate, and leaving four children, all of whom are of age except Sarah, and are parties to this bill. Charles H. Bradford died January 6, 1916, intestate, unmarried, and without issue. Augustus W. Bradford, Jr., and Emeline K. Bradford are still living, and both are unmarried, and Samuel W. Bradford is still living, but is married and has living issue. The three living children of the testator claim the estate left by Charles H. Bradford, while the children of Mrs. McElderry claim they are entitled to a fourth interest in it.

If paragraph A stood alone, it could not be doubted that the wife and seven children took the real estate in the residuary clause in fee simple and the entire personalty. Paragraph B tends to confirm that construction. The controversy arises by reason of paragraph C. As Charles H. Bradford died intestate and left no issue, it becomes necessary to ascertain the effect, if any, of paragraph C on paragraph A.

Paragraph C was only intended to take effect in case of a child of the testator dying intestate and leaving no issue. In determining the effect of that paragraph, it must be borne in mind that it is clear that the testator intended to connect it and paragraph B with paragraph A. Indeed, paragraph B is relied on by the appellees in support of their contention. It begins, "I do hereby further direct and declare," etc., and then paragraph C, which immediately follows, begins, "I do further will and declare," etc. It was evidently intended to be something more than a mere expression of a wish, desire, or direction, such as is spoken of as precatory language. All of those paragraphs were intended to be taken together in reference to the residuary devises and bequests, and, as we have seen, were not separated by the letters A, B, and C.

[1] It may be well to recall that the use of the words "their heirs, executors and assigns" in paragraph A is not controlling. In *Devcecom v. Shaw*, 70 Md. 219, 225, 16 Atl. 645, 647, Judge Alvey referred to what is section 327 of article 93 of Annotated Code to show that the daughter took a fee simple in the real estate without the use of the words "to her and her heirs or to her in fee simple," and he said she also took the entire interest in the personalty, but, as we will see later, held that the fee simple was defeasible and the interest in the personalty was subject to the contingencies specified. So in *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, also referred to later, the devise was, "To them and their heirs and assigns forever."

[2, 3] What effect, then, did paragraph C have on the devise and bequest given Charles H. Bradford by paragraph A? It is clear that there was no remainder, as a remain-

der cannot be limited after a fee simple (*Hill v. Hill*, 5 Gill. & J. 87; 40 Cyc. 641; 24 Am. & Eng. Ency. of Law, 380), but that is not so with an executory devise, and hence we must determine whether paragraph C was a valid executory devise, or made the estate given by paragraph A defeasible upon the happening of the contingencies specified.

[4] In 11 R. C. L., under the article "Executory Interests," the subject is discussed under different heads. Section 16 of that article on page 476 is on "Limitation Repugnant to Gift with Absolute Power of Disposal." It is there said:

"Indestructibility is an essential element of executory limitation, and an unlimited power of disposition in the first taker is clearly incongruous with this idea, being ipso facto a destruction of the executory limitation, whether the power is exercised or not. In this construction no distinction is made between goods and land, but if the primary gift vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder. Thus where an absolute gift to a person is followed in the same instrument by a gift over in case of that person dying intestate, or without having disposed of the property, the gift over is said to be repugnant, and is void. When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest. In the case of executory devises, the question whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided on a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator, which intent, when so discovered and made obvious, is controlling."

Section 17 of that article is on "Limitation Over After Life Estate with Power of Disposal." Section 18 is in reference to "Limitations tending to Create Perpetuities Generally," and section 19 as to "Limitations over on Failure of Issue." In the case of *Benesch v. Clark*, 49 Md. 497, relied on by the lower court, it was held that Mrs. Bramble only took a life estate in the Monument street lots, with the power of disposition, and that the power was effectually executed by a deed of assignment. That case turned on the question whether there was a valid execution of the power. While it is true that the language of the power there was that the lots were to be disposed of as the life tenant might see fit at his decease, and the court held that the execution of the power was not limited to a last will and testament, but the assignment of the leasehold property was valid, the court did not hold that the power to dispose of the property by will necessarily includes the power to dispose of it by deed. As shown by the discussion of the cases cited

by Judge Alvey, it depends largely upon the language of the donor of the power. We do not understand the rule to be as announced in the opinion of the lower court that "a genuine power to dispose of an estate by will includes also a power to dispose of it by deed," although such a power may be so worded as to include a power or disposition by deed. But this is not a case of whether a power has been validly exercised, but whether the limitation sought to be imposed is valid. There is not even an express power given to dispose of the property by will, although, as one of the limitations is dying intestate, it must be inferred that the testator intended that the devisees could dispose of their interests by will, but it would be difficult to construe this language into a power to dispose of the property by deed. Of course if he left the real property in fee and the personality absolutely, without any valid limitations, the devisees could convey the property by deed, or as they saw proper, but that is not the question we are now considering.

Section 19 of R. C. L., already referred to, begins by announcing a rule, which seems to be a very general one, that:

"It is well settled that while an executory limitation to take effect on a definite failure of issue in the first taker is valid, yet a limitation to take effect on a general or indefinite failure of issue is void."

Most of the rest of the section is taken up with the discussion of what is a definite or indefinite failure of issue, but there can be no such question in this case. The will itself says, "leaving no issue living at the times of their death," and the act of 1862, chapter 161, now section 332 of article 93 of the Code, provides that expressions such as "die without issue," etc., "shall be construed to mean a want or failure of issue in the lifetime, or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." A similar provision in reference to deeds is now in section 90 of article 21. *Combs v. Combs*, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359, is one of the cases cited in the note to section 19 of 11 R. C. L., above referred to, to show that in some states statutes have been passed. That case is relied on by the appellees to show that paragraph C was invalid to affect paragraph A, but there the property was devised to the devisees with full authority—"to sell and convey the same in his lifetime, or to dispose of the same by last will and testament; but should he die without issue of the body lawfully begotten, and without having disposed of the same by sale, or by last will and testament, either in whole or in part, then I give and devise my said estate, both real and personal, or the part remaining as above undisposed of, to my cousins," etc.

Of course, that limitation was held to be void, as the gift to the first taker was absolute and unqualified. It was there said

that an executory devise may be limited after a fee simple, but in such case, the former must be made determinable on some contingent event. In this case there was a fee, but it was determinable on the contingency of dying intestate and leaving no issue living at the time of the death of the devisee, "the share or portion of the one so dying shall survive to and vest in the surviving devisees aforesaid share and share alike."

In the case of *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, the testator left real estate to his wife so long as she should live or remain a widow, and at her death or marriage he left to his eight children named—

"the aforesaid real estate to them and their heirs and assigns forever, and in case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors, and this principle of survivorship I do direct to apply to any and all accumulations by survivorship, not only to the original shares, but to all accretions by survivorship until the death of any and all of such children as may die without issue at the time of his or her death."

It was there held, quoting from the syllabus for convenience:

"First. That the devisees took estates in fee, as tenants in common, defeasible as to each upon his or her death without issue, in which event the share of the person so dying passed to the survivors, so that the last survivor took his estate, including that which survived to him in fee, absolutely. Second. That it was not the intention of the testator that in the case of the death of one child without issue, his share should go in part to the issue of pre-deceased children, but nothing could pass to the issue of a pre-deceased child except that which the parent was entitled to at the time of his death. Third. That the word 'survivor' as used in the will meant the survivors of the children named as devisees, and did not include the issue of a deceased child as a surviving line of heirs."

That case is as nearly analogous to this as we could expect to find.

In *Deveemon v. Shaw et al.*, 70 Md. 219, 16 Atl. 645, the opinion of Judge Alvey filed in the lower court was adopted by this court. The testator after providing for his wife, and after making certain devises and bequests to his daughter without limitations or restrictions, added the provision:

"But in case my said daughter should die without leaving any child or children at the time of her death, or if leaving such child or children, such child or all such children should die before arriving at the age of twenty-one years, then all the real estate and personal estate devised to my said daughter shall go to my sister," etc.

It was held that:

"The daughter [of the testator] took a fee-simple estate in the realty, and the entire interest in the personality, defeasible as to both realty and personality on her dying without leaving a child, or, if she left child or children, upon their all dying before attaining the age of 21 years; and upon the happening of such contingencies the ultimate devisees and legatees would take by way of executory devise and bequest, and not by way of contingent remainder."

Judge Alvey said in his opinion:

"Upon consideration of the whole context of the will, I can entertain no doubt of the opin-

ion that the daughter was intended to take, and that she does by fair construction take, an estate in fee in the realty, and the entire interest in the personalty, defeasible as to both realty and personalty, upon the happening of the contingencies specified."

There are a number of other cases decided by this court to the same effect, and we are forced to the conclusion that under this will the children of Mrs. McElderry took no interest in the share of Charles H. Bradford left to him by his father's will.

It was said at the argument that in prior matters concerning the estate of Gov. Bradford the appellants had concurred in the views now taken by the appellees, and proceeds of properties had been disposed of accordingly, but there is nothing in the record which would justify us for that reason in making the distribution now before us contrary to what we are of opinion the will and authorities require. We will, however, direct that the costs be paid out of the estate of Charles H. Bradford.

Decree reversed, and cause remanded for further proceedings in accordance with this opinion, the costs to be paid out of the estate of Charles H. Bradford.

(131 Md. 50)

ARTHUR & BOYLE v. MORROW BROS.
(No. 51.)

(Court of Appeals of Maryland. June 28, 1917.)

1. RELEASE \S 57(1) — **EVIDENCE** — **SUFFICIENCY**.

In an attachment issued against a general contractor on a judgment against the subcontractor for work done by plaintiffs, *held*, under the evidence, that a release under seal executed by the subcontractor to the general contractor was not a release of the debt attached.

2. EVIDENCE \S 76—**PRESUMPTION**—**FAILURE OF PARTY TO TESTIFY**.

That neither of the garnishees took the stand raises a presumption against them.

3. FRAUDULENT CONVEYANCES \S 229—**LIABILITY OF GRANTEE**—**GARNISHMENT**.

If a creditor has fraudulently conveyed property to another, the grantee may be charged as garnishee.

4. FRAUDULENT CONVEYANCES \S 48—**VOLUNTARY RELEASE BY CREDITOR**.

The voluntary release of his debtor, by a creditor not having the means to pay debts is void as to the creditors of the latter.

5. FRAUDULENT CONVEYANCES \S 273—**VOLUNTARY RELEASE**—**PRESUMPTION**.

If the necessary effect and operation of a voluntary release of a debtor was to hinder, delay, or defraud creditors, the legal presumption is that it was made for that purpose.

6. FRAUDULENT CONVEYANCES \S 23—**VOLUNTARY RELEASE OF DEBTOR**—**INSTRUMENT UNDER SEAL**.

If the release had its origin in fraud, or what the law deems fraud, it would make no difference that it was under seal.

Appeal from Superior Court of Baltimore City; Robert F. Stanton, Judge.

Suit by Arthur & Boyle, for the use of Fielder C. Slingluff and another, trustees, against James G. Parlett. On the judgment

for plaintiffs, an attachment was issued against Morrow Bros., garnishees. From the judgment against the garnishees, plaintiffs appeal. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Albert R. Stuart and Stuart S. Janney, both of Baltimore (Ritchie & Janney, A. Dana Hodgson, and Fielder C. Slingluff, all of Baltimore, on the brief), for appellants. Carville D. Benson and John D. Nock, both of Baltimore (Benson & Karr, of Baltimore, on the brief), for appellees.

BOYD, C. J. The appellees were the general contractors for the State Normal School building near Towson, and made in writing a subcontract with James G. Parlett to do certain work in connection with its construction. The contract is not in the record, but a memorandum of agreement filed in the case shows that it was for grading and landscaping. Parlett made a subcontract with Carozza Bros. & Co., who in turn entered into a subcontract with Arthur & Boyle, the appellants.

While that work was going on, Charles Morrow, one of the appellees, called Frank J. Boyle, one of the appellants, to where he and Parlett were standing, and asked him if he would make some tunnels which were to be constructed under the building, and he replied that he would if he got his price, and that he could start the next morning. After some conversation about the price, Morrow turned to Parlett and said:

"Parlett, get them in right away," and also said to me, "You had better get your shovel up there and get to work on them and get them out, as we can't start this building until these tunnels are taken out." Q. And he said to Mr. Parlett, "You get them out right away"? A. Yes."

That is substantially all in the record in reference to the contract for the tunnels, but it is corroborated by Parlett.

The appellants did the work, and received a payment of \$1,890 on account of it. Frank J. Boyle testified that the amount was paid to him by Parlett, who received the money from Morrow Bros., at their office, in his presence, and turned it over to him. Later the appellants sued the appellees for the balance they claimed to be due on account of the work on the tunnels, but the case was decided against them. Afterwards they sued Parlett and recovered a judgment against him for \$4,409.05, with interest and costs. On that judgment an attachment was issued, and laid in the hands of Morrow Bros. They first filed a plea of nulla bona, but subsequently filed an additional plea in which they admitted having \$250 in hand due Parlett, but alleged that they had no other goods, chattels, or credits of Parlett in their hands. The \$250 was for the balance due on the

contract for grading and landscaping. The trial in this case resulted in the appellants obtaining a verdict for only \$250 against Morrow Bros., the garnishees, and they appealed from the judgment thereon.

There are only two bills of exception in the record, the first being to the admission of an "agreement and release," a "memorandum of agreement," and a receipt which were offered by the garnishees, and the second presents the rulings on the prayers. The plaintiffs offered five prayers, all of which were rejected, and the garnishees offered three, the second of which was granted, and the others rejected. We do not find in the record a copy of the judgment on which the attachment was issued, but the evidence of Mr. Boyle shows that they recovered judgment for \$1,409.05, with interest from May 9, 1916, and apparently that was the date of the judgment. Nor is there anything to show when the suit against Parlett was instituted. The appellees rely on the agreement and release referred to, while the theory of the appellants is that Morrow Bros. owe Parlett a balance for the work on the tunnels, which they claim is the amount of the judgment they recovered against Parlett, and (1) that Parlett never did release this claim, and (2) that, even if he did, the release was without consideration, void and of no effect as to them, by reason of the British statute (15 Elizabeth, c. 5) known as the statute against fraudulent conveyances, in force in this state.

[1] 1. We find no error in admitting the papers referred to, notwithstanding our conclusion to be hereafter stated as to the effect of the release. The memorandum of agreement was dated March 16, 1916, and was executed by Morrow Bros., parties of the first part, James G. Parlett, party of the second part, and Carozza Bros. & Co., parties of the third part, the individual members of the two firms being also named. Its recitals are as follows:

"Whereas, the parties of the first part entered into a contract with the party of the second part *for the grading and landscaping [italics ours]* at the Maryland State Normal School, and the parties of the third part claim to have an assignment of said contract from the party of the second part; and whereas, a dispute has arisen in regard to the state of accounts between them, and the parties hereto have arrived at a compromise settlement of their differences: Wherefore, now this agreement witnesseth: That in consideration of the sum of one (\$1.00) dollar by each of the parties hereto to the other paid, and in further consideration of certain mutual concessions by the parties hereto, it is agreed by the parties hereto and each of them that the total amount due by the parties of the first part in connection with and as a result of the *matters and things hereinbefore referred to [italics ours]* is eleven thousand five hundred dollars (\$11,500), and no more."

On the same day what is called an "agreement and release" was executed by Parlett, party of the first part, and the Carozza Bros. & Co., parties of the second part, to the

Morrow Bros., parties of the third part, the individual members of the firms being also named. It recites:

That, "whereas, certain differences and disputes have arisen between * * * [naming the parties] regarding certain contracts entered into by the parties of the first and third parts regarding certain work to be done at and on the Maryland State Normal School, for the erection of which school the parties of the third part were the general contractors, and whereas said differences and disputes have been adjusted to the satisfaction of the parties hereto," and that for and in consideration of the sum of \$10,500 in hand paid to the parties of the first and second parts by the parties of the third part, the receipt of which is acknowledged, and the further payment of \$1,000 when the state of Maryland makes final payment to Morrow Bros., and of other good and valuable considerations, Parlett and Carozza Bros. & Co. and each of them, remise, release, and forever discharge Morrow Bros. "from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, covenants, contracts, agreements, promises, damages, claims, and demands whatsoever in law or in equity which against the said William H. Morrow and Charles A. Morrow, or either of them, they ever had, now have, or which their respective heirs, personal representatives, or assigns hereafter can, shall, or may have, for, upon, or by reason of any manner or cause or thing whatsoever from the beginning of the world to the day of the date of these presents; the said parties of the first and second parts, and each of them, hereby declaring themselves fully paid and satisfied.

"And the said parties of the first and second parts do hereby covenant and warrant that any and all claims of any other subcontractors or other persons for labor and material done or furnished in, about, or in connection with the construction of the State Normal School in Baltimore county, or in or about the site of said State Normal School building, are paid in full, and that they and each of them will assume and pay any and all such claims as may arise or be presented."

The receipt referred to is as follows:

"Baltimore, 3/16/1916.

"Received of Morrow Bros. two thousand dollars in full settlement of Normal School contract, except the sum of \$1,000, which is to be paid when work is finally completed and accepted, to be paid as follows: Parlett, \$250.00; Carozza, \$750.00."

That is signed by Parlett and Carozza Bros. It would be difficult to use more words in a release than in the one above set out, but there are some significant facts which cannot be overlooked. In the first place, it would have been so easy to mention the contract for tunneling if that was intended. Then the "memorandum of agreement" and the "agreement and release" were executed the same day, and the former specifically refers to the contract for grading and landscaping and to no other contract. It cannot be contended that it relates to that for tunneling. It is there agreed "that the total amount due by the parties of the first part [Morrow Bros.] in connection with and as a result of the matters and things hereinbefore referred to, is eleven thousand five hundred (\$11,500) dollars, and no more." The only things "hereinbefore referred to" are the grading and landscaping. The \$11,500 is the precise sum named as the

consideration in the agreement and release, there being \$10,500 in hand paid, and the sum of \$1,000 to be paid when the state made its final payment. It is therefore affirmatively and clearly shown that no part of the \$11,500 was paid for the tunneling, but that the whole of that sum was due by Morrow Bros. to Parlett and Carozza Bros. Company for grading and tunneling.

But beyond that it is stated in the opinion of the learned judge below, and we so understand from the record, that the contract for the grading and landscaping was made between the Morrow Bros. who were the general contractors, and Parlett. Then Parlett made a subcontract with Carozza Bros. & Co. for that work, which, according to the memorandum of agreement, the latter claim amounted to an assignment of it, and that firm made a subcontract with Arthur & Boyle for that work. We find nothing in the record to suggest that the Carozza Company had any interest whatever in the contract for tunneling. It was therefore proper to join the Carozza Company in the memorandum of agreement and for them to unite in the release, and to require that company and Parlett to discharge Morrow Bros. from all claims they were jointly interested in or connected with, but why should it have been intended by that instrument to release Morrow Bros. from a claim of Parlett with which the Carozza Company had no connection? If it had been so intended, the natural and proper thing to do was to specifically recite in the release the claim for tunneling, as the Carozza Company had nothing to do with it, but were parties to the release. It is clear that the release was only intended to affect the contract or contracts with which Parlett and the Carozza Bros. & Co. were both connected, and not the one to which the latter were in no wise parties.

Then when we come to the oral evidence, which was admitted without objection so far as the record discloses, and, we think, properly admitted under the issues, it is altogether on the one side. Neither of the Morrows testified, nor did they call a witness, notwithstanding Parlett had sworn that the tunnel work was not included, and not intended to be included. As the record stands, Morrow Bros. have only paid \$1,890 for "sixty some hundred dollars" of work, without an iota of evidence to contradict that statement by Parlett, and if the appellees' construction of the release is correct, they were released from the payment of over \$4,000 without one penny's consideration; for, as we have shown, the consideration named in the release is exactly what all of the parties agreed under seal was due for the grading and landscaping.

But that it not all. Morrow Bros. not only knew that Arthur & Boyle were doing the tunneling, but according to the uncontradicted evidence Charles Morrow told Parlett in Boyle's presence to get them to work right

away, and Parlett gave them a written order to do the work, which work it is not denied they did. The \$1,890 which they did pay was paid to Parlett in Boyle's presence, and then turned over to him in Morrow Bros.' office. Parlett was criticized at the argument for making in this case statements contradictory to and inconsistent with his evidence in the suit which Arthur & Boyle brought against Morrow Bros. for the balance due for the tunneling work, but it cannot properly be said that his explanation is an unreasonable one. He testified in the other case that the money was due to Arthur & Boyle, and not to him, and he said at this trial that he then thought it did. They did the work, and under the facts about their employment shown by the record he might well have believed that they were entitled to the money. As Arthur & Boyle did the work, if their charges for it amounted to all that Morrow Bros. were to pay for it, the proper thing for Parlett to do was to treat it as their money, and not his. When the court determined that Arthur & Boyle could not recover from Morrow Bros. and that Parlett was responsible to them, he then very properly concluded that the money was due him. It certainly was not intended by the court, or any one else, that it should not be paid to some one. It was due either to Arthur & Boyle directly, or to Parlett for their benefit. He admits that he made a memorandum in his book of the amount, and sent Morrow Bros. a notice of it, but he says that his idea was that he was to collect it and pay it to Arthur & Boyle. As he had given the written order to Arthur & Boyle to proceed with the work, it was perfectly proper for him to make and keep a memorandum of it, but the only money that has been paid he paid over at once to Arthur & Boyle in the presence of Mr. Morrow.

[2] The fact that neither of the Morrows went on the stand is significant and raises a presumption against them. *Dawson v. Waltemeyer*, 91 Md. 328, 46 Atl. 994. Their claim that they are released from the sum due is simply based on the fact that the release is under seal, and not even on a contention that they have paid the money. We are therefore of the opinion that under the evidence the release did not apply to the contract for tunneling, and hence the fact that it was under seal can make no difference.

That being so, no reason appears from the record why Parlett cannot sue Morrow Bros., and there can be no application of the general principle referred to in the opinion of the lower court, and in the authorities cited by the appellees, that ordinarily the test of the liability of a garnishee is whether he had property, funds, or credits in his hands for which the debtor can sue him. That general principle is clearly and thoroughly established by 2 Poe on Pl. & Pr. § 531, B. & O. R. R. Co. v. Wheeler, 18 Md. 372, Myer v.

Insurance Co., 40 Md. 595, and many other authorities which could be cited, if there was any doubt about it.

[3] But there are well-recognized exceptions to the general rule, one of which is that, if a creditor has fraudulently conveyed property to another, the grantee may be charged as garnishee. *Odend'hal v. Devlin*, 48 Md. 439; *Farley v. Colver*, 113 Md. 379, 386, 77 Atl. 589; *Hodge & McLane on Attachments*, § 148. If he has conveyed it contrary to the Statute of Elizabeth, it comes within the exception.

[4-6] But if the release had included this fund, then it would have been null and void and of no effect as against the appellants or other creditors of Parlett. He testified that he had no means with which to pay this judgment, and it was in effect conceded at the argument that he was insolvent. If a debtor and creditor can discharge an indebtedness simply by having the creditor execute an instrument like this under seal, and the creditor has no other means with which he can pay his debts, then indeed might it be properly charged that the law encourages fraud and protects fraudulent transactions, instead of protecting honest and innocent people from attempts to defraud them. We do not mean to say that there was intentional fraud in this matter, but if it was intended to get rid of this indebtedness for no sufficient consideration, and thereby put it beyond the reach of the creditors of Parlett, it was certainly what the law condemns. Parlett swears positively that it was not intended to release this claim. The *Morrrows* are silent. The Statute of 13 Eliz. (chapter 5) has frequently been before this court. A voluntary conveyance is *prima facie* invalid as against existing creditors of the grantor who has no sufficient means to pay his debts, independent of that conveyed, without regard to his actual intent or to that of the grantee. *Christopher v. Christopher*, 64 Md. 583, 588, 3 Atl. 296; *Cone v. Cross*, 72 Md. 102, 105, 19 Atl. 391. The burden is on the party claiming under the conveyance to prove that a debtor had sufficient property with which to pay his debts, exclusive of that conveyed away. It is not necessary in order to bring a conveyance within the statute that there shall be an actual intent on the part of the grantee to perpetrate a fraud. If the necessary effect and operation be to hinder, delay, or defraud creditors, the legal presumption is that it was made for that purpose. *Schuman v. Peddicord*, 50 Md. 560, 563; *Riley v. Carter*, 76 Md. 581, 600, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; 1 Alex. Br. Stat. (Coe's Ed.) 507, note 21. If the release had its origin in fraud, or what the law deems fraud, it would make no difference that it was under seal. *Schaferman v. O'Brien*, 28 Md. 565, 575, 92 Am. Dec. 708; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290.

The statute is applicable to release of debts. *Bigelow on Fraud. Con.* 132; *May on Fraudulent and Voluntary Dis. of Prop.* (3d Ed.) 15, 16, 20, 21; *Moore on Fraud. Con.* p. 60, § 19; *Hauser v. King*, 76 Va. 731, 737; 12 R. C. L. 507, § 36; 20 Cyc. 354, 406.

It follows from what we have said that there was error in granting the garnishee's second prayer and rejecting the plaintiff's prayers. In this state the practice has been and is to permit a creditor to resort in such cases to either of two remedies, that of attachment or by bill in equity (*Stockbridge v. Fahnestock*, 87 Md. 127, 136, 39 Atl. 95, and cases there cited); and hence we have not thought it necessary to refer to the jurisdiction of a law court, as it is well established.

Judgment reversed, and new trial awarded; the appellees to pay the costs, above and below.

(131 Md. 296)

SOULSBY et al. v. AMERICAN COLONIZATION SOC. et al. (No. 54.)

(Court of Appeals of Maryland, June 28, 1917.)

APPEAL AND ERROR 1203(5)—MANDATE—DISMISSAL.

In a suit by the residuary legatees of the grantor of the trust to declare it void, a judgment of the Court of Appeals on a former appeal that the trustees' adversary possession of the trust property for more than 20 years prior to the suit was a bar to its recovery by the petitioners, notwithstanding a statement in the opinion that the trust was void because conflicting with the rule against perpetuities, was a determination that the petitioners had no right of action, so that, after mandate, the lower court's decree dismissing the petition was correct.

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Suit by Robert Soulsby and others against the American Colonization Society, Ferdinand C. Latrobe, and another, trustees. Decree sustaining the demurrers to the petition and dismissing the petition, and petitioners appeal. Decree affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Leigh Bonsal, of Baltimore, for appellants. William G. Johnson, of Washington, D. C., and D. K. Este Fisher, of Baltimore, for appellee American Colonization Soc. Charles F. Stein, Eugene O'Dunne, and Donald B. Creecy, all of Baltimore, for appellees Ferdinand C. Latrobe and James W. Harvey, trustees.

CONSTABLE, J. This appeal arises from a misunderstanding of the meaning and effect of the mandate together with the opinion of this court in the case of the American Colonization Society v. Robert Soulsby et al., 129 Md. 605, 99 Atl. 944, L. R. A. 1917C. 937.

We need only refer briefly to the facts of

the litigation, for they were set out very fully in the careful and comprehensive opinion prepared by Judge Pattison on the former appeal. Caroline Donovan in 1886 executed a declaration of trust, in which she provided that after her death certain enumerated real property should be held by specified trustees, and the net income paid over to the American Colonization Society for the transportation annually to Liberia of such colored persons as might desire to emigrate to that country, with the further provision that, if in any one year the cost of transportation for that year should not require the whole of the net income for that year, the income, or any balance, should be used by the said society for the maintenance of public schools for the education of colored children in Liberia. It was provided that the trust was to be under the supervision of a court of equity; so therefore at the death of Caroline Donovan, in March, 1890, the circuit court of Baltimore city assumed jurisdiction of the trust; and from that time to the present the trustees have collected the rents from the properties and paid the net income over to the society.

The American Colonization Society is a Maryland corporation incorporated in the year 1831, and was empowered under a new charter, passed in 1837, to purchase, have, and enjoy any lands by the gift, bargain, sale, devise, or otherwise of any person, to take and receive any sums of money, goods, or chattels that should be given to it in any manner, and to occupy, use, and enjoy, sell, transfer, or otherwise dispose of the same as it should "determine to be most conducive to the colonization, with their own consent in Africa, of the free people of color residing in the United States."

The appellants and petitioners, who are the heirs at law and residuary legatees of Caroline Donovan, filed their petition in this cause, praying that the trust properties might be delivered over them, upon the ground that the trust was void. The reasons assigned for its invalidity were twofold, or in the alternative. They contended, in the first place, that the declaration of trust was void as contravening the rule against perpetuities and for indefiniteness, and again that, even though it should be found that for those reasons it was not void ab initio, yet nevertheless it had since become inoperative and void, because the objects and purposes for which it had been created could no longer be accomplished.

Demurrers were filed to the petition on various grounds, including the ground that adversary possession for several years more than the statutory period completely barred all recognition of the petitioner's claim. The lower court overruled the demurrers, and the trustees and the society appealed to this court. This court, in disposing of the appeals, entered the order as follows: "Order reversed, and cases remanded; the appel-

lees to pay the costs." After the mandate was received below, the petitioners asked leave to amend the petition, but this the court refused to permit, and entered a decree sustaining the said demurrers and dismissing the petition. From this decree the petitioners have taken the present appeal.

As we said in the beginning of this opinion, this appeal arises from a misconception of the effect of the order on the first appeal. The appellants have laid hold of certain passages in the opinion the meaning of which, when considered with the whole of the text, gives no aid to the appellants' present contentions, and were not intended to do so when adopted by us. From the passages they argue that, when this court reversed the previous decree and remanded the cause, it must have intended that the petitioners were to be allowed to amend. The fact is that this court intended exactly what it has intended in a great number of cases where similar orders have been passed, where, by the opinion filed, it appeared that the complainants' or petitioners' contentions had been ruled against, that is, to have the lower court enter the decree of dismissal.

As stated above, the petitioners had two contentions—one that the trust was void ab initio; the other, that although the courts should find that the trust was not void ab initio, yet it must be found that it was void now, for the reason that the purposes for which it had been created were no longer available. Judge Pattison in delivering the opinion of the court first dealt with the former contention, and, after reviewing several of our leading cases treating of the rule against perpetuities, announced our conclusion in the following plain and unequivocal language:

"Whatever may be the law elsewhere, we, following the decisions of this court, must hold the trust in this case to be void because it is a perpetuity. In that it attempts to create an active trust which is required to continue beyond the period limited by the rule, but, although the trust is void for the reason stated, the petitioners are barred from recovery upon the ground of its invalidity, resulting from such cause, because of the adversary possession of the trustees of the trust property for a period of more than 20 years prior to the institution of these proceedings."

And in support of the latter part of the above *Needles v. Martin*, 33 Md. 618, was cited and quoted from with several citations of authorities to the same effect.

This, then, became the law of the case, and the correct law, as we then thought and now think. In our opinion, when we held that the adversary possession by the trustee of the trust property was a bar to its recovery by the petitioners, we intended to say just what the words, in their ordinary meaning, import; that is, that whatever rights the petitioners might have had at one time had been lost because others had acquired them through operation of law. This absolutely settled the case, in so far as the peti-

tioners were concerned, without the necessity of adverting to the other contention of the petitioners, based upon the theory that the trust, at the time of its creation, was a valid one, but had since become void through the impossibility of carrying out its objects. But it was thought proper, and perhaps helpful as a matter of pleading, to point out why the allegations of the petition that the grantor's objects and purposes were not being carried out were insufficient, and the demurrers thereto would have had to be sustained, if a different view had been taken of the question of adverse possession.

The lower court by its order dismissing the petition correctly expressed the mandates of this court.

Decree affirmed; the appellants to pay the costs.

(130 Md. 696)

HOEN v. KIDD. (No. 69.)

(Court of Appeals of Maryland. June 28, 1917.)

BROKERS — §88(1) — COMMISSION — RECOVERY — JURY QUESTION.

In an action for commissions on the sale of timber, held that the case was properly submitted to the jury; the evidence as to the agreement that defendant was to be the judge whether plaintiff actually made the sale being contradictory.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Frank B. Kidd against Frank N. Hoen. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Elmer J. Cook, of Towson (Frank J. Hoen and Willis & Willis, all of Baltimore, on the brief), for appellant. T. Scott Offutt, of Towson, for appellee.

STOCKBRIDGE, J. This appeal is from a judgment for \$170, rendered in the circuit court for Baltimore county in a suit to recover commissions on a sale of timber growing on some land belonging to the appellant. There is but one bill of exceptions. That was reserved to the action of the trial court upon the prayers. The first instruction asked for by the defendant was that there was no evidence legally sufficient to entitle the plaintiff to recover, and that the verdict must be for the defendant. It is upon the rejection of this prayer that the appellant lays the most stress, and it is to this that consideration must first be given.

In the early part of September, 1915, Mr. Kidd, a real estate broker, called on Mr. Frank H. Hoen relative to a sale of the timber on some 200 acres of land belonging to the latter in Baltimore county. He produced a contract which Mr. Hoen refused to sign. Mr. Kidd got up to leave, saying:

"I can't do any business with you?" and I said, 'No, sir; none at all,' and he started out the door, and then he came back and he said, 'Now, Mr. Hoen, suppose I could procure a purchaser for this tract of timber; you would not object to paying me the commission?' and I said, 'No; if I could know you were able to sell it and actually did it, I would not object to paying you the commission, but under no circumstances would I give you the order or commission you to act for me in the premises at all; I would have to be the judge as to whether you actually made the sale or not,' he said, 'That is perfectly satisfactory to me; you are responsible; that is perfectly satisfactory,' and with that he went out."

This is the account of the first interview as given by Mr. Hoen. Mr. Kidd's version is much shorter. He denies positively the statement that Mr. Hoen was to be the judge whether Mr. Kidd made the sale or not, and described the interview in this way:

"I told him I was in the real estate business and sold farms and also sold timber, and Mr. Hoen said that if I would bring or send a man I would get five per cent. commissions, and he asked, first, who paid the commissions and I said, the man selling it, and I told him I sold farms too, and I think I left him a form—I forget what you call it—a form where you fill out, a blank form."

Mr. Kidd went to Natwick & Co. to endeavor to induce them to purchase the timber, and on September 14th this firm wrote to Mr. Hoen, looking to a possible purchase. This letter was followed up by a call on Mr. Hoen by Mr. Natwick on October 31st. The progress was slow, and the deal not finally consummated until January 26, 1916, but negotiations do not seem to have been ever definitely broken off, and on frequent occasions, either by calls or conversations over the telephone, Mr. Kidd continued to press the completion of the sale.

At some time during this period a Mr. Snyder appears upon the scene, and it is suggested that he was or might have been the efficient cause in consummating the transaction. Mr. Natwick's testimony in relation to Snyder makes it seem as though his call was of a social rather than business nature. The case as presented, therefore, cannot be said to have been so entirely devoid of evidence as to warrant the court in withdrawing it from the consideration of the jury. On one material point there was a direct contradiction between the plaintiff and defendant, and it was for a jury, not the court, to say which was the correct version.

The subject of real estate brokers commissions has been a most fruitful occasion for litigation, and decisions defining the law governing them can be found in every state in this country. Nowhere have the principles controlling such controversies been more clearly stated than in Maryland. Such cases as *Keener v. Harrod*, 2 Md. 70, 56 Am. Dec. 706; *Martien v. Baltimore*, 109 Md. 260, 71 Atl. 966; *Walker v. Baldwin*, 106 Md. 632, 68 Atl. 25; *Slagle v. Russell*, 114 Md.

418, 80 Atl. 164; Way v. Turner, 127 Md. 327, 96 Atl. 676, and Daniels v. Iglehart, decided at the present term (no opinion filed), have fully covered every principle involved in this case, and a mere repetition of what was said in these cases would be superfluous.

Objection to the other prayers was not strenuously insisted on, and, even if it had been, no reversible error is apparent in any of them; and, as the plaintiff produced sufficient evidence to require the submission of the case to a jury, the judgment appealed from will be affirmed.

Judgment affirmed.

(131 Md. 301)

BECKER v. FREDERICK W. LIPPS CO.
(No. 57.)

(Court of Appeals of Maryland. June 28, 1917.)

1. EQUITY \S 43—LEGAL REMEDY.

Where plaintiff's right of action is not dependent upon or based upon some equitable matter, such as fraud, mistake, accident, trust, accounting, or the like, and the legal remedy would be complete, adequate, and certain, courts of equity have no concurrent jurisdiction, and will not interpose.

2. ACCOUNT \S 12 — SUIT FOR ACCOUNTING — BILL.

Bill in equity brought by the purchaser of a year's output of empty barrels from a manufacturer of confections, which bill alleged that the confectioner failed to deliver empty sugar barrels, and that plaintiff had no way to ascertain what number constituted the entire output of sugar barrels for the year, and prayed for a discovery and accounting and damages, could not be maintained as a suit for an accounting.

3. DISCOVERY \S 6—AUXILIARY REMEDY.

Discovery in equity to support an action at law or as auxiliary to the maintenance of a suit contemplated to be brought can be resorted to only where the discovery is essential and absolutely necessary to the establishment of plaintiff's rights, and the information cannot be otherwise obtained.

4. DISCOVERY \S 3 — BILL — POSSIBILITY OF DISCOVERY AT LAW—STATUTE.

Bill by purchaser of a year's output of empty sugar barrels from a confectioner, which alleged nondelivery, and prayed discovery, and a judgment for damages, was not maintainable as a bill for discovery, so that the court would proceed to determine the whole matter in controversy, as the discovery prayed for would have been available to plaintiff under Code Pub. Gen. Laws 1904, art. 75, §§ 99 and 100, providing mode of procuring production of books, papers, and testimony in a court of law.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

"To be officially reported."

Suit by William Becker, trading as William Becker & Co., against the Frederick W. Lipps Company, a body corporate. From an order sustaining demurrer and dismissing the bill, plaintiff appeals. Order affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Louis S. Ashman and George Weems Williams, both of Baltimore (Lucius Q. C. La-

mar, of Baltimore, on the brief), for appellant. Laurie H. Riggs, of Baltimore (C. R. Watten-scheidt, of Baltimore, on the brief), for appellee.

BRISCOE, J. The questions for decision in this case are raised upon a demurrer to a bill in equity which was sustained by the circuit court of Baltimore city. The bill was accordingly dismissed, and leave of the plaintiff to amend was denied.

The principal defense made on the demurrer and relied upon in argument is that the circuit court of Baltimore city has no jurisdiction of the subject-matter of the suit, because the cause of action and relief demanded are fully legal in their nature and properly cognizable in a court of law.

The facts of the case out of which the controversy arose and upon which the decision of the case must turn are stated and appear from the averments of the bill and are admitted by the demurrer to be true. They are these:

The plaintiff is engaged in the cooperage business in the city of Baltimore, and in the conduct of the business and in connection therewith buys and sells empty barrels of various kinds. The defendant is engaged in the manufacture and selling of chocolate and confections in the city of Baltimore, and in connection with its business has on hand a large number of empty barrels of different kinds for sale. On August 6, 1915, the plaintiff agreed to purchase and the defendant agreed to sell all of defendant's output of empty barrels for the period of one year from the 15th of July, 1915, to the 15th of July, 1916, upon the terms, conditions, and prices provided by a contract between the parties, which will more fully appear from the averments of the bill disclosed by the record now before us. The contract was signed in duplicate, is filed with the bill, as Plaintiffs Exhibit No. 4, and is as follows:

"Baltimore, Md., 7/15/15.

"This agreement made this 15th day of July, 1915, between Wm. Becker & Co., parties of the first part, and the Frederick W. Lipps Company, parties of the second part, all of Baltimore city:

"Parties of the first part agree to purchase and parties of the second part agree to sell all of their entire output of empty barrels, as they run, no deductions to be made for damaged barrels, unless by mutual consent, prices as follows:

Condensed milk oak barrels.....	\$1.00
Soft wood condensed milk barrels.....	.60
Glucose barrels90
Headdown glucose barrels.....	.75
Single head glucose barrels.....	.60
Grain alcohol and spirit barrels.....	1.00
Olive oil and cotton seed barrels.....	1.00
Engine, cylinder, dynamo oil barrels.....	.35
Double head sugar barrels.....	.20
Damaged and single head sugar barrels.....	.15
Cocconut, originally sugar barrels.....	.15

"And all other empty packages not mentioned above to be accepted at the ruling market prices.

"The parties of the first part guarantee the above prices for one year from date, and agree

to promptly remove all barrels when notified by the parties of the second part.

"Witness the signature of the parties of the first part and the parties of the second part duly authorized to sign this agreement.

"Terms: Cash on delivery.

"Accepted August 5, 1915.

"The Frederick W. Lipps Co., [Seal.]

"By Frederick W. Lipps, Pres."

The bill alleges that the defendant failed to deliver to him the entire output of empty sugar barrels, as under the contract it was required to do, but has at all times refused to deliver any of said barrels, although often demanded so to do; that the defendant has broken the contract, and as a result thereof the plaintiff has suffered a very substantial loss and damage therefrom.

The bill then alleges that the plaintiff has no way or means of ascertaining what number in fact constituted the defendant's entire output of sugar barrels for the period of one year mentioned in the contract because the facts and the means of ascertaining them are in the exclusive keeping and possession of the defendant.

The prayer of the bill is, in substance, that a court of equity decree a discovery, an accounting, and the defendant also be decreed to pay the sum ascertained to be due the plaintiff as damages for a breach of the contract, and such other and further relief as the case may require.

It is contended upon the part of the defendant in support of the demurrer that the plaintiff's relief or remedy, if any, is an action at law for the recovery of damages for a breach of contract; that a court of equity is without jurisdiction to entertain this bill, and the plaintiff ought to be left to his remedy at law.

On the other hand, it is urged by the plaintiff that the bill is one for an accounting and a discovery, and that a court of equity has concurrent jurisdiction to hear and determine the case under the averments of the bill. The doctrine is well settled in this state that, where a party has a certain, complete, and adequate remedy at law, he cannot sue in equity. The cause of action in this case, it will be seen, is clearly and primarily a legal one, arising from the nonperformance of a contract to deliver sugar barrels, and for the breach of which damages are sought to be recovered by the plaintiff from the defendant.

[1] In such cases, where the right of action is not dependent upon or based upon some equitable matter such as fraud, mistake, accident, trust, accounting, or the like, and the legal remedy would be complete, sufficient, and certain, courts of equity have no concurrent jurisdiction, and will not interpose. 1 Pomeroy, Eq. Jurisprudence, §§ 178-236; Price v. Tyson, 3 Bland, 399, 22 Am. Dec. 279; Powles v. Dilley, 9 Gill, 239; Taylor v. Ferguson, 4 Har. & J. 46.

In *Oliver v. Palmer*, 11 Gill & J. 444, it is said, if in a case like the present, where

the claim asserted is strictly legal in its form and substance, where the remedy at law is expeditious and ample, you grant to the court of equity the power ascribed to it upon the principles upon which it is claimed, there is scarcely a case resting in contract and now cognizable in a court of law which may not be drawn into the vortex of chancery jurisdiction.

[2] It is quite certain that the bill in this case cannot be sustained or maintained as a suit in equity for an accounting. Its allegations are not such as to bring it within that class of cases where a court of equity will take jurisdiction for an account. *Miller's Equity*, § 721, p. 823; 1 Pomeroy, *Equity Jurisprudence*, § 230; *Taylor v. Ferguson*, 4 Har. & J. 46. But it is insisted on the part of the appellant that the bill is framed for discovery, as well as for relief, and the court, being rightly in possession of the cause, will proceed to determine the whole matter in controversy.

[3] There are cases where a discovery may be had not only to support an action at law, but as auxiliary to the maintenance of a suit contemplated to be brought, but they are cases where the discovery is essential and absolutely necessary to the establishment of the plaintiff's rights, and the information cannot be otherwise attained. *Wolf v. Wolf*, 2 Har. & J. 382, 18 Am. Dec. 313; *Parrott v. Chestertown Bank*, 88 Md. 515, 41 Atl. 1087; *Heinz v. German Bldg. Ass'n*, 95 Md. 160, 51 Atl. 951; *Union Passenger Railway Co. v. M. & C. C.*, 71 Md. 238, 17 Atl. 933.

The general principle is stated in *Russell v. Clark*, 7 Cranch, 90, 3 L. Ed. 271, as follows:

"It is true that, if certain facts essential to the merits of a claim purely legal be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."

In *Phelps' Juridical Equity*, 159, it is said that not much stress is now laid upon the auxiliary jurisdiction of courts of equity, meaning the power to compel discovery, produce documents, etc., since those powers have been by statute conferred upon the courts of law, and the necessity for the auxiliary jurisdiction may be said to be practically almost entirely superseded, although still occasionally resorted to. 1 Pomeroy, *Eq. Jur.* §§ 83, 124, 143, 215; article 75, §§ 98, 99, and 100, Code P. G. Laws.

In the present case the discovery sought by the bill was a detailed statement of the number of sugar barrels constituting defendant's entire output for the year beginning July 15, 1915, and ending July 15, 1916, and that the defendant be required by decree of this court to pay the plaintiff the sum ascertained to be due.

[4] It is clear that the discovery prayed for in the bill would have been available to

the plaintiff, under article 75, §§ 99 and 100, of the Code in a court of law, where the mode of procuring the production of books, papers, and testimony is provided for in as ample a manner as in a court of equity, and where there is an adequate, complete, and sufficient remedy pointed out by law, courts of equity will not interpose.

For the reasons which we have stated, we do not think the appellant has made out such a case as entitles him to relief in a court of equity, but that his case is properly cognizable in a court of law.

The order of the court below sustaining the demurrer and dismissing the bill will be affirmed.

Order affirmed, with costs.

(131 Md. 358)

WILHELM v. MITCHELL. (No. 22.)

(Court of Appeals of Maryland. Aug. 11, 1917.)

COURTS ~~§~~ 184—COUNTY COURTS—SUFFICIENCY OF DECLARATION.

Under section 18g of the "Speedy Judgment Act" for Baltimore county (Acts 1894, c. 631, as amended by Acts 1912, c. 385, Acts 1914, c. 817, and Acts 1916, c. 184), providing that plaintiff shall not be entitled to judgment unless in an action founded upon an implied contract he state the particulars of the indebtedness, a declaration on the common counts for a physician's services, two of the items being, "To amount of account rendered August 31, 1907, \$183," "to amount of account rendered May 6, 1908, \$29," without disclosing to whom the accounts were rendered or the nature of the indebtedness or when it was incurred, gave the court no jurisdiction to enter judgment thereon.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Dr. A. R. Mitchell against Clarence M. Wilhelm, administrator of Mary J. Wilhelm, deceased. From an order of the circuit court for Baltimore county overruling a motion to strike out a judgment in favor of the plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

O. Parker Baker, of Baltimore, for appellant. T. Scott Offutt, of Towson (John Mays Little, of Towson, on the brief), for appellee.

PATTISON, J. This is an appeal from an order of the circuit court for Baltimore county, overruling a motion to strike out a judgment entered in favor of the appellee against the appellant.

The suit in which the judgment sought to be stricken out was rendered, was brought on May 26, 1916, under what is known as "the Speedy Judgment Act" for Baltimore county, chapter 631 of the Acts of 1894, as amended by chapter 385 of the Acts of 1912, chapter 817 of the Acts of 1914, and chapter 184 of the Acts of 1916.

The declaration contained the common counts only, and with it was filed the following account or cause of action verified by the affidavit of the plaintiff:

Monkton, Md., March 27, 1915.

Estate of Mrs. Mary J. Wilhelm, to Dr. A. R. Mitchell, Dr.

To amt. of acct. rendered Aug. 31, 1907 \$183 00
To amt. of acct. rendered May 6, 1908 28 00
To subsequent attention as follows:

1908, May 8.....
1912, May 28.....
1915, Feb. 15, Feb. 26, Feb. 27, Feb. 28..... 8 25

\$219 45

Credits:

1909, June 21, cash..... \$10 00
Oct. 28, cash..... 10 00
1910, Aug. 2, cash..... 8 00
Aug. 29, cash..... 25 00

Balance \$166 45 \$53 00
1916 Feb. 23 by check on account 53 00

The defendant being duly summoned, but failing to appear and plead to the declaration within the time prescribed by the statute, the plaintiff filed his motion in writing, as provided by the act, asking "the court to enter a judgment by default against the defendant for want of proper plea, affidavit, and certificate, as required by the statute in such case made and provided and * * * to extend said judgment." Upon this motion a judgment was entered by order of the court. Thereafter the defendant filed his motion to strike out the judgment so entered, assigning as one of the reasons therefor the insufficiency of the account under the provision of the act, under which the action was brought and the judgment rendered. This motion was overruled, and it is from the action of the court in overruling it that this appeal is taken. The act provides (chapter 631, § 18g, of the Acts of 1894), that the plaintiff shall not be entitled to judgment under the provisions of said act, "unless at the time of bringing his action, he shall file his declaration, with an affidavit, or affirmation, * * * stating the true amount the defendant is indebted to him over and above all discounts, and * * * if the action be formed upon a verbal or implied contract shall file his statement of the particulars of the defendant's indebtedness thereunder."

The account, as stated above, is the only cause of action that was filed in the case, and should it be found that it does not meet the requirements of the statute, in that it fails to give a statement of the particulars of the defendant's indebtedness, the plaintiff was not entitled to judgment by default under the aforesaid statute, and the court was without jurisdiction to enter the judgment, and its irregular entry could in no way aid

or supply that want of jurisdiction. *Thillman v. Shadrick*, 89 Md. 530, 16 Atl. 138. As stated in *Adler v. Crook*, 68 Md. 494, 13 Atl. 153:

"The object of the act was, in cases to which it applied, to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and the defense (if any) so that the parties might know exactly wherein they differed and shape their actions accordingly."

It will be seen from an examination of the account which is dated March 27, 1915, that it contains but three debit items, amounting in all to \$219.25. Two of these items aggregate \$211, and are stated as follows:

To amt. of acct. rendered Aug. 31, 1907 \$183.00
To amt. of acct. rendered May 6, 1908 28.00

It appears from these items that two separate accounts were rendered to some one, but to whom they do not disclose, nine and eight years, respectively, before the institution of this suit. It is not shown by the account filed what these accounts so rendered contained, and there is nothing in the items themselves showing the nature and character of the alleged indebtedness or when the same was incurred. To us it is clear that the account as filed does not set forth the particulars of such alleged indebtedness as required by the statute, and therefore the judgment was, in our opinion, wrongfully entered under the statute, and should have been stricken out under the motion filed.

It is contended by the appellee that as the defendant was regularly summoned and failed to file his plea, the plaintiff, irrespective of the statute, was, at the time of the entry of the judgment, entitled, under the rules of the court, to a judgment by default for want of such plea, and therefore should it be held that the judgment could not have been properly entered under the statute, for the reason here assigned, its entry was proper under the rule of the circuit court, because of the failure of the defendant to file his plea.

The rules of the court below are not before us, but whatever may be said of the plaintiff's rights thereunder to a judgment by default for want of a plea, it is clearly shown by the record that the judgment was not entered under such rule of the court, but was entered under the statute (chapter 631 of the Acts of 1894), as amended by the subsequent acts named above and as we have said was wrongfully entered thereunder.

Holding as we do that the court was in error in its refusal to strike out the judgment, its rulings will be reversed and a new trial awarded so that the judgment wrongfully entered may be stricken out and an opportunity given to the defendant to present his defense upon the merits.

Judgment reversed, and new trial awarded.

(31 Md. 315)
BOARD OF POLICE COM'RS v. McCLENEHAN. (Nos. 58 to 67.)

(Court of Appeals of Maryland. June 28, 1917.)

1. STATUTES \Leftrightarrow 76(2)—LOCAL LAWS—APPLICABILITY OF EXISTING LAWS.

Acts 1914, c. 600, Acts 1906, c. 63, Acts 1900, c. 560, Acts 1908, cc. 92, 192, Acts 1902, c. 280, Acts 1914, c. 493, Acts 1906, c. 335, Acts 1914, c. 486, Acts 1904, c. 632, and Acts 1916, c. 212, directing the board of police commissioners of Baltimore to pension a retired matron of the station house, the widow of a deceased member, and certain ex members of the police force, are not in conflict with Const. art. 3, § 33, prohibiting the passage of any special law where provision has been made by existing law; such pensions not being payable under the pension laws existing at the time the several acts were enacted.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 187—PENSIONS—STATUTE—DISCRETION.

Although Acts 1906, c. 63, authorizing the police commissioners of Baltimore to pension a former policeman, was discretionary, and not mandatory, where the matter had been acted upon by the board then in office, subsequent boards could not revoke it.

Appeals from Superior Court of Baltimore City; James M. Ambler, Judge.

Ten petitions for mandamus by E. E. McCleehane and nine others against the Board of Police Commissioners. The court ordered a writ of mandamus to issue in each case, and the Board appeals. Order affirmed in each case.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Ogle Marbury, Asst. Atty. Gen., and Albert C. Ritchie, Atty. Gen., for appellant. Isaac Lobe Straus, of Baltimore, for appellees.

BOYD, C. J. Ten cases were by agreement of the parties and with the consent of the court bound in one record, the main questions being involved in all of them. Each of the ten appellees filed a petition for a mandamus against the board of police commissioners of Baltimore city to require that board to obey the provisions and directions of one or more acts of the General Assembly of Maryland named in the petition, and to pay the petitioner the sum named in such act or acts. The main defense relied on in the answers was that the acts were special laws prohibited by article 3, § 33, of the state Constitution, and were therefore unconstitutional and void. Agreed statements of facts were filed in the cases, and the lower court ordered a writ of mandamus to issue in each case, and gave judgment for the petitioner for costs. Appeals from those several orders and judgment are now before us.

Chapter 459 of the Acts of 1886, being section 755 of article 4 of the Local Code of 1888, provided that:

"All sums of money which are now in, or which may hereafter come into the hands of

the board of police commissioners for the city of Baltimore, under and by virtue of the provisions of existing laws, except such sums as may come into their hands under and by virtue of the provisions of section 728 shall constitute a fund to be known and accounted for as the special fund."

That is section 776 of the new charter, and is under subtitle "Special Fund." Section 728 (747 of revised charter of 1915) referred to money received from taxes, and in case of a deficiency the board was authorized to issue certificates and raise therefrom a sum not exceeding \$50,000 to meet the exigency. The board has large powers, including the appointment of the police force, detectives, matrons, etc.

Section 756 of article 4, being Acts 1888, c. 459, as amended by Acts 1888, c. 306, provided that, in addition to the sums of money authorized by law to be paid out of the special fund, the board, whenever in their opinion the efficiency of the service required it, were authorized to retire any officer of police, policeman, detective, clerk, or turnkey appointed by them, and pay him out of said fund, in monthly installments a sum not to exceed one-third of the amount monthly paid to him at his retirement, provided he had served faithfully not less than 16 years, or shall have been permanently disabled in the discharge of his duties, and the board was required to procure and file among their records a certificate of a competent and reputable physician that the person proposed to be retired had been thoroughly examined by him and was incapable of performing active police duty, etc. That section was amended by several acts, so that as it is now in the revised charter of 1915 it provides for payment of a sum equal to one-half of that paid at retirement, provided he had served for not less than 20 years, and some other changes were made. That section (756) in the new charter of 1898 is on a different subject, and section 777 is the number of the one relating to retirement of officers of police, policemen, detectives, clerks, and turnkeys, but both sections 756 and 777 are in the revised charter. Section 756 in the revised charter requires those retired to perform such police duties as the board requires, not to exceed seven days during any year, for which service no compensation is to be paid by the board. Section 756A (revised charter), added by Acts 1912, c. 189, authorizes the board to retire any officer of police, policemen, detective, clerk, or turnkey appointed by them who may be ineligible in the way of length of service to retirement on pay for life as provided by section 756, and who has served faithfully and has become permanently incapacitated from active duty, and to pay him out of the special fund a sum not exceeding one year's salary allowed by law to him at the time of his retirement, provided a certificate is obtained from a majority of the police physicians of Baltimore city that he

has been examined by them and that he is incapable of performing active duty.

Section 776 in the revised charter is the same as section 755 quoted above from article 4 of the Code of 1888. Section 776A (Acts 1900, c. 266) makes the board of police commissioners trustees of the special fund. Section 776C states in detail what the special fund shall consist of—amongst other things, of 2 per cent. of the salary or pay of the police force entitled to participate in the special fund. It provides that it shall be optional with any member of the police force to contribute the 2 per cent., but that no member shall participate in the special fund unless he does so contribute. The confusion arising from having two sections of the charter as much alike as 756 and 777 seems to have begun in 1898. The new charter is chapter 123 of the acts of that session, and in that what was section 756 of article 4 in Code of 1888 was made section 777, but chapter 494 of the Acts of 1898, evidently drawn before the new charter was passed, in amending the provision for retirement referred to it as section 756. Then chapter 233 of Acts of 1900, chapter 81 of Acts of 1902, chapter 391 of Acts of 1910, and chapter 189 of Acts of 1912 continued to refer to it as section 756. Then chapter 567 of Acts of 1912, which is the last act signed, referred to the fact that chapter 391 of Acts of 1910 had erroneously stated the section to be 756 in lieu of 777, the correct number intended to be amended, and repealed and re-enacted as 777. It would seem therefore to be clear that section 777 as amended by chapter 567 of Acts of 1912 is now the statute in force on the subject, and, in so far as there is any conflict between it and what was called section 756 in above statute, section 777 must prevail. It could not have been intended to have two such sections in the charter. We need not therefore trouble ourselves with section 756, although there is not in the main much difference between them so far as can apply to this case excepting as to the time of service.

Section 777A (being Acts 1906, c. 456) includes superintendent of matrons and matrons of station houses within the provisions of section 777, so that they may enjoy the same rights and privileges and benefits, subject to the same limitations and conditions, as those conferred for the retiring of members of the police force, provided they pay to the special fund \$10 per annum for three years, in addition to the regular percentage required "under the special pension act." Section 777B included the secretary and assistant secretary of the board within the provisions of section 777, provided the secretary paid \$300 and the assistant secretary \$150 in three equal installments to the "special fund." Section 777Ba (Acts 1900, c. 263) directed the mayor, etc., of Baltimore, upon the request of the board, to appropriate annually a sum of money for the relief of dis-

abled and superannuated members of the police force, and for the relief of widows and children of policemen killed in the discharge of duty, when the special fund was not sufficient for the payments authorized by the act of the General Assembly heretofore passed. Provisions under the subtitle "Special Fund" are made in sections 776 to 780, inclusive, but we will not refer to the others. Having thus referred to what the appellant calls general laws on the subject, without deeming it necessary to enter upon a discussion as to whether they are general or special, and for the purposes of these cases assuming them to be general, we will now consider the several statutes passed for the benefit of the appellees.

1. Mrs. E. E. McClenehan.

[1] The first case in the record is that of Mrs. McClenehan. She was appointed matron on January 28, 1900, and continued in that capacity until the 9th day of July, 1912, when she was dismissed by the board, after an examination of physicians, who said she had Bright's disease and rheumatism, without any provision for future pay. She paid \$30, being for the three years as required by section 777A, and the 2 per cent. of her salary from the year 1906 (when matrons were included) until she was dismissed. Chapter 600 of Acts of 1914, after stating in the preamble that she had contributed to the pension fund and was obliged to retire on account of serious illness, whereby she had been incapacitated from work and from earning a livelihood, directed the board to pay her \$7.50 a week during her life out of the special fund. She had not been in service for 16 years, as required by section 777. It is contended by the appellant that section 756A governs her case, and leaves it discretionary with the board, but it would seem clear that that section does not apply. That was passed in 1912, six years after matrons were given the privileges of section 777, but expressly limits the relief to "any officer of police, policeman, detective, clerk or turnkey," and does not include matrons. There was then no general law in existence when the act of 1914 was passed which included Mrs. McClenehan.

The question then is whether such an act was in conflict with article 3, § 33, of the Constitution. It provides that:

"The General Assembly shall pass no special law for any case for which provision has been made by an existing general law."

It seems to us clear that the board had no power under the "general laws" in the charter to pension Mrs. McClenehan. As then they were not authorized to allow her a pension under those laws, it cannot be said that the constitutional provision above quoted prohibits the passage of such a statute as the one passed for her benefit. It

may be that the Legislature was not willing to pass a general law allowing the board to pension matrons who left the service by reason of ill health, but were not permanently disabled in the discharge of their duty, and had not served the time required by section 777—16 years. Indeed, section 756A indicates that it deemed it proper to permit the board to retire an "officer of police, policeman, detective, clerk or turnkey" appointed by them who was ineligible in the way of length of service to retirement on pay for life under the requirements of section 756, and had served faithfully and had become permanently incapacitated from active duty, but it was not willing to include matrons, and hence did not provide for their retirement by reason of sickness. It did not give them the benefit of the special fund at all until 1906.

There are many decisions of this court which indicate that such a special provision for a particular person named as is made by this act does not come within the prohibition. If there had been no such statute as section 756 or 777, we can see no reason why this act could not have been passed, and if we are correct in the conclusion that neither of those statutes embraced her case, is it not just as if there was no such statute? In *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446, Acts 1876, c. 220, required the mayor and city council of Baltimore to take charge of and maintain as a public highway a bridge known as "Harman's Bridge." On their refusal to do so Pumphrey filed a petition for a mandamus to compel them to do so. Amongst other defenses this provision of the Constitution was relied on. This court said, through Chief Judge Bartol:

"In the public local laws relating to Baltimore city no provision is made for the acquisition of the bridge in question, and the ascertainment of the amount to be paid to the owners in the manner contemplated and directed by" former acts referred to.

It was held that the act was constitutional and valid. In *O'Brian & Co. v. County Com'rs of Baltimore County*, 51 Md. 15, the Legislature passed a special act in reference to the opening of Wilkens avenue. The defense was taken that the General Laws provided a mode for the opening of any new road, or the widening, straightening, altering, or closing up an old road. The court said:

"As recited in the preamble, 'there were special circumstances in the case of Wilkens avenue requiring special legislation in regard thereto;' and as the purposes of the act could not be accomplished under any existing general law, its enactment was, of course, not within the prohibition contained in the Constitution (article 3, § 33)."

In *Hodges v. Balt. Pass. Ry. Co.*, 58 Md. 603, it was held that, as there was no general law conferring the rights and prescribing the terms and conditions on which the

defendant was to construct and operate its railway on certain streets in the city of Baltimore, the act then in question was not in conflict with this section of the Constitution. In *Gans v. Carter*, 77 Md. 1, 25 Atl. 663, it was contended that the powers given to the Fidelity & Deposit Company to become sole surety in all cases where two or more sureties were required, etc., was a special law, within the meaning of this section, but this court held that, as there was no general law providing for corporate security in such cases, the act was valid. See, also, *Revell v. Annapolis*, 81 Md. 1, 31 Atl. 695, *Baltimore v. United Ry. & El. Co.*, 126 Md. 39, 94 Atl. 378, and other cases where this provision of the Constitution has been passed on. The cases relied on by the appellant are clearly distinguishable from this. In *Prince George's County v. B. & O. R. R. Co.*, 113 Md. 179, 77 Atl. 433, there was a general law clearly covering the crossings involved. So in the case of *Baltimore v. Starr Church*, 106 Md. 281, 67 Atl. 261, the exemption was invalid because the statute was within this provision of the Constitution, and for other reasons.

It is true that there are a number of sections in the charter which relate to pensions for policemen and others, but they are only allowed on certain conditions. If a worthy person does not come within those provisions, it cannot be properly said that an act cannot be passed to provide for his or her case, any more than it can be successfully contended that the great amount of legislation which has been passed conferring special powers on corporations which are not granted by the general laws are invalid. That has been done over and over again, without a suggestion that they were not valid. The General Corporation Laws of 1868 provided that:

"No corporation shall possess or exercise any corporate powers, except such as are conferred by law, and such as shall be necessary to the exercise of the powers so acquired." Article 23, § 56, of Code of 1888; article 23, § 64, of Code of 1904.

And it was oftentimes exceedingly doubtful whether a corporation had under the general laws some special power it desired to exercise, and hence numerous acts were passed to confer such powers. Sections 756 and 777 empower, but do not require, the board to retire those provided for in them. It would be carrying the meaning of section 33 of article 8 of the Constitution very far to say that by reason of such sections the Legislature could not pass an act requiring the board to retire on pay a certain person or persons which the Legislature thought should be retired. The Legislature never intended to abandon all control over the board in such matters, as is shown by the many statutes on the subject. Of course, when there is a general statute covering the particular case, another question may arise,

but we are satisfied that there is no difficulty in this case.

2. William F. Gerwig.

The next case is that of William F. Gerwig. He was appointed on the police force October 21, 1899, and appointed a regular patrolman December 7, 1900. In January, 1904, whilst in the discharge of his duty, he sustained a fall, striking his spine on his revolver in his hip pocket. On September 6, 1904, he was dropped from the police force because of his injury and disability. It appeared to the board then in office that the incapacity was produced by spinal trouble of long standing, and not from an injury occurring in the performance of his duty. By Acts 1906, c. 63, it was provided:

"That if the police commissioners of Baltimore city, after a careful examination, are satisfied it is proper, they are hereby authorized and empowered to pay Mr. William Frederick Gerwig, a former policeman of the police force of Baltimore city, out of the funds in their possession or subject to their control, a weekly pension of nine dollars (\$9.00), payable on the last day of each week."

It is agreed that from and after the passage of that act the board regularly and continuously paid to him the sum of \$9 a week until he received the letter of the secretary of the board dated September 8, 1916, notifying him that the board considered the act unconstitutional, and therefore would make no further payments to him. It is clear that there was no general law which covered his case.

[2] It is contended, however, that the act itself was not mandatory, but was in the discretion of the board. While that is correct, the board did exercise its discretion, presumably after careful examination as the act provides. There is nothing in the act to indicate that the intention of the Legislature was to leave it to the discretion of each board from time to time, but, having been acted on by the board then in office, it was not longer in the power of subsequent boards to revoke it, merely as an exercise of their discretion. If that were so in reference to what we speak of as the "special acts," it would likewise be so under section 777 and section 756, if that is still of any force. They leave it to the determination of the board in the first place, "when-ever, in their opinion the efficiency of the service may require it, to retire any officer of police, policeman," etc., and they state the grounds upon which they may suspend payment or dismiss the party. It seems clear to us that it was left to the existing board, and was not intended to leave it to the discretion of each succeeding board as to whether the pay should be continued. Moreover, the action of the board, as shown by the letter of the secretary, was upon the ground that the act was unconstitutional, and it was not pretended that it was

done under a claim of discretion in the board.

3. Manno A. Behrens.

Behrens was appointed a patrolman upon the police force in 1879. It is admitted that he would have testified "that upon the 21st day of August, 1899, the petitioner was virtually dismissed for partisan political reasons * * * without any provision for a pension or any other allowance." By chapter 560 of the Acts of 1900 the board was authorized and directed to pay pensions to the three persons named (including Behrens) "who were permanently disabled in the discharge of their duty as such policemen" out of the funds in their hands known and accounted for as the "special fund" the sum of \$9 during the term of their respective lives. Then by Acts 1916, ch. 212, the board was directed to pay Behrens for the rest of his life out of the "special fund" a weekly pension equal to one-half of the weekly pay of a regular patrolman, in lieu of any pension now being paid him under any law theretofore enacted. The board having dismissed the petitioner, he was not a member of the force, and hence the board could not place him on the pension list. He had served 20 years, faithfully as he claims, and was dismissed for "partisan political reasons," as shown by the agreed statement. There was no general law in force authorizing his reinstatement, and the Acts of 1900 and 1916 cannot therefore be said to be contrary to article 3, § 33, of the Constitution.

4. George A. Grimes.

Grimes was a police officer from April 14, 1884, until November 11, 1906, when he was dismissed for being off his post and in an eating saloon for ten minutes. He had regularly paid the 2 per cent. of the salary received by him. By Acts 1908, ch. 192, the board was directed to pay him a weekly pension of \$9. That was paid until September, 1916, when he received the notice from the secretary that it would no longer be paid. There was no general law covering his case.

5. Edward F. Meehan.

He was appointed a patrolman in 1881, sergeant in 1886, and in January, 1896, a round sergeant. On July 12, 1897, he was dismissed by the board without any provision for pension. It was contended by him that he was innocent of the charges and was dismissed for partisan political reasons. By Acts 1908, ch. 92, the board was directed to pay him \$12 per week for life. It paid him regularly until September, 1916, when he was notified by the secretary that it would no longer be paid. We are informed by the appellees' brief that he has died since the decision below, and of course his rep-

resentative will only be entitled to the amount due from the time the payments ceased until his death. No proceedings were taken to make his personal representative a party to this case, but we assume that will not be required by the appellant.

6. Louis V. Paff.

He went on the police force June 1, 1888, and was employed as a driver of a patrol wagon. In July, 1890, he was run over by the patrol wagon and seriously injured. He suffered, but continued to work from time to time until finally he became in such condition that he resigned. The board accepted his resignation on May 10, 1898, without providing for any compensation. By Acts 1902, ch. 280, the board was authorized in their discretion to pay him \$9 per week, and by Acts 1914, ch. 493, they were directed to pay him \$10 per week. It is alleged that the first act was discretionary. That is true, but the board regularly paid him, until September, 1916, and what we have said above is sufficient as to that. Indeed, before he applied for the first act he notified the board of his intention to do so, and the secretary replied that the board had made inquiry as to his injuries and believed his was a worthy case and would do nothing to oppose legislation to put him on the retired list with pay. Apparently they only wanted the power which they thought they did not have.

7. Louis F. Norris.

He was appointed a patrolman August 25, 1875, and he continued in service until February 2, 1887, when he was dismissed for being found asleep in a chair at 3:10 a. m. in a hotel upon his beat. On January 10, 1886, he fell on the ice while patrolling his beat and dislocated his left arm at the elbow, since which time he was crippled. He was included in chapter 560 of the Act of 1900, referred to in the case of Manno A. Behrens. After that act he was regularly paid \$9 a week until September, 1916. Having been dismissed, there was no provision in the General Laws for reinstating him, so as to get the benefit of the pension, and he had not served the regular time.

8. Kate Spitznagle.

She is the widow of Charles Spitznagle, who was appointed on the police force on January 1, 1893. He died suddenly December 25, 1905, after a long chase of a violator of the law, made in the performance of his duties, either from a stroke of paralysis or heart failure, as a result of the chase and arrest of the party. The records of the police board show that he died of paralysis. The petitioner did not make a formal request for an allowance, but Acts 1906, c. 335, authorized the board, in their discretion, to pay her \$9 per week during

her life. That was paid her regularly until September, 1916. The only general law which could be claimed to cover her case is section 776D. That gives the board power in its discretion to pay to the widow of a member of the police force who was killed while in the actual performance of duty, or who died in consequence of injuries received while in the discharge of duty, an allowance until she remarried. It is not necessary to determine whether it could be said that Mr. Spitznagle's death came within the intention and meaning of either of those grounds. It might well be questioned whether it did, but the board paid the amount named in the act regularly from the time of its passage, and does not object to the amount now, so far as the record discloses, but relies on the constitutional objection referred to in the other cases. Nor is it necessary to consider whether the fact that the special act provides for paying during her life, and section 776B only until she remarries. She is still unmarried, so far as the record shows. The board in a worthy case should not be supposed to rely on purely technical reasons for granting or refusing such allowances. The object of the provision is to make the service more efficient, and if it be admitted that the board had the discretion to allow a pension under section 776D, and as the record shows the board did on April 23, 1906, grant her an allowance of \$9 a week, it may well be said that it did so, acting within its discretion, and, of course, if that section does not apply, there can be no valid objection to the act of 1906, from what we have already said.

9. Peter J. Patterson.

He served from September 12, 1896, to the 19th of February, 1913, when he was dismissed on the charge of having entered a saloon on other than police business, and remaining there 12 minutes, and while there drinking intoxicating liquor. He denies that he drank intoxicating liquor, but he was dismissed without an allowance or pension. He paid the 2 per cent. regularly while he was in service. By Acts 1914, ch. 486, the board was directed to pay him a weekly pension of \$11 per week, which was regularly paid until September, 1916. There was no general law covering his case, and what we have said in the other cases is sufficient to indicate our views.

10. Joseph J. Gilbert.

He was appointed as a patrolman January 27, 1881, as sergeant August 5, 1884, round sergeant April 19, 1894, lieutenant January 13, 1896, and on January 14, 1896, was appointed captain. He was dismissed as he claims, for partisan political reasons, on July 12, 1897, without any provision for

pension. By Acts 1904, c. 632, the board was authorized to allow him a weekly pension of \$15. That was paid regularly until September, 1916. We find no provision for allowing pensions when the board dismisses, and hence there was no general law applicable.

We have thus gone at some length into these ten cases, and, as we have above pointed out, we do not find any "general law" which can properly be said to interfere with the "special acts" referred to. We have already explained that we did not deem it necessary to discuss the point raised by the appellees that these acts codified in the Local Code on this subject are not "general laws" within the meaning of article 3, § 33, because, if they are admitted to be so, we find none of what we have spoken of as "special acts" coming within the prohibition of that section of the Constitution.

We are not called upon to speak of the wisdom of the Legislature in passing such acts, although some of them would seem to be peculiarly meritorious and just. The parties had paid regularly into the special fund, which was intended for pensions and some other purposes. From the view we take of the article of the Constitution relied on by the appellant, it becomes unnecessary to discuss any of the other questions raised. We will affirm all of the orders passed, including the Meehan Case, as we have no record of his death of which we can take notice, and we assume that that will be adjusted without making his representative a party. If necessary, of course, that can be done.

Order affirmed in each of the ten cases; the appellant to pay the costs.

(131 Md. 340)

SUSQUEHANNA TRANSMISSION CO. OF MARYLAND v. MURPHY et al.

(No. 71.)

(Court of Appeals of Maryland. June 28, 1917.)

1. APPEAL AND ERROR §836—REVIEW — LIMITATIONS.

The power of this court is limited to an examination of the record and a decision upon the question whether the court committed any injurious error of law in any of the rulings to which defendant reserved exceptions.

2. NEGLIGENCE §121(5) — CONCURRENCE WITH INJURY.

Where negligence is the basis of the action, it is essential that plaintiff show that the negligence alleged and the injuries suffered concurred.

3. TRIAL §134—QUESTIONS FOR JURY.

It is the exclusive province of the jury to decide questions of fact.

4. ELECTRICITY §19(6)—DAMAGE FROM FIRE — PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY.

In an action against defendant electric power corporation for damages, *held*, under evidence, that questions of its negligence in burning on right of way and whether fire was the proximate cause of the burning of plaintiff's timber and fencing were for jury.

5. APPEAL AND ERROR ¶971(2)—**EVIDENCE** ¶546—**QUALIFICATION OF EXPERTS—REVIEW.**

The amount of knowledge a witness must possess before he can be allowed to testify as an expert is largely for the trial court, and its rulings will not be disturbed unless clearly erroneous.

6. EVIDENCE ¶543(3)—**EXPERTS—QUALIFICATIONS.**

Parties who had been engaged in the timber business for about three years and were familiar with the prices of timber were competent to testify to the value of the timber before and after the fire.

7. APPEAL AND ERROR ¶1026—**HARMLESS ERROR.**

Errors which are without injury will not justify a reversal on appeal.

Appeal from Circuit Court, Baltimore County; Hon. Frank I. Duncan, Judge.

"To be officially reported."

Action by Thomas F. Murphy and another against the Susquehanna Transmission Company of Maryland. Judgment for plaintiffs, and defendant appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

T. Scott Offutt, of Towson, for appellant. Elmer J. Cook, of Towson, and Thomas H. Robinson, of Bel Air, for appellees.

BURKE, J. This is an appeal by the defendant below from a judgment of \$500 entered against it in the circuit court for Baltimore county. The defendant is a corporation, and owns a right of way about 100 feet wide through Harford and Baltimore counties to the city of Baltimore. Upon this right of way are erected towers to which wires and other mechanical devices are attached, and used for the transmission of electric power generated by a power plant located at McCall's Ferry in the state of Pennsylvania. The plaintiffs are the owners of land situated in Harford county at a distance of about 2,000 feet from the defendant's right of way. Upon this land was a tract of timber inclosed by a fence. Between their property and the defendant's right of way, at the location spoken of in the testimony, there is located the land of Mrs. Streett and Albert Berry, which land adjoins the plaintiffs' property. Then intervenes some land, which at the time of the injury complained of was occupied by a man named Ayres. A part of this land, adjoining that of Streett and Berry, was planted in corn, and the balance, covered with grass and weeds, was contiguous to what is spoken of by the witnesses as Campbell's and Slade's woods. These woods lay along and near the defendant's right of way. In Slade's woods there was a pile of rails between 300 and 400 in number and some posts which belonged to a man named Harmon. The evidence shows that Slade's woods was very much elevated above the plaintiffs' land.

The declaration alleged:

"That on or about the 2d day of May, in the year 1914, the servants, agents, and employes of the defendant negligently set fire to dried grass and weeds and bushes that were negligently suffered by the defendant to be and remain on its said right of way, for the purpose of burning the same, at a time when a high wind was blowing, and that the fire so negligently started on said right of way was thence communicated to the plaintiffs' timber and fencing, whereby and in consequence thereof a large part of said timber was burnt and injured."

The defendant pleaded the general issue pleas, and the case was tried before the court and a jury upon the issues joined upon these pleas.

[1] During the progress of the trial the defendant reserved 23 exceptions. Nineteen of these were taken to the rulings of the court upon questions of evidence, one to the rulings on the prayers, and three to certain statements made by the counsel for the plaintiffs in their arguments before the jury. A motion for a new trial was made by the defendant, which the court denied, and whilst the counsel for the defendant complains that the verdict was grossly excessive, he concedes that this court has no power to grant him relief on that ground. Our power is limited to an examination of the record and a decision upon the question as to whether the court below committed any injurious error of law in any of its rulings. Before considering the exceptions, it may be well to state some matters about which there does not appear to be any dispute. It is shown that the plaintiffs were the owners of the property mentioned in the declaration, and that on May 2, 1914, a fire broke out in the plaintiffs' woods, burned over about 5 acres of their land, injured the timber thereon, and destroyed a large portion of the fencing which inclosed the tract. It is also shown that about noon on that day James G. Parker, the line superintendent of the defendant, directed Caesar Hawkins and Walter Winder, two men in the employ of the defendant and over whom Parker had authority, to gather into piles and burn certain debris which was laying upon the right of way of the defendant and near to Campbell's and Slade's woods. These men gathered up the debris into piles, about 3 feet high and 5 feet wide and about 5 feet apart, along the right of way and set them on fire. The fire from these burning piles was communicated first to Campbell's and then to Slade's woods, and it destroyed the rails of Harmon, to which we have referred, and for which loss the defendant compensated him.

The disputed questions of fact were: First, as to the character of the timber on the plaintiffs' land, the extent of the injury to the timber, and its value before and after the fire; and, secondly, the extent of the fire in Slade's woods, the direction and velocity of the wind at the time of the fire; and, thirdly, a question of law, raised by the de-

defendant's first, second, and third prayers, which sought to withdraw the case from the jury, as to whether there was any testimony offered legally sufficient to show any negligence on the part of the defendant, or any legal connection between the fire started on the defendant's right of way and the injury suffered by the plaintiffs.

[2] As negligence is the basis of the action, it was essential for the plaintiffs to offer evidence legally sufficient to show the negligence alleged, and that the injuries sued for bore the relation of cause and effect. The concurrence of both and the nexus between them must be shown to exist to constitute a right to recover. *Benedict v. Potts*, 88 Md. 55, 40 Atl. 1067, 41 L. R. A. 478.

[3] It is not the province of this court to decide any question of fact. That was the exclusive province of the jury. Eight witnesses were called on behalf of the plaintiffs, viz.: W. Elijah Somerville, a surveyor, Thomas F. Murphy, James G. Parker, Cornelius F. Murphy, Albert Berry, Albert Berry, Jr., Edward L. Oldfield, and Benjamin Garber.

A brief synopsis of the material portions of the evidence of these witnesses bearing upon the questions presented by this appeal is here given:

Mr. Somerville made a plat of the location of the transmission line with reference to the property of the plaintiffs, and made measurements of the distance from the transmission line to the Murphy property and of the tract burned. He said the fire extended over a little more than $5\frac{1}{2}$ acres of the timber land, and that the distance from Slade's woods to the Berry and Streett land, which as we have said, adjoined the Murphy land, was 1,968 feet, and that the distance from the Slade land where this line of 1,968 feet was measured to the defendant's right of way was probably about 125 feet. He testified that the land slopes towards the Streett property, and that at about the center of the Slade land the elevation is from 50 to 75 feet above the Streett tract.

Thomas F. Murphy testified: That he first noticed the fire about 2 o'clock p. m. That it was "a terrible windy day." "The wind sounded like a train of cars. It was blowing from the west." That the fire burned more than 5 acres of his woodland. That he saw the smoke coming from the Slade woods—coming from the west, direct to his property. That the fence on the Berry and Streett lines was entirely destroyed. That the timber on his tract was principally oak, white oak, and the very best of chestnut; thickly wooded, a splendid piece of timber. That the fire continued in his woods until 6 o'clock, and killed the timber and the young growth. That the timber was large and marketable. He testified:

That he owned about 400 acres of land in that neighborhood, and had been engaged in farming for a number of years, and that he had had experience in buying and selling timber and timber

land for over two years. "In Harford county we bought 200 acres in the northern part of the county near what is known as Carea, and we bought 85 acres near the Rocks recently, and we have been buying telegraph poles in all the northern part of the country. He had been in the timber business a little over three years. Prior to that he had bought several pieces of land for himself with timber on it. That he made his own estimate of the lumber on a tract. They bought the timber for marketing it, cutting it into different things, railroad cross-ties, crossing planks, telegraph poles, bridge timber, wagon wood, whatever we can market it in best. They furnish the county with considerable bridge timber. In making the purchases of timber they bought just the timber; the wood leave we call it. He inspected it before he bought it."

He further said he knew of sales of woodland in that vicinity. That he knew of sales there. That he had bought the timber on the Wright property, which was about 8 miles from his own. That he was familiar with the prices of timber, and that he had been engaged in the timber business for the last two or three years. That the day of the fire was a windy day and very dry, and had been dry for several days.

James G. Parker, the line superintendent, was called by the plaintiffs, and testified that he ordered the men, Hawkins and Windler, to burn the debris, but was not present when the fire started in the Campbell and Slade woods; that he gave the order about 11 or 11:30 a. m., and that at that time he said the wind was blowing from the northeast.

Cornelius F. Murphy testified that he recalled the fire which occurred on May 2, 1914. He first noticed it about 1:30 or 2 o'clock; that it was a clear day, but very windy. The wind was blowing at a high gale. It was blowing a gale from Slade's woods to the plaintiffs' woods. He could see the smoke. The Slade land was higher than his own. His evidence as to the kind and character, quantity, and marketability of the timber on the tract burned was corroborative of Thomas F. Murphy. He said he had been engaged in the timber business; that he bought tracts, cut off the timber, operated a sawmill, and sold the lumber; that he had bought timber rights in the upper section of Harford county, and that the effect of the fire on the timber in question was to destroy it; that it killed the trees.

Albert Berry said he was at his home when he first saw the fire between 1 and 2 o'clock; that it was a very windy day; that he saw an "awful smoke" in the corner of the Slade property; that the wind was blowing directly from Slade's woods, and that there was a fire in that woods; that the fire was burning on the street property, which was much lower than the Slade woods, and spread to the Murphy tract; that it burned fencing on his and the Murphy tract, and spread into the Murphy land.

Albert Berry, Jr., said he saw the fire in Slade's woods between 12:30 and 1 o'clock, and testified that:

"That is the woods up by the Susquehanna Transmission line. He saw the fire burning there; saw the blaze. He supposed he was about a couple of hundred feet from his father's house. There was then a very high gale of northwestern wind blowing. It was a clear day. The wind was blowing from the west. He saw a fire when it went in Mr. Streett's woods. He did not suppose it was any more than a half hour after he saw the fire in Slade's woods that he saw fire in Streett's woods. He was eating his dinner. When he saw it in Mr. Slade's woods he went in to eat his dinner. When he saw it in Mr. Streett's woods his father called his attention, and he went to help put it out. When he got down there the fire was burning in Mrs. Streett's woods. He stayed there until it was completed about 6 o'clock. The fire got over to his father's land sometime later after they tried to put it out in Mr. Murphy's tract. When he went down on Mr. Streett's property the wind was blowing again westward. The Streett property and his property and the Murphy property is considerable sight lower than Slade's."

Mr. Oldfield saw the timber before and in February after the fire. The general effect of his evidence was that before the fire it was a fine piece of timber, and that it had been seriously injured by the fire.

Benjamin Garber testified: That he saw the fire between 1 and 2 o'clock. That there was a "terrible smoke" coming down the hollow, and that he went over to Murphy's and found the whole woods on fire. That the smoke was coming down over Slade's woods towards Murphy's woods. It was a dry day and the wind was blowing very hard, and he never saw it blow much harder than it did that day. That it was blowing direct from the west, and it was blowing smoke over Mr. Ayres' field down over the Murphy woods.

Testimony on the part of the defendant was offered tending to show that the plaintiffs' injury was much less than they testified to; that they had misstated the character and value of the timber; that the fire could not have been caused by any act of the defendant because the wind was moderate and was not blowing in the direction of the Murphy tract; and because there was no evidence of fire or burning of the dried grass or weeds in that part of the intervening field, above mentioned, which was in the possession of Ayres, who, however, when called as a witness for the defendant, testified that the fire had burned the fencing between him and Albert Berry. Berry's land was located beyond this intervening field and adjoined the land of Murphy.

We now pass to the consideration of the legal questions presented by the rulings on prayers. The only error which it is claimed the court made in this respect was in rejecting the defendant's first, second, and third prayers, which asserted that there was no legally sufficient evidence offered to entitle the plaintiffs to recover, and in overruling the special exception filed to the plaintiffs' first prayer, which declared that there was no legally sufficient evidence in the case to support the following hypothesis of the prayer, to wit:

"That the fire started by the defendant on its right of way was communicated from the woodland of one Slade, referred to in said prayer, to the woodland of one Streett, referred to in said prayer."

[4] By these prayers and under the special exception the court was asked to declare, as a matter of law, first, that the defendant was not guilty of negligence in starting the fires on its right of way under the circumstances stated in the evidence; and, secondly, that said fires were not the proximate cause of the injury sued for. Both of these questions are ordinarily questions to be passed on by the jury under the facts and circumstances of the particular case, and assuming, as we must, the plaintiffs' evidence as to the weather conditions and especially as to the velocity of the wind to be true, there can be no doubt of the defendant's negligence. Duties and responsibilities arise out of existing facts and conditions, and no reasonably prudent and cautious man would have fired the piles of debris under the conditions described by the evidence offered on behalf of the plaintiffs. The true rule of liability is stated in *Miller v. Neale*, 137 Wis. 426, 119 N. W. 94, 129 Am. St. Rep. 1077, as follows:

"A man may lawfully burn rubbish or brush upon his own land, if he exercises that prudence in the starting of the fire and the management of it after it is started which the rules of ordinary care demand. He is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction of his neighbor's lands, he may well be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates."

This rule is in accord with practically the unanimous decisions upon the subject, among which are *Black v. Christ Church Finance Co.*, App. Cas. [1894] 48; *McVay v. Central California Invest. Co.*, 6 Cal. App. 184, 91 Pac. 745; *Richard v. Schleusener*, 41 Minn. 49, 42 N. W. 599.

The question whether the injury suffered by the plaintiffs was the natural and proximate cause of the fires set by the defendant was properly submitted to the jury. The general principles upon this subject were stated in *State, use of Scott, v. W. B. & A. Electric R. R. Co.*, 101 Atl. 546, and need not be here restated. In the recent case of the *Western Md. R. R. Co. v. Jacques*, 129 Md. 400, 99 Atl. 549, we said:

"The rule long in force is that where fire has not been directly communicated to the plaintiff's property by sparks, or other burning matter from the engine, but has been communicated across other property, the question to be submitted to the jury, to determine from all the facts, is whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by some intervening cause. The record shows that this question was properly submitted. *A. & E. R. R. Co. v. Gantt*, 39 Md. 115; *P. W. & B. R. R. v. Constable*, 39 Md. 149; *Green Ridge R. R. v. Brinkman*, 64 Md. 52 [20 Atl. 1024, 54 Am. Rep. 755]; *Carter v. Md. & Pa. R. R.*, 112 Md. 599 [77 Atl. 301]."

As to the twenty-first, twenty-second, and twenty-third bills of exceptions, which were taken to the statements made by the counsel in argument, we find nothing sufficient to cause a reversal after a careful examination of the record, and of the principles by which the courts are guided in passing upon such objections. We said in *Esterline v. State*, 105 Md. 629, 66 Atl. 269:

"It is the duty of counsel to confine himself in argument to the facts in evidence, and he should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence, or to state what he could have proven. Persistence in this course of conduct may furnish good grounds for a new trial. The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge, and the appellate court should in no case interfere with the judgment, unless there be an abuse of discretion by the trial judge of a character likely to have injured the complaining party. * * * The observations of Mr. Justice Brown upon this subject in *Dunlop v. United States*, 165 U. S. 486 [17 Sup. Ct. 375, 41 L. Ed. 799] may well be applied to the facts embraced in this exception: 'There is no doubt that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony and which are or may be prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.'"

[5,6] There remains for consideration the 19 bills of exceptions taken to rulings on evidence. The only really important ones are the second, third, eighth, ninth, and tenth, which relate to the qualifications of Thomas F. Murphy and Cornelius F. Murphy, to speak as to the value of the timber before and after the fire with a view of establishing the damages. *Belt R. R. Co. v. Sattler*, 100 Md. 333, 59 Atl. 654; *Western Md. R. R. Co. v. Jacques*, supra. In *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510, the court said that how much knowledge a witness must possess before he can be allowed to give his opinion as an expert must in the nature of things be left largely to the trial court, and its rulings will not be disturbed unless clearly erroneous. We think these witnesses were qualified to speak upon the subject of value.

[7] There was technical error in some of the rulings embraced in some of the other exceptions, but some of the evidence admitted was of no importance, and as to the other rulings the record shows that substantially the same evidence was admitted without objection either before or after the rulings. There must be a concurrence of error and injury, and after a careful examination of the whole record we find no error which would justify us in reversing the judgment.

Judgment affirmed, with costs.

(73 N. H. 428)

CLARK v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merri-mack. June 5, 1917.)

1. RAILROADS \S 470 — LIABILITY FOR INJURIES CAUSED BY FIRE—STATUTE.

Pub. St. 1901, c. 159, § 29, making a railroad liable for damages to person or property from fires set by its locomotives, has no application to the case of a fireman, employed by a municipality to extinguish fires, and injured in attempting to extinguish a fire set by a railroad's locomotive; the act applying only to those so situated that as to them the operation of the road constitutes an extra fire hazard.

2. RAILROADS \S 470—SETTING FIRE—LIABILITY TO FIREMAN.

A railroad, apart from the contract of employment of a municipality's fireman, stood in no legal relations, however remote, to such fireman, and owed no duty toward him to refrain from setting a fire.

3. ACTION \S 4—INFRINGEMENT OF CODE OF MORALS.

Courts cannot give relief in damages for a mere infraction of a code of morals.

4. RAILROADS \S 470—SETTING FIRE—LIABILITY FOR INJURIES TO FIREMAN.

A railroad was not liable for injuries to a fireman employed by a municipality because of his public employment while endeavoring to extinguish a fire set by its locomotive; there being no breach of any duty owed the fireman by the road.

Transferred from Superior Court, Merrimack County; Sawyer, Judge.

Action by Clarence L. Clark against the Boston & Maine Railroad. On transfer from the superior court on defendant's demurrer. Demurrer sustained.

Case for injuries alleged to have been caused to the plaintiff by a fire set by the defendant's locomotive. There is a general count for negligence and one setting out that the plaintiff was a member of the Concord fire department and received his injuries while acting in that capacity attempting to extinguish the fire. A specification filed later shows that the first count is for the same alleged wrong. There is also a count alleging a right of recovery under the statute imposing liability upon railroads for damages caused by fires set by locomotives.

Robert W. Upton, of Concord, for plaintiff. Streeter, Demond, Woodworth & Sulloway, and Jonathan Piper, all of Concord, for defendant.

PEASLEE, J. The declaration, and the specification of facts applicable to the first count, show that the plaintiff's claim rests upon the theory that a fireman employed by a municipality to extinguish fires may recover from the party whose act caused the fire. It is not necessary to consider whether a recovery might be had if the fire had been designedly set, with the intent to injure the plaintiff, for his claim is based upon the statutory liability of railroads, or upon negligence.

[1] The statute making a railroad liable

for damage to person or property from fires set by its locomotives (P. S. c. 159, § 29) has no application to the present case. That act applies only to those so situated that as to them the operation of the railroad constitutes an extra fire hazard. If the act is broad enough in its terms so that it could have been construed to include all damage that could in any sense be deemed to be "caused" by the defendant, it is settled that such was not the legislative intent. *Welch v. Railroad*, 68 N. H. 206, 44 Atl. 304, is conclusive on this issue. If the statute covered the present case the plaintiff in that case would have recovered. The loss there was caused by a fire set by the defendant; but because the plaintiff's property was in the custody of the defendant as a bailee, it was held not to be within the class contemplated by the Legislature. While this conclusion rests in part upon the language of the act giving the railroad "an insurable interest in all property situate on the line of such road, exposed to such damage" (G. L. c. 162, § 9; P. S. c. 159, § 30), the reasoning is not inapplicable in determining the meaning of the related provision as to "damages to any person." The declaration of liability is in no way differentiated. There was occasion to express the understood limitation as to one class, and it is not to be presumed that the unexpressed intent was different as to the other class. The statute applies to persons and property exposed to damage along the line of the road. It does not apply to firemen or fire engines whose exposure results from an attempt to extinguish the fire. As the statute has no application, the rights of the parties are determined by the common-law rules governing actions to recover for negligence.

Authorities holding that a volunteer rescuer of persons or property may recover from a third person whose negligence caused the situation inducing the volunteer to act are relied upon by the plaintiff. It is also contended that his contract of employment as a city fireman gives him a standing more favorable to him than that of the volunteer.

[2] The case has been largely argued upon the issue of proximate cause, in furtherance of the first of these claims. But that question does not arise unless the defendant's act bore some legal relation to such a volunteer. The question here is not one of proximate or remote cause, but whether the defendant owed any duty at all to the plaintiff—whether, apart from his contract of employment, it stood in any legal relationship to him, however remote. It seems to us that it did not. Neither the plaintiff nor his property was in a position to be injured by a fire set by the defendant. His connection with the fire arose solely from his own act in coming into contact with it after it was set.

It is the law of this state that as to such interveners the defendant who created the situation owed no anticipatory duty. *McGill*

v. Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618. The situation is much like that of the land owner and a licensee. So long as no intentional injury is done, and no negligent act after the licensee is present, there is no liability. *Hobbs v. Company*, 75 N. H. 73, 70 Atl. 1082, 18 L. R. A. (N. S.) 939. The cases from other jurisdictions holding that there is a legal liability in such a case rest upon the ground that the intervener had a moral right, if not a moral duty, to make the attempt to save life or property; and because it may be assumed that men will do their moral duty, it is argued that the defendant is bound to consider the probabilities as to their subsequent and morally induced conduct. The defect in this reasoning is that it substitutes moral rights and duties for those recognized and regulated by law.

As to the intervener the defendant's previous conduct is wrong only in the sense that it is a wrong to society at large. It may be a moral wrong and may be punishable on behalf of the public; but it is not a private legal wrong to individual members of the public, who of their own motion undertake to lessen the evil effects of the defendant's dereliction from duty. The Good Samaritan could not recover from the thieves the value of the oil and wine which he poured into the wounds of the man at Jericho. His recompense is the same to-day that it always has been.

[3] Unless it be true that courts can give relief in damages for a mere infraction of a code of morals, the plaintiff's argument has no weight. That courts are not empowered to so act in this jurisdiction is too well settled to require discussion. *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Buch v. Amory Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163. If legal liability is to be extended so as to cover this new field, the change must be made by the Legislature.

The plaintiff's argument that the test laid down in *Garland v. Railroad*, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924, is applicable in his favor fails in an essential element. It is not true that, apart from his contract with the city, the defendant ought to have known that the plaintiff would be in a position to be injured by what it did. He was not in such position. He does not so state in his declaration. What he did was to put himself in such position after the defendant ceased to be an actor, and because a fire was in progress. He did not come upon the fire accidentally, or in the course of independent and lawful conduct, nor did the fire come upon him while he was so circumstanced. Such right as he had to be an actor in this matter grew out of the fact that there was a fire. It was not a right whose exercise the fire interfered with.

While in a certain sense the fire may be said to be a cause of the plaintiff's injury,

It does not follow that therefore the defendant's negligence was a breach of any duty the defendant owed to him. "The tortious nature of the defendant's conduct and the causative effect of that conduct are entirely distinct matters; and what is a requisite element as to the first subject is not necessarily so as to the second." *Jeremiah Smith* in 25 Harv. Law Rev. 245. In *Garland v. Railroad*, supra, the defendant's act undoubtedly caused the injury, yet it was no breach of a duty owed to the party who was injured.

The discussion in *Kambour v. Railroad*, 77 N. H. 33, 86 Atl. 624, 45 L. R. A. (N. S.) 1188, touching the rights of certain classes of people who encounter known danger, is not germane to the present case. That discussion relates to the acts of a plaintiff to whom a duty is owed, who knows the duty has been violated by the defendant. It is not authority for the proposition that fault as to one party constitutes a wrong to a third person who knows of the wrong and voluntarily seeks to remedy it. The citation there of cases permitting volunteer rescuers to recover was only for the purpose of showing that the maxim, "*Volenti non fit injuria*" was not generally considered to be a rule of universal application in the law of negligence. The question whether these cases were good law was not involved, and there was no attempt to pass upon it. Nor is it necessary to now consider this aspect of them. It is enough for the present case to say that even if the voluntary character of the act does not amount to an assent to the result, such act is not of a character to raise an anticipatory duty on the part of those not otherwise related to the actor to take care to avoid furnishing him an opportunity to act.

[4] The other claim suggested is that because the plaintiff was employed to extinguish fires he stands differently from a volunteer and may recover when a volunteer could not. But if it be assumed that his contract of employment brought him into a legal relation to the defendant and to its conduct in setting the fire, he is no better off. If his contract with the public created a relation to the individual member thereof, the relation created is such as the parties contemplated. It appeared to the public desirable to reduce the fire losses of its members by providing for the extinguishment of fires. The contract with the fireman is for the benefit of those who would be damaged by the fire. The agreement so made differs in no respect essential to this case from the ordinary contract of insurance. That is, the plaintiff has agreed to undertake to lessen the fire damage which would otherwise fall upon the defendant. It is argued that this relation exists only as between the fireman and the party whose property is in

danger of being consumed by the fire. But this is much too narrow a view. If a relation arises at all, it is one to all members of the public whose interests or liability are involved by the fire. This is the common-sense view of the situation. The plaintiff, knowing that fires will occur from various causes, some culpable and some not, undertakes the work of extinguishing all fires without reference to how they were caused. The chance of injury in doing such work is necessarily assumed by him. This assumption arises from the nature and terms of the contract he made. He agreed to fight all such fires as should occur. There is in his contract no distinction as to how the fires originated. If his contract has any bearing at all upon the relation of the parties, it establishes an express assumption of the risk here involved, and bars any recovery therefor.

The rule that one may not contract against the consequences of his own future negligence has no application. This is merely an undertaking of one not otherwise related to the situation to bear for the defendant the consequences of its fault. The defendant is not thereby released from any liability imposed upon it by law. The agreement is like any insurance contract, and its validity is not open to question.

Whether, then, the plaintiff is treated as a volunteer or as one whose contract of employment brought him into a legal relation to the defendant, the result is the same. In neither case was there a breach of any duty owed to him by the defendant.

Demurrer sustained. All concur.

(357 Pa. 329)

GEISSLER et al. v. READING TRUST CO.
(Supreme Court of Pennsylvania. March 23, 1917.)

1. PERPETUITIES §1—NATURE OF RULE.

"Perpetuities" are grants of property wherein the vesting of an estate or interest is unlawfully postponed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perpetuity.]

2. WILLS §630(2) — VESTED OR CONTINGENT ESTATE—LEGACIES.

The rule is that, where a legacy is given to a person to be paid at a future time, it vests immediately, but that, when not given until a certain future time, it does not vest until that time.

3. WILLS §634(14)—CONSTRUCTION—VESTED OR CONTINGENT REMAINDER.

A devise of property in trust, limiting the income to the testator's children by name for life and after their death to their children as a class, and after the death of the surviving grandchild the corpus to vest in testator's great-grandchildren per capita, created a contingent remainder, to vest in the great-grandchildren as a class after the death of the testator's last grandchild.

4. PERPETUITIES §4(9) — TESTAMENTARY TRUST.

Such devise offended the rule against perpetuities, and was void, and the testator's heirs

might compel the trustee to convey the property to them absolutely.

Appeal from Court of Common Pleas, Berks County.

Bill by Henry C. Geissler and others, heirs, to annul a testamentary trust and for reconveyance, against the Reading Trust Company, trustee under the will of Henry C. Geissler, deceased, and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Testator's will provided in part as follows:

(7) "Item—I give, devise and bequeath to my three sons, Henry C. Geissler, Jr., Samuel K. Geissler and Robert Franklin Geissler, the above-mentioned properties contained in purparts numbered 1 and 2, to wit: 727, 729 and 731 Penn street and all buildings appertaining thereto and 726 and 728 Court street and 720 Court street, marble works and stable, all in the said city of Reading, said county and state, same to be held by them in common, to use, occupy and enjoy the rents, issues and profits thereof, as long as they shall live. The same shall not be sold so long as any one of the said sons shall live. Should the said sons agree to dissolve partnership now existing between them, all to discontinue the business now engaged in, to wit: The tin and stove trade and tile and mantle works—and all engage in some other line of trade, the said premises to be used by all—or, should they engage in different enterprises, the said premises not used by any, then, the same shall be rented, and proceeds, after taxes, water rents and necessary repairs shall be paid, to be divided among the three sons, their heirs, share and share alike. After all the said three sons shall have died, then the said premises may be sold, if deemed advisable by my hereinafter named executor, a good and sufficient price secured therefor, the proceeds therefrom to be invested and the income thereof to be distributed to the children of my deceased sons, share and share alike, if of age and properly behaved and conducting themselves well, if not—then the same to be expended in their keep and maintenance—and, after all such grandchildren shall have died, then the principal sums so created shall be divided among all the children of my grandchildren, share and share alike, 'per capita' and not 'per stirpes'—the mortgage, now a lien upon said premises, to be paid and lien discharged, if not already so discharged at my death, as soon after my death as can be done, provision to be so made by sale of such securities as may be necessary, good and fair price being received for same."

(8) "Item—I give, devise and bequeath unto my daughter, Rosa M. Berg, widow of the late Edward C. Berg, deceased, the two dwelling houses and lots or pieces of ground upon which the same are erected, situate on North Fifth street, beyond Buttonwood street, Number 408 and 410 North Fifth street, in said city of Reading, county and state aforesaid, which I have appraised at the sum of five thousand (\$5,000) dollars per dwelling, aggregating ten thousand (\$10,000) dollars, for and during the term of her natural life, she to enjoy the rents, issues and profits of the same, after all taxes and necessary repairs shall have been made, as long as she shall live. And I direct that additional real estate, free from all incumbrances, or first class mortgage security, or securities be provided for her, which, together with the above two dwellings valued at ten thousand (\$10,000) dollars, as above contained, shall aggregate the sum of nineteen thousand three hundred and sixty-one and (\$19,361.08) $\frac{08}{100}$ dollars, same being an equivalent for what has been given to the three sons as above contained in purparts Nos. 1 and 2, and the material, wares and equipment

contained in the two branches of business, to wit, the tin and stove trade and the tile and mantle business, which I gave the said three sons, when I retired from business and installed my said sons into the said branch of business, August 1, 1908,—same to be invested and held in the name of my estate, the income from the dwellings and that from the additional investment to be paid to her, for her sole and separate use as long as she shall live, said income to be paid to her, and to her alone, her receipt alone to be in payment of same, such income not to be subject to any bills or liabilities which may be contracted, nor be liable to attachment nor in any manner, menace nor liable for any debt or loss sustained by said daughter, Rosa M. Berg. After the death of my daughter, Rosa M. Berg, if in the judgment of my hereinafter named executor, a good and sufficient price be secured for same, the real estate so set aside for her as above contained, or, that may be bought for her use and enjoyment, may be sold and the proceeds reinvested in other good premises same continued in my estate, or in good first mortgage security or securities, in my estate, the income whereof shall be distributed to my grandchildren, children of my said daughter, Rosa M. Berg, share and share alike, if of age and properly behaved and conducting themselves well, if not—then the same to be expended for such so misbehaving for their maintenance and keep. This extra provision extending to my grandchildren is made in consideration of the fact that my good deceased wife and I have always had the grandchildren around us, in our home, and are very warmly attached to them, and, hence this provision."

(9) "Item—I direct that the additional sum of two thousand five hundred and fifty-five and $\frac{69}{100}$ (\$2,555.69) dollars be invested by my hereinafter named executor, which sum, together with the real estate hereinbefore disposed of, and the amount of stock as per inventory, given to the boys, when the two branches of business were transferred to them, August 1, 1908, to wit, 'eight thousand eighty-three and $\frac{23}{100}$ (\$8,083.23) dollars, with the additional amount to make the share of Rosa M. Berg equal to the share of one of my sons, will make a grand total of eighty thousand dollars—the income of which said sum of two thousand five hundred and fifty-five and $\frac{69}{100}$ dollars shall be divided into four equal shares and be paid to the said Henry C. Geissler, Jr., Samuel K. Geissler, and Robert Franklin Geissler and Rosa M. Berg, and to their children, the children of any deceased child or children, throughout this testament, to take the share of such deceased parent, share and share alike."

(10) "Item—After the death of all my children and their children (my grandchildren), then I direct that the above-mentioned investments (real estate and securities), aggregating the sum of eighty thousand (\$80,000) dollars less the amount as contained in inventory of stock, to wit, the sum of eight thousand eighty-three and $\frac{23}{100}$ (\$8,083.23) dollars, or the sum of seventy-two thousand four hundred sixteen and $\frac{77}{100}$ (\$72,416.77) dollars, together with whatever increase of principal, by reason of higher values received for real estate sold, as hereinbefore set aside to the uses of the sons and daughter, and whatever other increase of real estate and securities, together with interest which shall have accrued, shall be divided among all my great-grandchildren, grandchildren of my sons, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and my daughter, Rosa M. Berg, all share and share alike, same taking per capita and not per stirpes."

Other facts appear in the opinion of Wagner, J., in the common pleas, sur defendant's demurrer to plaintiff's bill:

The plaintiffs have filed a bill in equity wherein they set forth certain provisions in the will of Henry C. Geissler, deceased, and allege that the scheme of the trust attempted to be established by these provisions is repugnant to the rule against perpetuities, and void for remoteness. They therefore pray the court to enter a decree declaring said trust null and void, and directing the defendant to convey and quitclaim unto the plaintiffs the real and personal property comprising the said trust estate. To this bill defendant demurred.

Item 7 of the will gives to Henry C. Geissler, Jr., Samuel K. Geissler, and Robert Franklin Geissler, 727, 729, and 731 Penn street, 726, 728, and 720 Court street, to be held by them in common to use and enjoy the rents, etc., as long as they live, same not to be sold as long as any one of the sons shall live. It further directs that, after the three sons shall have died, then the premises may be sold by his executor, if deemed advisable, the proceeds therefrom to be invested and the income thereof to be distributed to the children of his deceased sons, share and share alike, if of age and properly behaved and conducting themselves well, and, after all such grandchildren shall have died, then the principal sum so created shall be divided among all the children of his grandchildren, share and share alike, per capita and not per stirpes.

Section 8 gives to Rosa M. Berg, his daughter and only other child, 408 and 410 North Fifth street, as long as she lives, and directs that additional real estate free from all incumbrances be provided for her, so that the aggregate value shall amount to \$19,361.08; the income from the dwellings and additional investment to be paid to her as long as she shall live. After her death the real estate may be sold by the executor, and the proceeds invested in any other good premises or in first mortgage security or securities, the income to be distributed to his grandchildren, the children of his daughter, Rosa M. Berg, share and share alike.

Item 10 provides that, after the death of all his children and their children (his grandchildren), then the above trust estate (real estate and securities), aggregating the sum of \$72,416.77, together with increase of principal, shall be divided among all his great-grandchildren, grandchildren of his sons, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and his daughter, Rosa M. Berg, all share and share alike: same taking per capita, and not per stirpes.

[1, 2] Perpetuities, as stated in *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 26, 84 Am. Dec. 470, are "grants of property, wherein the vesting of an estate or interest is unlawfully postponed." When, then, does the estate in or interest to the principal of this contemplated trust fund vest? That is, do his great grandchildren take a vested or a contingent interest? In *Sternbergh's Estate*, 250 Pa. 167, 171, 95 Atl. 404, 406, we have: "In *Smith's Estate*, 228 Pa. 304, 307, 308 [75 Atl. 425, 426], this court said: 'As Chief Justice Tilghman said in *Patterson v. Hawthorn*, 12 Serg. & R. 112: "The rule is that, where a legacy is given to a person to be paid at a future time, it vests immediately. But when it is not given until a certain future time, it does not vest until that time; and if the legatee dies before, it is lost." * * * The statement of the rule by Chief Justice Gibson, in *Moore v. Smith*, 9 Watts, 403, 408, has always been accepted; it is that: "The legacy shall be deemed vested or contingent just as the time shall appear to have been annexed to the gift or the payment of it." In the case at bar the time is manifestly annexed to the gift, not merely to its payment. If any of the members of the class die before the time fixed for distribution they get nothing.

[3] It will be noticed that in this will a life estate is first given to his children, mentioning them by name. After their death we again have

a life estate to their children (grandchildren of testator) as a class, the names of no particular individuals being designated. These are to take per capita. It is clear that the quantum of this life estate is measured by the number of grandchildren living at the time of death of the last of testator's children. Then only after the last of these, the grandchildren, shall have died shall the trust estate then vest in the great-grandchildren of the testator, per capita. Here again the quantum of the principal of the trust estate to be eventually received by each of the great-grandchildren is determined by the number of great-grandchildren in being at the time of the death of the last grandchild. That is, the estate vests, not presently in designated persons, but only after the death of the last grandchild of the testator, in his then great-grandchildren as a class per capita. We have here clearly a contingent and not a vested interest.

[4] Is, then, this vesting unlawfully postponed? "The law allows the vesting of an estate or interest, or the power of alienation, to be postponed * * * for the period of lives in being, and 21 years and 9 months thereafter, and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently the estates or interests dependent on them are void." *City of Philadelphia v. Girard's Heirs*, 45 Pa. 26, supra. By the terms of the will the principal will not vest in the great-grandchildren until after the death of all the grandchildren, whether now born or to be hereafter born; that is, in the natural course of events, for a period of from 50 to 80 or more years after the period of lives in being. This period is too remote, and offends the rule of perpetuities. The antecedent estate thus falls, and the heirs at law of this testator are entitled to immediate possession. *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Gerber's Estate*, 196 Pa. 366, 46 Atl. 497; *Kountz's Estate* (No. 1), 213 Pa. 390, 62 Atl. 1103, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427; *In re Kountz's Trust*, 251 Pa. 582, 96 Atl. 1097.

Findings of Law.

1. The interest of the great-grandchildren of Henry C. Geissler, the decedent, in the trust estate of \$72,729.31, attempted to be created by the testator, Henry C. Geissler, in his will, is not a vested interest.

2. The devise of the principal of the property contained in the attempted trust is one wherein the vesting thereof is postponed for a longer period than the period of lives in being and 21 years and 9 months thereafter, is void under the rule against perpetuities, and the plaintiffs, the heirs at law of Henry C. Geissler, deceased, are entitled to immediate possession of the said principal.

3. The plaintiffs are entitled to a decree declaring the aforesaid trust, aggregating in value the sum of \$72,729.31, null and void, and that the Reading Trust Company, defendant, be directed to convey a quitclaim unto the plaintiffs, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and Rosa M. Berg, of the real estate and personal property described in the will as comprising the said trust estate.

4. The costs of the proceeding shall be paid by the defendant.

The court below entered the following decree:

1. That the demurrer be and is hereby overruled.

2. That the devise of the beneficial estate or interests in the six several purparts of real estate mentioned and described in the third paragraph of the plaintiff's bill, contained in the seventh clause of the last will of Henry C. Geissler, deceased, the several purparts contained in the eighth clause of said will, and the di-

rection to provide additional real estate in the same clause, and the bequest of \$2,555.69 in the ninth clause of said will, is wholly and entirely void, and that to the extent of said beneficial estates and interests in said purparts of real estate and said sum of money the said Henry O. Geissler died intestate.

3. That the power of sale by the said will of the said Henry O. Geissler granted to the executor relating to the aforesaid several purparts is invalid and void.

4. That the said defendant do make, execute, and deliver to the plaintiffs, the heirs at law of the said Henry O. Geissler, deceased, proper and sufficient deeds, conveyances, and quitclaims as executor and trustee, conveying and quitclaiming to the said plaintiff the legal title to the said several purparts of real estate described and specified in the third paragraph of the plaintiff's bill.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHISKER, and
FRAZER, JJ.

Walter B. Craig, of Reading, for appellant.
Jefferson Snyder and H. Robert Mays, both
of Reading, for appellees.

PER CURIAM. The decree in this case is affirmed, at the costs of the appellant, on the opinion of the learned court below, directing it to be entered.

(257 Pa. 341)

REYNOLDSVILLE WATER CO. v. FARMERS' & MINERS' TRUST CO.

(Supreme Court of Pennsylvania. March 23, 1917.)

**CORPORATIONS 479—BONDS—TRUST DEED
—DELIVERY OF BONDS—LIABILITY FOR NEGLIGENCE.**

The trustee under a mortgage to secure a water company's bond issue providing that the bonds be executed by its president and secretary and for their delivery to the trustee, to be certified and afterwards returned to the company's treasurer, which received the treasurer's receipt for certain of the bonds, together with the bonds from the company's president, with directions to send them to a bank for delivery to him, and which, in reliance on such receipt, sent the bonds to such bank, from which the president obtained and embezzled them, was not liable to the company for their value.

Appeal from Court of Common Pleas, Jefferson County.

Trespass by the Reynoldsville Water Company against the Farmers' & Miners' Trust Company for alleged negligent disposal of bonds. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

From the record it appeared that certain mortgage bonds of the Reynoldsville Water Company were executed in its behalf by A. Grant Richwine, as president, and W. Dale Shaffer, as secretary. The bonds provided that after execution by the president and secretary, they should be sent to the Farmers' & Miners' Trust Company, trustee, for certification by it and that they should then be delivered to the treasurer of the water company. After their execution by the presi-

dent and secretary, Richwine suggested that Shaffer, as treasurer, send a receipt along with the bonds, which were to be forthwith certified and delivered. Such receipt was prepared, and, together with the bonds, was handed by Shaffer to Richwine, who sent both receipt and bonds to the trust company, with directions to send the bonds, when certified, to a certain bank for delivery by said bank to Richwine. The trust company, relying upon the treasurer's receipt, sent the bonds to the bank as directed, and Richwine subsequently procured same and embezzled them. The lower court entered a compulsory nonsuit, which it subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

John W. Reed, of Brookville, and H. H. Mercer, of Mechanicsburg, for appellant.
Cadmus Z. Gordon and Raymond E. Brown, both of Brookville, and Lex N. Mitchell, of Punxsutawney, for appellee.

PER CURIAM. The following is the first condition of the mortgage under which the bonds in controversy were issued:

"The bonds to be issued under and secured thereby shall be executed on behalf of the Reynoldsville Water Company, by its president and secretary, and shall be delivered to the trustee, to be certified by it, and of the bonds so executed and delivered the trustee shall forthwith certify and deliver to the treasurer of the company ninety thousand (\$90,000) dollars worth of said bonds, to be used for property, real and personal, already acquired by it, and ten thousand (\$10,000) dollars for making additional improvements and extensions, to the plant of said company."

On November 17, 1913, the treasurer of the water company acknowledged in writing:

"The receipt of \$100,000 of the Reynoldsville Water Company bonds: \$90,000 for the property, real and personal, already acquired by it, and \$10,000 for the making of additional improvements and extensions to the plant of said company."

Upon the delivery of this receipt by the president of the water company to the Farmers' & Miners' Trust Company, the appellee. It was fully warranted in what it subsequently did with the bonds, and the judgment of the court below is affirmed, on the following from its opinion refusing to take off the nonsuit:

"The receipt, prepared and signed by W. Dale Shaffer, treasurer, and sent to the trust company, defendant, acknowledging the receipt of \$100,000 of the Reynoldsville Water Company bonds, was clearly designed and intended by the treasurer of the company to be his official and final acknowledgment of the receipt of that amount of the bonds from the trust company, after it should have certified them, and was so regarded by the trust company. Shaffer sent no request and gave no direction, in connection with the receipt, to the latter. * * * The man who sent the receipt to the defendant, and requested that the bonds be sent to him, and who got them, was the president of the water com-

pany, and also a director. These men (the president and treasurer), chosen by its stockholders, were the executive officers of the water company, who for it executed the bonds and mortgage, and who at the time of this transaction were deemed worthy of trust and confidence, and unsuspected of any motive but the interest of the company, at whose head they stood."

Judgment affirmed.

(257 Pa. 241)

In re CROZER'S ESTATE.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. WILLS §523—CONSTRUCTION OF LEGACY—REPRESENTATION.

Where testator, dying without issue after the death of two of his brothers, one of whom left issue, gave an undivided part of certain furniture to his three brothers and two sisters, and the residue of his estate to his two sisters and three brothers absolutely, the gift was not to a class, but to individuals, and the issue of the deceased brother were entitled to his share.

2. WILLS §441—CONSTRUCTION—INTENT.

The testator's intention as gathered from the language of his will with the aid of his surrounding circumstances is the object sought in the construction of a will.

3. WILLS §449—CONSTRUCTION—AVOIDANCE OF INTESTACY.

A construction resulting in intestacy as to the residue of an estate is most strongly to be avoided.

4. WILLS §437—CONSTRUCTION—INTENTION—TIME.

The testator's legal intention is to be gathered from the state of the law at the date of the will, regardless of what it was at the date of his death.

5. WILLS §850—LAPSED LEGACIES—RE-ENACTMENT OF STATUTE.

Act July 12, 1897 (P. L. 256), relating to lapsed legacies, does not repeal, but re-enacts, Act May 6, 1844 (P. L. 565) § 2, providing that no legacy to a brother or sister by one not leaving any lineal descendants shall lapse by reason of the decease of the legatee in the testator's lifetime, if the legatee leaves issue surviving the testator.

Appeal from Orphans' Court, Delaware County.

George K. Crozer and others appeal from a decree dismissing exceptions to the report of Josiah Smith, Esq., auditor, in the estate of Robert H. Crozer, deceased. Appeals dismissed, and decree affirmed.

The following is the opinion of Johnson, P. J., dismissing the exceptions:

The testator, by his will, after giving sundry legacies to his three brothers and two sisters, naming them, and after bequeathing in the following words: "I give and bequeath to my three brothers and two sisters, my one-sixth undivided part of the furniture, etc., at my home in Upland, which I received from my mother's estate, and which I own in common with them"—disposes of the residue of his estate in the following words: "All the rest, residue and remainder of my estate, I give and bequeath to my two sisters and three brothers absolutely." The question has arisen in the distribution of the estate whether by these clauses the gifts are to testator's three brothers and two sisters individually or as a class. The auditor has decided that the gifts are to them individually

and made distribution accordingly, and exceptions have been filed to this conclusion.

If these gifts are to the three brothers and two sisters as a class, the auditor's distribution is wrong. If, on the other hand, these gifts are to them as individuals, there arises a second question: Was the second section of the act of May 6, 1844 (P. L. 565), repealed by the act of July 12, 1897 (P. L. 256; Stewart's Purdon, vol. 4, page 5143, pl. 22)? If it was so repealed, then the auditor's distribution is wrong; otherwise, it is correct. To sustain the auditor requires an affirmative answer to the following two propositions: (1) The gifts to the three brothers and two sisters of the testator were to them as individuals. (2) The act of 1897 did not repeal the act of 1844. The auditor has addressed to the solution of these questions a great deal of painstaking labor and research, and fortified his conclusion by an exhaustive citation of the authorities. Agreeing as we do with his conclusions, it is unnecessary for us to review his report with any great degree of detail.

[1-4] The object to be obtained is the ascertainment of the intent of the testator, to be gathered from the language of his will, with the aid of his surrounding circumstances. He was a very wealthy man, and a bachelor. He executed his will in 1888, with a codicil in 1893, and died in 1914, 73 years of age. At the date of his will his parents were dead. At that time, and also at the date of the codicil, he had three living brothers and two sisters. One of these brothers, J. Lewis Crozer, died in 1897, without children. Another brother, Samuel A. Crozer, died in 1910, leaving children. His other brother, George K. Crozer, and his two sisters, Elizabeth C. Griffith and Emma C. Knowles, survived him. By his will he gave legacies of \$10,000 each to his brothers, Samuel A. and J. Lewis, naming them, and then, conscious that he was about to give munificent legacies to his sister, Elizabeth C., and her children, and to his brother, George K., and his children, and to his sister, Emma C., and her children, he takes occasion to say in his will that these legacies of \$10,000 are comparatively small, that is to say, compared with those about to be given to the others, and that they are made thus comparatively small for reasons which he states, and then, to avoid an inference that the distinction is attributable to any difference in regard for them, he says: "My love for all my brothers and sisters is strong and deep." He then gives to his sister, Elizabeth C., naming her, and her children, legacies amounting to \$250,000; also to his brother, George K., naming him and his children, a like sum; and also to his sister, Emma C., naming her and her children, a like sum. Then after a number of legacies come these two clauses, which have been referred to, and which produce this controversy:

"Item. I give and bequeath to my three brothers and two sisters my one-sixth undivided part of the furniture, etc., at my home at Upland, which I received from my mother's estate and which I own in common with them."

"Item. All the rest, residue and remainder of my estate I give and bequeath to my two sisters and three brothers absolutely."

Did the testator intend these gifts to the donees to be to them as a class or as individuals? It would scarcely occur to the average mind that these gifts were otherwise than the ordinary gifts to them as individuals. What did the testator intend in 1888, when the will was executed? Did he have them in mind as a class? If he had in mind to treat them as a class, then he intended that only those who survived him should take, and the children of those who predeceased him should be excluded; but he said that his love for all of them was deep and strong. Moreover, if a class were

although it may seem improbable and be strongly contradicted.

That part of the charge embraced in the eighth assignment of error, referring to the question of damages, is subject to criticism. The thought in the mind of the court does not seem to find expression in the language as reported. However, that and any inadequacy in the charge can be corrected on another trial. The assignments of error, except as herein stated, are not sustained.

The judgment is reversed, and a *venire facias de novo* awarded.

(267 Pa. 422)

GRIFFIN et al. v. DELAWARE & HUDSON CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. TRESPASS \Leftrightarrow 20(1) — TRESPASS QUARE CLAUSUM FREGIT—POSSESSION.

At common law an action of trespass quare clausum fregit cannot be maintained by one neither in actual nor constructive possession of the land.

2. TRESPASS \Leftrightarrow 18 — GROUNDS OF ACTION — STATUTE.

Practice Act May 25, 1887, § 3 (P. L. 271), providing that certain actions *ex delicto* should be brought under the one name of trespass, did not change the fundamental grounds upon which the right to recover rests, or give an action of trespass where no action for the same cause would arise at common law.

3. MINES AND MINERALS \Leftrightarrow 55(8)—ADVERSE CLAIM TO MINERALS—EVIDENCE.

An adverse claim to the minerals in freehold lands must be distinctly established against the owner of the surface, which may be done by documents showing that the minerals had been conveyed, excepted, or reserved, so as to vest in the claimant.

4. MINES AND MINERALS \Leftrightarrow 51(1)—TRESPASS FOR REMOVAL OF COAL—POSSESSION.

An action of trespass for the unlawful mining of coal from plaintiff's land could not be maintained, where plaintiff had never been in actual or constructive possession of the surface, which was in the possession of parties holding adversely, and under whose lease defendant had removed the underlying coal, as plaintiffs, never having severed the coal, were not in constructive possession thereof.

Appeal from Court of Common Pleas, Lackawanna County.

Trespass by Edmund R. Griffin and others against the Delaware & Hudson Company for removing coal from land claimed by plaintiffs. From an order dismissing exceptions to the report and supplemental report of a referee, defendant appeals. Reversed, and judgment entered for defendant.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

James H. Torrey and Charles H. Welles, both of Scranton, and Walter C. Noyes, of New York City, for appellant. Thos. F. Wells, M. W. Stephens, and F. L. Hitchcock, all of Scranton, for appellees.

POTTER, J. This was an action of trespass brought by Edmund R. Griffin et al against the Delaware & Hudson Company, to recover damages for the entry by defendant on land of which plaintiffs claimed ownership, and for mining coal and taking it from such land. It is averred in plaintiff's statement of claim that 100,000 tons of coal were unlawfully removed by defendant between the year 1867 and the date of suit. The pleas were not guilty and the statute of limitations.

By agreement of the parties the case was referred to Hon. R. W. Archbald, who, after a full hearing, filed a report, with findings of fact and law, in which he held that the plaintiffs never had actual or constructive possession of the coal in controversy, and were not, therefore, in a position to maintain this action, and that judgment should be entered for defendant. Exceptions were filed to the report, whereupon the case was opened, additional testimony was taken, and the findings reconsidered by the referee. He then filed a supplemental report, with new findings of fact and law, in which he reversed his former ruling, and directed that judgment be entered in favor of plaintiffs for the sum of \$41,925. Exceptions were filed by both parties to the suit, which were dismissed by the court, and judgment was entered in accordance with the recommendation of the referee in his supplemental report. Defendant has appealed.

According to the referee's findings, the material facts were substantially as follows: The coal in controversy underlay a tract of land in Providence township, Lackawanna (formerly Luzerne) county, which is now part of the city of Scranton, and comprised 3 acres and 56 perches of ground. This land was included in a larger tract for which a patent was granted, on June 15, 1823, by the commonwealth to Thomas Griffin. Prior to that date, on February 10, 1823, Isaac Griffin, a son of the subsequent patentee, had made and delivered to Silas B. Robinson a general warranty deed for a portion of the land patented by his father, and Robinson took possession under such deed. A year later, on February 6, 1829, Thomas Griffin made and delivered to Isaac Griffin a deed for the same land that Isaac had already conveyed to Robinson. The deed of Isaac Griffin to Robinson was identical with that of Thomas Griffin to Isaac Griffin, with the exception of the length of the north line of the tract, and it is from that difference that the controversy in this case arises. The land conveyed by Isaac Griffin to Robinson began at the Lackawanna river, and extended thence northwest for a distance of 246 perches, while in the deed from Thomas Griffin to Isaac Griffin the tract was described as beginning at the same point, and extending by the same course a distance of 264½ perches.

being 18½ perches longer than the corresponding line in the deed from Isaac Griffin to Robinson. The difference appears clearly from the diagrams in the referee's supplemental report. The courses and distances on the west and south were the same in both deeds, but in neither one was the distance given on the next to the final course, which terminated at the Lackawanna river.

Plaintiffs are the heirs at law of Isaac Griffin, and claim to be the owners of the westernmost end of the tract, which they allege was not included in the deed of their ancestor to Silas B. Robinson. The portion which they claim, extends from a point distant 246 perches from the river to a point 264½ perches distant therefrom, being 18½ by 30 perches in area, containing, as stated, 3 acres and 56 perches. In the eighteenth finding of fact the referee found that:

"Silas B. Robinson, after the conveyance to him by Isaac Griffin and wife, entered into the actual possession of the 52 acres and 58 perches, with the allowance of 3 per cent., and he and those claiming under him in line of title have fenced and lived upon and occupied the said land, using it for farming purposes, cultivating the same, pasturing cattle thereon, cutting timber therefrom, mining and removing coal, plotted it into building lots, sold building lots covering a portion of the land in dispute, and parties purchasing the said lots have built houses and other buildings thereon, and are now in the actual, open, notorious possession of the same."

In his first report the referee found as a fact:

"The plaintiffs have never been in the actual possession of the land in dispute and have not severed the coal from the surface. The Robinsons and Griffins and Von Storches have been in the actual possession of the whole tract of land running from the Lackawanna river back 264½ rods to a point about 30 feet beyond the Keyser Valley Branch, and to the corner of what is known as the Philip C. Griffin tract, and, being so in possession, leased the coal to the Delaware & Hudson Canal Company in 1867, and the possession of the Griffins and the Delaware & Hudson Company has continued from that time to the present, and has been open, notorious, and visible."

In the supplemental report this finding was modified, so as to exclude a small portion of the piece occupied by a railroad. The defendant company, under a claim of ownership through leases given to them by the successors in title of Silas B. Robinson, has mined and removed the coal from the tract claimed by plaintiffs, and it was to recover damages for this alleged trespass that the present suit was brought.

Four grounds of defense were set up: (1) A valid paper title to the coal in question. (2) Title by adverse possession. (3) That plaintiffs were never in possession of the locus in quo, and therefore were not entitled to maintain an action of trespass quare clausum fregit for the removal of the coal. (4) That any right claimed by plaintiffs was barred by the statute of limitations. Upon the third question, the right of plaintiffs

to maintain the action, the referee reversed himself. In his original report he said:

"On the whole case, therefore, whatever the state of the title, the plaintiffs, as I view it, are not in a position to maintain the action, never having had actual or constructive possession of the coal in controversy. This is decisive of the case, and judgment must therefore be entered for the defendant."

But in his supplemental report the referee reached the conclusion that plaintiffs had constructive possession of the coal, whatever may have been the situation as to the surface, and that therefore they might maintain their action.

[1] It is conceded that plaintiffs were never in actual physical possession of the tract of land here in question. The referee affirmed, without qualification, defendant's seventh, thirty-first, and thirty-seventh requests for findings of fact, which were to that effect, and no exception was taken to such affirmance. It is admitted that the common-law action of trespass quare clausum fregit could not be maintained by one not in possession of the land. But it is contended that this rule was changed by the practice act of May 25, 1887 (P. L. 271), by which all distinctions between actions of trespass are said to have been abolished.

[2] In *Welsfield v. Beale*, 231 Pa. 39, 42, 79 Atl. 878, 879, we said:

"Under the act of May 25, 1887 (P. L. 271, § 3), all actions ex delicto, whether trespass, trover, or trespass on the case, are now brought under the one name of trespass. The distinction, therefore, between trespass quare clausum fregit, in which actual or constructive possession in the plaintiff was necessary, and trespass on the case, in which it was not, is no longer of importance."

That related, however, only to the form of procedure. It was intended to point out that, under the statute, recovery might be had in an action of trespass, where formerly upon the facts the only remedy would have been in an action upon the case. But the fundamental requirements, upon which the right to recover rests, have not been changed. The act of 1887 "was intended to dispense with formality, but to insist on matters of substance, indispensable to an intelligent and just judgment between the parties." *Winkleblake v. Van Dyke*, 161 Pa. 5, 28 Atl. 937.

In the case at bar plaintiffs claimed direct damages for an unlawful and forcible entry upon their premises and removal of the coal therefrom. In their statement they aver that they were in possession of the premises, and that defendant did "with force and arms enter upon and into the said parcel of land beneath the surface thereof" from its own land adjoining, and did mine a large quantity of coal therefrom and convert it to its own use. If plaintiffs can recover at all, it must be in an action in the nature of quare clausum fregit. The authorities are clear that, in order to maintain

such an action, a plaintiff must have been in possession, either actual or constructive, at the time the trespass was committed. *Greber v. Kleckner*, 2 Pa. 289; *King v. Baker*, 25 Pa. 186; *Collins v. Beatty*, 148 Pa. 65, 23 Atl. 982; *Wilkinson v. Connell*, 158 Pa. 126, 27 Atl. 870; *Busch v. Calhoun*, 14 Pa. Super. Ct. 578; *Vanderslice v. Donner*, 26 Pa. Super. Ct. 319. The referee so found in his third finding of law. He further found as a fact that there never had been actual possession by plaintiffs, or any of them. He was also of opinion that plaintiffs had not shown that they were at any time in constructive possession of the surface. But in his supplemental report he held that there was constructive possession of the coal, and on that ground he awarded damages to plaintiffs. He based this conclusion on the ground that there had been a severance of the coal from the surface. He said:

"When the coal is severed from surface, and a separate estate created in it, there is no good reason why, as to such coal, ownership of the title should not draw to it the constructive possession, so as to protect the real owner against any one trespassing and mining from it."

He had previously said:

"It may be that constructive possession of the coal, as distinct from the surface, is not permitted where coal and surface remain under one title, and the surface is in the actual possession of another."

In this connection the referee in his first report said, most convincingly:

"While by the leases in evidence there is a severance of the coal for mining purposes, it is not absolute or complete; a reversionary interest, as noted above, being retained in the lessors, contingent on the termination of the leases for any reason. But more than that: Having regard to the effect given to the severance, in the rule invoked, the purpose being to protect the mineral estate from an adverse possession of the surface, that which was intended to protect that estate cannot be made the basis of encumbering it. It is in fact no concern of the plaintiffs as to what has been done with the coal, or how it has been treated by others. Whatever has happened to it is not of their doing, and neither adds to nor detracts from their rights with respect to it, nor can they predicate anything upon it."

The only severance was under the leases from the holders of the Robinson title to defendant. These leases are not recognized by plaintiffs, as affecting their rights in any way, and they cannot be used to aid them in establishing constructive possession of the coal. We can see nothing in the facts to justify the referee in changing his conclusion in this respect. Had the plaintiffs or their ancestors severed the coal from the surface, a different situation would be presented.

[3] The only case cited by counsel for appellees upon this point is *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853, and there the severance was made by the undisputed owner of the land from whom both parties claimed title. In the present case there was nothing to show any entry by plaintiffs into possession of the

subsurface estate. The correct principle is stated in *Bainbridge on the Law of Mines & Minerals* (4th Ed.) 28, where it is said:

"In all freehold lands an adverse claim to the mineral must be distinctly established against the owner of the surface. This may be effected by the production of documents showing that the minerals have been conveyed, excepted or reserved, so as to have become vested in the claimant."

[4] Nothing of the kind was shown in the case at bar, and, as these plaintiffs were in neither actual nor constructive possession of the surface, they cannot be held to have been in constructive possession of the coal. The alleged severance was not by any act of theirs, but the leases were made by persons who, according to plaintiffs' contention, had no title to either estate, and no power to sever them. If plaintiffs should concede that these leases effected a valid severance, it would follow that defendant thereby acquired the right to mine the coal, and this action of trespass could not be maintained.

We think the referee very properly determined, in his first report, that, as plaintiffs had neither actual nor constructive possession of the coal in dispute, they were not in a position to maintain this action. As this is decisive of the case, it becomes unnecessary to consider other questions raised. It is, however, by no means clear that, under a fair and reasonable construction of the deed from Isaac Griffin to Silas B. Robinson, the defendant and its predecessors were without a paper title to the premises in dispute. It requires a strained inference, to say the least, to support the conclusion that Isaac Griffin, in the year 1828, intended to retain a small piece of isolated ground, 18½ by 30 perches, at the rear of the tract he conveyed to Robinson. All the facts point strongly to the conclusion that all parties interested believed that Robinson acquired all of Isaac Griffin's interest in that particular piece of land in 1828, and that they all acted in accordance with that belief from that time on. All the lines and angles and distances in the deed from Thomas to Isaac Griffin, and in that from the latter to Robinson, are identical, except that of the northerly line; and taking into consideration the monuments upon the ground, and the acreage intended to be conveyed, the longer line, running 264½ perches from the river, seems to be imperatively required to meet the conditions. No reasonable explanation was offered for the discrepancy in the length of the northerly line as it appears in the deed made by Isaac Griffin to Robinson. Possibly the length of the line was first noted by the surveyor in figures, which afterwards were accidentally transposed, so that 264 perches appeared as 246 perches. Conjecture as to this, however, is useless.

But, leaving out of consideration the question of paper title, and without reference to the additional claim that defendant and

its predecessors had acquired title to the coal by possession, and to the further claim that the action was barred by the statute of limitations, it is quite sufficient to rest the case upon the conclusion first reached by the referee that, in the absence of actual or constructive possession of the coal, plaintiffs had no standing to maintain this action.

The judgment is reversed, and is here entered for defendant.

(257 Pa. 276)

SHEAFER et al. v. WOODSIDE et al.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. PAYMENT §66(5) — PRESUMPTION AND BURDEN OF PROOF.

The rule that after the lapse of 20 years debts by specialty are presumed to be paid does not bar the debt, but is merely a rule of evidence affecting the burden of proof, and within that time the burden of proving payment is on the debtor, and after that time it is upon the creditor. The presumption is rebuttable by any competent evidence tending to show that the debt was not in fact paid, though it should be clear and convincing, especially where suit is not brought until after the debtor's death.

2. MORTGAGES §319(3) — PAYMENT — SUFFICIENCY OF EVIDENCE.

Evidence upon a scire facias issued in August, 1915, upon a mortgage executed in 1876, wherein the administrator of the estate of the last surviving mortgagor pleaded payment, and relied upon the presumption of payment arising from the lapse of more than 20 years, held sufficient to overcome the presumption of payment, so as to make payment a question for the jury.

Appeal from Court of Common Pleas, Schuylkill County.

Scire facias sur mortgage by A. W. Sheaffer and another, surviving executors of the estate of Peter W. Sheaffer, deceased, against A. B. Woodside and others. Judgment for defendants non obstante veredicto, and plaintiffs appeal. Reversed, and record remitted, with direction to enter judgment on the verdict.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

John G. Johnson, of Philadelphia, and Woodbury & Woodbury, of Pottsville, for appellants. John Robert Jones, of Pottsville, for appellees.

FRAZER, J. In 1876 Mrs. A. B. Woodside and her three daughters, Virginia, Geraldine, and Fannie, executed a bond and mortgage to Peter W. Sheaffer, to secure the payment of \$2,650 in two years, covering property owned by them in the borough of Pottsville. The mortgage was duly recorded in the office for recording deeds in Schuylkill county on June 24, 1876, in Mortgage Book 1 A H, page 395. Peter W. Sheaffer, the mortgagee, died in 1891, leaving a will in which Arthur W. Sheaffer and Henry W. Sheaffer were named as executors. At the time of his

death the bond and mortgage above referred to were found among his papers; the bond having indorsed thereon, in the writing of Peter W. Sheaffer, a payment of \$56, under date of December 22, 1877. There is no evidence that demand for payment of the indebtedness secured by the mortgage was made until after the death of the last survivor of the mortgagors, when the executors of the estate of Peter W. Sheaffer, on August 25, 1915, issued a scire facias, to which the administrator of the estate of Geraldine Woodside, the last survivor, pleaded payment, and, in support of this plea, at the trial relied upon the presumption of payment by reason of lapse of time, and presented a point for binding instructions for defendant. The trial judge reserved the point, and submitted to the jury the facts presented by plaintiff to rebut presumption of payment. A verdict was rendered in plaintiff's favor for the amount of the mortgage, with interest, aggregating, after deducting the payment indorsed on the bond, the sum of \$8,727.87. Judgment was subsequently entered in favor of defendant non obstante veredicto, whereupon plaintiff appealed.

A period of 36 years elapsed from the maturity of the mortgage until the beginning of foreclosure proceedings. Dr. O'Hara, a practicing physician in Pottsville for 20 years, called by plaintiff, who had been a family physician of the Woodsidés, although only Fannie and Geraldine were living when he first attended them, testified that in 1914, shortly after the death of Fannie, Geraldine, the survivor, spoke to him in reference to the mortgage due the Sheaffer estate, and, while the witness was unable to recall the exact language of the conversation, he stated:

"She told me she did not know what would happen to them, or what would happen to her, or would become of her; I do not exactly know the verbatim statement, but she wept, and so forth, and she said that the Sheafers held a mortgage, or that she was in a great debt to them, in other words."

He testified further she told him:

"She did not know what would become of them now; she did not know whether Sheafers will push the mortgage or not, and she was in a very nervous state, not knowing what would become of her."

He also testified the family had been in straitened financial circumstances, and had received assistance from neighbors, and further that Geraldine requested him to speak to the Sheafers about the mortgage, which he subsequently did by informing Lesley Sheaffer that—

"one of those Miss Woodsidés is worried to death about what will become of her now, since the other sister is gone; she did not know what will become of the place now."

Lesley Sheaffer, called as witness by plaintiff, corroborated Dr. O'Hara's testimony as to the conversation in relation to the Woodside mortgage, and testified to bringing the

subject to the attention of A. W. Sheaffer, one of the executors of the Sheaffer estate, who, following that conversation, on December 22, 1914, wrote Miss Woodside, as follows:

"Dear Miss Woodside: Information has come to us through Dr. O'Hara that you are worried in regard to the mortgage which we hold on your property at 219 South Center street. We therefore take this opportunity of assuring you that we have no intention of in any way endeavoring to collect this mortgage or any interest thereon during your lifetime, or so long as it remains your property. We trust, therefore, that you will not allow this matter to trouble you in the least. Extending to you our sympathy in your recent bereavement, we are, yours very truly, A. W. Sheaffer, for the Executors of Estate of P. W. Sheaffer, Deceased."

A copy of this letter was also sent to Dr. O'Hara, who subsequently saw Miss Woodside, and was informed by her of having received the letter from Mr. Sheaffer, and that it gave her much relief.

[1] The above is the evidence relied upon by plaintiff to rebut the presumption of payment arising from lapse of time. The rule that after the lapse of 20 years debts of every kind are presumed to be paid is a rule of convenience and policy, resulting from a necessary regard for the peace and security of society, and also for the debtor, who should not be called upon to defend stale claims at a time when witnesses are dead, and papers lost or destroyed. *Foulk v. Brown*, 2 Watts, 209; *Eby v. Eby's Assignee*, 5 Pa. 435. This presumption does not bar the debt, however. Unlike the statute of limitations, it is merely a rule of evidence affecting the burden of proof, and no new promise is required as the basis of an action. *Eby v. Eby's Assignee*, supra. Within 20 years the burden of proving payment is on the debtor; after that time it shifts to the creditor. *Reed v. Reed*, 46 Pa. 239. To rebut the presumption, any competent evidence tending to show the debt is not in fact paid will be received. Although it need not be of the same quality as required to remove the bar of the statute of limitations (*Gregory v. Commonwealth*, 121 Pa. 611, 15 Atl. 452, 6 Am. St. Rep. 804; *Devereux's Estate*, 184 Pa. 429, 39 Atl. 225), it should, however, be clear and convincing, especially where suit is not brought until after the death of the debtor, as in the present case (*Fidelity Title & Trust Co. v. Chapman*, 226 Pa. 312, 75 Atl. 429). In *Foulk v. Brown*, 2 Watts, 209, the rule was stated as follows:

"Within the 20 years, the onus of proving payment lies on the defendant; after that time it devolves on the plaintiff to show the contrary, by such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment. And if these facts are sufficient satisfactorily to account for the delay, then the presumption of payment, not being necessary to account for it, does not arise. Slighter circumstances are sufficient to repel the presumption than are required to take the case out of the statute of limitations—the latter being a positive enactment of the Legislature;

the former merely an inference on which legal belief is founded."

In *Reed v. Reed*, 46 Pa. 239, 242, it was said:

"The presumption is rebutted, or, to speak more accurately, does not arise where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

[2] Whether the proof is ample to rebut the presumption of payment must necessarily depend on the particular circumstances of each case, and it is primarily for the court to decide whether the facts, if true, are adequate for the purpose for which offered, and whether the facts relied upon are true is a question for the jury. *Fidelity Title & Trust Co. v. Chapman*, supra. In *Gregory v. Commonwealth*, supra, the plaintiff, to rebut the presumption of payment, relied upon acknowledgments by the debtor, made to third persons at various times, to the effect that there was something between him and plaintiff which "had never been thoroughly settled." It appeared, however, that the reference might have been to the settlement of certain other matters concerning an estate in which the debtor was interested, and it was held the testimony was too uncertain and equivocal in meaning to rebut the presumption of payment; the court saying:

"Any competent evidence which tends to show that the debt is in fact unpaid is admissible for that purpose. The evidence may consist of the defendant's admission made to the creditor himself (*Eby v. Eby's Assignee*, 5 Pa. 435), or to his agent, or even to a stranger (*Morrison v. Funk*, 23 Pa. 421; *Reed v. Reed*, 46 Pa. 239); but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to demand for a debt (*Hentley's App.*, 99 Pa. 500). It is of no consequence that the admission of nonpayment is accompanied by refusal to pay; the action is not founded on a promise, but on the original indebtedness; the question, as against the presumption, is whether or not the debt is in fact unpaid."

In *Runner's Appeal*, 121 Pa. 649, 15 Atl. 647, statements made by the debtor of an intention to pay were held sufficient for the purpose of rebutting the presumption of payment. In *Smith v. Schoenberger*, 176 Pa. 95, 84 Atl. 864, declarations by defendant to the effect that the debt was not paid, made in the presence of plaintiff, was held enough to take the case to the jury. In *White v. White*, 200 Pa. 565, 50 Atl. 157, an admission by the debtor, in the presence of a witness, that he had no money to pay the interest on the debt in question, was held ample to overcome the presumption of payment. In *O'Hara v. Corr*, 210 Pa. 341, 59 Atl. 1099, it was held that the case was for the jury, where witnesses for the plaintiff testified that the deceased mortgagor stated he had purchased the mortgaged premises, but could not pay the mortgage, and would have to let the property go. It has also been held that proof of the inability of the debtor to pay during the whole period

of the existence of the debt is such circumstance as would explain the delay, and prevent the presumption of payment arising. For instance, in *Taylor v. Megargee*, 2 Pa. 225, 226, it was said that mere poverty, or insolvency alone, was insufficient to overthrow the presumption of payment, arising from lapse of time, "unless it be such as to have created an abiding inability to pay during all the time"; and in *Devereux's Estate*, supra, it was said:

"The ability of the obligor to pay and the pressing need of the obligee for money have been recognized as circumstances which aid the presumption of payment. *Hughes v. Hughes*, 54 Pa. 240. On the other hand, it was held in *Tilghman v. Fisher*, 9 Watts, 441, that one of the intervening circumstances which may rebut the presumption is the inability of the debtor to pay within 20 years, and proof of a continued inability to pay was recognized in *Taylor v. Megargee*, 2 Pa. 225, as sufficient to rebut the presumption. There are convincing reasons for the ruling that proof of the insolvency of the debtor alone will not rebut the presumption. An insolvent may be possessed of property or be in receipt of an income, and have the means of payment; but proof of positive inability to pay is in effect that payment could not have been made."

In the present case we have proof of a long-continued inability of the debtors to pay; that the surviving debtor recognized the existence of the indebtedness in 1914, stating in effect her inability to pay, and requesting the witness to see the creditor and ask indulgence; that the witness complied with the wishes of the mortgagor, and, as a result of the interview, the debtor received the letter in evidence, informing her that no steps to enforce payment of the indebtedness would be taken during her lifetime, or so long as the property remained in her possession. This evidence the jury accepted as true, and was sufficient, under the decisions, to overcome the presumption of payment arising from lapse of time.

The judgment is reversed, and the record remitted, with direction that judgment be entered on the verdict.

(357 Pa. 451)

SCHMITT v. CITY OF CARBONDALE et al.
(Supreme Court of Pennsylvania. April 16, 1917.)

1. EVIDENCE §372(11) — **ANCIENT DOCUMENTS—MAP.**

A map found in the office of a corporation, which had conveyed land shown thereon, was admissible as an ancient document, where it was more than 50 years old, and appeared to be genuine, and had been acted upon.

2. ADVERSE POSSESSION §8(1) — **ENCROACHMENT ON PUBLIC PARK—EFFECT.**

A citizen acquires no rights as against the public by the maintenance of a fence in a public park, as the public's rights are not lost by encroachment, however long continued.

3. DEDICATION §50 — **PUBLIC PARK — EX-TENT.**

A city's acceptance and use of a park embraces all the land dedicated for that purpose,

although some parts thereof along the border lines may not have been actually used therefor.

4. ESTOPPEL §68(5) — **EMINENT DOMAIN — PUBLIC PARK.**

Where a building has been erected on land dedicated as a public park, an ordinance providing for the condemnation of the land occupied by the building does not estop the municipality from claiming the property, especially where no viewers were appointed, and nothing further was done in reference to the ordinance.

Appeal from Court of Common Pleas, Lackawanna County.

Bill in equity for an injunction by W. H. Arthur Schmitt against the City of Carbon-dale and others. From a decree on final hearing, dismissing the bill, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POT-TER, STEWART, FRAZER, and WAL-LING, JJ.

A. A. Vosburg, of Scranton, and J. B. Jenkins, of Carbondale, for appellant. J. E. Brennan, of Carbondale, for appellees.

WALLING, J. This suit in equity involves the question of the location of the line of a public highway. Prior to 1843, the Delaware & Hudson Canal Company was the owner of a tract of land in the village (now city) of Carbondale, and in plotting the same a triangular piece of land was left open for public use as a park, and known as "the Parade." It is shown, with well-defined boundaries, on an ancient map in the possession of the company. Lots appear on the map, which were conveyed bounded by the Parade. For nearly 50 years, prior to 1890, the Parade was used generally by the public as a passageway and for all purposes of a public common. Meantime streets had been opened on the borders of the Parade; Main street on the west, Sixth avenue on the south, and Park Place on the northeast. In or about the year last mentioned the city constructed an iron fence around that part of the Parade inclosed by these streets, and therein was placed a monument and a fountain; and, at about the same time, the cart-way in Sixth avenue was paved. Church street extends in a northerly and southerly direction, and is a short distance east of the intersection of Park Place and Sixth avenue. It is about 455 feet from Main and Church streets, and the land facing on the south side of the Parade (now Sixth avenue) was subdivided into lots as a part of the original plot.

In 1843 the company sold one of the lots facing 65 feet on the Parade to James Clarkson, a part of which by sundry conveyances is now owned by plaintiff, and thereon is a two-story frame building, which stands about one foot back from the south line of the Parade as originally dedicated. However, from the time of or shortly after the purchase by Clarkson down to this time the owners of the lot have had adverse posses-

sion of a strip of land some 5 feet in width extending in front of the lot and within the lines of the Parade as dedicated. This strip of land was inclosed for many years as part of the lot by a fence, and near the west end thereof was formerly a well, and toward the east end for about 30 years last past a porch stood thereon in front of the building, and some of the strip of land has been used as a lawn and flower bed. The owners of some of the other lots have also made encroachments upon the south side of the Parade. The original deed to Clarkson describes his lot as being 130 feet in depth, from the Parade south, which it is exclusive of said 5 feet. While there is some controversy, yet, taking the case as a whole, it fully warrants the finding that plaintiff's paper title does not include the disputed land; and it appears with equal clearness that plaintiff and those through whom he claims title have had exclusive possession thereof for much more than 21 years.

In 1897 the city passed an ordinance providing, as we understand the facts, for the condemnation, *inter alia*, of the land here at issue, and a report was made that an agreement with the property owners as to the damages and benefits could not be had; but no viewers were appointed, and nothing further done with reference thereto. In 1915 plaintiff, in remodeling his building, was proceeding to add a new store front thereto, which would occupy a portion of said 5 feet, when he was prevented by the officials of the city, and filed this bill to restrain their interference. After a full hearing the court below entered a final decree dismissing the bill, from which plaintiff took this appeal.

[1] The record seems free from error. The map in the office of the Delaware & Hudson Canal Company was found in the proper custody, was shown to be more than 30 years old, was to all appearances genuine, had been acted upon, and was competent as an ancient document. *Commonwealth v. Alburger*, 1 Whart. 469; *Huffman & Foreman v. McCrea*, 56 Pa. 95; *Smucker v. Penna. R. Co.*, 188 Pa. 40, 41 Atl. 457. And see *Barnett v. Yeadon Borough*, 37 Pa. Super. Ct. 97.

[2] Plaintiff's claim by adverse possession would be well founded as against private parties, but cannot prevail against the public, whose rights are not lost by encroachment, however long continued. *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599; *McGuire v. Wilkes-Barre*, 36 Pa. Super. Ct. 418.

[3] It scarcely requires the citation of authorities to support the proposition that a citizen acquires no rights as against the public by the maintenance of a fence or building in a highway, and the same rule applies to a public park. The acceptance and use by the public of the Parade in question as a

park embraced all the land dedicated for that purpose, although some parts thereof along the border lines may not have been actually used as such. It is like a dedicated street, the acceptance of which constitutes it of the full width, although only the traveled portion may be used by the public. See *State Road*, 236 Pa. 141, 84 Atl. 688. The disputed land being in the Parade, the fact that it is not within Sixth avenue as opened on the ground is not controlling.

As plaintiff's lot in the original deed was bounded on the north by the Parade, he is not helped by the fact of a surplus in that block. If he is entitled to that, or any part of it, he must find it within the lines of the block, and not in the public park or street.

[4] The passage of the ordinance does not estop the city from claiming the land in question; and the fact that the proceedings thereunder were apparently abandoned would suggest that they may have been started under a misapprehension. The facts found by the learned chancellor are in accordance with the evidence and his legal conclusions seem to be entirely accurate.

The assignments of error are overruled, and the decree is affirmed, at the cost of the appellant.

(257 Pa. 335)

EWALT v. DAVENHILL et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. TRUSTS ¶9—SPENDTHRIFT TRUST—CREATION.

A spendthrift trust may be created as well for a woman as for a man.

2. TRUSTS ¶9—SEPARATE USE TRUSTS—VALIDITY.

A testator, dying in 1846 devised land to his son J. for life, with remainder in trust for J.'s children and their heirs, and gave J. power to revoke such trusts by will and to create other trusts; and J., dying in 1870, by will revoked all such trusts, and devised the estate in trust to pay an annuity to his wife and the balance of the income to his son W., born in the lifetime of his grandfather, and on his death the balance in trust for his children in such shares as they would be entitled to if he had died intestate, and gave W. power to appoint the shares of his children in trust for the sole and separate use of such children and to the issue of any deceased child; and W., dying in 1877, directed that the share of each of his three daughters be held in trust for them until they reached 21, and created sole and separate use trusts and spendthrift trusts for them, and directed that on the death of any daughter her share should be paid to her issue during the life of the surviving daughters, and if there was no issue then to the survivors for life, and on the death of the last survivor then to their issue. *Held*, that the sole and separate use trusts were void, because the daughters were not married or in contemplation of marriage at the time of the creation of such trusts.

3. POWERS ¶36(1)—CONSTRUCTION—CREATION OF SPENDTHRIFT TRUSTS.

Such spendthrift trusts for the daughters of the last testator were within the scope of the power of appointment conferred upon him by the will of his deceased father.

4. WILLS ⇨634(9)—VESTED INTERESTS—TIME OF VESTING.

The interests of such last testator's three daughters vested upon the death of their grandfather, the creator of the power.

5. PERPETUITIES ⇨4(15)—REMAINDERS—VALIDITY.

Such gift to the issue of the daughters of the last testator violated the rule against perpetuities.

6. PERPETUITIES ⇨4(22)—PARTIAL INVALIDITY—SEVERABLE GIFT.

The gifts for the lives of such last testator's daughters were severable, and were not affected by the invalidity of a gift of the remainders to their issue.

7. TRUSTS ⇨52—PARTIAL INVALIDITY—GIFT OVER—EFFECT.

Where an active trust is created to pay the income to one for life, it will not be defeated because of the failure or invalidity of the gift over of the corpus of the estate.

8. PERPETUITIES ⇨4(3)—NATURE OF RULE.

The rule against perpetuities is directed against future contingent estates, and has no reference to vested estates.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for partition by Henry C. Ewalt against Catharine M. Davenhill and others. Bill dismissed on demurrer, and plaintiff appeals. Decree affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

M. T. McManus, of Philadelphia, for appellant. Henry Preston Erdman, of Philadelphia, for appellees.

WALLING, J. This case involves the question as to whether certain real estate situate on the southeast corner of Seventh and Chestnut streets, Philadelphia, is now so held in trust as to prevent its partition. This land was formerly owned by William Swaim, Sr., who died in 1846, and by his last will devised the property in trust for his son James for life, and then in trust for the latter's children and their heirs, giving James power, however, to revoke by will all trusts and interests expressed by the testator, and to direct or to appoint such new or other trusts with respect to said property as to him might seem proper. James Swaim died in 1870, leaving a last will in which he referred to the power given him in his father's will, and in execution thereof revoked all the trusts and interests so created by his father, and devised the estate in trust to pay an annuity to his wife for life and balance of the net income to his son William Swaim, Jr., free from the control of his creditors, and provided, further, that after the son's death the property should be held "in trust for the children of the said William Swaim and the issue of such as may be deceased, in such parts, shares and proportions, and for such estates as they would be entitled to, if the said William Swaim had died intestate." William Swaim, Jr., was then given the power

by will to appoint the shares of his children or of the children of any deceased child to trustees, "in trust for the sole and separate use of said child or issue of said deceased child, and under such limitations and restrictions as in his discretion he may deem best, so as to secure the same to the said child or issue of deceased child, for his, her or their sole and separate use, maintenance and enjoyment."

William Swaim, Jr., died in 1877, testate, and left surviving him three daughters, who at the time of the execution of his will were minors, unmarried, and not in contemplation of marriage, although they did subsequently marry, and two of them are still living. In his will, William Swaim, Jr., pursuant to the power vested in him under the will of his father, directed that the share of each of his children, or the children of any deceased child, be held in trust for them until they reached the age of 21 years, "and as and after each of my said children respectively arrive at the age of twenty-one years, to pay her said part and share of the said rents, issues, profits, income, and dividends to her directly whether she be covert or sole, during all the period of her natural life, for her separate use and benefit, the said income to be and at all times to remain free and exempt from the power and control of any husband, and from liabilities for any debts or engagements. The receipts of my children for such payments to them, whether covert or sole, shall be deemed and taken to be good and sufficient vouchers and acquittances for the said trustees or either of them, in the settlement of their accounts." The will also provided that, in the event of the death of any of the children, her share should be paid to her issue during the life of the surviving children, or in case there should be no issue, then to the survivors for life, and, upon the death of the last survivor of the children, then to their issue, or, if no issue, then to the persons who would be entitled under the provisions of his father's will. William Swaim, Jr., was born before the death of his grandfather.

Plaintiff is the owner by purchase of the interest of one of the daughters of William Swaim, Jr., in the premises, and as such filed his bill for partition in this case; and from the decree of the court below, sustaining defendants' demurrer and dismissing the bill, this appeal was taken.

The action of the court below was based upon the construction previously placed upon the wills in question by the orphans' court of said county, where the questions were exhaustively and ably considered, and in our opinion correctly decided. The trusts created by the last will of James Swaim were unquestionably valid as a due execution of the power contained in the will of his father, and created a spendthrift trust for the life

of William Swaim, Jr., with remainder over as therein provided. The real question is as to the effect of the trust provisions in the will of William Swaim, Jr. So far as making a testamentary disposition of the property, James Swaim was practically the owner in fee; and the testamentary trusts so created and powers so conferred by him must be given effect.

[1] A careful reading of his will shows that he conferred upon William Swaim, Jr., a power sufficiently broad to enable the latter to create for his children a spendthrift trust, as well as a separate use trust. True, when the will of James Swaim was executed, the children of William Swaim, Jr., consisted of three daughters, yet there was nothing to indicate that sons might not thereafter be born to him. The words of the will above quoted, empowering his son William by his last will to place such property "in trust for the sole and separate use of said child or issue of said deceased child, and under such limitations and restrictions as in his discretion he may deem best, so as to secure the same to the said child or issue of deceased child, for his, her, or their sole and separate use, maintenance and enjoyment," seem to indicate an intent to authorize the creation of both separate use and spendthrift trusts. And William Swaim, Jr., fully executed such power in his last will as above quoted. A spendthrift trust may be created as well for a woman as for a man. *Ashhurst's Appeal*, 77 Pa. 464; *Hughes-Hallett v. Hughes-Hallett*, 152 Pa. 590, 594, 26 Atl. 101.

[2] While the separate use trusts were ineffective, because the daughters were neither married nor in contemplation of marriage, yet by said wills spendthrift trusts were created in favor of the daughters of William Swaim, Jr., and valid during their lives. No set form of words is necessary to the creation of a spendthrift trust. *Graeff v. De Turk*, 44 Pa. 527, 531; *Winthrop Co. v. Clinton*, 196 Pa. 472, 46 Atl. 435, 79 Am. St. Rep. 729. See, also, *Shower's Estate*, 211 Pa. 297, 60 Atl. 789; *Dunn & Biddle's Appeal*, 85 Pa. 94.

[3-6] So far as creating a trust for his own children, or for the issue of any of his children who may have died in his lifetime, William Swaim, Jr., was acting within the powers conferred upon him by the will of his father; but he went further, and attempted to continue the trust for various uses and purposes for an indefinite time beyond the lives in being at his death. To that extent the trust so created is invalid, as transgressing the rule against perpetuities, and because no such power was vested in him by the will of James Swaim. However, the trust so designated in the will of William Swaim, Jr., is severable, so that the trust created for his children may stand, and that attempted to be created for others beyond fail. *Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062.

[7] Where an active trust is created to pay the income to one for life, it will not be defeated because of the failure or invalidity of the gift over of the corpus of the estate. On the death of William Swaim, Jr., the title to the property in question vested in his children as devisees under the will of their grandfather, James Swaim, but their enjoyment thereof was subject to the trust created by their father's will.

[8] The rule against perpetuities is directed against future contingent interests and has no reference to vested estates: *Johnston's Est.*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621. As the children's estate vested on their father's death, and as he was in being at the death of William Swaim, Sr., so far as concerns them the rule against perpetuities has not been violated. It is the vesting of the estate within the life in being and 21 years thereafter that fixes its status. The fact that, when vested, it may continue beyond that period, is not material. And computing the time from the creation of the power by the will of James Swaim, it is still more apparent that the rule has not been transgressed. In our opinion the will of William Swaim, Jr., creates an active trust during the lives of his daughters, and the real estate embraced therein cannot now be partitioned.

The assignment of error is overruled, and the decree is affirmed, at the cost of appellant.

(257 Pa. 468)

In re POTTER'S ESTATE.

Appeal of HALLSTEAD.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. WILLS ⇐452—DISINHERITANCE—INTENT.

Every doubt must be resolved in favor of the heir at law, who cannot be disinherited except by express words or by necessary implication.

2. WILLS ⇐440—PRESUMPTION AGAINST INTENT.

The presumption is that a testatrix intended to dispose of her residuary estate.

3. WILLS ⇐509—REVOCATION OF RESIDUARY CLAUSE—EFFECT.

The revocation by codicil of a residuary clause in favor of a legatee, effecting a gift over to the next of kin of the testatrix, did not preclude such legatee from sharing in the gift to the next of kin of which he was one, where he was not excluded by express language or by necessary implication.

Appeal from Orphans' Court, Lackawanna County.

Appeal by Jesse Wilkins Hallstead, by his mother and next friend, Maud Hallstead, from a decree dismissing exceptions to adjudication in the estate of Lucy A. Potter, deceased. Reversed, and record remitted to the court below for distribution of estate.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

J. E. Sickler and H. D. Carey, both of Scranton, for appellant. W. L. Schanz and C. B. Gardner, both of Scranton, for appellee.

WALLING, J. Lucy A. Potter made her will in 1906, and in the eighth and ninth paragraphs gave her nephew, Erwin M. Hallstead, certain furniture and household effects, and the fourteenth paragraph thereof is:

"Fourteenth. I order and direct that after the payment of all debts, legacies, expenses and charges herein mentioned, the money arising from my estate shall be safely invested by my executor in bank or real estate securities, and the income therefrom paid only annually to my said nephew, Erwin M. Hallstead, during the term of his natural life. Should the said Erwin M. Hallstead die leaving children, all my remaining estate shall go to said children, absolutely, share and share alike, and should he die leaving one child to survive him, then all the said estate to go to said child absolutely. But should the said Erwin M. Hallstead die without leaving any child to survive him, then all my said remaining property, and estate is to go to, and be divided amongst my next of kin in accordance with the intestate laws of the state of Pennsylvania, in same manner as though I had not made any will, except that my brother, C. W. Moredock, shall not participate in said distribution, or receive any part of my estate, as I feel that I have already helped him in various ways to as much as he would be fairly entitled to receive."

Mr. Hallstead was married in 1907, and died in 1912, leaving a posthumous child, Jesse Wilkins Hallstead, the appellant. In 1914 Mrs. Potter made a codicil to said will, which is, *inter alia*, as follows:

"First. My nephew, Erwin M. Hallstead, having died since said will was executed, I hereby revoke all portions of the eighth, ninth and fourteenth paragraphs of said will, by which any property, or the use thereof, was given or bequeathed to said Erwin M. Hallstead, or to his children or child should any survive him. * * *

"Ninth. All the terms and conditions of said will are to be and remain in full force except as revoked or modified by this codicil."

Testatrix died childless shortly after the execution of the codicil, leaving as her next of kin her said brother, now deceased, two nieces, daughters of a deceased sister of testatrix, and appellant, the grandson and only lineal descendant of another deceased sister.

[1] Mrs. Potter's executor filed an account showing a fund for distribution, no claim to which was made on behalf of the brother or his children; and from a decree of the orphans' court awarding same to the two nieces, to the exclusion of appellant, this appeal was taken on his behalf. Admittedly, as between him and the nieces, he is entitled to one-half of the fund, unless excluded therefrom by the terms of the will and codicil. After a careful examination, we are of the opinion that there is no such exclusion, and that appellant as next of kin is entitled to share in the distribution in accordance with the intestate laws. Every doubt must be resolved in favor of the heir at law, who cannot be disinherited except by express

words or necessary implication. *Bender v. Dietrick*, 7 Watts & S. 284; *Brendlinger v. Brendlinger*, 26 Pa. 131; *France's Estate*, 75 Pa. 220; *Bruckman's Estate*, 195 Pa. 363, 45 Atl. 1078.

[2, 3] The presumption is that testatrix intended to dispose of her residuary estate, and construing together the will and codicil, it may fairly be determined that she did so. The original residuary bequest to Mr. Hallstead and his child contained in the will was revoked by the codicil, and thereupon the alternative residuary bequest to the next of kin took effect. This thought is emphasized by paragraph 9 of the codicil, wherein testatrix expressly continues in full force all of the terms of the will except as revoked or modified. Now the codicil revoked all portions of paragraph 14 of the will, by which any property was given or bequeathed to Mr. Hallstead or to his surviving child, which revoked all of the paragraph down to and including the words "then all of said estate to go to said child absolutely," and thereby he was deprived of the bequest as sole residuary legatee. But only so much of the paragraph was revoked as gave something to Hallstead or his child. The original will gave them nothing as next of kin; for by its express terms nothing was given to the next of kin until after the death of both Hallstead and his child. The codicil by its terms revoked only what had been given in the will, and did not attempt to revoke the rights of the next of kin, which arose by virtue of the codicil itself and had no prior existence. She did not revoke that which had no existence until after the revocation. Whatever rights the next of kin have as residuary legatees had their inception in the codicil, because the will gave them nothing as such except upon a condition that never occurred, to wit, the death of Hallstead and his child during the life of testatrix. But the codicil was a republication of the will as modified, and thereby the residuary estate was given to all the next of kin as they would have taken under the intestate laws, with the single exception that the brother was excluded therefrom. At the time of such republication Mrs. Potter undoubtedly knew that appellant was one of her next of kin, and had she desired to exclude him could have so stated, or, had she then intended to give all of her residuary estate to the two nieces, that could have been stated in the codicil. But the mere fact that testatrix revoked the clause making appellant sole legatee, without more, does not preclude him from sharing in the gift to the next of kin of which he is one. Construing the will and codicil by the language used, we find nothing to prevent appellant from so sharing. He is excluded neither by express language nor by necessary implication: In fact, as the express exclusion includes the brother only, the implication would be the other way, as it

also would because of the fact that the residuary estate is given to the next of kin as a class and not to any particular individuals. Because Mrs. Potter did not desire appellant to have the entire residuary estate does not change his status as next of kin or deprive him of the right to share with the others as such. See *Hitchcock v. Hitchcock*, 35 Pa. 393; *Wain's Estate, Vaux's Appeal*, 156 Pa. 194, 27 Atl. 59; *Gorgas's Estate, Robinson's Appeal*, 166 Pa. 269, 31 Atl. 86; *Fuller's Estate*, 225 Pa. 626, 74 Atl. 623.

The cases above cited seem to support our conclusion although no two wills are exactly alike.

McGovran's Estate, 190 Pa. 375, 42 Atl. 705, relied on by the court below, is not in point, except as applicable to the brother. There the residuary bequest was, "The rest and residue of my estate I direct to be distributed by my executor hereinafter named under the intestate laws of Pennsylvania, but in no event is Mrs. Murdock, widow of Campbell Murdock, or her three children, and Mrs. Kate Johnson, or her two children, to receive any portion of my estate in any shape or form," and it was held that those so expressly excluded were not entitled to share in the distribution; whereas in our case there is no express exclusion of appellant.

The assignments of error are sustained, the decree is reversed at the cost of appellees, and the record is remitted to the court below that distribution may be made in accordance with this opinion.

(257 Pa. 349)

C. G. GAWTHROP CO. v. FIBRE SPECIALTY CO. et al.

(Supreme Court of Pennsylvania. April 9, 1917.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§298—RIGHTS OF CREDITORS—TIME.

The rights of creditors are fixed as of the date of an assignment for the benefit of creditors.

2. PRINCIPAL AND SURETY §194(1) — **CONTRIBUTION—CLAIM OF COSURETY.**

Except as to the right and property connected with the transaction, the claim of a cosurety for contribution is no higher than that of any other claim.

3. SUBROGATION §21—**GROUND—EQUITY.**

Subrogation, which is founded upon equity, will never be granted to the prejudice of other rights of equal or higher rank.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§298—CLAIMS—EQUITIES.

Claims against an insolvent estate existing at the date of an assignment for the benefit of creditors are at least as strong in equity as a claim thereafter arising, even though the obligation out of which it arose antedated the assignment.

5. SUBROGATION §21—**PAYMENT—GROUND.**

It is not a liability to pay, but an actual payment to the creditor, which raises the equitable right to be subrogated to his remedies.

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§215—STATUS OF ASSIGNEE.

An assignee for the benefit of creditors stands in the place of the assignor.

7. CORPORATIONS §566(1) — **INSOLVENCY — RIGHTS AS BETWEEN SURETIES — GENERAL CREDITOR.**

A surety on the bond of the treasurer of the corporation loaned \$5,000 to the corporation on its note, and subsequently made an assignment of his property, including the note, to a trustee for the benefit of his creditors, and the estate of a cosurety paid the corporation the amount of the treasurer's default and claimed subrogation to the rights of the first surety for the amount of the dividend awarded him against the corporation in receivership, in preference to his general creditors whose claims arose before the treasurer's default. *Held*, that the estate was only a general creditor.

8. APPEAL AND ERROR §1170(12)—**DECREE ON EXCEPTIONS TO AUDITOR'S REPORT—REVERSAL.**

Where the lower court's decree sustains exceptions to an auditor's report, and the controlling exceptions are well taken, and the decree is properly entered, it will not be reversed because it apparently sustains some minor exceptions not well founded, nor because of minor inaccuracies in the opinion filed with the decree.

Appeal from Court of Common Pleas, Chester County.

Proceeding by the C. G. Gawthrop Company against the Fibre Specialty Company, George W. Taft, president, and J. W. Brainard, secretary. From a decree sustaining exceptions to the auditor's report and directing the disposition of dividends, D. Duer Phillips and others, executors of James M. Worrall, deceased, appeal. *Affirmed.*

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHISKER, and WALLING, JJ.

Isabel Darlington and Thomas S. Butler, both of West Chester, for appellants. A. M. Holding, of West Chester, for appellee.

WALLING, J. This is a question of distribution in an insolvent estate. On April 28, 1913, receivers were appointed for the Fibre Specialty Company, a corporation. Prior thereto, on July 23, 1912, the company for value gave George W. Taft a demand note for \$5,000. J. W. Brainard was official treasurer of the company, and in 1903 gave a bond in \$5,000, with Taft and James M. Worrall (now deceased) as sureties, conditioned for the faithful performance of his duties as such treasurer. June 26, 1913, Mr. Taft made an assignment of his estate, specifically including the \$5,000 note, to Harry W. Chalfant, for benefit of creditors. In 1914 the receivers filed an account, and an auditor was appointed to make distribution thereof, to whom the Taft note was presented by the assignee, and a dividend amounting to \$2,157.15 awarded thereon. Mr. Brainard, while treasurer of the company, made default, by reason of which the receivers brought suit against him and his sureties on the bond in the court of common pleas of Chester county, at the January term, 1915, and recovered a verdict for \$3,809.02, on which judgment was entered, and affirmed by this court in case of *Marshall v. Brainard*

253 Pa. 35, 97 Atl. 1057. Brainard and Taft being insolvent, this judgment was, on April 20, 1916, paid by appellants as executors of James M. Worrall, deceased, to whom one-half of the judgment was thereupon assigned.

After the award of the dividend to Chalfant on the Taft note, the claim against Brainard and his sureties on the bond having been brought to the attention of the court below, it was there ordered that the dividend be retained by the receivers until the final determination of the action on the bond, which was done. The receivers in a subsequent final account charged themselves with the \$2,157.15 dividend, which the auditor thereafter awarded appellants by way of contribution from Taft as their cosurety. The learned court below sustained exceptions to the auditor's report, and by final decree ordered the dividend paid to Chalfant on the Taft note; and from that decree this appeal was taken.

The \$5,000 note was a matter entirely separate and apart from the treasurer's bond, and had no connection with Mr. Brainard or his account with the company. Appellants' right to contribution or subrogation arose when they paid the judgment. Then they were equitably entitled to an assignment of the judgment, and also of any collateral or other property held by the receivers to secure the payment of the bond. But they were not entitled to the dividend awarded to the Taft note, as that was an entirely separate matter. The note was a part of Taft's general estate, and appellants had no special equity in that. Except as to matters connected with the bond, appellants are merely creditors of Taft to one-half the amount they paid on account of the surety bond; and they only became such creditors when they paid the judgment on April 20, 1916. Prior to that time they had no claim against Taft. See 8 Modern American Law, p. 224.

[1-5] It is not easy to see how appellants can secure preference over other creditors whose claims were in existence at the time of the assignment, for as a general rule the rights of creditors are fixed as of that date. Sweatman's Appeal, 150 Pa. 369, 24 Atl. 617; Jamison & Co.'s Assigned Estate, 163 Pa. 143, 29 Atl. 1001; Potter v. Gilbert, 177 Pa. 159, 35 Atl. 597, 35 L. R. A. 580; Chestnut Street Trust & Saving Fund Co.'s Assigned Estate, 217 Pa. 151, 66 Atl. 332, 118 Am. St. Rep. 909. Except as to rights and property connected with the transaction, the claim of a cosurety for contribution is no higher than that of any other claim; and subrogation, which is founded upon equity and benevolence, will never be granted to the prejudice of other rights of equal or higher rank. Fritch v. Citizens' Bank, 191 Pa. 283, 43 Atl. 394; Knouf's Appeal, 91 Pa. 78; Grand Council of Penna. Royal Arcanum v. Cornelius, 193 Pa. 46, 47 Atl. 1124; Shimp's Assigned Es-

tate, 197 Pa. 128, 46 Atl. 1037. Claims against an insolvent estate which were in existence at date of the assignment, would seem at least to have as strong an equity as one thereafter arising, even though the obligation out of which it arose antedated the assignment. "It is not a liability to pay, but actual payment to the creditor, which raises the equitable right to be subrogated to his remedies." Kyner v. Kyner, 6 Watts, 221; Hoover v. Epler, 52 Pa. 522; Forest Oil Company's Appeals, 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584. Subrogation will never be enforced to defeat a superior or even an equal equity. Robeson's Appeal, 117 Pa. 633, 12 Atl. 51. A case quite similar to this in principle is that of Farmers' & Drovers' Bank v. Sherley et al., 12 Bush (75 Ky.) 304.

[6, 7] Creditors of Taft acquired no special rights because of the transfer of the note to Chalfant, as an assignee for benefit of creditors stands in the place of the assignor (Potter v. Gilbert, 177 Pa. 159, 35 Atl. 597, 35 L. R. A. 580), and not in that of a bona fide holder for value. In Marshall v. Brainerd, supra, it is held that the Taft note could not be interposed as a set-off against the suit on the treasurer's bond. Whether or not such bond should have been set off against the claim on the note does not seem now important; in any event, it was not so used; and the real question here is as to the equitable rights to the fund in question between the Worrall estate and other creditors of Taft. The question as to the validity of the assignment to Chalfant is not before the court. The other assignments of error do not seem to require special consideration.

[8] Where the lower court makes a general decree sustaining exceptions to an auditor's report, and the controlling exceptions are well taken, and the right decree is entered, an appellate court will not reverse because such general decree seemingly sustains some minor exceptions that were not well founded, nor because of minor inaccuracies in the opinion filed with the decree. However, the opinion in this case indicates a correct understanding of the facts and legal principles applicable thereto.

The decree is affirmed, at the costs of appellants.

(257 Pa. 426)

SCHUYLKILL COUNTY v. WIEST,
County Treasurer.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. COUNTIES ~~6~~72—COUNTY CLERK—SALARY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 14, § 5, providing that compensation of county officers shall be regulated by law, and that county officers shall pay all fees received into the county or state treasury as directed by law, and Act March 31, 1876 (P. L. 13) § 1, requiring county officers to receive all fees for the use of the county, except those

levied by the state which shall be payable to it, and that they shall receive no fees for any official services, and section 15, declaring the salary of such officers to be in lieu of any fees and perquisites, show a fixed intention to confine salaried county officers to their salary as compensation for all official services.

2. COUNTIES \Rightarrow 80(2)—COUNTY TREASURER—DISPOSITION OF FEES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. art. 14, § 5, regulating the salary of county treasurers and their disposition of fees received in their official capacity, and Act March 31, 1876 (P. L. 13), enacted to carry such provision in effect in counties containing over 150,000 inhabitants, the treasurer of such a county is not entitled to retain the fees collected by him for issuing hunters' licenses under Act April 17, 1913 (P. L. 85), but is required to pay them into the county treasury.

3. OFFICERS \Rightarrow 94—COMPENSATION FOR SERVICES—PRESUMPTION.

The presumption is that, when an officer receives money for services rendered in his official capacity, it is as compensation for the performance of duties as such officer.

Appeal from Court of Common Pleas, Schuylkill County.

Assumpsit for money had and received by the County of Schuylkill against Fred J. Wiest, County Treasurer. Judgment for plaintiff on the case stated, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-LING, JJ.

John B. McGurl, of Minersville, for appellant. Edmund D. Smith, Sp. Counsel, C. E. Berger, Sol. for Controller, and C. A. Snyder, Co. Sol., all of Pottsville, for appellee.

MESTREZAT, J. This is an action of assumpsit brought by the county of Schuylkill to recover fees collected by the defendant, as county treasurer, for hunters' licenses issued by him under the provisions of the act of April 17, 1913 (P. L. 85). The treasurer claims that the fees belong to him personally, and that he is entitled to retain them for his own use, while the county contends that they belong to it and must be accounted for by the treasurer. The facts were agreed upon by the parties and submitted to the court in a case stated. The court was of opinion that the license fees collected by the treasurer belong to the county, and entered judgment against the defendant. He has taken this appeal.

The act of 1913 was passed, as its title shows, for the better protection of wild birds and game within the state. It authorizes the county treasurer to issue a "resident hunter's license" granting permission to hunt for birds and game within the state and provides penalties for a violation of its provisions. The eighth section of the statute enacts as follows:

"Said county treasurers are herewith authorized to retain for services rendered the sum of ten cents from the amount paid by each licensee, which amount shall be full compensation for

services rendered by him in each case under the provisions of this act, and shall remit all balances arising from this source, at least once a month, to the state treasurer, for the purposes otherwise provided for in this act."

[1] The county of Schuylkill contains over 150,000 inhabitants, and therefore is within section 5, art. 14, of the Constitution of Pennsylvania, which provides, inter alia, as follows:

"The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary."

To carry into effect this provision of the Constitution the Legislature passed the act of March 31, 1876 (P. L. 13), section 1 of which provides that in counties containing over 150,000 inhabitants—

"all fees limited and appointed by law to be received by each and every county officer * * * or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed; and it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state, which shall be to and for the use of the state; and none of said officers shall receive for his own use, or for any use or purpose whatever except for the use of the proper county or for the state, as the case may be, any fees for any official services whatsoever."

The act fixes the salary of the treasurer and other county officers, and then provides in section 15 as follows:

"The salaries fixed and provided by the foregoing provisions shall be in lieu of all or any moneys, fees, perquisites or mileage which are now or may hereafter be received by any officer named in this act; and all said moneys, fees, mileage or perquisites, received by any of them as compensation, fees or perquisites, from any source whatever, shall in all cases belong to the county, and shall be paid into the treasury (except where required to be paid to the state), as provided in this act."

We think there is no difficulty in sustaining the judgment entered for the plaintiff by the learned court below. The constitutional mandate and the legislative enactment passed to make it effective are so explicit that they do not require judicial construction. In fact, as was well said by Judge Thayer in *Plerie v. Philadelphia*, 139 Pa. 573, 578, 21 Atl. 90:

"The prohibition of the receipt of fees for their own use, and the regulation of their compensation by fixed salaries exclusively, could hardly have been expressed in plainer language than that which is written in the Constitution. It is impossible for any ingenuity to prevail against it. There is nothing left for construction or interpretation. It interprets itself as plainly as any words in the English language can do so, and there is no hook upon which to hang a query or a doubt."

In making this assertion we are not unmindful of the several attempts made by county officers, as disclosed by the numerous

cases in this court, to defeat the constitutional and statutory enactments by appropriating to their use fees received in their official capacity. This provision of the Constitution has never been satisfactory to county officials, who, by the assistance of able and ingenious counsel, have omitted no opportunity to evade its mandatory provisions.

An analysis of the enactments, constitutional and legislative, will clearly show the fixed intention to confine a salaried county officer to his salary as compensation for all services rendered in his official capacity. The Constitution declares that he "shall pay all fees" which he may be authorized to receive into the treasury of the county or state. The first section of the act of 1876 provides that "all fees limited and appointed by law" to be received by county officers shall be received "to and for the use of their respective counties," and declares that "none of said [county] officers shall receive for his own use, or for any use or purpose whatever except for the use of the proper county or for the state, * * * any fees for any official services whatsoever." Section 15 seeks to emphasize, if it can be made more emphatic, the provision of section 1 by declaring that salaries fixed by the act "shall be in lieu of all or any moneys, fees, perquisites or mileage, which are now or may hereafter be received by any officer; * * * and all said moneys * * * received by any of them as compensation, fees or perquisites, from any source whatever, shall in all cases belong to the county, and shall be paid into the treasury (except where required to be paid to the state), as provided in this act." As to this exception and in explanation of it, Mr. Justice Dean, speaking for the court, said in *Commonwealth v. Mann et al.*, 168 Pa. 290, 299, 31 Atl. 1003, 1006:

"This would have been but little more significant if it had said 'except collateral inheritance taxes, state tax on writs, wills, commissions and license fees.'"

Section 9 of the act requires county officers to make monthly returns to the state treasurer of such taxes and all fees otherwise due the state, and pay the same quarterly into the state treasury, and provides that:

"All commissions on the collection of such taxes as are now or may hereafter be allowed by law shall be deemed and taken as part of the regular fees of the officer collecting the same, and shall be accounted for accordingly."

The present controversy is between an individual, who is county treasurer, and the county. The state is not claiming the fees for which this suit was brought nor is she interested in who gets them.

[2, 3] The county of Schuylkill has a population of over 150,000, and the treasurer of the county is therefore a salaried officer. He receives \$5,000 a year for his services. It is difficult to see, in view of the constitutional and legislative provisions, what claim the defendant, Wiest, county treasurer, as an in-

dividual and for his own use, can have on the fund in controversy. He, through his counsel, contends in support of his claim that the services performed by him in collecting the hunters' license fees under the act of 1913 were rendered to the state, and were no part of his duties as county treasurer, but separate and distinct therefrom. This contention cannot be sustained. The act of 1913 did not make Wiest a state officer, as will be conceded, nor did he have any functions as such to perform in the collection of the license fees. He did not receive the fees in controversy by authority conferred on him as a state official. The act deals with him as a county, and not a state official, and not as an individual. The Constitution of the state fixed his status as a county officer. The county treasurer, as provided in the act, is authorized to issue hunters' licenses, to collect \$1 from each applicant, to retain 10 cents from the amount paid to the licensee, and remit the balance to the state treasury. The act therefore confers its authority on the county treasurer, and not on the individual who happens at the time to be the incumbent of the office. Each step he takes to carry out the provisions of the act is in his official capacity as county treasurer. The license is issued and signed by the county treasurer in his official, and not his personal, capacity. By virtue of his office, and not as an individual, he collects the license fee and retains the amount for services designated in the act. It is true that the license fees are levied for and are to be paid to the state, but it does not follow that the compensation for the services rendered in issuing the licenses and collecting the fees therefor is to be paid to and for the use of the individual who at the time is the officer authorized in his official capacity by the statute to perform the service. On the contrary, section 9 of the act, as will be observed, provides that the commissions for collecting state taxes and fees shall be deemed "part of the regular fees of the officer collecting the same, and shall be accounted for accordingly." The act does not appoint county treasurers as agents of the commonwealth to collect the license fees, nor does it authorize them to apply to their own use the money retained for such services. The presumption is that, when an officer receives money for services rendered in his official capacity, it is as compensation for the performance of duties as such officer. If Wiest had not held the office of county treasurer, he could not have issued the hunters' licenses or collected the license fees, and necessarily could not have retained the designated fees for the services. He therefore holds the fees, received as compensation, in his official capacity as county treasurer, and under the constitutional and legislative mandates he must account for them to the county of Schuylkill.

In construing the act of 1876 and holding that the prothonotary of Schuylkill county, a

salaried officer, is not entitled to the fees authorized by the act of Congress to be retained by him for the naturalization of aliens, *Mr. Justice Stewart, speaking for the court in the recent case of Schuykill County v. Reese*, 249 Pa. 281, 286, 95 Atl. 77, 78, said:

"These fees for services in connection with naturalization proceedings, though prescribed by federal statute, and by such statute directed to be paid to a clerk of a state court, are quite as clearly limited and appointed by law to be collected by such official as any fees prescribed by state enactment. * * * It was only by virtue of his official character, and not as an individual, that he was authorized to collect and receive these fees; he is not designated as an individual, but as an official."

The Supreme Court of the United States, in *Mulcrevy & Fidelity & Deposit Co. v. City and County of San Francisco*, 231 U. S. 669, 84 Sup. Ct. 260, 58 L. Ed. 425, in construing a provision of the city charter of San Francisco similar to the provision of our act of 1876 and applying this act of Congress, came to the same conclusion, and held that the clerk should account to the county for the fees received by him. *Mr. Justice McKenna, speaking for the court*, said (231 U. S. 674, 34 Sup. Ct. 262, 58 L. Ed. 425):

"If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was not earning them otherwise, or receiving them otherwise, but under compact with the city to pay them into the city treasury."

The judgment is affirmed.

(257 Pa. 391)

KETCHAM v. LAND TITLE & TRUST CO.
(Supreme Court of Pennsylvania. April 16, 1917.)

MORTGAGES §—151(3)—PRIORITY—MECHANICS' LIENS—DEMOLITION OF BUILDING—"VISIBLE COMMENCEMENT UPON THE GROUND OF THE WORK OF BUILDING."

Where it was necessary to tear down a dwelling house before an apartment house could be constructed upon a lot and the demolition was performed under the same contract as the construction, such demolition constitutes a "visible commencement upon the ground of the work of building" within Mechanic's Lien Act (Act June 1, 1901 [P. L.] 431) § 13, defining the priority of liens, so that a mechanic's lien filed for work, labor, and materials in the construction dated from the commencement of such demolition, and was prior to a mortgage executed and recorded after the demolition has been completed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Visible Commencement of Work.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on a policy of title insurance by O. W. Ketcham against the Land Title & Trust Company. From a final order dismissing exceptions to the report of a referee, defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

John G. Johnson, Ormond Rambo, and J. Quincy Hunsicker, Jr., all of Philadelphia, for appellant. Alex. Simpson, Jr., and Joseph G. Magee, both of Philadelphia, for appellee.

BROWN, C. J. On July 9, 1912, Samuel Shoemaker acquired title to a lot of ground situated at the northeast corner of Schoolhouse lane and Wayne avenue, Germantown, on which there was a suburban dwelling house. Shoemaker purchased the lot for the purpose of erecting an apartment house upon it on the site of the dwelling house. On August 5, 1912, he executed a mortgage on the premises to Frank H. Moss for \$150,000, and the money so raised was expended in the erection of the new building. The Land Title & Trust Company, the appellant, issued its policy of insurance to Moss, the mortgagee, insuring the completion of the apartment house discharged of liens. O. W. Ketcham, the appellee, filed a mechanic's lien against it for materials furnished to Shoemaker for the erection of it. In proceedings on the Moss mortgage the premises were sold at sheriff's sale, and Ketcham, claiming that his mechanic's lien had priority over the mortgage, took a rule on the sheriff to pay the entire purchase price for the property, \$150,000, into court. This rule was subsequently abandoned by Ketcham, he and the Land Title & Trust Company having agreed in writing that the question of the priority of his lien over the mortgage should be referred to Francis B. Bracken, Esq., under the act of May 14, 1874 (P. L. 166). In pursuance of the terms of this agreement, Ketcham brought suit against the Land Title & Trust Company, and from the report of the referee, confirmed by the court below, holding that the mechanic's lien had priority over the mortgage, the present appeal was taken.

The facts in the case are not in dispute. The amount claimed by the appellee on his mechanic's lien—\$15,056—is admitted to be correct. His claim for its priority over the mortgage is resisted solely on the ground that the mortgage was recorded before there was "the visible commencement" of the apartment house within the meaning of the Mechanic's Lien Act of June 4, 1901 (P. L. 431, § 13). The only work done on the premises prior to August 5, 1912, the date of the execution and recording of the mortgage, in connection with the contemplated erection of the apartment house, was the demolition of the dwelling house. This work, which was commenced on July 15th, was completed on or about the third of the following month, two days before the recording of the mortgage, and the question before the referee and court below was whether its demolition was "the visible commencement upon the ground of the work of building" the apartment house.

The demolition of the dwelling house was a necessary precedent condition to the erection of the apartment house. The latter could not be built until the former was out of the way. The tearing down of the old house was more essential to the building of the new than would have been the digging of a cellar, for the new house might have been built without a cellar. The first step to be taken for its erection was the removal of the old dwelling which stood on the site selected for it. The situation here presented is not that of the removal of an old building having no connection with the construction of a new one, for the removal was so linked with the work upon the new building as to become a part of one single operation, and this conclusively appeared to the appellant before it issued its policy of insurance to Moss. The architect who designed the new building and drew the specifications for it to be submitted to contractors, included in them the following:

"Demolition. Remove the buildings now on the site together with all foundations, sidewalks and curbing, and prepare the site to receive the new building."

J. Willson Smith, the manager of the building operation department of the appellant, admitted in his testimony before the referee that these specifications were on file with his company before it issued its policy to Moss, and the learned court below, in dismissing the exceptions to the report of the referee, properly said:

"The defendant had actual knowledge that the work of demolition was done for constructive purposes, that is, as part of the work necessary to the new building. The specifications recited the work of demolition and construction as part of the same contract, and it was these specifications which the defendant insured should be carried out. Moreover, the money to pay for the whole was deposited with the defendant for distribution. It therefore had knowledge of the unity of the operation."

We find none of the authorities cited by learned counsel for appellant in conflict with the correct conclusion of the learned referee that, under the undisputed facts in the case, the demolition work incident to the erection of the apartment house on the lot of ground subject to the mortgage insured by the defendant was a "visible commencement" of the work of building the apartment house, within the meaning of the mechanic's lien act. In none of our own cases was the question now before us passed upon. It incidentally arose in *McCristal v. Cochran*, 147 Pa. 225, 23 Atl. 444, and, in declining to pass upon it, Mr. Chief Justice Paxson said:

"Most of the items contained in the bill of particulars were for tearing down an old building preparatory to the erection of the new building, for which the claim was filed. Whether such demolition is part of the erection of a new building is a question which we do not find decided by this court in any reported case. We are not required to do it now, as the first item in the bill of particulars is sufficient to sustain

the claim. It is not a good ground to strike off a claim that some of the items are insufficient. If it contains one good item, which is the subject of a lien, it is enough."

Among the cases in other jurisdictions sustaining the referee are *Whitford v. Newell*, 2 Allen (84 Mass.) 424; *Bruns v. Braun*, 35 Mo. App. 337; *Pratt v. Nakdimen*, 99 Ark. 293, 138 S. W. 974, Ann. Cas. 1913A, 872. "Where improvements for which a lien can properly be obtained are made, the lien may include the work of tearing down old structures or parts thereof which was a necessary part of the making of the improvements," 27 Cyc. 36. In Ann. Cas. 1912B, 15, there is a note on the subject now under consideration, and, after citing authorities which hold that, for the removal or demolition of a building, no lien will be sustained, it proceeds as follows:

"Where an old building is torn down for the purpose of erecting a new one, obviously a different case is presented. The demolition becomes part of the work of erection, construction, or repair, and the laborer is entitled to a lien. *Ward v. Crane*, 118 Cal. 676, 50 Pac. 839; *Bruns v. Braun*, 35 Mo. App. 337."

The assignments of error are overruled and the judgment is affirmed.

(267 Pa. 515)

IN RE BRINGHURST'S ESTATE.

Appeal of FLANAGAN.

(Supreme Court of Pennsylvania. April 16, 1917.)

WILLS §—601(7)—DEVISE TO MARRIED WOMAN—TRUST.

A will devising a residuary estate to a daughter for her sole and exclusive use free from the control of her husband, to be used by her as if she were sole and unmarried, intended a trust for her separate use, so that her petition to vacate her appointment as trustee for herself, filed during the lifetime of her husband, was properly dismissed.

Appeal from Orphans' Court, Philadelphia County.

Petition by Mary Bringhurst Flanagan, trustee, to annul and vacate a decree appointing her trustee in the estate of Alice R. Bringhurst, deceased, and directing the entry of security. From an order dismissing the petition, petitioner appeals. Affirmed.

The facts appear from the following opinion of Lamorelle, J., in the orphans' court:

This is a petition to annul and vacate a decree appointing a trustee and directing the entry of security. Alice R. Bringhurst, who died in the year 1906, bequeathed and devised her residuary estate unto her daughter, Mary Bringhurst Flanagan, in the language following:

"Sixth. All the rest of residue and remainder of my estate real and personal and mixed of whatsoever kind and whosoever the same may be situate I give and devise and bequeath to my daughter Mary Bringhurst Flanagan to be for her sole separate and exclusive use notwithstanding any coverture free and clear of interruption intervention or control of her husband or any husband she may have and without the said property and estate shall be held and used and enjoyed by the said Mary Bringhurst Flana-

gan in all respects and in as full and ample a manner notwithstanding her coverture as if she were sole and unmarried."

In 1907 Mary Bringham Flanagan, the daughter, being desirous of selling some of the realty forming part of the residue of the estate, petitioned this court for leave to appoint her trustee for herself to make such sale, and to give her own bond. In due course she was appointed such trustee, her request to give her own bond refused, and security was directed to be entered in the sum of \$12,500.

The surety on the bond is now deceased, and the purpose of the present petition is to terminate the trust, release the bondsman, and receive from the executors of her will the sum of some \$6,500 which he in his lifetime held as counter indemnity. As we view the will, we cannot grant the prayer of the petition.

At the time of the execution of the will Mary Bringham Flanagan was married, and her husband survives. It was the manifest intention of testatrix that her daughter should hold the estate for her sole, separate, and exclusive use, and while the latter part of the clause wherein and whereby the gift is made is not altogether in harmony with the gift itself, we do not feel that there is such a contradiction as will enable us to ignore the legal effect of the technical language used by the testatrix.

The lower court dismissed the petition. The trustee appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER and WAL-
LING, JJ.

E. Hunn, Jr., of Philadelphia, for appellant.

PER OURIAM. Though the last clause of the sixth paragraph of the will of testatrix is apparently contradictory of what immediately precedes it, her main intent that a trust should be created for her daughter's sole, separate, and exclusive use is clearly stated, and the decree is affirmed, at appellant's costs, on the opinion of the court below directing it to be entered.

(257 Pa. 517)

MILLER v. WEST JERSEY & S. S. R. CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

RAILROADS ⇨ 327(3)—GRADE CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

One who before stepping upon a track at a grade crossing had an unobstructed view for 967 feet, and who, if he had then looked, must have seen the approaching electric express train by which he was struck, was negligent.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Elizabeth H. Miller, administratrix of the estate of Franklin C. Miller, deceased, against the West Jersey & Seashore Railroad Company, to recover for the death of plaintiff's husband. Verdict for the plaintiff for \$25,000, judgment for defendant non obstante veredicto, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-
LING, JJ.

Jacob Singer, David Bortin and Emanuel Furth, all of Philadelphia, for appellant. Sharswood Brinton, of Philadelphia, for appellee.

PER OURIAM. Upon a review of the evidence in this case the court below could not have avoided the conclusion that the carelessness of the deceased, when about to cross the railroad tracks, was responsible for his death, and the judgment non obstante veredicto is affirmed on the following from the opinion directing it to be entered:

"If the deceased did not see the electric train in time to save himself, it was because he did not look. Where a person fails to see that which was plainly obvious, such person is clearly guilty of contributory negligence. The deceased must either have seen the electric train and have taken his chances of crossing in front of it, or he did not look. All the facts in the case evidence that the electric train was not one which came into view after the deceased was committed to the act of crossing; it was in plain view at the time that he stepped upon the tracks. The deceased was not a stranger at this railway crossing, as has already been shown, and his knowledge charged him with the necessity of exercising special care in crossing the tracks. It was shown that at the time he attempted to cross the train that he expected to take would not reach the station for some eight minutes. Another point which would appear to be perfectly clear is that for the whole length of the picket fence which separated the middle south-bound track from the north-bound track there was positively no obstruction of vision. This fence by measurement was 967 feet. When the deceased and the witness Avis stood west of the first outbound track, after leaving the news stand and before stepping upon the track, and also when they stood in the 15 feet clear space between the two south-bound tracks, they had an admittedly perfect, unobstructed view of the length of the fence, the 967 feet."

Judgment affirmed.

(257 Pa. 249)

**COMMONWEALTH v. KEYSTONE GRAPH-
ITE CO. et al.**

(Supreme Court of Pennsylvania. March 19, 1917.)

1. JUDICIAL SALES ⇨ 1 — MORTGAGES — SALE — "JUDICIAL SALE."

Where a corporation mortgaged its property to a trust company to secure a bond issue, a sale by the mortgage trustee under a power of sale contained in the mortgage to certain trustees for the bondholders, made after the corporation had sold its interest in the mortgaged premises, was not a "judicial sale."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

2. TAXATION ⇨ 682—TAX LIEN—ENFORCEMENT AGAINST PURCHASER AT MORTGAGE FORECLOSURE SALE.

Where a lien for unpaid capital stock taxes was entered against the corporation purchaser of corporation property mortgaged to secure a bond issue, and the property was subsequently sold by the mortgage trustee under a power of sale contained in the mortgage to certain trustees for bondholders, the tax lien was not thereby divested, and the proceeds of the sheriff's sale

under such lien were properly awarded to the commonwealth, to the exclusion of the trustees for bondholders.

Appeal from Court of Common Pleas, Chester County.

Scire facias to remove the lien of a mortgage by the Commonwealth of Pennsylvania against the Keystone Graphite Company, with notice to Hiram C. Himes and others, trustees for the bondholders of the New Philadelphia Graphite Company, terre-tenants. On exceptions to the report of an auditor distributing the proceeds of a sheriff's sale of real estate. Dismissed, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER, and
WALLING, JJ.

Edmund Bayly Seymour, Jr., of Philadelphia and Arthur P. Reid, of West Chester, for appellants. Isabel Darlington and Thomas S. Butler, both of West Chester, for the Commonwealth.

WALLING, J. In 1905 the New Philadelphia Graphite Company, a New Jersey corporation, took title to certain real estate in Chester county, Pa., and at the time executed a deed of trust in the nature of a mortgage to the Union Trust Company (now Merchants' Union Trust Company) to secure an issue of bonds to the amount of \$50,000. In 1907 the Keystone Graphite Company, a Delaware corporation, purchased the property from the New Philadelphia Graphite Company, subject to the mortgage. On December 14, 1910, the commonwealth entered its lien for capital stock taxes for the years 1907 to 1910 against the Keystone Graphite Company. On December 21, 1910, the trust company, pursuant to authority contained in the mortgage, sold the property at public auction for \$5,000 to certain parties as trustees for the bondholders. In 1912 the commonwealth issued a scire facias on its lien, and the last-named trustees, being served as terre-tenants, made defense on the ground that plaintiff's lien had been divested by the public sale. Such defense was held insufficient, and judgment was entered for the commonwealth in the court below, which was affirmed by this court in *Com. v. Keystone Graphite Co.*, 248 Pa. 344, 93 Atl. 1071. It is there held that the sale on the mortgage, not being a judicial sale, did not divest the plaintiff's lien.

[1, 2] In 1915 the commonwealth issued a *levari facias* on the judgment, by virtue of which the sheriff sold the real estate to trustees for the bondholders for \$1,860. The court below confirmed the auditor's report awarding the fund, less costs, etc., to the commonwealth on its judgment. From this decree the trustees for the bondholders took this appeal. The fund was rightly distributed. The public sale on the mortgage divest-

ed its lien and left that of the commonwealth the first lien against the property. The sheriff sold the land as the property of the Keystone Graphite Company, and his deed conveyed whatever interest the company had in the land when the lien of the commonwealth was filed; and, so far as relates to this distribution, it is not important whether his deed carried a fee or merely an equity of redemption. The sheriff's sale certainly did not divest the lien of the mortgage, and hence the holders of the bonds thereunder have no claim on this fund. It is *res adjudicata* that the commonwealth's lien was not divested by the sale on the mortgage, and hence the purchasers of the land at that sale have no claim here. One who buys land subject to a lien does not thereby become entitled to the proceeds derived from a subsequent judicial sale of the same property on such lien.

There is nothing in the record to support a claim by the purchasers at the sheriff's sale to recover back in this distribution the consideration they there paid for the property. The rule of *caveat emptor* applies to such sale; and, aside from that, there is nothing to indicate that the sheriff's vendees did not acquire a valid title. In our opinion the question of the statutory right of the commonwealth to enforce liens filed for such taxes, to the prejudice of the holders of prior mortgages whether given for purchase money or otherwise, is not involved in this case.

The assignment of error is overruled, and the order of distribution is affirmed, at the costs of the appellants.

(257 Pa. 344)

LAPINCO v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 9,
1917.)

1. RAILROADS §—346(1)—CROSSING ACCIDENT
—NEGLIGENCE—EVIDENCE.

In action against railroad for personal injury when struck by locomotive, evidence held insufficient to overcome presumption that defendant was not negligent in failing to provide proper headlight, so that trial judge should have directed finding that headlight was burning.

2. RAILROADS §—333(1)—CROSSING ACCIDENT
—CONTRIBUTORY NEGLIGENCE.

Where plaintiff stopped, looked, and listened at a track next to the one on which the train which struck him approached, and did not see the engine, though he had an unobstructed view for 160 feet, and immediately started across the track, and was struck, he was contributorily negligent.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Jachim Lapinco against the Philadelphia & Reading Railway Company to recover damages for personal injury. Verdict for plaintiff for \$4,500, and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRAZ-
ER, JJ.

William Clarke Mason, of Philadelphia, for appellant. William T. Connor and John R. K. Scott, both of Philadelphia, for appellee.

BROWN, C. J. The plaintiff was struck by an engine of the defendant on November 29, 1913, about 5 o'clock in the afternoon, at what the jury found was a permissible crossing in the city of Coatesville. For the injuries sustained he recovered a verdict; the jury having found that the defendant had negligently operated its engine at the point where he was hurt, and that he had exercised due care in attempting to cross the track. On this appeal from the judgment on the verdict the contention of the appellant is that its motion for a nonsuit ought to have prevailed, or a verdict should have been directed in its favor, as no negligence on its part had been shown, and the contributory negligence of the plaintiff was so clear that the trial judge should have declared it to be a bar to his right to recover.

[1,2] Alongside the track on which the plaintiff was struck there are two sidings. After crossing over the first, he stepped on the second and looked up and down the main track. It was dark, but lights were burning, and the plaintiff testified he could see a distance of 160 feet in the direction from which the engine was coming. He stated distinctly that there was nothing to obstruct his view down the track for that distance. According to the testimony of witnesses called by the defendant, the distance of the unobstructed view, from actual measurements on the ground, was much greater. With the unobstructed view of at least 160 feet before him, the plaintiff started toward the third or main track, and the instant he put his foot on the first rail the engine ran over it. He testified that from the time he started from the siding or second track he kept on looking and listening, but neither heard nor saw the approaching engine. On the testimony which he submitted as to its speed and the failure to give notice of its approach, by bell or whistle, it may be conceded that the question of the defendant's negligence was for the jury; but, as the plaintiff was bound not only to listen, but to look, the only rational conclusion deducible from all the testimony in the case is that he failed to look as he approached the track on which he was struck. If he had looked, he must have seen the engine coming towards him. Nei-

ther he nor either of his two witnesses who saw the accident testified that there was not a headlight burning on the locomotive. Neither of them said anything about a headlight, and their testimony, given its full effect, was merely that they had not seen the engine. There was no presumption that the defendant had failed to have a burning headlight on it, and the burden of showing negligence in this respect was upon the plaintiff. *Hanna v. Philadelphia & Reading Ry. Co.*, 213 Pa. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344.

The negative testimony of plaintiff and his witnesses, to which we have referred, was not sufficient to make out a charge of negligence as to the headlight, and a finding by the jury that one was not burning on the engine at the time of the accident was not only without evidence on the part of the plaintiff to sustain it, but was in the teeth of unimpeached evidence submitted by the defendant that the engine was equipped with a proper light. Nalin, the engineer, testified that there was a burning headlight on his engine, in front of a reflector; Gray, his fireman, said the headlight was burning brightly; and Thompson, the conductor, said he saw it burning. The testimony of these three witnesses was unequivocally corroborated by Harnish, Bivans, and Williams, three of defendant's brakemen. These six witnesses were in a position to see, and did see, and, in view of their positive and affirmative testimony that the headlight was burning, with no proof offered by the plaintiff to rebut the presumption that the defendant was not negligent as to this, the trial judge should have directed the jury to find that it was burning. *Knox v. Philadelphia & Reading Ry. Co.*, 202 Pa. 504, 52 Atl. 90; *Kelser v. Lehigh Valley R. R. Co.*, 212 Pa. 409, 61 Atl. 903, 108 Am. St. Rep. 872; *Anspach v. Philadelphia & Reading Ry. Co.*, 225 Pa. 528, 74 Atl. 373, 28 L. R. A. (N. S.) 382; *Charles v. Lehigh Valley R. R. Co.*, 245 Pa. 496, 91 Atl. 890; *Leader v. Northern Central Ry. Co.*, 246 Pa. 452, 92 Atl. 696.

Under *Carroll v. Penna. R. R. Co.*, 12 Wkly. Notes. Cas. 348, and the long line of cases following it down to *Stoker v. Philadelphia & Reading Ry. Co.*, 254 Pa. 494, 99 Atl. 28, it was the clear duty of the court below to enter judgment for the defendant non obstante veredicto.

The fourth assignment of error is sustained, and judgment is here entered for the defendant.

(91 Vt. 465)

BAKER v. RUSHFORD et al.(Supreme Court of Vermont. Franklin.
Sept. 4, 1917.)**1. INSURANCE §580(1) — VENDOR AND PURCHASER — RIGHTS OF PARTIES — INSURANCE MONEY.**

Where premises were sold, title to be transferred on the making of certain payments and a contemporaneous mortgage to the vendor to secure the balance of the consideration, the rights of the parties in respect to insurance money accruing from destruction by fire of a building on the premises were the same as they would have been if the fire had occurred after conveyance, the buyer being in possession and having performed all his obligations under the contract to date.

2. VENDOR AND PURCHASER §54 — ESTATES OF VENDOR AND VENDEE.

An executory contract for the sale of land left the legal estate in the vendor, but, except for his interest in the property as security, the vendor held the title in trust for the vendee, regarded by equity as the owner.

3. VENDOR AND PURCHASER §54 — RIGHTS OF PARTIES AFTER TRANSFER OF TITLE.

After title to land was sold under an executory contract, the vendee before he broke any condition of the contract was holder of the legal title and estate, and the vendor had his security in the form of a mortgage given him.

4. VENDOR AND PURCHASER §182 — PAYMENT OF PRICE — TIME — OPTION OF VENDEE.

Where installments of the purchase price of land were all payable on or before the dates specified, the entire indebtedness was payable at once at the vendee's option.

5. INSURANCE §580(1) — PROCEEDS — VENDOR AND PURCHASER — RETENTION OF SECURITY — CHANGE IN FORM.

Where a farm and personal property were sold, the vendee giving the vendor a chattel mortgage on all the personalty to secure payment of the first \$1,500 of the price, the contract providing that when such payment was completed and all conditions performed the vendor should give the vendee a warranty deed of the land, and receive a mortgage for the balance, payable on or before specified dates, the vendee to keep the buildings and contents insured for \$1,400 for benefit of the vendor, the insurance money arising from loss by fire stood in the place of the property destroyed, to be held for application by the vendor which would complete payment of the debt, and the vendee could not require application thereof to the discharge of the chattel mortgage.

Appeal in Chancery, Franklin County; L. P. Slack, Chancellor.

Suit by David Baker against Calvin Rushford and Ella Rushford. From a decree for plaintiff, defendants appeal. Decree reversed, and cause remanded, with direction that the complaint be dismissed.

Argued before MUNSON, C. J., and WATSON, HAZELTON, POWERS, and TAYLOR, JJ.

P. H. Coleman, of Montgomery, and A. B. Rowley, of Richford, for appellants. Gaylord F. Ladd, of Richford, for appellee.

MUNSON, C. J. The defendants are the vendors, and the plaintiff the assignee of the vendee, of a farm and personal property, the sale of which was evidenced by a writ-

ten contract, dated July 10, 1911. The price was \$3,000; \$200 of which was to be paid on or before July 10, 1912, and \$200 on or before the 10th of July in each year thereafter until all was paid. At the date of the contract, the vendee, Mary Martin, gave the defendant Calvin a chattel mortgage of all the personal property described in the contract, to secure the payment of the first \$1,500 of the purchase price. When this payment was completed, and all conditions performed, the vendors were to give the vendee a warranty deed of the land and premises, and receive a mortgage deed of the same to secure the balance of the annual payments, and the other conditions of the contract. By the terms of the contract the vendee was to pay all taxes afterwards assessed on the property, and keep the buildings and contents insured for \$1,400 in a specified company for the benefit of the vendors. The vendee and her husband took possession of the property soon after the execution of the contract, and remained in possession until October 14, 1912, on which day they assigned their interest in the contract to the plaintiff, who thereupon took possession. The dwelling house on the premises was destroyed by fire February 21, 1915, without the fault of either party. It was insured in the required company for \$1,000, by a policy procured by the plaintiff and made payable to the plaintiff and the defendant Calvin; and on the 20th of March the loss was adjusted at \$990, and covered by a check made payable to both the insured. The plaintiff indorsed the check and delivered it to Calvin, who deposited it in a bank in his name as trustee, where it has since remained. There was nothing due under the contract at the time of the fire, and \$95 had been paid on the installment next to become due; and all tax assessments had been paid. It would cost between \$1,500 and \$1,800 to replace the building. Each party has refused to take the money and rebuild. The value of the land without the building is \$800. On the 25th of March, 1915, the plaintiff gave the defendants written directions to make an immediate application of the insurance money on the payments to become due under the contract. The bill prays to have the money so applied, and the defendants ordered to make conveyance of the premises and discharge the chattel mortgage. The defendants have filed a cross-bill, praying that the plaintiff be foreclosed of his equity in the premises. The decree below is for the plaintiff. It was held in *Thorp v. Croto*, 79 Vt. 390, 65 Atl. 562, 10 L. R. A. (N. S.) 1168, 118 Am. St. Rep. 961, 9 Ann. Cas. 58, on the facts there presented, that the mortgagee should hold the insurance money and apply it to extinguish the mortgage debt, including interest, as fast as the same became due. The plaintiff claims that this decision is conclusive in his favor. The defendant does not

question the correctness of the decision, but contends that the two cases are clearly distinguishable.

[1-3] The relations of these parties at the time of the fire were those of vendor and vendee, under a contract of sale which provided for a subsequent transfer of the title on the making of certain payments, and a contemporaneous mortgage of the premises to the vendor to secure the balance of the consideration. But the rights of the parties are the same as they would have been if the fire had occurred after the conveyance; other conditions remaining the same. This was in law an executory contract, which left the legal estate in the vendor; but, except for his interest in the property as security, the vendor held the title in trust for the vendee, whom equity regards as the owner. But after the transfers, and before condition broken, the vendee would be the holder of the legal title and estate, and the vendor would have his security in the form of a mortgage. So the case is not distinguished from *Thorp v. Croto* by the fact that the latter was a suit between mortgagor and mortgagee.

But there are obvious differences between the case at bar and *Thorp v. Croto*. The facts presented in the *Thorp* Case disclose nothing as to the adequacy or inadequacy of the security, and no question as to the sufficiency of the security seems to have been raised. Nothing is said in either the majority or the minority opinion regarding the question of adequacy as a matter bearing upon the decision rendered. Here, the defendants refer to the facts reported as showing an inadequacy of security, and claim that this inadequacy distinguishes the case from the *Thorp* Case.

[4] The defendants say further of the *Thorp* Case that "both the mortgagor and mortgagee were willing that the money should be applied as payment, and the court treated it as the parties did." But the dissent was put upon the ground that the mortgagee was entitled to hold the insurance money in place of the property destroyed; so this aspect of the subject must have entered into the court's consideration of the case. The cases are alike in that no part of the debt was due when the insurance money was received, but they differ as to the terms of payment. In the *Thorp* Case there was no provision enabling the mortgagor to require an acceptance of payment in advance of its becoming due. Here the installments of the purchase money were all payable on or before the dates specified, so that the entire indebtedness was payable at once at the option of the vendee; and the vendors were directed "to immediately apply said sum * * * upon the payments to become due under said contract."

There is another difference to be consid-

ered in connection with the vendee's option. In the *Thorp* Case there was no intermediate condition on the fulfillment of which the debtor was entitled to a change in the form and substance of the security. Under this contract, the payment of \$1,500 of the purchase price would entitle the vendee to a discharge of the mortgage on the chattels, and to a conveyance of the title to the realty upon his giving a mortgage of the same to secure the balance of the debt. So this provision for an exercise of the vendee's option divides the principal into two parts, as to which the rights of the vendor touching the security are not identical.

[5] In the absence of an agreement for a release of some part of the security on the payment of a portion of the debt secured, the creditor is entitled to retain the entire security until the debt is fully paid. If the insurance money stands in place of the property destroyed it goes with the land, and retains in equity the quality of indivisibility; and the creditor is entitled to retain the entire security notwithstanding the change in form of a part of it. This would require that the insurance money be held for an application which would complete the payment of the debt. The question then arises whether the vendee's right to a transfer of the title and discharge of the chattel mortgage on the payment of a sum less than the entire debt, in connection with his privilege of paying a part or all of the notes at any time before their maturity, entitles him to use the insurance money to complete such partial payment. We think not. A part of the notes could not be paid by a tender of funds which the creditor was entitled to hold as security for the payment of all the notes. This view accords with the terms and nature of the provision regarding insurance. The vendee is to keep the buildings insured for the benefit of the vendor. The insurance is for the benefit of both parties, but is primarily for the benefit of the vendor as security holder of the property insured, and inures to the benefit of the vendee through the reduction of his debt. The vendee cannot require an application of it which would give him the primary benefit and leave the vendor inadequately secured. The application must be such as will preserve the equities of the vendor or mortgagee in the given case. Our disposition of the question presented here is not inconsistent with the decision in *Thorp v. Croto* as limited by the facts of that case; and it accords with the court's view, elsewhere expressed, that the proceeds of a policy of insurance on mortgaged property are to be substituted for the property destroyed. *Powers v. N. E. Fire Ins. Co.*, 69 Vt. 494, 38 Atl. 148.

Decree reversed and cause remanded, with direction that the complaint be dismissed.

(21 Md. 91)

CARTER v. SUBURBAN WATER CO.
(No. 56.)

(Court of Appeals of Maryland. June 28, 1917.)

1. WATERS AND WATER COURSES §203(13)—SHUTTING OFF WATER SUPPLY — INJUNCTION.

An injunction is the proper remedy to prevent the shutting off of water by a water company where the consumer denies in good faith the amount of the charge.

2. WATERS AND WATER COURSES §203(13)—WATER COMPANY—RIGHT TO SHUT OFF WATER.

Although a water company may adopt a rule that water may be shut off for nonpayment therefor, it cannot arbitrarily shut off the consumer's supply where the amount claimed is a matter of just dispute.

3. WATERS AND WATER COURSES §203(6)—WATER COMPANIES—PUBLIC SERVICE COMMISSIONS—JURISDICTION.

The Public Service Commission, under Acts 1910, c. 180, is not invested with power to determine controversies between defendant water company and plaintiff consumer as to correctness of the bills rendered.

4. WATERS AND WATER COURSES §203(13)—REFUSAL TO SUPPLY WATER—JURISDICTION.

Although it be conceded that the Public Service Commission has jurisdiction in cases involving the correctness of charges for water, it could not deprive a court of equity of its original jurisdiction to grant an injunction for refusal to supply water.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Bill by John F. Carter against the Suburban Water Company. From an order dismissing plaintiff's bill and dissolving the injunction issued, he appeals. Reversed, with costs, and cause remanded.

Argued before **BOYD, C. J.**, and **BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.**

Robert Biggs, of Baltimore, for appellant. Daniel R. Randall, of Baltimore (R. E. Lee Marshall, of Baltimore, on the brief), for appellee.

BURKE, J. John F. Carter, the appellant, is the owner of 71 dwelling houses, which are located in West Arlington, Baltimore county, Md., on certain avenues and roads mentioned in the bill filed in this case. The appellee is a public service corporation, having its principal office in Baltimore city, and is engaged in the business of furnishing water to the appellant and many other property owners in and about West Arlington. The 71 houses of the appellant are connected with the water mains of the appellee, and secure their supply of water for drinking and household purposes from them, and have no other source of supply from which water for drinking and household purposes may be secured. During the quarter ending October 30, 1916, the defendant repeatedly failed to supply said houses with a suitable quantity of water, and the appellant was subjected to damage

and loss as the result of the irregular supply of water furnished by the appellee to said houses. On the 1st day of October, 1916, the appellee furnished the appellant a bill, amounting to \$291.42, for water furnished said houses. The appellant disputed the bill, and claimed the legal right to deduct therefrom the losses sustained by him as the result of the failure of the appellee to furnish an adequate supply of water for drinking and household purposes—

“but expressed his willingness to adjust the said accounts with the defendant and to pay it such sum of money as would reasonably and fairly represent the proper charges for the services rendered by the defendant; that the said defendant, however, positively refused even to consider the claim of your orator, and also notified your orator that unless the said bills as rendered are paid on or before 10 o'clock on Tuesday the 10th day of October, 1916, it would cut off the supply from all the said houses, and leave them and the tenants therein without any supply of water for any purpose whatever.”

The appellee is insolvent.

The bill in this case was filed on October 9, 1916, and set out substantially the facts above stated, and prayed for an injunction against the appellee, its officers, agents, and servants, restraining them from cutting off the supply of water from the houses or any of them, and for other and further relief. An injunction was issued on October 9, 1916, as prayed; the appellant first having filed an approved bond in the penalty of \$2,000 as required by the order of court. On December 2, 1916, the defendant demurred to the bill upon the ground that the plaintiff “has a plain, adequate, and complete remedy at law.” On the 6th day of February, 1917, the court passed an order dismissing the bill and dissolving the injunction, and from that order this appeal was taken. The appellant filed an approved appeal bond which operated to suspend the effect of the order.

[1] The single question presented by the appeal is this: Upon the facts stated in the bill, was the plaintiff entitled to the injunction prayed for? It is to be observed that this is not a simple, and perhaps a common case, where a water company shuts off or threatens to shut off the supply of water from a consumer for nonpayment of the amount due for water supplied.

[2] It is now well settled that a water company may adopt, as a reasonable regulation for the conduct of its business, a rule providing that the water supplied to a customer may be shut off for nonpayment therefor. *City of Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 238, 31 L. R. A. (N. S.) 301, 19 Ann. Cas. 842; *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320; *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273; *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432. But it is a case of dispute as to the

amount due, where the appellant had expressed himself ready and willing to adjust and pay the amount for which he is liable, and where the company declines to accept anything less than the amounts of the bills rendered, and threatens to shut off the water on a certain day unless the bills are paid. The courts appear to be quite uniform in holding that a water company cannot arbitrarily shut off the consumer's supply when the amount claimed is a matter of just dispute. *Cox v. City of Cynthiana*, 123 Ky. 363, 96 S. W. 456; *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376; *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432.

In *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, the court said:

"While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term."

The same principle is announced in *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390. That an injunction is the proper remedy to prevent the shutting off of the water in cases where the consumer denies in good faith either his liability or the amount of the charge appears to be well established by the authorities. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *American Conduit Co. v. Kensington Water Co.*, 234 Pa. 208, 83 Atl. 70.

The occupants of these houses must have water daily and hourly. It is a prime necessity of comfort and health, and to suddenly shut off the water in order to coerce the owner to pay an unjust or a disputed bill would be not only a violation of his legal rights, but would subject him to serious injury, and such injury as the owner would likely sustain before he could be compensated in an action at law even against a solvent corporation is sufficient to furnish the equity for an application for an injunction. In *Sickles v. Manhattan Gas Light Co.*, 64 How. Prac. (N. Y.) 33, it appears that Gen. Sickles applied for an injunction to restrain the defendant from cutting off the supply of gas from his residence. He alleged that an improper bill had been presented to him, and that he had offered to pay for the gas consumed, but that the company refused to accept and threatened to remove the meter and shut off the gas. Upon these facts the court

held that he was entitled to a preliminary injunction.

[3, 4] It is contended that the Public Service Commission, under Acts 1910, c. 180, has exclusive jurisdiction over the subject-matter of this suit, and has the power to grant the plaintiff full and complete relief. We do not find that the Public Service Commission is invested with the power to hear and determine the controversy between the parties as to the correctness of the bills rendered, or to determine what amount the plaintiff owes. But if that power be conceded, the court of equity would not for that reason be deprived of its original jurisdiction to grant the injunction. It has been long since settled that, where a court of equity has original jurisdiction, and a statute confers upon the common-law courts a similar power, the jurisdiction of equity is not thereby ousted. *Barnes v. Compton*, 8 Gill, 398; *Shryock v. Morris*, 75 Md. 72, 23 Atl. 68.

Order reversed, with costs, and cause remanded.

(121 Md. 291)

HUBBARD v. HUBBARD. (No. 48.)

(Court of Appeals of Maryland. June 28, 1917.)

1. HUSBAND AND WIFE \Leftarrow 297—ACTION FOR ALIMONY—EVIDENCE—SUFFICIENCY.

In a suit for alimony, *held*, under the evidence, that after the dismissal of a prior bill for divorce there was at least a partial reconciliation followed by the husband's leaving and not returning.

2. HUSBAND AND WIFE \Leftarrow 288 — SUIT FOR ALIMONY—DEFENSE.

That the wife had her husband arrested, and when they were before the magistrate had asked, in anticipation of the husband's returning to their home, to be afforded police protection, would not justify a total failure to make any provision for the support of the wife barring her suit for alimony.

3. HUSBAND AND WIFE \Leftarrow 298(3)—EXCESSIVE ALLOWANCE OF ALIMONY.

Where a husband had a weekly drawing account as salary of \$20 a week, an allowance to the wife of \$3 a week permanent alimony cannot be said to be unreasonable.

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Bill by Florence Hubbard against William J. Hubbard, Sr. Decree for plaintiff, and defendant appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry C. Kalben and David Ash, both of Baltimore, for appellant. James Fluegel, of Baltimore, for appellee.

STOCKBRIDGE, J. On the 27th of May, 1915, a decree was passed in a case between the same parties as those who are parties to this record, upon a bill filed originally as a bill for alimony, and subsequently by amend-

ment converted into a bill for divorce a mensa et thoro. Three days after the entry of the decree in that case an appeal was taken to this court, and, the case having been heard here, the decree of the circuit court No. 2 of Baltimore city was affirmed on January 21, 1916.

Shortly following the decree of the circuit court No. 2 of Baltimore city, to which reference has just been made, namely, on July 1, 1915, Mrs. Hubbard swore out a warrant for the arrest of her husband, charging desertion and nonsupport. Mr. Hubbard was absent from the city at the time, and did not return to Baltimore until about the middle of that month. Immediately upon his return he surrendered himself, and the case was set for a hearing on the 19th or 20th of July. When the matter was taken up before the magistrate there appears to have been some discussion relative to a possible reconciliation between the parties, and without final action there, either upon the theory of a lack of jurisdiction on the part of the magistrate or for some other reason, the case was sent to the grand jury, which subsequently found an indictment. The criminal proceeding does not appear to have been pushed to a conclusion, but was settled by the state's attorney without prejudice to the assertion of the rights of the parties in an equity court.

On September 28, 1916, the bill of complaint in this case was filed. It contains three prayers: The first, for alimony pendente lite and permanent alimony; the second, for an injunction to restrain Mr. Hubbard from disposing of certain household effects and furniture; and, third, the general prayer for relief.

The evidence consists largely of the testimony of the parties to this suit, and is contradictory on material points. It would be idle to attempt to reconcile their stories, or account for the discrepancies by any supposed lapse of memory. The alleged foundation for Mrs. Hubbard's suit is this: That some time during the month of July, 1915, or approximately two months after the dismissal of her former bill for a divorce, and after the hearing before the magistrate of the proceeding instituted because of the nonsupport, Mr. Hubbard did return to the house on Madison avenue, which belonged to the parties, and although not occupying the same room with his wife, did during some week or ten days take his meals or some of them with his wife and others who were staying at the house, thereby effecting at least a partial reconciliation of the parties.

Mr. Hubbard, on the other hand, denies most emphatically that he ever took a meal at the house or stayed in the house over night, and insists that the various witnesses who testified to his presence there were mistaken in their estimates of time by at least one year. He does admit that he paid a brief visit to the house for the purpose of

getting some of his clothing, but insists that that was all, and that the total length of time that he was so in the house was very brief.

In the course of the examination it was admitted (record, page 28) by the counsel for Mr. Hubbard that there was nothing to prevent him from going home. Of the conflicting statements made by Mr. and Mrs. Hubbard, there is no corroboration of Mr. Hubbard's version. On the other hand, Mrs. Hubbard is supported by the testimony of the son of the parties, though apparently some animus existed between the father and son.

There is further corroboration from three apparently disinterested witnesses, a Mrs. Overley, who spent a considerable length of time in the house in 1915, and who details with particularity the events and actions of Mr. Hubbard in the house during that week or ten days, at the expiration of which he left and did not thereafter return.

Mr. and Mrs. Haas were neighbors, living on Madison avenue. Their testimony is to the effect that, while neither of them saw Mr. Hubbard in the house, yet Mrs. Haas saw him entering the house, and Mr. Haas saw him in the immediate neighborhood and had a short conversation with him.

[1] The preponderance of testimony therefore is to the effect that after the dismissal of the prior bill there was at least a partial reconciliation of the parties, followed by Mr. Hubbard's leaving the home, and that he has not since returned to it.

Upon one point the evidence of the parties to the case is in entire accord, namely, that since the decree of May 27, 1915, Mr. Hubbard has contributed nothing whatever to the support or maintenance of his wife.

The right of a wife to look to her husband for support, and to maintain a bill in equity therefor, where the parties are not living together, and that through no fault of the wife, is too firmly established in the law of this state to call at this time for any discussion or extended citation of authorities. *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717.

[2] The only pretext upon which Mr. Hubbard relied in his testimony to justify his failure to return to his wife, or to fail to provide her with a proper allowance for her support, was that she had had him arrested, and that when the parties were before the magistrate she had asked in anticipation of his returning to their home to be afforded police protection, but such reasons, however galling they may have been to the husband's pride, cannot be relied upon as justifying a total failure to make any provision whatever for the support of the wife.

[3] A large amount of the testimony taken at the trial of this case was directed to the capacity of the husband to support his wife, and the details of his business and the

amount received by him from it were gone into at great length. The facts upon the uncontracted evidence of this branch of the case show that he was conducting a relatively small business in the shipping and selling of oysters, and that the profits at the close of the year were trifling in amount. In reaching this result there were deducted as a part of the expenses of the business weekly payments to the defendant as salary of \$20, to his bookkeeper of \$18, a foreman, \$15, and a driver, \$11. Without stopping to consider or discuss whether this weekly salary list was or was not out of proportion to the amount of business done, the important fact is that Mr. Hubbard had a weekly drawing account as salary of \$20.

The decree from which this appeal was taken awards Mrs. Hubbard the sum of \$3 per week as permanent alimony, less than one-fourth of the earning capacity of the husband, as shown by the salary which he was drawing. Such an allowance of alimony cannot be said to be unreasonable (*Ricketts v. Ricketts*, 4 Gill, 105; *Harding v. Harding*, 22 Md. 337); and since an allowance for alimony is subject to be increased or diminished by the court making it, according to the altered condition of the parties as they may from time to time exist, no reason is apparent for disturbing the decree of the circuit court for Baltimore city, and that decree will accordingly be affirmed.

Decree affirmed, with costs.

(131 Md. 330)

BRADFORD et al. v. MACKENZIE et al.
(No. 70.)

(Court of Appeals of Maryland. June 28, 1917.)

1. WILLS §507(1)—CONSTRUCTION—FEE.

Under a will devising the residue of testator's property equally among his wife and his seven surviving children, "their heirs, executors and assigns," share and share alike, the use of such words was not controlling as to whether the devisees took a fee simple.

2. WILLS §622—REMAINDERS—PRECEDENT ESTATE—FEE.

A remainder cannot be limited upon a fee simple.

3. WILLS §625—EXECUTORY DEVISE—PRECEDENT ESTATE.

An executory devise can be limited after a fee simple.

4. WILLS §548—CONSTRUCTION—EXECUTORY DEVISE.

Under a will devising a residue to testator's wife and his seven surviving children, their heirs, executors, and assigns, and on the death of any child intestate and without living issue devising his share over to the surviving devisees, the share of a son so dying vested in the testator's surviving children, to the exclusion of the children of a daughter dying intestate before the son.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Bill by Thomas Mackenzie, committee, and others against Samuel W. Bradford and others. Decree for plaintiffs, and defendants

appeal. Decree reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry S. Carver, of Bel Air, for appellants. Ralph Robinson, of Baltimore, and Edward H. Burke, of Towson, for appellee children of Mrs. McElderry. Gerald F. Kopp, of Baltimore, for Emeline K. Bradford. Thomas Mackenzie, of Baltimore, for committee and trustee.

BOYD, C. J. The main question involved in this case is the proper construction of the residuary clause of the will of the late Augustus W. Bradford, a former Governor of this state. That clause is as follows:

"A. I give and bequeath all the rest and residue of my property, real, personal and mixed, after the payment of any debts I may be owing at the time of my death, to be equally divided among my wife aforesaid and my said seven surviving children, to wit: Emeline K. Bradford, Jane B. Bradford, Augustus W. Bradford, Junior, Charles H. Bradford, Elizabeth Bradford, Thomas Kell Bradford and Samuel Webster Bradford, their heirs, executors and assigns share and share alike.

"B. I do hereby further direct and declare that so far as concerns the female devisees above mentioned the portions so devised to them respectively shall be for the sole and separate use of each of them and absolutely free and discharged from any interest or estate therein of any husband whom either of them may hereafter marry and in no way subject to his direction or control or liable for his debts or engagements.

"C. I do further will and declare that should either of my said seven children included in the aforesaid devise die intestate, whether in my lifetime or afterwards, and leaving no issue living at the time of their death, or should my wife die intestate, then the share or portion of the one so dying shall survive to and vest in the surviving devisees aforesaid share and share alike."

For convenience of reference we have marked those paragraphs in the residuary clause A, B, and C, although those letters do not appear in the will. By prior provisions in his will the testator had left to his wife his house and lot on Eutaw place in the city of Baltimore, together with all the household furniture, linen, pictures, and plate therein contained (excepting a set or plate described) for life, and after her death to pass into the residue of his estate and be with that residue equally divided as directed. He then made bequests to three of his sons of personal property and \$50 to each of his three daughters and the same amount to his son Charles H.

Gov. Bradford died March 1, 1881, leaving a widow and the seven children named in the residuary clause. Mrs. Bradford (the widow) died December 27, 1894, leaving a last will and testament. Jane B. Bradford died unmarried and without issue on February 27, 1905, but left a will. Thomas Kell Bradford died July 14, 1906, intestate, unmar-

ried, and without issue. Elizabeth Bradford married Thomas McElderry, who predeceased his wife, and she died June 9, 1915, intestate, and leaving four children, all of whom are of age except Sarah, and are parties to this bill. Charles H. Bradford died January 6, 1916, intestate, unmarried, and without issue. Augustus W. Bradford, Jr., and Emeline K. Bradford are still living, and both are unmarried, and Samuel W. Bradford is still living, but is married and has living issue. The three living children of the testator claim the estate left by Charles H. Bradford, while the children of Mrs. McElderry claim they are entitled to a fourth interest in it.

If paragraph A stood alone, it could not be doubted that the wife and seven children took the real estate in the residuary clause in fee simple and the entire personalty. Paragraph B tends to confirm that construction. The controversy arises by reason of paragraph C. As Charles H. Bradford died intestate and left no issue, it becomes necessary to ascertain the effect, if any, of paragraph C on paragraph A.

Paragraph C was only intended to take effect in case of a child of the testator dying intestate and leaving no issue. In determining the effect of that paragraph, it must be borne in mind that it is clear that the testator intended to connect it and paragraph B with paragraph A. Indeed, paragraph B is relied on by the appellees in support of their contention. It begins, "I do hereby further direct and declare," etc., and then paragraph C, which immediately follows, begins, "I do further will and declare," etc. It was evidently intended to be something more than a mere expression of a wish, desire, or direction, such as is spoken of as precatory language. All of those paragraphs were intended to be taken together in reference to the residuary devises and bequests, and, as we have seen, were not separated by the letters A, B, and C.

[1] It may be well to recall that the use of the words "their heirs, executors and assigns" in paragraph A is not controlling. In *Devecmon v. Shaw*, 70 Md. 219, 225, 16 Atl. 645, 647, Judge Alvey referred to what is section 327 of article 93 of Annotated Code to show that the daughter took a fee simple in the real estate without the use of the words "to her and her heirs or to her in fee simple," and he said she also took the entire interest in the personalty, but, as we will see later, held that the fee simple was defeasible and the interest in the personalty was subject to the contingencies specified. So in *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, also referred to later, the devise was, "To them and their heirs and assigns forever."

[2, 3] What effect, then, did paragraph C have on the devise and bequest given Charles H. Bradford by paragraph A? It is clear that there was no remainder, as a remain-

der cannot be limited after a fee simple (*Hill v. Hill*, 5 Gill. & J. 87; 40 Cyc. 641; 24 Am. & Eng. Ency. of Law, 380), but that is not so with an executory devise, and hence we must determine whether paragraph C was a valid executory devise, or made the estate given by paragraph A defeasible upon the happening of the contingencies specified.

[4] In 11 R. C. L., under the article "Executory Interests," the subject is discussed under different heads. Section 16 of that article on page 476 is on "Limitation Repugnant to Gift with Absolute Power of Disposal." It is there said:

"Indestructibility is an essential element of executory limitation, and an unlimited power of disposition in the first taker is clearly incongruous with this idea, being ipso facto a destruction of the executory limitation, whether the power is exercised or not. In this construction no distinction is made between goods and land, but if the primary gift vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder. Thus where an absolute gift to a person is followed in the same instrument by a gift over in case of that person dying intestate, or without having disposed of the property, the gift over is said to be repugnant, and is void. When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest. In the case of executory devises, the question whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided on a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator, which intent, when so discovered and made obvious, is controlling."

Section 17 of that article is on "Limitation Over After Life Estate with Power of Disposal." Section 18 is in reference to "Limitations tending to Create Perpetuities Generally," and section 19 as to "Limitations over on Failure of Issue." In the case of *Benesch v. Clark*, 49 Md. 497, relied on by the lower court, it was held that Mrs. Bramble only took a life estate in the Monument street lots, with the power of disposition, and that the power was effectually executed by a deed of assignment. That case turned on the question whether there was a valid execution of the power. While it is true that the language of the power there was that the lots were to be disposed of as the life tenant might see fit at his decease, and the court held that the execution of the power was not limited to a last will and testament, but the assignment of the leasehold property was valid, the court did not hold that the power to dispose of the property by will necessarily includes the power to dispose of it by deed. As shown by the discussion of the cases cited

by Judge Alvey, it depends largely upon the language of the donor of the power. We do not understand the rule to be as announced in the opinion of the lower court that "a genuine power to dispose of an estate by will includes also a power to dispose of it by deed," although such a power may be so worded as to include a power or disposition by deed. But this is not a case of whether a power has been validly exercised, but whether the limitation sought to be imposed is valid. There is not even an express power given to dispose of the property by will, although, as one of the limitations is dying intestate, it must be inferred that the testator intended that the devisees could dispose of their interests by will, but it would be difficult to construe this language into a power to dispose of the property by deed. Of course if he left the real property in fee and the personality absolutely, without any valid limitations, the devisees could convey the property by deed, or as they saw proper, but that is not the question we are now considering.

Section 19 of R. C. L., already referred to, begins by announcing a rule, which seems to be a very general one, that:

"It is well settled that while an executory limitation to take effect on a definite failure of issue in the first taker is valid, yet a limitation to take effect on a general or indefinite failure of issue is void."

Most of the rest of the section is taken up with the discussion of what is a definite or indefinite failure of issue, but there can be no such question in this case. The will itself says, "leaving no issue living at the times of their death," and the act of 1862, chapter 161, now section 332 of article 93 of the Code, provides that expressions such as "die without issue," etc., "shall be construed to mean a want or failure of issue in the lifetime, or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." A similar provision in reference to deeds is now in section 90 of article 21. *Combs v. Combs*, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359, is one of the cases cited in the note to section 19 of 11 R. C. L., above referred to, to show that in some states statutes have been passed. That case is relied on by the appellees to show that paragraph C was invalid to affect paragraph A, but there the property was devised to the devisees with full authority—"to sell and convey the same in his lifetime, or to dispose of the same by last will and testament; but should he die without issue of the body lawfully begotten, and without having disposed of the same by sale, or by last will and testament, either in whole or in part, then I give and devise my said estate, both real and personal, or the part remaining as above undisposed of, to my cousins," etc.

Of course, that limitation was held to be void, as the gift to the first taker was absolute and unqualified. It was there said

that an executory devise may be limited after a fee simple, but in such case, the former must be made determinable on some contingent event. In this case there was a fee, but it was determinable on the contingency of dying intestate and leaving no issue living at the time of the death of the devisee, "the share or portion of the one so dying shall survive to and vest in the surviving devisees aforesaid share and share alike."

In the case of *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, the testator left real estate to his wife so long as she should live or remain a widow, and at her death or marriage he left to his eight children named—

"the aforesaid real estate to them and their heirs and assigns forever, and in case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors, and this principle of survivorship I do direct to apply to any and all accumulations by survivorship, not only to the original shares, but to all accretions by survivorship until the death of any and all of such children as may die without issue at the time of his or her death."

It was there held, quoting from the syllabus for convenience:

"First. That the devisees took estates in fee, as tenants in common, defeasible as to each upon his or her death without issue, in which event the share of the person so dying passed to the survivors, so that the last survivor took his estate, including that which survived to him in fee, absolutely. Second. That it was not the intention of the testator that in the case of the death of one child without issue, his share should go in part to the issue of pre-deceased children, but nothing could pass to the issue of a pre-deceased child except that which the parent was entitled to at the time of his death. Third. That the word 'survivor' as used in the will meant the survivors of the children named as devisees, and did not include the issue of a deceased child as a surviving line of heirs."

That case is as nearly analogous to this as we could expect to find.

In *Devecmon v. Shaw et al.*, 70 Md. 219, 16 Atl. 645, the opinion of Judge Alvey filed in the lower court was adopted by this court. The testator after providing for his wife, and after making certain devises and bequests to his daughter without limitations or restrictions, added the provision:

"But in case my said daughter should die without leaving any child or children at the time of her death, or if leaving such child or children, such child or all such children should die before arriving at the age of twenty-one years, then all the real estate and personal estate devised to my said daughter shall go to my sister," etc.

It was held that:

"The daughter [of the testator] took a fee-simple estate in the realty, and the entire interest in the personality, defeasible as to both realty and personality on her dying without leaving a child, or, if she left child or children, upon their all dying before attaining the age of 21 years; and upon the happening of such contingencies the ultimate devisees and legatees would take by way of executory devise and bequest, and not by way of contingent remainder."

Judge Alvey said in his opinion:

"Upon consideration of the whole context of the will, I can entertain no doubt of the opin-

ion that the daughter was intended to take, and that she does by fair construction take, an estate in fee in the realty, and the entire interest in the personality, defeasible as to both realty and personality, upon the happening of the contingencies specified."

There are a number of other cases decided by this court to the same effect, and we are forced to the conclusion that under this will the children of Mrs. McElderry took no interest in the share of Charles H. Bradford left to him by his father's will.

It was said at the argument that in prior matters concerning the estate of Gov. Bradford the appellants had concurred in the views now taken by the appellees, and proceeds of properties had been disposed of accordingly, but there is nothing in the record which would justify us for that reason in making the distribution now before us contrary to what we are of opinion the will and authorities require. We will, however, direct that the costs be paid out of the estate of Charles H. Bradford.

Decree reversed, and cause remanded for further proceedings in accordance with this opinion, the costs to be paid out of the estate of Charles H. Bradford.

(131 Md. 59)

ARTHUR & BOYLE v. MORROW BROS.
(No. 51.)

(Court of Appeals of Maryland. June 28, 1917.)

1. RELEASE §57(1) — EVIDENCE — SUFFICIENCY.

In an attachment issued against a general contractor on a judgment against the subcontractor for work done by plaintiffs, *held*, under the evidence, that a release under seal executed by the subcontractor to the general contractor was not a release of the debt attached.

2. EVIDENCE §76—PRESUMPTION—FAILURE OF PARTY TO TESTIFY.

That neither of the garnishees took the stand raises a presumption against them.

3. FRAUDULENT CONVEYANCES §229—LIABILITY OF GRANTEE—GARNISHMENT.

If a creditor has fraudulently conveyed property to another, the grantee may be charged as garnishee.

4. FRAUDULENT CONVEYANCES §48—VOLUNTARY RELEASE BY CREDITOR.

The voluntary release of his debtor, by a creditor not having the means to pay debts is void as to the creditors of the latter.

5. FRAUDULENT CONVEYANCES §273—VOLUNTARY RELEASE—PRESUMPTION.

If the necessary effect and operation of a voluntary release of a debtor was to hinder, delay, or defraud creditors, the legal presumption is that it was made for that purpose.

6. FRAUDULENT CONVEYANCES §23—VOLUNTARY RELEASE OF DEBTOR—INSTRUMENT UNDER SEAL.

If the release had its origin in fraud, or what the law deems fraud, it would make no difference that it was under seal.

Appeal from Superior Court of Baltimore City; Robert F. Stanton, Judge.

Suit by Arthur & Boyle, for the use of Fielder C. Slingluff and another, trustees, against James G. Parlett. On the judgment

for plaintiffs, an attachment was issued against Morrow Bros., garnishees. From the judgment against the garnishees, plaintiffs appeal. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISOOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Albert R. Stuart and Stuart S. Janney, both of Baltimore (Ritchie & Janney, A. Dana Hodgson, and Fielder C. Slingluff, all of Baltimore, on the brief, for appellants. Carville D. Benson and John D. Nock, both of Baltimore (Benson & Karr, of Baltimore, on the brief, for appellees.

BOYD, C. J. The appellees were the general contractors for the State Normal School building near Towson, and made in writing a subcontract with James G. Parlett to do certain work in connection with its construction. The contract is not in the record, but a memorandum of agreement filed in the case shows that it was for grading and landscaping. Parlett made a subcontract with Carozza Bros. & Co., who in turn entered into a subcontract with Arthur & Boyle, the appellants.

While that work was going on, Charles Morrow, one of the appellees, called Frank J. Boyle, one of the appellants, to where he and Parlett were standing, and asked him if he would make some tunnels which were to be constructed under the building, and he replied that he would if he got his price, and that he could start the next morning. After some conversation about the price, Morrow turned to Parlett and said:

"'Parlett, get them in right away,' and also said to me, 'You had better get your shovel up there and get to work on them and get them out, as we can't start this building until these tunnels are taken out.' Q. And he said to Mr. Parlett, 'You get them out right away'? A. Yes."

That is substantially all in the record in reference to the contract for the tunnels, but it is corroborated by Parlett.

The appellants did the work, and received a payment of \$1,890 on account of it. Frank J. Boyle testified that the amount was paid to him by Parlett, who received the money from Morrow Bros., at their office, in his presence, and turned it over to him. Later the appellants sued the appellees for the balance they claimed to be due on account of the work on the tunnels, but the case was decided against them. Afterwards they sued Parlett and recovered a judgment against him for \$4,409.05, with interest and costs. On that judgment an attachment was issued, and laid in the hands of Morrow Bros. They first filed a plea of nulla bona, but subsequently filed an additional plea in which they admitted having \$250 in hand due Parlett, but alleged that they had no other goods, chattels, or credits of Parlett in their hands. The \$250 was for the balance due on the

contract for grading and landscaping. The trial in this case resulted in the appellants obtaining a verdict for only \$250 against Morrow Bros., the garnishees, and they appealed from the judgment thereon.

There are only two bills of exception in the record, the first being to the admission of an "agreement and release," a "memorandum of agreement," and a receipt which were offered by the garnishees, and the second presents the rulings on the prayers. The plaintiffs offered five prayers, all of which were rejected, and the garnishees offered three, the second of which was granted, and the others rejected. We do not find in the record a copy of the judgment on which the attachment was issued, but the evidence of Mr. Boyle shows that they recovered judgment for \$1,409.05, with interest from May 9, 1916, and apparently that was the date of the judgment. Nor is there anything to show when the suit against Parlett was instituted. The appellees rely on the agreement and release referred to, while the theory of the appellants is that Morrow Bros. owe Parlett a balance for the work on the tunnels, which they claim is the amount of the judgment they recovered against Parlett, and (1) that Parlett never did release this claim, and (2) that, even if he did, the release was without consideration, void and of no effect as to them, by reason of the British statute (15 Elizabeth, c. 5) known as the statute against fraudulent conveyances, in force in this state.

[1] 1. We find no error in admitting the papers referred to, notwithstanding our conclusion to be hereafter stated as to the effect of the release. The memorandum of agreement was dated March 16, 1916, and was executed by Morrow Bros., parties of the first part, James G. Parlett, party of the second part, and Carozza Bros. & Co., parties of the third part, the individual members of the two firms being also named. Its recitals are as follows:

"Whereas, the parties of the first part entered into a contract with the party of the second part *for the grading and landscaping* [italics ours] at the Maryland State Normal School, and the parties of the third part claim to have an assignment of said contract from the party of the second part; and whereas, a dispute has arisen in regard to the state of accounts between them, and the parties hereto have arrived at a compromise settlement of their differences: Wherefore, now this agreement witnesseth: That in consideration of the sum of one (\$1.00) dollar by each of the parties hereto to the other paid, and in further consideration of certain mutual concessions by the parties hereto, it is agreed by the parties hereto and each of them that the total amount due by the parties of the first part in connection with and as a result of the *matters and things hereinbefore referred to* [italics ours] is eleven thousand five hundred dollars (\$11,500), and no more."

On the same day what is called an "agreement and release" was executed by Parlett, party of the first part, and the Carozza Bros. & Co., parties of the second part, to the

Morrow Bros., parties of the third part, the individual members of the firms being also named. It recites:

That, "whereas, certain differences and disputes have arisen between * * * [naming the parties] regarding certain contracts entered into by the parties of the first and third parts regarding certain work to be done at and on the Maryland State Normal School, for the erection of which school the parties of the third part were the general contractors, and whereas said differences and disputes have been adjusted to the satisfaction of the parties hereto," and that for and in consideration of the sum of \$10,500 in hand paid to the parties of the first and second parts by the parties of the third part, the receipt of which is acknowledged, and the further payment of \$1,000 when the state of Maryland makes final payment to Morrow Bros., and of other good and valuable considerations, Parlett and Carozza Bros. & Co. and each of them, remise, release, and forever discharge Morrow Bros. "from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, covenants, contracts, agreements, promises, damages, claims, and demands whatsoever in law or in equity which against the said William H. Morrow and Charles A. Morrow, or either of them, they ever had, now have, or which their respective heirs, personal representatives, or assigns hereafter can, shall, or may have, for, upon, or by reason of any manner or cause or thing whatsoever from the beginning of the world to the day of the date of these presents; the said parties of the first and second parts, and each of them, hereby declaring themselves fully paid and satisfied.

"And the said parties of the first and second parts do hereby covenant and warrant that any and all claims of any other subcontractors or other persons for labor and material done or furnished in, about, or in connection with the construction of the State Normal School in Baltimore county, or in or about the site of said State Normal School building, are paid in full, and that they and each of them will assume and pay any and all such claims as may arise or be presented."

The receipt referred to is as follows:

"Baltimore, 3/16/1916.

"Received of Morrow Bros. two thousand dollars in full settlement of Normal School contract, except the sum of \$1,000, which is to be paid when work is finally completed and accepted, to be paid as follows: Parlett, \$250.00; Carozza, \$750.00."

That is signed by Parlett and Carozza Bros. It would be difficult to use more words in a release than in the one above set out, but there are some significant facts which cannot be overlooked. In the first place, it would have been so easy to mention the contract for tunneling if that was intended. Then the "memorandum of agreement" and the "agreement and release" were executed the same day, and the former specifically refers to the contract for grading and landscaping and to no other contract. It cannot be contended that it relates to that for tunneling. It is there agreed "that the total amount due by the parties of the first part [Morrow Bros.] in connection with and as a result of the matters and things hereinbefore referred to, is eleven thousand five hundred (\$11,500) dollars, and no more." The only things "hereinbefore referred to" are the grading and landscaping. The \$11,500 is the precise sum named as the

consideration in the agreement and release, there being \$10,500 in hand paid, and the sum of \$1,000 to be paid when the state made its final payment. It is therefore affirmatively and clearly shown that no part of the \$11,500 was paid for the tunneling, but that the whole of that sum was due by Morrow Bros. to Parlett and Carozza Bros. Company for grading and tunneling.

But beyond that it is stated in the opinion of the learned judge below, and we so understand from the record, that the contract for the grading and landscaping was made between the Morrow Bros. who were the general contractors, and Parlett. Then Parlett made a subcontract with Carozza Bros. & Co. for that work, which, according to the memorandum of agreement, the latter claim amounted to an assignment of it, and that firm made a subcontract with Arthur & Boyle for that work. We find nothing in the record to suggest that the Carozza Company had any interest whatever in the contract for tunneling. It was therefore proper to join the Carozza Company in the memorandum of agreement and for them to unite in the release, and to require that company and Parlett to discharge Morrow Bros. from all claims they were jointly interested in or connected with, but why should it have been intended by that instrument to release Morrow Bros. from a claim of Parlett with which the Carozza Company had no connection? If it had been so intended, the natural and proper thing to do was to specifically recite in the release the claim for tunneling, as the Carozza Company had nothing to do with it, but were parties to the release. It is clear that the release was only intended to affect the contract or contracts with which Parlett and the Carozza Bros. & Co. were both connected, and not the one to which the latter were in no wise parties.

Then when we come to the oral evidence, which was admitted without objection so far as the record discloses, and, we think, properly admitted under the issues, it is altogether on the one side. Neither of the Morrrows testified, nor did they call a witness, notwithstanding Parlett had sworn that the tunnel work was not included, and not intended to be included. As the record stands, Morrow Bros. have only paid \$1,890 for "sixty some hundred dollars" of work, without an iota of evidence to contradict that statement by Parlett, and if the appellees' construction of the release is correct, they were released from the payment of over \$4,000 without one penny's consideration; for, as we have shown, the consideration named in the release is exactly what all of the parties agreed under seal was due for the grading and landscaping.

But that it not all. Morrow Bros. not only knew that Arthur & Boyle were doing the tunneling, but according to the uncontradicted evidence Charles Morrow told Parlett in Boyle's presence to get them to work right

away, and Parlett gave them a written order to do the work, which work it is not denied they did. The \$1,890 which they did pay was paid to Parlett in Boyle's presence, and then turned over to him in Morrow Bros.' office. Parlett was criticized at the argument for making in this case statements contradictory to and inconsistent with his evidence in the suit which Arthur & Boyle brought against Morrow Bros. for the balance due for the tunneling work, but it cannot properly be said that his explanation is an unreasonable one. He testified in the other case that the money was due to Arthur & Boyle, and not to him, and he said at this trial that he then thought it did. They did the work, and under the facts about their employment shown by the record he might well have believed that they were entitled to the money. As Arthur & Boyle did the work, if their charges for it amounted to all that Morrow Bros. were to pay for it, the proper thing for Parlett to do was to treat it as their money, and not his. When the court determined that Arthur & Boyle could not recover from Morrow Bros. and that Parlett was responsible to them, he then very properly concluded that the money was due him. It certainly was not intended by the court, or any one else, that it should not be paid to some one. It was due either to Arthur & Boyle directly, or to Parlett for their benefit. He admits that he made a memorandum in his book of the amount, and sent Morrow Bros. a notice of it, but he says that his idea was that he was to collect it and pay it to Arthur & Boyle. As he had given the written order to Arthur & Boyle to proceed with the work, it was perfectly proper for him to make and keep a memorandum of it, but the only money that has been paid he paid over at once to Arthur & Boyle in the presence of Mr. Morrow.

[2] The fact that neither of the Morrrows went on the stand is significant and raises a presumption against them. *Dawson v. Waltemeyer*, 91 Md. 328, 46 Atl. 994. Their claim that they are released from the sum due is simply based on the fact that the release is under seal, and not even on a contention that they have paid the money. We are therefore of the opinion that under the evidence the release did not apply to the contract for tunneling, and hence the fact that it was under seal can make no difference.

That being so, no reason appears from the record why Parlett cannot sue Morrow Bros., and there can be no application of the general principle referred to in the opinion of the lower court, and in the authorities cited by the appellees, that ordinarily the test of the liability of a garnishee is whether he had property, funds, or credits in his hands for which the debtor can sue him. That general principle is clearly and thoroughly established by 2 Poe on Pl. & Pr. § 531, B. & O. R. R. Co. v. Wheeler, 18 Md. 372, Myer v.

Insurance Co., 40 Md. 595, and many other authorities which could be cited, if there was any doubt about it.

[3] But there are well-recognized exceptions to the general rule, one of which is that, if a creditor has fraudulently conveyed property to another, the grantee may be charged as garnishee. *Odend'hal v. Devlin*, 48 Md. 439; *Farley v. Colver*, 113 Md. 379, 386, 77 Atl. 589; *Hodge & McLane on Attachments*, § 148. If he has conveyed it contrary to the Statute of Elizabeth, it comes within the exception.

[4-6] But if the release had included this fund, then it would have been null and void and of no effect as against the appellants or other creditors of Parlett. He testified that he had no means with which to pay this judgment, and it was in effect conceded at the argument that he was insolvent. If a debtor and creditor can discharge an indebtedness simply by having the creditor execute an instrument like this under seal, and the creditor has no other means with which he can pay his debts, then indeed might it be properly charged that the law encourages fraud and protects fraudulent transactions, instead of protecting honest and innocent people from attempts to defraud them. We do not mean to say that there was intentional fraud in this matter, but if it was intended to get rid of this indebtedness for no sufficient consideration, and thereby put it beyond the reach of the creditors of Parlett, it was certainly what the law condemns. Parlett swears positively that it was not intended to release this claim. The *Morrrows* are silent. The Statute of 13 Eliz. (chapter 5) has frequently been before this court. A voluntary conveyance is prima facie invalid as against existing creditors of the grantor who has no sufficient means to pay his debts, independent of that conveyed, without regard to his actual intent or to that of the grantee. *Christopher v. Christopher*, 64 Md. 583, 588, 3 Atl. 296; *Cone v. Cross*, 72 Md. 102, 105, 19 Atl. 391. The burden is on the party claiming under the conveyance to prove that a debtor had sufficient property with which to pay his debts, exclusive of that conveyed away. It is not necessary in order to bring a conveyance within the statute that there shall be an actual intent on the part of the grantee to perpetrate a fraud. If the necessary effect and operation be to hinder, delay, or defraud creditors, the legal presumption is that it was made for that purpose. *Schuman v. Peddicord*, 50 Md. 560, 563; *Riley v. Carter*, 76 Md. 581, 600, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; 1 Alex. Br. Stat. (Coe's Ed.) 507, note 21. If the release had its origin in fraud, or what the law deems fraud, it would make no difference that it was under seal. *Schaferman v. O'Brien*, 28 Md. 565, 575, 92 Am. Dec. 708; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290.

The statute is applicable to release of debts. *Bigelow on Fraud. Con.* 132; *May on Fraudulent and Voluntary Dis. of Prop.* (3d Ed.) 15, 16, 20, 21; *Moore on Fraud. Con.* p. 60, § 19; *Hauser v. King*, 76 Va. 731, 737; 12 R. C. L. 507, § 36; 20 Cyc. 354, 406.

It follows from what we have said that there was error in granting the garnishee's second prayer and rejecting the plaintiff's prayers. In this state the practice has been and is to permit a creditor to resort in such cases to either of two remedies, that of attachment or by bill in equity (*Stockbridge v. Fahnestock*, 87 Md. 127, 136, 39 Atl. 95, and cases there cited); and hence we have not thought it necessary to refer to the jurisdiction of a law court, as it is well established.

Judgment reversed, and new trial awarded; the appellees to pay the costs, above and below.

(131 Md. 296)

SOULSBY et al. v. AMERICAN COLONIZATION SOC. et al. (No. 54.)

(Court of Appeals of Maryland. June 28, 1917.)

APPEAL AND ERROR ⇐1208(5)—MANDATE—DISMISSAL.

In a suit by the residuary legatees of the grantor of the trust to declare it void, a judgment of the Court of Appeals on a former appeal that the trustees' adversary possession of the trust property for more than 20 years prior to the suit was a bar to its recovery by the petitioners, notwithstanding a statement in the opinion that the trust was void because conflicting with the rule against perpetuities, was a determination that the petitioners had no right of action, so that, after mandate, the lower court's decree dismissing the petition was correct.

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Suit by Robert Soulsby and others against the American Colonization Society, Ferdinand C. Latrobe, and another, trustees. Decree sustaining the demurrers to the petition and dismissing the petition, and petitioners appeal. Decree affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Leigh Bonsal, of Baltimore, for appellants. William G. Johnson, of Washington, D. C., and D. K. Este Fisher, of Baltimore, for appellee American Colonization Soc. Charles F. Stein, Eugene O'Dunne, and Donald B. Creecy, all of Baltimore, for appellees Ferdinand C. Latrobe and James W. Harvey, trustees.

CONSTABLE, J. This appeal arises from a misunderstanding of the meaning and effect of the mandate together with the opinion of this court in the case of the American Colonization Society v. Robert Soulsby et al., 129 Md. 605, 99 Atl. 944, L. R. A. 1917C. 937.

We need only refer briefly to the facts of

the litigation, for they were set out very fully in the careful and comprehensive opinion prepared by Judge Pattison on the former appeal. Caroline Donovan in 1886 executed a declaration of trust, in which she provided that after her death certain enumerated real property should be held by specified trustees, and the net income paid over to the American Colonization Society for the transportation annually to Liberia of such colored persons as might desire to emigrate to that country, with the further provision that, if in any one year the cost of transportation for that year should not require the whole of the net income for that year, the income, or any balance, should be used by the said society for the maintenance of public schools for the education of colored children in Liberia. It was provided that the trust was to be under the supervision of a court of equity; so therefore at the death of Caroline Donovan, in March, 1890, the circuit court of Baltimore city assumed jurisdiction of the trust; and from that time to the present the trustees have collected the rents from the properties and paid the net income over to the society.

The American Colonization Society is a Maryland corporation incorporated in the year 1831, and was empowered under a new charter, passed in 1837, to purchase, have, and enjoy any lands by the gift, bargain, sale, devise, or otherwise of any person, to take and receive any sums of money, goods, or chattels that should be given to it in any manner, and to occupy, use, and enjoy, sell, transfer, or otherwise dispose of the same as it should "determine to be most conducive to the colonization, with their own consent in Africa, of the free people of color residing in the United States."

The appellants and petitioners, who are the heirs at law and residuary legatees of Caroline Donovan, filed their petition in this cause, praying that the trust properties might be delivered over them, upon the ground that the trust was void. The reasons assigned for its invalidity were twofold, or in the alternative. They contended, in the first place, that the declaration of trust was void as contravening the rule against perpetuities and for indefiniteness, and again that, even though it should be found that for those reasons it was not void ab initio, yet nevertheless it had since become inoperative and void, because the objects and purposes for which it had been created could no longer be accomplished.

Demurrers were filed to the petition on various grounds, including the ground that adversary possession for several years more than the statutory period completely barred all recognition of the petitioner's claim. The lower court overruled the demurrers, and the trustees and the society appealed to this court. This court, in disposing of the appeals, entered the order as follows: "Order reversed, and cases remanded; the appel-

lees to pay the costs." After the mandate was received below, the petitioners asked leave to amend the petition, but this the court refused to permit, and entered a decree sustaining the said demurrers and dismissing the petition. From this decree the petitioners have taken the present appeal.

As we said in the beginning of this opinion, this appeal arises from a misconception of the effect of the order on the first appeal. The appellants have laid hold of certain passages in the opinion the meaning of which, when considered with the whole of the text, gives no aid to the appellants' present contentions, and were not intended to do so when adopted by us. From the passages they argue that, when this court reversed the previous decree and remanded the cause, it must have intended that the petitioners were to be allowed to amend. The fact is that this court intended exactly what it has intended in a great number of cases where similar orders have been passed, where, by the opinion filed, it appeared that the complainants' or petitioners' contentions had been ruled against, that is, to have the lower court enter the decree of dismissal.

As stated above, the petitioners had two contentions—one that the trust was void ab initio; the other, that although the courts should find that the trust was not void ab initio, yet it must be found that it was void now, for the reason that the purposes for which it had been created were no longer available. Judge Pattison in delivering the opinion of the court first dealt with the former contention, and, after reviewing several of our leading cases treating of the rule against perpetuities, announced our conclusion in the following plain and unequivocal language:

"Whatever may be the law elsewhere, we, following the decisions of this court, must hold the trust in this case to be void because it is a perpetuity, in that it attempts to create an active trust which is required to continue beyond the period limited by the rule, but, although the trust is void for the reason stated, the petitioners are barred from recovery upon the ground of its invalidity, resulting from such cause, because of the adversary possession of the trustees of the trust property for a period of more than 20 years prior to the institution of these proceedings."

And in support of the latter part of the above *Needles v. Martin*, 33 Md. 618, was cited and quoted from with several citations of authorities to the same effect.

This, then, became the law of the case, and the correct law, as we then thought and now think. In our opinion, when we held that the adversary possession by the trustee of the trust property was a bar to its recovery by the petitioners, we intended to say just what the words, in their ordinary meaning, import; that is, that whatever rights the petitioners might have had at one time had been lost because others had acquired them through operation of law. This absolutely settled the case, in so far as the peti-

tioners were concerned, without the necessity of adverting to the other contention of the petitioners, based upon the theory that the trust, at the time of its creation, was a valid one, but had since become void through the impossibility of carrying out its objects. But it was thought proper, and perhaps helpful as a matter of pleading, to point out why the allegations of the petition that the grantor's objects and purposes were not being carried out were insufficient, and the demurrers thereto would have had to be sustained, if a different view had been taken of the question of adverse possession.

The lower court by its order dismissing the petition correctly expressed the mandates of this court.

Decree affirmed; the appellants to pay the costs.

(130 Md. 686)

HOEN v. KIDD. (No. 69.)

(Court of Appeals of Maryland. June 28, 1917.)

BROKERS' COMMISSION—RECOVERY—JURY QUESTION.

In an action for commissions on the sale of timber, held that the case was properly submitted to the jury; the evidence as to the agreement that defendant was to be the judge whether plaintiff actually made the sale being contradictory.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Frank B. Kidd against Frank N. Hoen. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Elmer J. Cook, of Towson (Frank J. Hoen and Willis & Willis, all of Baltimore, on the brief), for appellant. T. Scott Offutt, of Towson, for appellee.

STOCKBRIDGE, J. This appeal is from a judgment for \$170, rendered in the circuit court for Baltimore county in a suit to recover commissions on a sale of timber growing on some land belonging to the appellant. There is but one bill of exceptions. That was reserved to the action of the trial court upon the prayers. The first instruction asked for by the defendant was that there was no evidence legally sufficient to entitle the plaintiff to recover, and that the verdict must be for the defendant. It is upon the rejection of this prayer that the appellant lays the most stress, and it is to this that consideration must first be given.

In the early part of September, 1915, Mr. Kidd, a real estate broker, called on Mr. Frank H. Hoen relative to a sale of the timber on some 200 acres of land belonging to the latter in Baltimore county. He produced a contract which Mr. Hoen refused to sign. Mr. Kidd got up to leave, saying:

"I can't do any business with you?" and I said, 'No, sir; none at all;' and he started out the door, and then he came back and he said, 'Now, Mr. Hoen, suppose I could procure a purchaser for this tract of timber; you would not object to paying me the commission?' and I said, 'No; if I could know you were able to sell it and actually did it, I would not object to paying you the commission, but under no circumstances would I give you the order or commission you to act for me in the premises at all; I would have to be the judge as to whether you actually made the sale or not;' he said, 'That is perfectly satisfactory to me; you are responsible; that is perfectly satisfactory;' and with that he went out."

This is the account of the first interview as given by Mr. Hoen. Mr. Kidd's version is much shorter. He denies positively the statement that Mr. Hoen was to be the judge whether Mr. Kidd made the sale or not, and described the interview in this way:

"I told him I was in the real estate business and sold farms and also sold timber, and Mr. Hoen said that if I would bring or send a man I would get five per cent. commissions, and he asked, first, who paid the commissions and I said, the man selling it, and I told him I sold farms too, and I think I left him a form—I forget what you call it—a form where you fill out, a blank form."

Mr. Kidd went to Natwick & Co. to endeavor to induce them to purchase the timber, and on September 14th this firm wrote to Mr. Hoen, looking to a possible purchase. This letter was followed up by a call on Mr. Hoen by Mr. Natwick on October 31st. The progress was slow, and the deal not finally consummated until January 26, 1916, but negotiations do not seem to have been ever definitely broken off, and on frequent occasions, either by calls or conversations over the telephone, Mr. Kidd continued to press the completion of the sale.

At some time during this period a Mr. Snyder appears upon the scene, and it is suggested that he was or might have been the efficient cause in consummating the transaction. Mr. Natwick's testimony in relation to Snyder makes it seem as though his call was of a social rather than business nature. The case as presented, therefore, cannot be said to have been so entirely devoid of evidence as to warrant the court in withdrawing it from the consideration of the jury. On one material point there was a direct contradiction between the plaintiff and defendant, and it was for a jury, not the court, to say which was the correct version.

The subject of real estate brokers' commissions has been a most fruitful occasion for litigation, and decisions defining the law governing them can be found in every state in this country. Nowhere have the principles controlling such controversies been more clearly stated than in Maryland. Such cases as Keener v. Harrod, 2 Md. 70, 56 Am. Dec. 706; Martien v. Baltimore, 109 Md. 260, 71 Atl. 966; Walker v. Baldwin, 106 Md. 632, 68 Atl. 25; Slagle v. Russell, 114 Md.

418, 80 Atl. 164; Way v. Turner, 127 Md. 327, 96 Atl. 676, and Daniels v. Iglehart, decided at the present term (no opinion filed), have fully covered every principle involved in this case, and a mere repetition of what was said in these cases would be superfluous.

Objection to the other prayers was not strenuously insisted on, and, even if it had been, no reversible error is apparent in any of them; and, as the plaintiff produced sufficient evidence to require the submission of the case to a jury, the judgment appealed from will be affirmed.

Judgment affirmed.

(131 Md. 301)

BECKER v. FREDERICK W. LIPPS CO.
(No. 57.)

(Court of Appeals of Maryland. June 28, 1917.)

1. EQUITY §43—LEGAL REMEDY.

Where plaintiff's right of action is not dependent upon or based upon some equitable matter, such as fraud, mistake, accident, trust, accounting, or the like, and the legal remedy would be complete, adequate, and certain, courts of equity have no concurrent jurisdiction, and will not interpose.

2. ACCOUNT §12 — SUIT FOR ACCOUNTING — BILL.

Bill in equity brought by the purchaser of a year's output of empty barrels from a manufacturer of confections, which bill alleged that the confectioner failed to deliver empty sugar barrels, and that plaintiff had no way to ascertain what number constituted the entire output of sugar barrels for the year, and prayed for a discovery and accounting and damages, could not be maintained as a suit for an accounting.

3. DISCOVERY §6—AUXILIARY REMEDY.

Discovery in equity to support an action at law or as auxiliary to the maintenance of a suit contemplated to be brought can be resorted to only where the discovery is essential and absolutely necessary to the establishment of plaintiff's rights, and the information cannot be otherwise obtained.

4. DISCOVERY §3 — BILL — POSSIBILITY OF DISCOVERY AT LAW—STATUTE.

Bill by purchaser of a year's output of empty sugar barrels from a confectioner, which alleged nondelivery, and prayed discovery, and a judgment for damages, was not maintainable as a bill for discovery, so that the court would proceed to determine the whole matter in controversy, as the discovery prayed for would have been available to plaintiff under Code Pub. Gen. Laws 1904, art. 75, §§ 99 and 100, providing mode of procuring production of books, papers, and testimony in a court of law.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

"To be officially reported."

Suit by William Becker, trading as William Becker & Co., against the Frederick W. Lipps Company, a body corporate. From an order sustaining demurrer and dismissing the bill, plaintiff appeals. Order affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Louis S. Ashman and George Weems Williams, both of Baltimore (Lucius Q. C. La-

mar, of Baltimore, on the brief), for appellant. Laurie H. Riggs, of Baltimore (C. R. Watten-scheidt, of Baltimore, on the brief), for appellee.

BRISCOE, J. The questions for decision in this case are raised upon a demurrer to a bill in equity which was sustained by the circuit court of Baltimore city. The bill was accordingly dismissed, and leave of the plaintiff to amend was denied.

The principal defense made on the demurrer and relied upon in argument is that the circuit court of Baltimore city has no jurisdiction of the subject-matter of the suit, because the cause of action and relief demanded are fully legal in their nature and properly cognizable in a court of law.

The facts of the case out of which the controversy arose and upon which the decision of the case must turn are stated and appear from the averments of the bill and are admitted by the demurrer to be true. They are these:

The plaintiff is engaged in the cooperage business in the city of Baltimore, and in the conduct of the business and in connection therewith buys and sells empty barrels of various kinds. The defendant is engaged in the manufacture and selling of chocolate and confections in the city of Baltimore, and in connection with its business has on hand a large number of empty barrels of different kinds for sale. On August 8, 1915, the plaintiff agreed to purchase and the defendant agreed to sell all of defendant's output of empty barrels for the period of one year from the 15th of July, 1915, to the 15th of July, 1916, upon the terms, conditions, and prices provided by a contract between the parties, which will more fully appear from the averments of the bill disclosed by the record now before us. The contract was signed in duplicate, is filed with the bill, as Plaintiffs Exhibit No. 4, and is as follows:

"Baltimore, Md., 7/15/15.

"This agreement made this 15th day of July, 1915, between Wm. Becker & Co., parties of the first part, and the Frederick W. Lipps Company, parties of the second part, all of Baltimore city:

"Parties of the first part agree to purchase and parties of the second part agree to sell all of their entire output of empty barrels, as they run, no deductions to be made for damaged barrels, unless by mutual consent, prices as follows:

Condensed milk oak barrels.....	\$1.00
Soft wood condensed milk barrels.....	.60
Glucose barrels90
Headdown glucose barrels.....	.75
Single head glucose barrels.....	.60
Grain-alcohol and spirit barrels.....	1.00
Olive oil and cotton seed barrels.....	1.00
Engine, cylinder, dynamo oil barrels.....	.85
Double head sugar barrels.....	.20
Damaged and single head sugar barrels.....	.15
Cocoonut, originally sugar barrels.....	.15

"And all other empty packages not mentioned above to be accepted at the ruling market prices.

"The parties of the first part guarantee the above prices for one year from date, and agree

to promptly remove all barrels when notified by the parties of the second part.

"Witness the signature of the parties of the first part and the parties of the second part duly authorized to sign this agreement.

"Terms: Cash on delivery.

"Accepted August 5, 1915.

"The Frederick W. Lipps Co., [Seal.]

"By Frederick W. Lipps, Pres."

The bill alleges that the defendant failed to deliver to him the entire output of empty sugar barrels, as under the contract it was required to do, but has at all times refused to deliver any of said barrels, although often demanded so to do; that the defendant has broken the contract, and as a result thereof the plaintiff has suffered a very substantial loss and damage therefrom.

The bill then alleges that the plaintiff has no way or means of ascertaining what number in fact constituted the defendant's entire output of sugar barrels for the period of one year mentioned in the contract because the facts and the means of ascertaining them are in the exclusive keeping and possession of the defendant.

The prayer of the bill is, in substance, that a court of equity decree a discovery, an accounting, and the defendant also be decreed to pay the sum ascertained to be due the plaintiff as damages for a breach of the contract, and such other and further relief as the case may require.

It is contended upon the part of the defendant in support of the demurrer that the plaintiff's relief or remedy, if any, is an action at law for the recovery of damages for a breach of contract; that a court of equity is without jurisdiction to entertain this bill, and the plaintiff ought to be left to his remedy at law.

On the other hand, it is urged by the plaintiff that the bill is one for an accounting and a discovery, and that a court of equity has concurrent jurisdiction to hear and determine the case under the averments of the bill. The doctrine is well settled in this state that, where a party has a certain, complete, and adequate remedy at law, he cannot sue in equity. The cause of action in this case, it will be seen, is clearly and primarily a legal one, arising from the nonperformance of a contract to deliver sugar barrels, and for the breach of which damages are sought to be recovered by the plaintiff from the defendant.

[1] In such cases, where the right of action is not dependent upon or based upon some equitable matter such as fraud, mistake, accident, trust, accounting, or the like, and the legal remedy would be complete, sufficient, and certain, courts of equity have no concurrent jurisdiction, and will not interpose. 1 Pomeroy, Eq. Jurisprudence, §§ 178-236; Price v. Tyson, 3 Bland, 399, 22 Am. Dec. 279; Powles v. Dilley, 9 Gill, 239; Taylor v. Ferguson, 4 Har. & J. 46.

In *Oliver v. Palmer*, 11 Gill & J. 444, it is said, if in a case like the present, where

the claim asserted is strictly legal in its form and substance, where the remedy at law is expeditious and ample, you grant to the court of equity the power ascribed to it upon the principles upon which it is claimed, there is scarcely a case resting in contract and now cognizable in a court of law which may not be drawn into the vortex of chancery jurisdiction.

[2] It is quite certain that the bill in this case cannot be sustained or maintained as a suit in equity for an accounting. Its allegations are not such as to bring it within that class of cases where a court of equity will take jurisdiction for an account. *Miller's Equity*, § 721, p. 823; 1 Pomeroy, Eq. Jurisprudence, § 230; *Taylor v. Ferguson*, 4 Har. & J. 46. But it is insisted on the part of the appellant that the bill is framed for discovery, as well as for relief, and the court, being rightly in possession of the cause, will proceed to determine the whole matter in controversy.

[3] There are cases where a discovery may be had not only to support an action at law, but as auxiliary to the maintenance of a suit contemplated to be brought, but they are cases where the discovery is essential and absolutely necessary to the establishment of the plaintiff's rights, and the information cannot be otherwise attained. *Wolf v. Wolf*, 2 Har. & J. 382, 18 Am. Dec. 313; *Parrott v. Chestertown Bank*, 88 Md. 515, 41 Atl. 1067; *Heinz v. German Bldg. Ass'n*, 95 Md. 160, 51 Atl. 951; *Union Passenger Railway Co. v. M. & C. C.*, 71 Md. 238, 17 Atl. 933.

The general principle is stated in *Russell v. Clark*, 7 Cranch, 90, 3 L. Ed. 271, as follows:

"It is true that, if certain facts essential to the merits of a claim purely legal be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."

In *Phelps' Juridical Equity*, 159, it is said that not much stress is now laid upon the auxiliary jurisdiction of courts of equity, meaning the power to compel discovery, produce documents, etc., since those powers have been by statute conferred upon the courts of law, and the necessity for the auxiliary jurisdiction may be said to be practically almost entirely superseded, although still occasionally resorted to. 1 Pomeroy, Eq. Jur. §§ 83, 124, 143, 215; article 75, §§ 98, 99, and 100, Code P. G. Laws.

In the present case the discovery sought by the bill was a detailed statement of the number of sugar barrels constituting defendant's entire output for the year beginning July 15, 1915, and ending July 15, 1916, and that the defendant be required by decree of this court to pay the plaintiff the sum ascertained to be due.

[4] It is clear that the discovery prayed for in the bill would have been available to

the plaintiff, under article 75, §§ 99 and 100, of the Code in a court of law, where the mode of procuring the production of books, papers, and testimony is provided for in as ample a manner as in a court of equity, and where there is an adequate, complete, and sufficient remedy pointed out by law, courts of equity will not interpose.

For the reasons which we have stated, we do not think the appellant has made out such a case as entitles him to relief in a court of equity, but that his case is properly cognizable in a court of law.

The order of the court below sustaining the demurrer and dismissing the bill will be affirmed.

Order affirmed, with costs.

(131 Md. 358)

WILHELM v. MITCHELL. (No. 22.)

(Court of Appeals of Maryland. Aug. 11, 1917.)

COURTS  184—COUNTY COURTS—SUFFICIENCY OF DECLARATION.

Under section 18g of the "Speedy Judgment Act" for Baltimore county (Acts 1894, c. 631, as amended by Acts 1912, c. 385, Acts 1914, c. 817, and Acts 1916, c. 184), providing that plaintiff shall not be entitled to judgment unless in an action founded upon an implied contract he state the particulars of the indebtedness, a declaration on the common counts for a physician's services, two of the items being, "To amount of account rendered August 31, 1907, \$183," "to amount of account rendered May 6, 1908, \$29," without disclosing to whom the accounts were rendered or the nature of the indebtedness or when it was incurred, gave the court no jurisdiction to enter judgment thereon.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Dr. A. R. Mitchell against Clarence M. Wilhelm, administrator of Mary J. Wilhelm, deceased. From an order of the circuit court for Baltimore county overruling a motion to strike out a judgment in favor of the plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

O. Parker Baker, of Baltimore, for appellant. T. Scott Offutt, of Towson (John Mays Little, of Towson, on the brief), for appellee.

PATTISON, J. This is an appeal from an order of the circuit court for Baltimore county, overruling a motion to strike out a judgment entered in favor of the appellee against the appellant.

The suit in which the judgment sought to be stricken out was rendered, was brought on May 28, 1916, under what is known as "the Speedy Judgment Act" for Baltimore county, chapter 631 of the Acts of 1894, as amended by chapter 385 of the Acts of 1912, chapter 817 of the Acts of 1914, and chapter 184 of the Acts of 1916.

The declaration contained the common counts only, and with it was filed the following account or cause of action verified by the affidavit of the plaintiff:

Monkton, Md., March 27, 1915.

Estate of Mrs. Mary J. Wilhelm, to Dr. A. R. Mitchell, Dr.

To amt. of acct. rendered Aug. 31, 1907	\$183 00
To amt. of acct. rendered May 6, 1908	28 00
To subsequent attention as follows:	
1908, May 8	
1912, May 28	
1915, Feb. 15, Feb. 26, Feb. 27, Feb. 28	8 25
	<hr/> \$219 45

Credits:	
1909, June 21, cash	\$10 00
Oct. 28, cash	10 00
1910, Aug. 2, cash	8 00
Aug. 29, cash	25 00

Balance	\$168 45	\$53 00
1916 Feb. 23 by check on account	53 00	

The defendant being duly summoned, but failing to appear and plead to the declaration within the time prescribed by the statute, the plaintiff filed his motion in writing, as provided by the act, asking "the court to enter a judgment by default against the defendant for want of proper plea, affidavit, and certificate, as required by the statute in such case made and provided and * * * to extend said judgment." Upon this motion a judgment was entered by order of the court. Thereafter the defendant filed his motion to strike out the judgment so entered, assigning as one of the reasons therefor the insufficiency of the account under the provision of the act, under which the action was brought and the judgment rendered. This motion was overruled, and it is from the action of the court in overruling it that this appeal is taken. The act provides (chapter 631, § 18g, of the Acts of 1894), that the plaintiff shall not be entitled to judgment under the provisions of said act, "unless at the time of bringing his action, he shall file his declaration, with an affidavit, or affirmation, * * * stating the true amount the defendant is indebted to him over and above all discounts, and * * * if the action be formed upon a verbal or implied contract shall file his statement of the particulars of the defendant's indebtedness thereunder."

The account, as stated above, is the only cause of action that was filed in the case, and should it be found that it does not meet the requirements of the statute, in that it fails to give a statement of the particulars of the defendant's indebtedness, the plaintiff was not entitled to judgment by default under the aforesaid statute, and the court was without jurisdiction to enter the judgment, and its irregular entry could in no way aid

or supply that want of jurisdiction. *Thillman v. Shadrick*, 69 Md. 530, 16 Atl. 138. As stated in *Adler v. Crook*, 68 Md. 494, 13 Atl. 153:

"The object of the act was, in cases to which it applied, to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and the defense (if any) so that the parties might know exactly wherein they differed and shape their actions accordingly."

It will be seen from an examination of the account which is dated March 27, 1915, that it contains but three debit items, amounting in all to \$219.25. Two of these items aggregate \$211, and are stated as follows:

To amt. of acct. rendered Aug. 31, 1907 \$183.00
To amt. of acct. rendered May 6, 1908 28.00

It appears from these items that two separate accounts were rendered to some one, but to whom they do not disclose, nine and eight years, respectively, before the institution of this suit. It is not shown by the account filed what these accounts so rendered contained, and there is nothing in the items themselves showing the nature and character of the alleged indebtedness or when the same was incurred. To us it is clear that the account as filed does not set forth the particulars of such alleged indebtedness as required by the statute, and therefore the judgment was, in our opinion, wrongfully entered under the statute, and should have been stricken out under the motion filed.

It is contended by the appellee that as the defendant was regularly summoned and failed to file his plea, the plaintiff, irrespective of the statute, was, at the time of the entry of the judgment, entitled, under the rules of the court, to a judgment by default for want of such plea, and therefore should it be held that the judgment could not have been properly entered under the statute, for the reason here assigned, its entry was proper under the rule of the circuit court, because of the failure of the defendant to file his plea.

The rules of the court below are not before us, but whatever may be said of the plaintiff's rights thereunder to a judgment by default for want of a plea, it is clearly shown by the record that the judgment was not entered under such rule of the court, but was entered under the statute (chapter 631 of the Acts of 1894), as amended by the subsequent acts named above and as we have said was wrongfully entered thereunder.

Holding as we do that the court was in error in its refusal to strike out the judgment, its rulings will be reversed and a new trial awarded so that the judgment wrongfully entered may be stricken out and an opportunity given to the defendant to present his defense upon the merits.

Judgment reversed, and new trial awarded.

(121 Md. 315)
BOARD OF POLICE COM'RS v. McCLENEHAN. (Nos. 58 to 67.)

(Court of Appeals of Maryland. June 28, 1917.)

1. STATUTES §76(2)—LOCAL LAWS—APPLICABILITY OF EXISTING LAWS.

Acts 1914, c. 600, Acts 1906, c. 63, Acts 1900, c. 580, Acts 1908, cc. 92, 192, Acts 1902, c. 280, Acts 1914, c. 493, Acts 1906, c. 335, Acts 1914, c. 486, Acts 1904, c. 632, and Acts 1916, c. 212, directing the board of police commissioners of Baltimore to pension a retired matron of the station house, the widow of a deceased member, and certain ex members of the police force, are not in conflict with Const. art. 3, § 33, prohibiting the passage of any special law where provision has been made by existing law; such pensions not being payable under the pension laws existing at the time the several acts were enacted.

2. MUNICIPAL CORPORATIONS §187—PENSIONS—STATUTE—DISCRETION.

Although Acts 1906, c. 63, authorizing the police commissioners of Baltimore to pension a former policeman, was discretionary, and not mandatory, where the matter had been acted upon by the board then in office, subsequent boards could not revoke it.

Appeals from Superior Court of Baltimore City; James M. Ambler, Judge.

Ten petitions for mandamus by E. E. McCleenehan and nine others against the Board of Police Commissioners. The court ordered a writ of mandamus to issue in each case, and the Board appeals. Order affirmed in each case.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Ogle Marbury, Asst. Atty. Gen., and Albert C. Ritchie, Atty. Gen., for appellant. Isaac Lobe Straus, of Baltimore, for appellees.

BOYD, C. J. Ten cases were by agreement of the parties and with the consent of the court bound in one record, the main questions being involved in all of them. Each of the ten appellees filed a petition for a mandamus against the board of police commissioners of Baltimore city to require that board to obey the provisions and directions of one or more acts of the General Assembly of Maryland named in the petition, and to pay the petitioner the sum named in such act or acts. The main defense relied on in the answers was that the acts were special laws prohibited by article 3, § 33, of the state Constitution, and were therefore unconstitutional and void. Agreed statements of facts were filed in the cases, and the lower court ordered a writ of mandamus to issue in each case, and gave judgment for the petitioner for costs. Appeals from those several orders and judgment are now before us.

Chapter 459 of the Acts of 1886, being section 755 of article 4 of the Local Code of 1888, provided that:

"All sums of money which are now in, or which may hereafter come into the hands of

the board of police commissioners for the city of Baltimore, under and by virtue of the provisions of existing laws, except such sums as may come into their hands under and by virtue of the provisions of section 728 shall constitute a fund to be known and accounted for as the special fund."

That is section 776 of the new charter, and is under subtitle "Special Fund." Section 728 (747 of revised charter of 1915) referred to money received from taxes, and in case of a deficiency the board was authorized to issue certificates and raise therefrom a sum not exceeding \$50,000 to meet the exigency. The board has large powers, including the appointment of the police force, detectives, matrons, etc.

Section 756 of article 4, being Acts 1888, c. 459, as amended by Acts 1888, c. 306, provided that, in addition to the sums of money authorized by law to be paid out of the special fund, the board, whenever in their opinion the efficiency of the service required it, were authorized to retire any officer of police, policeman, detective, clerk, or turnkey appointed by them, and pay him out of said fund, in monthly installments a sum not to exceed one-third of the amount monthly paid to him at his retirement, provided he had served faithfully not less than 16 years, or shall have been permanently disabled in the discharge of his duties, and the board was required to procure and file among their records a certificate of a competent and reputable physician that the person proposed to be retired had been thoroughly examined by him and was incapable of performing active police duty, etc. That section was amended by several acts, so that as it is now in the revised charter of 1915 it provides for payment of a sum equal to one-half of that paid at retirement, provided he had served for not less than 20 years, and some other changes were made. That section (756) in the new charter of 1898 is on a different subject, and section 777 is the number of the one relating to retirement of officers of police, policemen, detectives, clerks, and turnkeys, but both sections 756 and 777 are in the revised charter. Section 756 in the revised charter requires those retired to perform such police duties as the board requires, not to exceed seven days during any year, for which service no compensation is to be paid by the board. Section 756A (revised charter), added by Acts 1912, c. 189, authorizes the board to retire any officer of police, policeman, detective, clerk, or turnkey appointed by them who may be ineligible in the way of length of service to retirement on pay for life as provided by section 756, and who has served faithfully and has become permanently incapacitated from active duty, and to pay him out of the special fund a sum not exceeding one year's salary allowed by law to him at the time of his retirement, provided a certificate is obtained from a majority of the police physicians of Baltimore city that he

has been examined by them and that he is incapable of performing active duty.

Section 776 in the revised charter is the same as section 755 quoted above from article 4 of the Code of 1888. Section 776A (Acts 1900, c. 266) makes the board of police commissioners trustees of the special fund. Section 776C states in detail what the special fund shall consist of—amongst other things, of 2 per cent. of the salary or pay of the police force entitled to participate in the special fund. It provides that it shall be optional with any member of the police force to contribute the 2 per cent., but that no member shall participate in the special fund unless he does so contribute. The confusion arising from having two sections of the charter as much alike as 756 and 777 seems to have begun in 1898. The new charter is chapter 123 of the acts of that session, and in that what was section 756 of article 4 in Code of 1888 was made section 777, but chapter 494 of the Acts of 1898, evidently drawn before the new charter was passed, in amending the provision for retirement referred to it as section 756. Then chapter 233 of Acts of 1900, chapter 81 of Acts of 1902, chapter 391 of Acts of 1910, and chapter 189 of Acts of 1912 continued to refer to it as section 756. Then chapter 567 of Acts of 1912, which is the last act signed, referred to the fact that chapter 391 of Acts of 1910 had erroneously stated the section to be 756 in lieu of 777, the correct number intended to be amended, and repealed and re-enacted as 777. It would seem therefore to be clear that section 777 as amended by chapter 567 of Acts of 1912 is now the statute in force on the subject, and, in so far as there is any conflict between it and what was called section 756 in above statute, section 777 must prevail. It could not have been intended to have two such sections in the charter. We need not therefore trouble ourselves with section 756, although there is not in the main much difference between them so far as can apply to this case excepting as to the time of service.

Section 777A (being Acts 1906, c. 456) includes superintendent of matrons and matrons of station houses within the provisions of section 777, so that they may enjoy the same rights and privileges and benefits, subject to the same limitations and conditions, as those conferred for the retiring of members of the police force, provided they pay to the special fund \$10 per annum for three years, in addition to the regular percentage required "under the special pension act." Section 777B included the secretary and assistant secretary of the board within the provisions of section 777, provided the secretary paid \$300 and the assistant secretary \$150 in three equal installments to the "special fund." Section 777Ba (Acts 1900, c. 263) directed the mayor, etc., of Baltimore, upon the request of the board, to appropriate annually a sum of money for the relief of dis-

abled and superannuated members of the police force, and for the relief of widows and children of policemen killed in the discharge of duty, when the special fund was not sufficient for the payments authorized by the act of the General Assembly heretofore passed. Provisions under the subtitle "Special Fund" are made in sections 776 to 780, inclusive, but we will not refer to the others. Having thus referred to what the appellant calls general laws on the subject, without deeming it necessary to enter upon a discussion as to whether they are general or special, and for the purposes of these cases assuming them to be general, we will now consider the several statutes passed for the benefit of the appellees.

1. Mrs. E. E. McClenehan.

[1] The first case in the record is that of Mrs. McClenehan. She was appointed matron on January 28, 1900, and continued in that capacity until the 9th day of July, 1912, when she was dismissed by the board, after an examination of physicians, who said she had Bright's disease and rheumatism, without any provision for future pay. She paid \$30, being for the three years as required by section 777A, and the 2 per cent. of her salary from the year 1906 (when matrons were included) until she was dismissed. Chapter 600 of Acts of 1914, after stating in the preamble that she had contributed to the pension fund and was obliged to retire on account of serious illness, whereby she had been incapacitated from work and from earning a livelihood, directed the board to pay her \$7.50 a week during her life out of the special fund. She had not been in service for 16 years, as required by section 777. It is contended by the appellant that section 756A governs her case, and leaves it discretionary with the board, but it would seem clear that that section does not apply. That was passed in 1912, six years after matrons were given the privileges of section 777, but expressly limits the relief to "any officer of police, policeman, detective, clerk or turnkey," and does not include matrons. There was then no general law in existence when the act of 1914 was passed which included Mrs. McClenehan.

The question then is whether such an act was in conflict with article 3, § 33, of the Constitution. It provides that:

"The General Assembly shall pass no special law for any case for which provision has been made by an existing general law."

It seems to us clear that the board had no power under the "general laws" in the charter to pension Mrs. McClenehan. As then they were not authorized to allow her a pension under those laws, it cannot be said that the constitutional provision above quoted prohibits the passage of such a statute as the one passed for her benefit. It

may be that the Legislature was not willing to pass a general law allowing the board to pension matrons who left the service by reason of ill health, but were not permanently disabled in the discharge of their duty, and had not served the time required by section 777—16 years. Indeed, section 756A indicates that it deemed it proper to permit the board to retire an "officer of police, policeman, detective, clerk or turnkey" appointed by them who was ineligible in the way of length of service to retirement on pay for life under the requirements of section 756, and had served faithfully and had become permanently incapacitated from active duty, but it was not willing to include matrons, and hence did not provide for their retirement by reason of sickness. It did not give them the benefit of the special fund at all until 1906.

There are many decisions of this court which indicate that such a special provision for a particular person named as is made by this act does not come within the prohibition. If there had been no such statute as section 756 or 777, we can see no reason why this act could not have been passed, and if we are correct in the conclusion that neither of those statutes embraced her case, is it not just as if there was no such statute? In *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446, Acts 1876, c. 220, required the mayor and city council of Baltimore to take charge of and maintain as a public highway a bridge known as "Harman's Bridge." On their refusal to do so Pumphrey filed a petition for a mandamus to compel them to do so. Amongst other defenses this provision of the Constitution was relied on. This court said, through Chief Judge Bartol:

"In the public local laws relating to Baltimore city no provision is made for the acquisition of the bridge in question, and the ascertainment of the amount to be paid to the owners in the manner contemplated and directed by" former acts referred to.

It was held that the act was constitutional and valid. In *O'Brian & Co. v. County Com'rs of Baltimore County*, 51 Md. 15, the Legislature passed a special act in reference to the opening of Wilkens avenue. The defense was taken that the General Laws provided a mode for the opening of any new road, or the widening, straightening, altering, or closing up an old road. The court said:

"As recited in the preamble, 'there were special circumstances in the case of Wilkens avenue requiring special legislation in regard thereto;' and as the purposes of the act could not be accomplished under any existing general law, its enactment was, of course, not within the prohibition contained in the Constitution (article 3, § 33)."

In *Hodges v. Balt. Pass. Ry. Co.*, 58 Md. 603, it was held that, as there was no general law conferring the rights and prescribing the terms and conditions on which the

defendant was to construct and operate its railway on certain streets in the city of Baltimore, the act then in question was not in conflict with this section of the Constitution. In *Gans v. Carter*, 77 Md. 1, 25 Atl. 663, it was contended that the powers given to the Fidelity & Deposit Company to become sole surety in all cases where two or more sureties were required, etc., was a special law, within the meaning of this section, but this court held that, as there was no general law providing for corporate security in such cases, the act was valid. See, also, *Revell v. Annapolis*, 81 Md. 1, 31 Atl. 696, *Baltimore v. United Ry. & E. Co.*, 126 Md. 39, 94 Atl. 378, and other cases where this provision of the Constitution has been passed on. The cases relied on by the appellant are clearly distinguishable from this. In *Prince George's County v. B. & O. R. Co.*, 113 Md. 179, 77 Atl. 433, there was a general law clearly covering the crossings involved. So in the case of *Baltimore v. Starr Church*, 106 Md. 281, 67 Atl. 261, the exemption was invalid because the statute was within this provision of the Constitution, and for other reasons.

It is true that there are a number of sections in the charter which relate to pensions for policemen and others, but they are only allowed on certain conditions. If a worthy person does not come within those provisions, it cannot be properly said that an act cannot be passed to provide for his or her case, any more than it can be successfully contended that the great amount of legislation which has been passed conferring special powers on corporations which are not granted by the general laws are invalid. That has been done over and over again, without a suggestion that they were not valid. The General Corporation Laws of 1868 provided that:

"No corporation shall possess or exercise any corporate powers, except such as are conferred by law, and such as shall be necessary to the exercise of the powers so acquired." Article 23, § 56, of Code of 1888; article 23, § 64, of Code of 1904.

And it was oftentimes exceedingly doubtful whether a corporation had under the general laws some special power it desired to exercise, and hence numerous acts were passed to confer such powers. Sections 756 and 777 empower, but do not require, the board to retire those provided for in them. It would be carrying the meaning of section 33 of article 8 of the Constitution very far to say that by reason of such sections the Legislature could not pass an act requiring the board to retire on pay a certain person or persons which the Legislature thought should be retired. The Legislature never intended to abandon all control over the board in such matters, as is shown by the many statutes on the subject. Of course, when there is a general statute covering the particular case, another question may arise,

but we are satisfied that there is no difficulty in this case.

2. William F. Gerwig.

The next case is that of William F. Gerwig. He was appointed on the police force October 21, 1890, and appointed a regular patrolman December 7, 1900. In January, 1904, whilst in the discharge of his duty, he sustained a fall, striking his spine on his revolver in his hip pocket. On September 6, 1904, he was dropped from the police force because of his injury and disability. It appeared to the board then in office that the incapacity was produced by spinal trouble of long standing, and not from an injury occurring in the performance of his duty. By Acts 1906, c. 63, it was provided:

"That if the police commissioners of Baltimore city, after a careful examination, are satisfied it is proper, they are hereby authorized and empowered to pay Mr. William Frederick Gerwig, a former policeman of the police force of Baltimore city, out of the funds in their possession or subject to their control, a weekly pension of nine dollars (\$9.00), payable on the last day of each week."

It is agreed that from and after the passage of that act the board regularly and continuously paid to him the sum of \$9 a week until he received the letter of the secretary of the board dated September 8, 1916, notifying him that the board considered the act unconstitutional, and therefore would make no further payments to him. It is clear that there was no general law which covered his case.

[2] It is contended, however, that the act itself was not mandatory, but was in the discretion of the board. While that is correct, the board did exercise its discretion, presumably after careful examination as the act provides. There is nothing in the act to indicate that the intention of the Legislature was to leave it to the discretion of each board from time to time, but, having been acted on by the board then in office, it was not longer in the power of subsequent boards to revoke it, merely as an exercise of their discretion. If that were so in reference to what we speak of as the "special acts," it would likewise be so under section 777 and section 756, if that is still of any force. They leave it to the determination of the board in the first place, "when-ever, in their opinion the efficiency of the service may require it, to retire any officer of police, policeman," etc., and they state the grounds upon which they may suspend payment or dismiss the party. It seems clear to us that it was left to the existing board, and was not intended to leave it to the discretion of each succeeding board as to whether the pay should be continued. Moreover, the action of the board, as shown by the letter of the secretary, was upon the ground that the act was unconstitutional, and it was not pretended that it was

done under a claim of discretion in the board.

3. Manno A. Behrens.

Behrens was appointed a patrolman upon the police force in 1879. It is admitted that he would have testified "that upon the 21st day of August, 1899, the petitioner was virtually dismissed for partisan political reasons * * * without any provision for a pension or any other allowance." By chapter 560 of the Acts of 1900 the board was authorized and directed to pay pensions to the three persons named (including Behrens) "who were permanently disabled in the discharge of their duty as such policemen" out of the funds in their hands known and accounted for as the "special fund" the sum of \$9 during the term of their respective lives. Then by Acts 1916, ch. 212, the board was directed to pay Behrens for the rest of his life out of the "special fund" a weekly pension equal to one-half of the weekly pay of a regular patrolman, in lieu of any pension now being paid him under any law theretofore enacted. The board having dismissed the petitioner, he was not a member of the force, and hence the board could not place him on the pension list. He had served 20 years, faithfully as he claims, and was dismissed for "partisan political reasons," as shown by the agreed statement. There was no general law in force authorizing his reinstatement, and the Acts of 1900 and 1916 cannot therefore be said to be contrary to article 3, § 33, of the Constitution.

4. George A. Grimes.

Grimes was a police officer from April 14, 1884, until November 11, 1906, when he was dismissed for being off his post and in an eating saloon for ten minutes. He had regularly paid the 2 per cent. of the salary received by him. By Acts 1908, ch. 192, the board was directed to pay him a weekly pension of \$9. That was paid until September, 1916, when he received the notice from the secretary that it would no longer be paid. There was no general law covering his case.

5. Edward F. Meehan.

He was appointed a patrolman in 1881, sergeant in 1886, and in January, 1896, a round sergeant. On July 12, 1897, he was dismissed by the board without any provision for pension. It was contended by him that he was innocent of the charges and was dismissed for partisan political reasons. By Acts 1908, ch. 92, the board was directed to pay him \$12 per week for life. It paid him regularly until September, 1916, when he was notified by the secretary that it would no longer be paid. We are informed by the appellees' brief that he has died since the decision below, and of course his rep-

resentative will only be entitled to the amount due from the time the payments ceased until his death. No proceedings were taken to make his personal representative a party to this case, but we assume that will not be required by the appellant.

6. Louis V. Paff.

He went on the police force June 1, 1888, and was employed as a driver of a patrol wagon. In July, 1890, he was run over by the patrol wagon and seriously injured. He suffered, but continued to work from time to time until finally he became in such condition that he resigned. The board accepted his resignation on May 10, 1898, without providing for any compensation. By Acts 1902, ch. 280, the board was authorized in their discretion to pay him \$9 per week, and by Acts 1914, ch. 493, they were directed to pay him \$10 per week. It is alleged that the first act was discretionary. That is true, but the board regularly paid him, until September, 1916, and what we have said above is sufficient as to that. Indeed, before he applied for the first act he notified the board of his intention to do so, and the secretary replied that the board had made inquiry as to his injuries and believed his was a worthy case and would do nothing to oppose legislation to put him on the retired list with pay. Apparently they only wanted the power which they thought they did not have.

7. Louis F. Norris.

He was appointed a patrolman August 25, 1875, and he continued in service until February 2, 1887, when he was dismissed for being found asleep in a chair at 3:10 a. m. in a hotel upon his beat. On January 10, 1886, he fell on the ice while patrolling his beat and dislocated his left arm at the elbow, since which time he was crippled. He was included in chapter 560 of the Act of 1900, referred to in the case of Manno A. Behrens. After that act he was regularly paid \$9 a week until September, 1916. Having been dismissed, there was no provision in the General Laws for reinstating him, so as to get the benefit of the pension, and he had not served the regular time.

8. Kate Spitznagle.

She is the widow of Charles Spitznagle, who was appointed on the police force on January 1, 1893. He died suddenly December 25, 1905, after a long chase of a violator of the law, made in the performance of his duties, either from a stroke of paralysis or heart failure, as a result of the chase and arrest of the party. The records of the police board show that he died of paralysis. The petitioner did not make a formal request for an allowance, but Acts 1906, c. 335, authorized the board, in their discretion, to pay her \$9 per week during

her life. That was paid her regularly until September, 1916. The only general law which could be claimed to cover her case is section 776D. That gives the board power in its discretion to pay to the widow of a member of the police force who was killed while in the actual performance of duty, or who died in consequence of injuries received while in the discharge of duty, an allowance until she remarried. It is not necessary to determine whether it could be said that Mr. Spitznagle's death came within the intention and meaning of either of those grounds. It might well be questioned whether it did, but the board paid the amount named in the act regularly from the time of its passage, and does not object to the amount now, so far as the record discloses, but relies on the constitutional objection referred to in the other cases. Nor is it necessary to consider whether the fact that the special act provides for paying during her life, and section 776B only until she remarries. She is still unmarried, so far as the record shows. The board in a worthy case should not be supposed to rely on purely technical reasons for granting or refusing such allowances. The object of the provision is to make the service more efficient, and if it be admitted that the board had the discretion to allow a pension under section 776D, and as the record shows the board did on April 23, 1906, grant her an allowance of \$9 a week, it may well be said that it did so, acting within its discretion, and, of course, if that section does not apply, there can be no valid objection to the act of 1906, from what we have already said.

9. Peter J. Patterson.

He served from September 12, 1896, to the 19th of February, 1913, when he was dismissed on the charge of having entered a saloon on other than police business, and remaining there 12 minutes, and while there drinking intoxicating liquor. He denies that he drank intoxicating liquor, but he was dismissed without an allowance or pension. He paid the 2 per cent. regularly while he was in service. By Acts 1914, ch. 486, the board was directed to pay him a weekly pension of \$11 per week, which was regularly paid until September, 1916. There was no general law covering his case, and what we have said in the other cases is sufficient to indicate our views.

10. Joseph J. Gilbert.

He was appointed as a patrolman January 27, 1881, as sergeant August 5, 1884, round sergeant April 19, 1894, lieutenant January 13, 1896, and on January 14, 1896, was appointed captain. He was dismissed as he claims, for partisan political reasons, on July 12, 1897, without any provision for

pension. By Acts 1904, c. 682, the board was authorized to allow him a weekly pension of \$15. That was paid regularly until September, 1916. We find no provision for allowing pensions when the board dismisses, and hence there was no general law applicable.

We have thus gone at some length into these ten cases, and, as we have above pointed out, we do not find any "general law" which can properly be said to interfere with the "special acts" referred to. We have already explained that we did not deem it necessary to discuss the point raised by the appellees that these acts codified in the Local Code on this subject are not "general laws" within the meaning of article 3, § 33, because, if they are admitted to be so, we find none of what we have spoken of as "special acts" coming within the prohibition of that section of the Constitution.

We are not called upon to speak of the wisdom of the Legislature in passing such acts, although some of them would seem to be peculiarly meritorious and just. The parties had paid regularly into the special fund, which was intended for pensions and some other purposes. From the view we take of the article of the Constitution relied on by the appellant, it becomes unnecessary to discuss any of the other questions raised. We will affirm all of the orders passed, including the Meehan Case, as we have no record of his death of which we can take notice, and we assume that that will be adjusted without making his representative a party. If necessary, of course, that can be done.

Order affirmed in each of the ten cases; the appellant to pay the costs.

(131 Md. 340)

SUSQUEHANNA TRANSMISSION CO. OF MARYLAND v. MURPHY et al.

(No. 71.)

(Court of Appeals of Maryland. June 28, 1917.)

1. APPEAL AND ERROR §836—REVIEW — LIMITATIONS.

The power of this court is limited to an examination of the record and a decision upon the question whether the court committed any injurious error of law in any of the rulings to which defendant reserved exceptions.

2. NEGLIGENCE §121(5) — CONCURRENCE WITH INJURY.

Where negligence is the basis of the action, it is essential that plaintiff show that the negligence alleged and the injuries suffered concurred.

3. TRIAL §134—QUESTIONS FOR JURY.

It is the exclusive province of the jury to decide questions of fact.

4. ELECTRICITY §19(6)—DAMAGE FROM FIRE — PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY.

In an action against defendant electric power corporation for damages, *held*, under evidence, that questions of its negligence in burning on right of way and whether fire was the proximate cause of the burning of plaintiff's timber and fencing were for jury.

5. APPEAL AND ERROR ¶971(2)—**EVIDENCE**
 ¶546—**QUALIFICATION OF EXPERTS—REVIEW.**

The amount of knowledge a witness must possess before he can be allowed to testify as an expert is largely for the trial court, and its rulings will not be disturbed unless clearly erroneous.

6. EVIDENCE ¶543(3)—**EXPERTS—QUALIFICATIONS.**

Parties who had been engaged in the timber business for about three years and were familiar with the prices of timber were competent to testify to the value of the timber before and after the fire.

7. APPEAL AND ERROR ¶1026—**HARMLESS ERROR.**

Errors which are without injury will not justify a reversal on appeal.

Appeal from Circuit Court, Baltimore County; Hon. Frank I. Duncan, Judge.

"To be officially reported."

Action by Thomas F. Murphy and another against the Susquehanna Transmission Company of Maryland. Judgment for plaintiffs, and defendant appeals. Affirmed, with costs.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

T. Scott Offutt, of Towson, for appellant. Elmer J. Cook, of Towson, and Thomas H. Robinson, of Bel Air, for appellees.

BURKE, J. This is an appeal by the defendant below from a judgment of \$500 entered against it in the circuit court for Baltimore county. The defendant is a corporation, and owns a right of way about 100 feet wide through Harford and Baltimore counties to the city of Baltimore. Upon this right of way are erected towers to which wires and other mechanical devices are attached, and used for the transmission of electric power generated by a power plant located at McCall's Ferry in the state of Pennsylvania. The plaintiffs are the owners of land situated in Harford county at a distance of about 2,000 feet from the defendant's right of way. Upon this land was a tract of timber inclosed by a fence. Between their property and the defendant's right of way, at the location spoken of in the testimony, there is located the land of Mrs. Streett and Albert Berry, which land adjoins the plaintiffs' property. Then intervenes some land, which at the time of the injury complained of was occupied by a man named Ayres. A part of this land, adjoining that of Streett and Berry, was planted in corn, and the balance, covered with grass and weeds, was contiguous to what is spoken of by the witnesses as Campbell's and Slade's woods. These woods lay along and near the defendant's right of way. In Slade's woods there was a pile of rails between 300 and 400 in number and some posts which belonged to a man named Harmon. The evidence shows that Slade's woods was very much elevated above the plaintiffs' land.

The declaration alleged:

"That on or about the 2d day of May, in the year 1914, the servants, agents, and employes of the defendant negligently set fire to dried grass and weeds and bushes that were negligently suffered by the defendant to be and remain on its said right of way, for the purpose of burning the same, at a time when a high wind was blowing, and that the fire so negligently started on said right of way was thence communicated to the plaintiffs' timber and fencing, whereby and in consequence thereof a large part of said timber was burnt and injured."

The defendant pleaded the general issue pleas, and the case was tried before the court and a jury upon the issues joined upon these pleas.

[1] During the progress of the trial the defendant reserved 23 exceptions. Nineteen of these were taken to the rulings of the court upon questions of evidence, one to the rulings on the prayers, and three to certain statements made by the counsel for the plaintiffs in their arguments before the jury. A motion for a new trial was made by the defendant, which the court denied, and whilst the counsel for the defendant complains that the verdict was grossly excessive, he concedes that this court has no power to grant him relief on that ground. Our power is limited to an examination of the record and a decision upon the question as to whether the court below committed any injurious error of law in any of its rulings. Before considering the exceptions, it may be well to state some matters about which there does not appear to be any dispute. It is shown that the plaintiffs were the owners of the property mentioned in the declaration, and that on May 2, 1914, a fire broke out in the plaintiffs' woods, burned over about 5 acres of their land, injured the timber thereon, and destroyed a large portion of the fencing which inclosed the tract. It is also shown that about noon on that day James G. Parker, the line superintendent of the defendant, directed Caesar Hawkins and Walter Winder, two men in the employ of the defendant and over whom Parker had authority, to gather into piles and burn certain debris which was laying upon the right of way of the defendant and near to Campbell's and Slade's woods. These men gathered up the debris into piles, about 3 feet high and 5 feet wide, and about 5 feet apart, along the right of way and set them on fire. The fire from these burning piles was communicated first to Campbell's and then to Slade's woods, and it destroyed the rails of Harmon, to which we have referred, and for which loss the defendant compensated him.

The disputed questions of fact were: First, as to the character of the timber on the plaintiffs' land, the extent of the injury to the timber, and its value before and after the fire; and, secondly, the extent of the fire in Slade's woods, the direction and velocity of the wind at the time of the fire; and, thirdly, a question of law, raised by the de-

fendant's first, second, and third prayers, which sought to withdraw the case from the jury, as to whether there was any testimony offered legally sufficient to show any negligence on the part of the defendant, or any legal connection between the fire started on the defendant's right of way and the injury suffered by the plaintiffs.

[2] As negligence is the basis of the action, it was essential for the plaintiffs to offer evidence legally sufficient to show the negligence alleged, and that the injuries sued for bore the relation of cause and effect. The concurrence of both and the nexus between them must be shown to exist to constitute a right to recover. *Benedict v. Potts*, 88 Md. 55, 40 Atl. 1067, 41 L. R. A. 478.

[3] It is not the province of this court to decide any question of fact. That was the exclusive province of the jury. Eight witnesses were called on behalf of the plaintiffs, viz.: W. Elijah Somerville, a surveyor, Thomas F. Murphy, James G. Parker, Cornelius F. Murphy, Albert Berry, Albert Berry, Jr., Edward L. Oldfield, and Benjamin Garber.

A brief synopsis of the material portions of the evidence of these witnesses bearing upon the questions presented by this appeal is here given:

Mr. Somerville made a plat of the location of the transmission line with reference to the property of the plaintiffs, and made measurements of the distance from the transmission line to the Murphy property and of the tract burned. He said the fire extended over a little more than 5½ acres of the timber land, and that the distance from Slade's woods to the Berry and Streett land, which as we have said, adjoined the Murphy land, was 1,968 feet, and that the distance from the Slade land where this line of 1,968 feet was measured to the defendant's right of way was probably about 125 feet. He testified that the land slopes towards the Streett property, and that at about the center of the Slade land the elevation is from 50 to 75 feet above the Streett tract.

Thomas F. Murphy testified: That he first noticed the fire about 2 o'clock p. m. That it was "a terrible windy day." "The wind sounded like a train of cars. It was blowing from the west." That the fire burned more than 5 acres of his woodland. That he saw the smoke coming from the Slade woods—coming from the west, direct to his property. That the fence on the Berry and Streett lines was entirely destroyed, that the timber on his tract was principally oak, white oak, and the very best of chestnut; thickly wooded, a splendid piece of timber. That the fire continued in his woods until 6 o'clock, and killed the timber and the young growth. That the timber was large and marketable. He testified:

That he owned about 400 acres of land in that neighborhood, and had been engaged in farming for a number of years, and that he had had experience in buying and selling timber and timber

land for over two years. "In Harford county we bought 200 acres in the northern part of the county near what is known as Carea, and we bought 35 acres near the Rocks recently, and we have been buying telegraph poles in all the northern part of the country. He had been in the timber business a little over three years. Prior to that he had bought several pieces of land for himself with timber on it. That he made his own estimate of the lumber on a tract. They bought the timber for marketing it, cutting it into different things, railroad cross-ties, crossing planks, telegraph poles, bridge timber, wagon wood, whatever we can market it in best. They furnish the county with considerable bridge timber. In making the purchases of timber they bought just the timber; the wood leave we call it. He inspected it before he bought it."

He further said he knew of sales of woodland in that vicinity. That he knew of sales there. That he had bought the timber on the Wright property, which was about 8 miles from his own. That he was familiar with the prices of timber, and that he had been engaged in the timber business for the last two or three years. That the day of the fire was a windy day and very dry, and had been dry for several days.

James G. Parker, the line superintendent, was called by the plaintiffs, and testified that he ordered the men, Hawkins and Windler, to burn the debris, but was not present when the fire started in the Campbell and Slade woods; that he gave the order about 11 or 11:30 a. m., and that at that time he said the wind was blowing from the north-east.

Cornelius F. Murphy testified that he recalled the fire which occurred on May 2, 1914. He first noticed it about 1:30 or 2 o'clock; that it was a clear day, but very windy. The wind was blowing at a high gale. It was blowing a gale from Slade's woods to the plaintiffs' woods. He could see the smoke. The Slade land was higher than his own. His evidence as to the kind and character, quantity, and marketability of the timber on the tract burned was corroborative of Thomas F. Murphy. He said he had been engaged in the timber business; that he bought tracts, cut off the timber, operated a sawmill, and sold the lumber; that he had bought timber rights in the upper section of Harford county, and that the effect of the fire on the timber in question was to destroy it; that it killed the trees.

Albert Berry said he was at his home when he first saw the fire between 1 and 2 o'clock; that it was a very windy day; that he saw an "awful smoke" in the corner of the Slade property; that the wind was blowing directly from Slade's woods, and that there was a fire in that woods; that the fire was burning on the street property, which was much lower than the Slade woods, and spread to the Murphy tract; that it burned fencing on his and the Murphy tract, and spread into the Murphy land.

Albert Berry, Jr., said he saw the fire in Slade's woods between 12:30 and 1 o'clock, and testified that:

"That is the woods up by the Susquehanna Transmission line. He saw the fire burning there; saw the blaze. He supposed he was about a couple of hundred feet from his father's house. There was then a very high gale of northwestern wind blowing. It was a clear day. The wind was blowing from the west. He saw a fire when it went in Mr. Streett's woods. He did not suppose it was any more than a half hour after he saw the fire in Slade's woods that he saw fire in Streett's woods. He was eating his dinner. When he saw it in Mr. Slade's woods he went in to eat his dinner. When he saw it in Mr. Streett's woods his father called his attention, and he went to help put it out. When he got down there the fire was burning in Mrs. Streett's woods. He stayed there until it was completed about 6 o'clock. The fire got over to his father's land sometime later after they tried to put it out in Mr. Murphy's tract. When he went down on Mr. Streett's property the wind was blowing again westward. The Streett property and his property and the Murphy property is considerable sight lower than Slade's."

Mr. Oldfield saw the timber before and in February after the fire. The general effect of his evidence was that before the fire it was a fine piece of timber, and that it had been seriously injured by the fire.

Benjamin Garber testified: That he saw the fire between 1 and 2 o'clock. That there was a "terrible smoke" coming down the hollow, and that he went over to Murphy's and found the whole woods on fire. That the smoke was coming down over Slade's woods towards Murphy's woods. It was a dry day and the wind was blowing very hard, and he never saw it blow much harder than it did that day. That it was blowing direct from the west, and it was blowing smoke over Mr. Ayres' field down over the Murphy woods.

Testimony on the part of the defendant was offered tending to show that the plaintiffs' injury was much less than they testified to; that they had misstated the character and value of the timber; that the fire could not have been caused by any act of the defendant because the wind was moderate and was not blowing in the direction of the Murphy tract; and because there was no evidence of fire or burning of the dried grass or weeds in that part of the intervening field, above mentioned, which was in the possession of Ayres, who, however, when called as a witness for the defendant, testified that the fire had burned the fencing between him and Albert Berry. Berry's land was located beyond this intervening field and adjoined the land of Murphy.

We now pass to the consideration of the legal questions presented by the rulings on prayers. The only error which it is claimed the court made in this respect was in rejecting the defendant's first, second, and third prayers, which asserted that there was no legally sufficient evidence offered to entitle the plaintiffs to recover, and in overruling the special exception filed to the plaintiffs' first prayer, which declared that there was no legally sufficient evidence in the case to support the following hypothesis of the prayer, to wit:

"That the fire started by the defendant on its right of way was communicated from the woodland of one Slade, referred to in said prayer, to the woodland of one Streett, referred to in said prayer."

[4] By these prayers and under the special exception the court was asked to declare, as a matter of law, first, that the defendant was not guilty of negligence in starting the fires on its right of way under the circumstances stated in the evidence; and, secondly, that said fires were not the proximate cause of the injury sued for. Both of these questions are ordinarily questions to be passed on by the jury under the facts and circumstances of the particular case, and assuming, as we must, the plaintiffs' evidence as to the weather conditions and especially as to the velocity of the wind to be true, there can be no doubt of the defendant's negligence. Duties and responsibilities arise out of existing facts and conditions, and no reasonably prudent and cautious man would have fired the piles of debris under the conditions described by the evidence offered on behalf of the plaintiffs. The true rule of liability is stated in *Miller v. Neale*, 137 Wis. 426, 119 N. W. 94, 129 Am. St. Rep. 1077, as follows:

"A man may lawfully burn rubbish or brush upon his own land, if he exercises that prudence in the starting of the fire and the management of it after it is started which the rules of ordinary care demand. He is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction of his neighbor's lands, he may well be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates."

This rule is in accord with practically the unanimous decisions upon the subject, among which are *Black v. Christ Church Finance Co.*, App. Cas. [1894] 48; *McVay v. Central California Invest. Co.*, 6 Cal. App. 184, 91 Pac. 745; *Richard v. Schleusener*, 41 Minn. 49, 42 N. W. 599.

The question whether the injury suffered by the plaintiffs was the natural and proximate cause of the fires set by the defendant was properly submitted to the jury. The general principles upon this subject were stated in *State, use of Scott, v. W. B. & A. Electric R. R. Co.*, 101 Atl. 546, and need not be here restated. In the recent case of the *Western Md. R. R. Co. v. Jacques*, 129 Md. 400, 99 Atl. 549, we said:

"The rule long in force is that where fire has not been directly communicated to the plaintiff's property by sparks, or other burning matter from the engine, but has been communicated across other property, the question to be submitted to the jury, to determine from all the facts, is whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by some intervening cause. The record shows that this question was properly submitted. *A. & E. R. R. Co. v. Gantt*, 39 Md. 115; *P. W. & B. R. R. v. Constable*, 39 Md. 149; *Green Ridge R. R. v. Brinkman*, 64 Md. 52 [20 Atl. 1024, 54 Am. Rep. 755]; *Carter v. Md. & Pa. R. R.*, 112 Md. 599 [77 Atl. 301]."

As to the twenty-first, twenty-second, and twenty-third bills of exceptions, which were taken to the statements made by the counsel in argument, we find nothing sufficient to cause a reversal after a careful examination of the record, and of the principles by which the courts are guided in passing upon such objections. We said in *Esterline v. State*, 105 Md. 629, 66 Atl. 269:

"It is the duty of counsel to confine himself in argument to the facts in evidence, and he should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence, or to state what he could have proven. Persistence in this course of conduct may furnish good grounds for a new trial. The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge, and the appellate court should in no case interfere with the judgment, unless there be an abuse of discretion by the trial judge of a character likely to have injured the complaining party. * * * The observations of Mr. Justice Brown upon this subject in *Dunlop v. United States*, 165 U. S. 486 [17 Sup. Ct. 375, 41 L. Ed. 799] may well be applied to the facts embraced in this exception: 'There is no doubt that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony and which are or may be prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.'"

[5,6] There remains for consideration the 19 bills of exceptions taken to rulings on evidence. The only really important ones are the second, third, eighth, ninth, and tenth, which relate to the qualifications of Thomas F. Murphy and Cornelius F. Murphy, to speak as to the value of the timber before and after the fire with a view of establishing the damages. *Belt R. R. Co. v. Sattler*, 100 Md. 333, 59 Atl. 654; *Western Md. R. R. Co. v. Jacques*, supra. In *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510, the court said that how much knowledge a witness must possess before he can be allowed to give his opinion as an expert must in the nature of things be left largely to the trial court, and its rulings will not be disturbed unless clearly erroneous. We think these witnesses were qualified to speak upon the subject of value.

[7] There was technical error in some of the rulings embraced in some of the other exceptions, but some of the evidence admitted was of no importance, and as to the other rulings the record shows that substantially the same evidence was admitted without objection either before or after the rulings. There must be a concurrence of error and injury, and after a careful examination of the whole record we find no error which would justify us in reversing the judgment.

Judgment affirmed, with costs.

(78 N. H. 428)

CLARK v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merri-mack. June 5, 1917.)

1. RAILROADS \Leftrightarrow 470 — LIABILITY FOR INJURIES CAUSED BY FIRE—STATUTE.

Pub. St. 1901, c. 159, § 29, making a railroad liable for damages to person or property from fires set by its locomotives, has no application to the case of a fireman, employed by a municipality to extinguish fires, and injured in attempting to extinguish a fire set by a railroad's locomotive; the act applying only to those so situated that as to them the operation of the road constitutes an extra fire hazard.

2. RAILROADS \Leftrightarrow 470—SETTING FIRE—LIABILITY TO FIREMAN.

A railroad, apart from the contract of employment of a municipality's fireman, stood in no legal relations, however remote, to such fireman, and owed no duty toward him to refrain from setting a fire.

3. ACTION \Leftrightarrow 4—INFRINGEMENT OF CODE OF MORALS.

Courts cannot give relief in damages for a mere infraction of a code of morals.

4. RAILROADS \Leftrightarrow 470—SETTING FIRE—LIABILITY FOR INJURIES TO FIREMAN.

A railroad was not liable for injuries to a fireman employed by a municipality because of his public employment while endeavoring to extinguish a fire set by its locomotive; there being no breach of any duty owed the fireman by the road.

Transferred from Superior Court, Merrimack County; Sawyer, Judge.

Action by Clarence L. Clark against the Boston & Maine Railroad. On transfer from the superior court on defendant's demurrer. Demurrer sustained.

Case for injuries alleged to have been caused to the plaintiff by a fire set by the defendant's locomotive. There is a general count for negligence and one setting out that the plaintiff was a member of the Concord fire department and received his injuries while acting in that capacity attempting to extinguish the fire. A specification filed later shows that the first count is for the same alleged wrong. There is also a count alleging a right of recovery under the statute imposing liability upon railroads for damages caused by fires set by locomotives.

Robert W. Upton, of Concord, for plaintiff. Streeter, Demond, Woodworth & Sulloway, and Jonathan Piper, all of Concord, for defendant.

PEASLEE, J. The declaration, and the specification of facts applicable to the first count, show that the plaintiff's claim rests upon the theory that a fireman employed by a municipality to extinguish fires may recover from the party whose act caused the fire. It is not necessary to consider whether a recovery might be had if the fire had been designedly set, with the intent to injure the plaintiff, for his claim is based upon the statutory liability of railroads, or upon negligence.

[1] The statute making a railroad liable

for damage to person or property from fires set by its locomotives (P. S. c. 159, § 29) has no application to the present case. That act applies only to those so situated that as to them the operation of the railroad constitutes an extra fire hazard. If the act is broad enough in its terms so that it could have been construed to include all damage that could in any sense be deemed to be "caused" by the defendant, it is settled that such was not the legislative intent. *Welch v. Railroad*, 68 N. H. 206, 44 Atl. 304, is conclusive on this issue. If the statute covered the present case the plaintiff in that case would have recovered. The loss there was caused by a fire set by the defendant; but because the plaintiff's property was in the custody of the defendant as a bailee, it was held not to be within the class contemplated by the Legislature. While this conclusion rests in part upon the language of the act giving the railroad "an insurable interest in all property situate on the line of such road, exposed to such damage" (G. L. c. 162, § 9; P. S. c. 159, § 30), the reasoning is not inapplicable in determining the meaning of the related provision as to "damages to any person." The declaration of liability is in no way differentiated. There was occasion to express the understood limitation as to one class, and it is not to be presumed that the unexpressed intent was different as to the other class. The statute applies to persons and property exposed to damage along the line of the road. It does not apply to firemen or fire engines whose exposure results from an attempt to extinguish the fire. As the statute has no application, the rights of the parties are determined by the common-law rules governing actions to recover for negligence.

Authorities holding that a volunteer rescuer of persons or property may recover from a third person whose negligence caused the situation inducing the volunteer to act are relied upon by the plaintiff. It is also contended that his contract of employment as a city fireman gives him a standing more favorable to him than that of the volunteer.

[2] The case has been largely argued upon the issue of proximate cause, in furtherance of the first of these claims. But that question does not arise unless the defendant's act bore some legal relation to such a volunteer. The question here is not one of proximate or remote cause, but whether the defendant owed any duty at all to the plaintiff—whether, apart from his contract of employment, it stood in any legal relationship to him, however remote. It seems to us that it did not. Neither the plaintiff nor his property was in a position to be injured by a fire set by the defendant. His connection with the fire arose solely from his own act in coming into contact with it after it was set.

It is the law of this state that as to such interveners the defendant who created the situation owed no anticipatory duty. *McGill*

v. Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618. The situation is much like that of the land owner and a licensee. So long as no intentional injury is done, and no negligent act after the licensee is present, there is no liability. *Hobbs v. Company*, 75 N. H. 73, 70 Atl. 1082, 18 L. R. A. (N. S.) 939. The cases from other jurisdictions holding that there is a legal liability in such a case rest upon the ground that the intervener had a moral right, if not a moral duty, to make the attempt to save life or property; and because it may be assumed that men will do their moral duty, it is argued that the defendant is bound to consider the probabilities as to their subsequent and morally induced conduct. The defect in this reasoning is that it substitutes moral rights and duties for those recognized and regulated by law.

As to the intervener the defendant's previous conduct is wrong only in the sense that it is a wrong to society at large. It may be a moral wrong and may be punishable on behalf of the public; but it is not a private legal wrong to individual members of the public, who of their own motion undertake to lessen the evil effects of the defendant's dereliction from duty. The Good Samaritan could not recover from the thieves the value of the oil and wine which he poured into the wounds of the man at Jericho. His recompense is the same to-day that it always has been.

[3] Unless it be true that courts can give relief in damages for a mere infraction of a code of morals, the plaintiff's argument has no weight. That courts are not empowered to so act in this jurisdiction is too well settled to require discussion. *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Buch v. Amory Co.*, 69 N. H. 257, 44 Atl. 809, 78 Am. St. Rep. 163. If legal liability is to be extended so as to cover this new field, the change must be made by the Legislature.

The plaintiff's argument that the test laid down in *Garland v. Railroad*, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924, is applicable in his favor fails in an essential element. It is not true that, apart from his contract with the city, the defendant ought to have known that the plaintiff would be in a position to be injured by what it did. He was not in such position. He does not so state in his declaration. What he did was to put himself in such position after the defendant ceased to be an actor, and because a fire was in progress. He did not come upon the fire accidentally, or in the course of independent and lawful conduct, nor did the fire come upon him while he was so circumstanced. Such right as he had to be an actor in this matter grew out of the fact that there was a fire. It was not a right whose exercise the fire interfered with.

While in a certain sense the fire may be said to be a cause of the plaintiff's injury,

it does not follow that therefore the defendant's negligence was a breach of any duty the defendant owed to him. "The tortious nature of the defendant's conduct and the causative effect of that conduct are entirely distinct matters; and what is a requisite element as to the first subject is not necessarily so as to the second." *Jeremiah Smith* in 25 Harv. Law Rev. 245. In *Garland v. Railroad*, supra, the defendant's act undoubtedly caused the injury, yet it was no breach of a duty owed to the party who was injured.

The discussion in *Kambour v. Railroad*, 77 N. H. 33, 86 Atl. 624, 45 L. R. A. (N. S.) 1188, touching the rights of certain classes of people who encounter known danger, is not germane to the present case. That discussion relates to the acts of a plaintiff to whom a duty is owed, who knows the duty has been violated by the defendant. It is not authority for the proposition that fault as to one party constitutes a wrong to a third person who knows of the wrong and voluntarily seeks to remedy it. The citation there of cases permitting volunteer rescuers to recover was only for the purpose of showing that the maxim, "*Volenti non fit injuria*" was not generally considered to be a rule of universal application in the law of negligence. The question whether these cases were good law was not involved, and there was no attempt to pass upon it. Nor is it necessary to now consider this aspect of them. It is enough for the present case to say that even if the voluntary character of the act does not amount to an assent to the result, such act is not of a character to raise an anticipatory duty on the part of those not otherwise related to the actor to take care to avoid furnishing him an opportunity to act.

[4] The other claim suggested is that because the plaintiff was employed to extinguish fires he stands differently from a volunteer and may recover when a volunteer could not. But if it be assumed that his contract of employment brought him into a legal relation to the defendant and to its conduct in setting the fire, he is no better off. If his contract with the public created a relation to the individual member thereof, the relation created is such as the parties contemplated. It appeared to the public desirable to reduce the fire losses of its members by providing for the extinguishment of fires. The contract with the fireman is for the benefit of those who would be damaged by the fire. The agreement so made differs in no respect essential to this case from the ordinary contract of insurance. That is, the plaintiff has agreed to undertake to lessen the fire damage which would otherwise fall upon the defendant. It is argued that this relation exists only as between the fireman and the party whose property is in

danger of being consumed by the fire. But this is much too narrow a view. If a relation arises at all, it is one to all members of the public whose interests or liability are involved by the fire. This is the common-sense view of the situation. The plaintiff, knowing that fires will occur from various causes, some culpable and some not, undertakes the work of extinguishing all fires without reference to how they were caused. The chance of injury in doing such work is necessarily assumed by him. This assumption arises from the nature and terms of the contract he made. He agreed to fight all such fires as should occur. There is in his contract no distinction as to how the fires originated. If his contract has any bearing at all upon the relation of the parties, it establishes an express assumption of the risk here involved, and bars any recovery therefor.

The rule that one may not contract against the consequences of his own future negligence has no application. This is merely an undertaking of one not otherwise related to the situation to bear for the defendant the consequences of its fault. The defendant is not thereby released from any liability imposed upon it by law. The agreement is like any insurance contract, and its validity is not open to question.

Whether, then, the plaintiff is treated as a volunteer or as one whose contract of employment brought him into a legal relation to the defendant, the result is the same. In neither case was there a breach of any duty owed to him by the defendant.

Demurrer sustained. All concur.

(367 Pa. 329)

GEISSLER et al. v. READING TRUST CO.
(Supreme Court of Pennsylvania. March 23, 1917.)

1. PERPETUITIES §1—NATURE OF RULE.

"Perpetuities" are grants of property where in the vesting of an estate or interest is unlawfully postponed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perpetuity.]

2. WILLS §630(2) — VESTED OR CONTINGENT ESTATE—LEGACIES.

The rule is that, where a legacy is given to a person to be paid at a future time, it vests immediately, but that, when not given until a certain future time, it does not vest until that time.

3. WILLS §634(14)—CONSTRUCTION—VESTED OR CONTINGENT REMAINDER.

A devise of property in trust, limiting the income to the testator's children by name for life and after their death to their children as a class, and after the death of the surviving grandchild the corpus to vest in testator's great-grandchildren per capita, created a contingent remainder, to vest in the great-grandchildren as a class after the death of the testator's last grandchild.

4. PERPETUITIES §4(9) — TESTAMENTARY TRUST.

Such devise offended the rule against perpetuities, and was void, and the testator's heirs

might compel the trustee to convey the property to them absolutely.

Appeal from Court of Common Pleas, Berks County.

Bill by Henry C. Geissler and others, heirs, to annul a testamentary trust and for reconveyance, against the Reading Trust Company, trustee under the will of Henry C. Geissler, deceased, and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Testator's will provided in part as follows:

(7) "Item—I give, devise and bequeath to my three sons, Henry C. Geissler, Jr., Samuel K. Geissler and Robert Franklin Geissler, the above-mentioned properties contained in purparts numbered 1 and 2, to wit: 727, 729 and 731 Penn street and all buildings appertaining thereto and 726 and 728 Court street and 720 Court street, marble works and stable, all in the said city of Reading, said county and state, same to be held by them in common, to use, occupy and enjoy the rents, issues and profits thereof, as long as they shall live. The same shall not be sold so long as any one of the said sons shall live. Should the said sons agree to dissolve partnership now existing between them, all to discontinue the business now engaged in, to wit: The tin and stove trade and tile and mantle works—and all engage in some other line of trade, the said premises to be used by all—or, should they engage in different enterprises, the said premises not used by any, then, the same shall be rented, and proceeds, after taxes, water rents and necessary repairs shall be paid, to be divided among the three sons, their heirs, share and share alike. After all the said three sons shall have died, then the said premises may be sold, if deemed advisable by my hereinafter named executor, a good and sufficient price secured therefor, the proceeds therefrom to be invested and the income thereof to be distributed to the children of my deceased sons, share and share alike, if of age and properly behaved and conducting themselves well, if not—then the same to be expended in their keep and maintenance—and, after all such grandchildren shall have died, then the principal sums so created shall be divided among all the children of my grandchildren, share and share alike. 'per capita' and not 'per stirpes'—the mortgage, now a lien upon said premises, to be paid and lien discharged, if not already so discharged at my death, as soon after my death as can be done, provision to be so made by sale of such securities as may be necessary, good and fair price being received for same."

(8) "Item—I give, devise and bequeath unto my daughter, Rosa M. Berg, widow of the late Edward C. Berg, deceased, the two dwelling houses and lots or pieces of ground upon which the same are erected, situate on North Fifth street, beyond Buttonwood street, Number 408 and 410 North Fifth street, in said city of Reading, county and state aforesaid, which I have appraised at the sum of five thousand (\$5,000) dollars per dwelling, aggregating ten thousand (\$10,000) dollars, for and during the term of her natural life, she to enjoy the rents, issues and profits of the same, after all taxes and necessary repairs shall have been made, as long as she shall live. And I direct that additional real estate, free from all incumbrances, or first class mortgage security, or securities be provided for her, which, together with the above two dwellings valued at ten thousand (\$10,000) dollars, as above contained, shall aggregate the sum of nineteen thousand three hundred and sixty-one and (\$19,361.08) $\frac{08}{100}$ dollars, same being an equivalent for what has been given to the three sons as above contained in purparts Nos. 1 and 2, and the material, wares and equipment

contained in the two branches of business, to wit, the tin and stove trade and the tile and mantle business, which I gave the said three sons, when I retired from business and installed my said sons into the said branch of business, August 1, 1908,—same to be invested and held in the name of my estate, the income from the dwellings and that from the additional investment to be paid to her, for her sole and separate use as long as she shall live, said income to be paid to her, and to her alone, her receipt alone to be in payment of same, such income not to be subject to any bills or liabilities which may be contracted, nor be liable to attachment nor in any manner, menace nor liable for any debt or loss sustained by said daughter, Rosa M. Berg. After the death of my daughter, Rosa M. Berg, if in the judgment of my hereinafter named executor, a good and sufficient price be secured for same, the real estate so set aside for her as above contained, or, that may be bought for her use and enjoyment, may be sold and the proceeds reinvested in other good premises same continued in my estate, or in good first mortgage security or securities, in my estate, the income whereof shall be distributed to my grandchildren, children of my said daughter, Rosa M. Berg, share and share alike, if of age and properly behaved and conducting themselves well, if not—then the same to be expended for such so misbehaving for their maintenance and keep. This extra provision extending to my grandchildren is made in consideration of the fact that my good deceased wife and I have always had the grandchildren around us, in our home, and are very warmly attached to them, and, hence this provision."

(9) "Item—I direct that the additional sum of two thousand five hundred and fifty-five and $\frac{69}{100}$ (\$2,555.69) dollars be invested by my hereinafter named executor, which sum, together with the real estate hereinbefore disposed of, and the amount of stock as per inventory, given to the boys, when the two branches of business were transferred to them, August 1, 1908, to wit, 'eight thousand eighty-three and $\frac{23}{100}$ (\$8,083.23) dollars, with the additional amount to make the share of Rosa M. Berg equal to the share of one of my sons, will make a grand total of eighty thousand dollars—the income of which said sum of two thousand five hundred and fifty-five and $\frac{69}{100}$ dollars shall be divided into four equal shares and be paid to the said Henry C. Geissler, Jr., Samuel K. Geissler, and Robert Franklin Geissler and Rosa M. Berg, and to their children, the children of any deceased child or children, throughout this testament, to take the share of such deceased parent, share and share alike."

(10) "Item—After the death of all my children and their children (my grandchildren), then I direct that the above-mentioned investments (real estate and securities), aggregating the sum of eighty thousand (\$80,000) dollars less the amount as contained in inventory of stock, to wit, the sum of eight thousand eighty-three and $\frac{23}{100}$ (\$8,083.23) dollars, or the sum of seventy-two thousand four hundred sixteen and $\frac{77}{100}$ (\$72,416.77) dollars, together with whatever increase of principal, by reason of higher values received for real estate sold, as hereinbefore set aside to the uses of the sons and daughter, and whatever other increase of real estate and securities, together with interest which shall have accrued, shall be divided among all my great-grandchildren, grandchildren of my sons, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and my daughter, Rosa M. Berg, all share and share alike, same taking per capita and not per stirpes."

Other facts appear in the opinion of Wagner, J., in the common pleas, sur defendant's demurrer to plaintiff's bill:

The plaintiffs have filed a bill in equity wherein they set forth certain provisions in the will of Henry C. Geissler, deceased, and allege that the scheme of the trust attempted to be established by these provisions is repugnant to the rule against perpetuities, and void for remoteness. They therefore pray the court to enter a decree declaring said trust null and void, and directing the defendant to convey and quitclaim unto the plaintiffs the real and personal property comprising the said trust estate. To this bill defendant demurred.

Item 7 of the will gives to Henry C. Geissler, Jr., Samuel K. Geissler, and Robert Franklin Geissler, 727, 729, and 731 Penn street, 726, 728, and 720 Court street, to be held by them in common to use and enjoy the rents, etc., as long as they live, same not to be sold as long as any one of the sons shall live. It further directs that, after the three sons shall have died, then the premises may be sold by his executor, if deemed advisable, the proceeds therefrom to be invested and the income thereof to be distributed to the children of his deceased sons, share and share alike, if of age and properly behaved and conducting themselves well, and, after all such grandchildren shall have died, then the principal sum so created shall be divided among all the children of his grandchildren, share and share alike, per capita and not per stirpes.

Section 8 gives to Rosa M. Berg, his daughter and only other child, 408 and 410 North Fifth street, as long as she lives, and directs that additional real estate free from all incumbrances be provided for her, so that the aggregate value shall amount to \$19,361.08; the income from the dwellings and additional investment to be paid to her as long as she shall live. After her death the real estate may be sold by the executor, and the proceeds invested in any other good premises or in first mortgage security or securities, the income to be distributed to his grandchildren, the children of his daughter, Rosa M. Berg, share and share alike.

Item 10 provides that, after the death of all his children and their children (his grandchildren), then the above trust estate (real estate and securities), aggregating the sum of \$72,416.77, together with increase of principal, shall be divided among all his great-grandchildren, grandchildren of his sons, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and his daughter, Rosa M. Berg, all share and share alike; same taking per capita, and not per stirpes.

[1. 2] Perpetuities, as stated in *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 26, 84 Am. Dec. 470, are "grants of property, wherein the vesting of an estate or interest is unlawfully postponed." When, then, does the estate in or interest to the principal of this contemplated trust fund vest? That is, do his great grandchildren take a vested or a contingent interest? In *Sternbergh's Estate*, 250 Pa. 167, 171, 95 Atl. 404, 406, we have: "In *Smith's Estate*, 226 Pa. 304, 307, 308 [75 Atl. 425, 426], this court said: 'As Chief Justice Tilghman said in *Patterson v. Hawthorn*, 12 Serg. & R. 112: "The rule is that, where a legacy is given to a person to be paid at a future time, it vests immediately. But when it is not given until a certain future time, it does not vest until that time; and if the legatee dies before, it is lost." * * * The statement of the rule by Chief Justice Gibson, in *Moore v. Smith*, 9 Watts, 403, 408, has always been accepted; it is that: "The legacy shall be deemed vested or contingent just as the time shall appear to have been annexed to the gift or the payment of it." In the case at bar the time is manifestly annexed to the gift, not merely to its payment. If any of the members of the class die before the time fixed for distribution they get nothing.

[3] It will be noticed that in this will a life estate is first given to his children, mentioning them by name. After their death we again have

a life estate to their children (grandchildren of testator) as a class, the names of no particular individuals being designated. These are to take per capita. It is clear that the quantum of this life estate is measured by the number of grandchildren living at the time of death of the last of testator's children. Then only after the last of these, the grandchildren, shall have died shall the trust estate then vest in the great-grandchildren of the testator, per capita. Here again the quantum of the principal of the trust estate to be eventually received by each of the great-grandchildren is determined by the number of great-grandchildren in being at the time of the death of the last grandchild. That is, the estate vests, not presently in designated persons, but only after the death of the last grandchild of the testator, in his then great-grandchildren as a class per capita. We have here clearly a contingent and not a vested interest.

[4] Is, then, this vesting unlawfully postponed? "The law allows the vesting of an estate or interest, or the power of alienation, to be postponed * * * for the period of lives in being, and 21 years and 9 months thereafter, and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently the estates or interests dependent on them are void." *City of Philadelphia v. Girard's Heirs*, 45 Pa. 26, supra. By the terms of the will the principal will not vest in the great-grandchildren until after the death of all the grandchildren, whether now born or to be hereafter born; that is, in the natural course of events, for a period of from 50 to 80 or more years after the period of lives in being. This period is too remote, and offends the rule of perpetuities. The antecedent estate thus falls, and the heirs at law of this testator are entitled to immediate possession. *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Gerber's Estate*, 196 Pa. 366, 46 Atl. 497; *Kountz's Estate* (No. 1), 213 Pa. 390, 62 Atl. 1103, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427; *In re Kountz's Trust*, 251 Pa. 582, 96 Atl. 1097.

Findings of Law.

1. The interest of the great-grandchildren of Henry C. Geissler, the decedent, in the trust estate of \$72,729.31, attempted to be created by the testator, Henry C. Geissler, in his will, is not a vested interest.

2. The devise of the principal of the property contained in the attempted trust is one wherein the vesting thereof is postponed for a longer period than the period of lives in being and 21 years and 9 months thereafter, is void under the rule against perpetuities, and the plaintiffs, the heirs at law of Henry C. Geissler, deceased, are entitled to immediate possession of the said principal.

3. The plaintiffs are entitled to a decree declaring the aforesaid trust, aggregating in value the sum of \$72,729.31, null and void, and that the Reading Trust Company, defendant, be directed to convey a quitclaim unto the plaintiffs, Henry C. Geissler, Jr., Samuel K. Geissler, Robert Franklin Geissler, and Rosa M. Berg, of the real estate and personal property described in the will as comprising the said trust estate.

4. The costs of the proceeding shall be paid by the defendant.

The court below entered the following decree:

1. That the demurrer be and is hereby overruled.

2. That the devise of the beneficial estate or interests in the six several purparts of real estate mentioned and described in the third paragraph of the plaintiff's bill, contained in the seventh clause of the last will of Henry C. Geissler, deceased, the several purparts contained in the eighth clause of said will, and the di-

rection to provide additional real estate in the same clause, and the bequest of \$2,555.69 in the ninth clause of said will, is wholly and entirely void, and that to the extent of said beneficial estates and interests in said purparts of real estate and said sum of money the said Henry O. Geissler died intestate.

3. That the power of sale by the said will of the said Henry O. Geissler granted to the executor relating to the aforesaid several purparts is invalid and void.

4. That the said defendant do make, execute, and deliver to the plaintiffs, the heirs at law of the said Henry O. Geissler, deceased, proper and sufficient deeds, conveyances, and quitclaims as executor and trustee, conveying and quitclaiming to the said plaintiff the legal title to the said several purparts of real estate described and specified in the third paragraph of the plaintiff's bill.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER, and
FRAZER, JJ.

Walter B. Craig, of Reading, for appellant.
Jefferson Snyder and H. Robert Mays, both
of Reading, for appellees.

PER CURIAM. The decree in this case is affirmed, at the costs of the appellant, on the opinion of the learned court below, directing it to be entered.

(257 Pa. 341)

REYNOLDSVILLE WATER CO. v. FARMERS' & MINERS' TRUST CO.

(Supreme Court of Pennsylvania. March 23, 1917.)

CORPORATIONS — 479 — BONDS — TRUST DEED — DELIVERY OF BONDS — LIABILITY FOR NEGLIGENCE.

The trustee under a mortgage to secure a water company's bond issue providing that the bonds be executed by its president and secretary and for their delivery to the trustee, to be certified and afterwards returned to the company's treasurer, which received the treasurer's receipt for certain of the bonds, together with the bonds from the company's president, with directions to send them to a bank for delivery to him, and which, in reliance on such receipt, sent the bonds to such bank, from which the president obtained and embezzled them, was not liable to the company for their value.

Appeal from Court of Common Pleas, Jefferson County.

Trespass by the Reynoldsville Water Company against the Farmers' & Miners' Trust Company for alleged negligent disposal of bonds. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

From the record it appeared that certain mortgage bonds of the Reynoldsville Water Company were executed in its behalf by A. Grant Richwine, as president, and W. Dale Shaffer, as secretary. The bonds provided that after execution by the president and secretary, they should be sent to the Farmers' & Miners' Trust Company, trustee, for certification by it and that they should then be delivered to the treasurer of the water company. After their execution by the presi-

dent and secretary, Richwine suggested that Shaffer, as treasurer, send a receipt along with the bonds, which were to be forthwith certified and delivered. Such receipt was prepared, and, together with the bonds, was handed by Shaffer to Richwine, who sent both receipt and bonds to the trust company, with directions to send the bonds, when certified, to a certain bank for delivery by said bank to Richwine. The trust company, relying upon the treasurer's receipt, sent the bonds to the bank as directed, and Richwine subsequently procured same and embezzled them. The lower court entered a compulsory nonsuit, which it subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

John W. Reed, of Brookville, and H. H. Mercer, of Mechanicsburg, for appellant.
Cadmus Z. Gordon and Raymond E. Brown, both of Brookville, and Lex N. Mitchell, of Punxsutawney, for appellee.

PER CURIAM. The following is the first condition of the mortgage under which the bonds in controversy were issued:

"The bonds to be issued under and secured thereby shall be executed on behalf of the Reynoldsville Water Company, by its president and secretary, and shall be delivered to the trustee, to be certified by it, and of the bonds so executed and delivered the trustee shall forthwith certify and deliver to the treasurer of the company ninety thousand (\$90,000) dollars worth of said bonds, to be used for property, real and personal, already acquired by it, and ten thousand (\$10,000) dollars for making additional improvements and extensions, to the plant of said company."

On November 17, 1913, the treasurer of the water company acknowledged in writing:

"The receipt of \$100,000 of the Reynoldsville Water Company bonds; \$90,000 for the property, real and personal, already acquired by it, and \$10,000 for the making of additional improvements and extensions to the plant of said company."

Upon the delivery of this receipt by the president of the water company to the Farmers' & Miners' Trust Company, the appellee, it was fully warranted in what it subsequently did with the bonds, and the judgment of the court below is affirmed, on the following from its opinion refusing to take off the nonsuit:

"The receipt, prepared and signed by W. Dale Shaffer, treasurer, and sent to the trust company, defendant, acknowledging the receipt of \$100,000 of the Reynoldsville Water Company bonds, was clearly designed and intended by the treasurer of the company to be his official and final acknowledgment of the receipt of that amount of the bonds from the trust company, after it should have certified them, and was so regarded by the trust company. Shaffer sent no request and gave no direction, in connection with the receipt, to the latter. * * * The man who sent the receipt to the defendant, and requested that the bonds be sent to him, and who got them, was the president of the water com-

pany, and also a director. These men (the president and treasurer), chosen by its stockholders, were the executive officers of the water company, who for it executed the bonds and mortgage, and who at the time of this transaction were deemed worthy of trust and confidence, and unsuspected of any motive but the interest of the company, at whose head they stood."

Judgment affirmed.

(267 Pa. 241)

IN RE CROZER'S ESTATE.

(Supreme Court of Pennsylvania. March 19, 1917.)

1. WILLS ~~§~~523—CONSTRUCTION OF LEGACY—REPRESENTATION.

Where testator, dying without issue after the death of two of his brothers, one of whom left issue, gave an undivided part of certain furniture to his three brothers and two sisters, and the residue of his estate to his two sisters and three brothers absolutely, the gift was not to a class, but to individuals, and the issue of the deceased brother were entitled to his share.

2. WILLS ~~§~~441—CONSTRUCTION—INTENT.

The testator's intention as gathered from the language of his will with the aid of his surrounding circumstances is the object sought in the construction of a will.

3. WILLS ~~§~~449—CONSTRUCTION—AVOIDANCE OF INTESCTACY.

A construction resulting in intestacy as to the residue of an estate is most strongly to be avoided.

4. WILLS ~~§~~437—CONSTRUCTION—INTENTION—TIME.

The testator's legal intention is to be gathered from the state of the law at the date of the will, regardless of what it was at the date of his death.

5. WILLS ~~§~~850—LAPSED LEGACIES—RE-ENACTMENT OF STATUTE.

Act July 12, 1897 (P. L. 256), relating to lapsed legacies, does not repeal, but re-enacts, Act May 6, 1844 (P. L. 565) § 2, providing that no legacy to a brother or sister by one not leaving any lineal descendants shall lapse by reason of the decease of the legatee in the testator's lifetime, if the legatee leaves issue surviving the testator.

Appeal from Orphans' Court, Delaware County.

George K. Crozer and others appeal from a decree dismissing exceptions to the report of Josiah Smith, Esq., auditor, in the estate of Robert H. Crozer, deceased. Appeals dismissed, and decree affirmed.

The following is the opinion of Johnson, P. J., dismissing the exceptions:

The testator, by his will, after giving sundry legacies to his three brothers and two sisters, naming them, and after bequeathing in the following words: "I give and bequeath to my three brothers and two sisters, my one-sixth undivided part of the furniture, etc., at my home in Upland, which I received from my mother's estate, and which I own in common with them"—disposes of the residue of his estate in the following words: "All the rest, residue and remainder of my estate, I give and bequeath to my two sisters and three brothers absolutely." The question has arisen in the distribution of the estate whether by these clauses the gifts are to testator's three brothers and two sisters individually or as a class. The auditor has decided that the gifts are to them individually

and made distribution accordingly, and exceptions have been filed to this conclusion.

If these gifts are to the three brothers and two sisters as a class, the auditor's distribution is wrong. If, on the other hand, these gifts are to them as individuals, there arises a second question: Was the second section of the act of May 6, 1844 (P. L. 565), repealed by the act of July 12, 1897 (P. L. 256; Stewart's Purdon, vol. 4, page 5143, pl. 22)? If it was so repealed, then the auditor's distribution is wrong; otherwise, it is correct. To sustain the auditor requires an affirmative answer to the following two propositions: (1) The gifts to the three brothers and two sisters of the testator were to them as individuals. (2) The act of 1897 did not repeal the act of 1844. The auditor has addressed to the solution of these questions a great deal of painstaking labor and research, and fortified his conclusion by an exhaustive citation of the authorities. Agreeing as we do with his conclusions, it is unnecessary for us to review his report with any great degree of detail.

[1-4] The object to be obtained is the ascertainment of the intent of the testator, to be gathered from the language of his will, with the aid of his surrounding circumstances. He was a very wealthy man, and a bachelor. He executed his will in 1888, with a codicil in 1893, and died in 1914, 73 years of age. At the date of his will his parents were dead. At that time, and also at the date of the codicil, he had three living brothers and two sisters. One of these brothers, J. Lewis Crozer, died in 1897, without children. Another brother, Samuel A. Crozer, died in 1910, leaving children. His other brother, George K. Crozer, and his two sisters, Elizabeth C. Griffith and Emma C. Knowles, survived him. By his will he gave legacies of \$10,000 each to his brothers, Samuel A. and J. Lewis, naming them, and then, conscious that he was about to give munificent legacies to his sister, Elizabeth C., and her children, and to his brother, George K., and his children, and to his sister, Emma C., and her children, he takes occasion to say in his will that these legacies of \$10,000 are comparatively small, that is to say, compared with those about to be given to the others, and that they are made thus comparatively small for reasons which he states, and then, to avoid an inference that the distinction is attributable to any difference in regard for them, he says: "My love for all my brothers and sisters is strong and deep." He then gives to his sister, Elizabeth C., naming her, and her children, legacies amounting to \$250,000; also to his brother, George K., naming him and his children, a like sum; and also to his sister, Emma C., naming her and her children, a like sum. Then after a number of legacies come these two clauses, which have been referred to, and which produce this controversy:

"Item. I give and bequeath to my three brothers and two sisters my one-sixth undivided part of the furniture, etc., at my home at Upland, which I received from my mother's estate and which I own in common with them."

"Item. All the rest, residue and remainder of my estate I give and bequeath to my two sisters and three brothers absolutely."

Did the testator intend these gifts to the donees to be to them as a class or as individuals? It would scarcely occur to the average mind that these gifts were otherwise than the ordinary gifts to them as individuals. What did the testator intend in 1888, when the will was executed? Did he have them in mind as a class? If he had in mind to treat them as a class, then he intended that only those who survived him should take, and the children of those who predeceased him should be excluded; but he said that his love for all of them was deep and strong. Moreover, if a class were

intended, it was not known in 1888 but that J. Lewis Crozer might be the only one of the class to survive him, and he had been childless for many years. What he might do with the testator's estate would be quite uncertain. This would provoke a critical commentary upon the testator's expression of equality of love for all of his brothers and sisters. And that is not all, for if the whole class should predecease him, then he would die intestate as to the residue of his estate, a conclusion of construction most strongly to be avoided, a cardinal canon of construction.

A class is indeterminate in number at the date of the will, which may be enlarged or diminished, and finally determined at the death of the testator. We have here the definite number, five, incapable of enlargement. True, the number may be decreased by death. But the number of shares remain the same, if those dying leave children. If those dying should not leave children, there would be an intestacy to that extent. But such intestacy as to a possible share or shares is not so serious as a possibility of an intestacy of the entire residue above alluded to. *Gross Estate*, 10 Pa. 360, has been in the limelight of the argument of counsel. But that is quite a different case from this. There the gift was to brothers' and sisters' children, which could not be definitely fixed until testator's death. Hence the children of a deceased brother and sister, dying before the testator, although living at the date of the will were excluded.

A testator's legal intention is to be gathered from the state of the law at the date of the will, regardless of what it was at the date of his death. *Martindale v. Warner*, 15 Pa. 471; *Hood v. Penna. Society to Protect Children from Cruelty*, 221 Pa. 474, 70 Atl. 845, Ann. Cas. 1913A, 1290, note. If these were not class gifts, then this testator legally intended under the act of May 6, 1844, that if any of his brothers and sisters should die in his lifetime leaving children they should take their parent's share, and that such was not his actual intent there can be no tenable question. He had them in mind as individuals; he names them in his will; he states their number; they were all the brothers and sisters he had or could have; he individualizes them by sex; they were all personally near to him. It was not that sisters should take if the brothers were dead, nor that brothers should take if the sisters were dead, but it was sisters and brothers who were to take; it was not that one sister was to take if the other were dead, nor that one or two brothers were to take if one or two were dead, but it was his two sisters and three brothers who were to take.

It is true that, where there is a general gift to brothers and sisters, the child of a sister who was dead at the date of the will is not entitled. *Guenther's Appeal*, 4 Weekly Notes Cases, 41. But the reasoning of Judge Penrose in *Reynold's Estate*, 11 Pa. Dist. R. 387, is quite convincing that, where the gift is to brothers and sisters, the parents being dead, it is a gift to them as individuals. The same reasoning was applied by the same judge to the brothers and sisters of a legatee for life. (*Wenzel's Estate*, 12 Pa. Dist. R. 63); and again to nephews and nieces, where the number is incapable of enlargement in *Cooper's Estate*, 29 Pa. Co. Ct. 425. We have therefore concluded that the auditor's conclusion that these gifts were to the donees as individuals, and not as a class, is correct.

[5] It only remains to refer briefly to the contention that the act of May 6, 1844, has been repealed by the act of July 12, 1897. We are only concerned with the provision respecting the lapse of the legacy to Samuel A. Crozer. There has never been a moment of time since

May 6, 1844, to the present time, when it has not been the law that a legacy by a testator without lineal descendants to a brother dying during testator's life, leaving issue surviving the testator does not lapse, but enures to such issue. The act of 1897 re-enacts the act of 1844 in this respect. How can it be that the re-enactment of the law repeals it, and this by implication? The question echoes the answer. The auditor was correct in holding that there was no such repeal.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHISKER, and
WALLING, JJ.

William I. Schaffer and E. Wallace Chadwick, both of Chester, for appellant Crozer. Maurice Bower Saul and Jesse S. Shepard, both of Philadelphia, for appellant Knowles. Garnett Penuleton, of Chester, for appellant Griffith. Benjamin H. Ludlow, of Philadelphia, for appellees Hilprecht, John Price Crozer, and Page. Harold Evans and B. Gordon Bromley, both of Philadelphia, for appellee Samuel A. Crozer, 3d. Wm. M. Stewart, Jr., of Philadelphia, for appellee Fox. Joseph H. Hinkson and J. DeHaven Ledward, both of Chester, for appellee Edward Crozer.

PER CURIAM. These appeals are dismissed, and the decree affirmed, at appellants' costs, on the opinion of the learned president judge of the court below, dismissing the exceptions to the report of the auditor.

(257 Pa. 533)

LEOTTI v. PHILADELPHIA MACARONI CO.

(Supreme Court of Pennsylvania. April 23, 1917.)

1. MASTER AND SERVANT ⇨278(12)—NEGLIGENCE—EVIDENCE.

In a servant's action for injury from the descent of an elevator without warning while he was working in the elevator pit, evidence held to sustain a finding of negligence.

2. TRIAL ⇨91—STATEMENT OF PARTY—MOTION TO STRIKE.

Where a servant, suing for personal injury, while being cross-examined on a former trial as to inconsistencies between his testimony and his statement of claim, denied the genuineness of his signature to such statement, apparently thinking that the examiner was attempting to entrap him, a motion at a subsequent trial to strike out the statement for such reason was properly dismissed, where defendant's counsel objected to the examination of plaintiff as to the genuineness of his signature as being immaterial.

3. MASTER AND SERVANT ⇨291(4)—ACTION FOR INJURY—INSTRUCTION.

In a servant's action for injury from the descent of an elevator without warning, the refusal of defendant's requested charge that, if plaintiff went into the elevator pit knowing that his safety depended upon the elevator being locked, and after trying the lock, was satisfied that it was locked, and was thereafter injured because not attentive or because mistaken in thinking that it was locked, without requiring the jury to believe that plaintiff did not rely upon the assurance of safety given by defendant's engineer, was properly refused, where plaintiff had testified that the engineer had promised to

put some one on the first floor to see that it was not lowered.

4. TRIAL 146—STATEMENT OF COUNSEL—INSTRUCTIONS TO IGNORE—WITHDRAWAL OF JUROR.

In a servant's action for personal injury, the trial judge properly refused to order the withdrawal of a juror because of a statement of his counsel that the case had been tried before, and that plaintiff had told the same story at the last trial, where prior reference had been made to the fact of the former trial, and where the statement was withdrawn on objection with an instruction to ignore it and determine the case on the evidence.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Joseph Leotti against the Philadelphia Macaroni Company to recover damages for personal injury. Verdict for plaintiff for \$11,000, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Ralph B. Evans, Frank P. Prichard, and W. W. Smithers, all of Philadelphia, for appellant. J. W. Wescott, of Philadelphia, for appellee.

MOSCHZISKER, J. The plaintiff, a carpenter, was injured while performing services in the employ of the defendant company. He sued in trespass, alleging negligence, and recovered a verdict, upon which judgment was entered. Defendant has appealed.

[1] The following facts may be stated as determined by the jury: On the date of the accident, November 4, 1915, the plaintiff, Joseph Leotti, was about 40 years of age, and a vigorous, healthy man, with a substantial earning capacity. He was instructed by the engineer of the defendant company, who had authority to give the order in question, to go into an elevator pit, in the cellar of the defendant's premises, for the purpose of repairing the gates of the elevator. Whereupon plaintiff said to the engineer, "Will you guarantee that you will not allow this elevator to come down on me?" and the latter replied, "Yes; I will station a man at the first floor, to see that it will not come any lower than that." Relying upon this assurance, Leotti entered the pit, and, while he was engaged at work, the elevator, in charge of another employe, who had not been informed of the plaintiff's whereabouts, descended upon him, so injuring his back that he will be a hopeless cripple the rest of his life.

While appellant admitted the plaintiff was told to repair the elevator gates, yet it denied he had been given any promise whatever that precautions would be taken to insure his safety. In fact, one witness for defendant went so far as to state that at the time the instructions for the work were given the engineer left plaintiff's side, in or-

der to get some materials for use in connection with the repairs about to be made, and, as he did so, expressly told the latter not to go near the elevator until he, the engineer, should come back, adding, "I will operate the elevator and you will work, you will be safer." This was the answer on the main branch of the case. There was no pretense that any precautions had been taken to insure the safety of plaintiff; the theory of the defense being that neither the engineer nor any one else in authority knew, or had an opportunity to know, that the injured man had placed himself in a position of danger, and therefore that he did so at his own risk. It is evident, however, that the jury disbelieved the testimony and rejected the theory of the defendant, accepting that of the plaintiff; and, under the circumstances, they reasonably could draw the conclusion that the former had been guilty of negligence toward the latter in permitting the elevator to descend upon him without warning. *Powell v. S. Morgan Smith Co.*, 237 Pa. 272, 85 Atl. 416.

[2] All the issues involved were submitted to the jury in a careful, comprehensive charge, which was eminently fair to both sides; but the appellant complains of several rulings of the learned court below, which call for consideration. This case was tried once before, but, for some unexplained reason, the former verdict in appellee's favor was set aside. The plaintiff testified through an interpreter. At the other trial, when under cross-examination, counsel for the defendant, holding in his hand the statement of claim, proceeded to question plaintiff as to certain alleged inconsistencies between the averments thereof and the latter's testimony, whereupon the witness, no doubt thinking the examiner was endeavoring to trap him, denied the genuineness of his own signature upon the written statement. Prior to the trial now under review a rule was taken, based upon this incident, to strike the statement of claim from the record; but this rule was discharged. When the present trial opened, the defendant again moved, on the same ground, that the statement should be stricken from the record, and, when its motion was overruled, it secured an exception, which forms the basis of an assignment of error. At the second trial counsel for the plaintiff placed before him the original statement of claim, and proceeded to inquire as to the genuineness of his signature, with the evident purpose of clearing up the confusion on that point; whereupon counsel for defendant objected to the inquiry as "immaterial," stating that "there is no objection now." We have read the stenographer's notes with care, and so far as they throw light upon the subject in hand, it appears clear to us that whatever objection had formerly been entered to the statement of claim

was "withdrawn" at the second trial. It may be well to note at this point, however, that both the attorney who drew the statement and the notary who took plaintiff's affidavit, testified to the genuineness of the latter's signature; further, that certain testimony from the first trial, printed in appellee's paper book shows the plaintiff himself stated he had signed and sworn to a statement for these men, when he was at the hospital after the accident. Under the circumstances, we feel there can be no reasonable doubt that the statement of claim relied upon by plaintiff was prepared, signed, and sworn to in the usual way.

[3] It is strongly contended that the trial judge erred in refusing a point for charge submitted by defendant, as follows:

"If you find that when plaintiff went into the elevator pit he knew his safety depended upon the elevator being locked above, tried to lock it himself, was satisfied that it was already locked, and that he was subsequently hurt because he was not watchful or was mistaken in his belief that the elevator was locked, then your verdict should be for the defendant."

It appears from plaintiff's testimony that, when he went into the pit, he looked up and saw the elevator standing at the fifth floor; that he tried the cord and found the vehicle was already locked at the indicated station; that, "it being locked there," he "could not lock it" where he was about to work, as he otherwise might have done. He was then asked the question, "When you found it was locked at the fifth floor, you let it alone and started to work, is that the idea?" and replied, "Yes; because the engineer had assured me that he would place a person on the first floor to see that it would not be lowered." As drawn, the point was properly refused. Had the defendant added to his request, after the last use of the word "locked," something to the effect that, if the jury further believed the plaintiff did not in fact rely upon the alleged guaranty or assurance given him by the engineer, then the point would properly have covered the theory of the defense, and might have called for an affirmation.

[4] There is but one other assignment which requires discussion, and that concerns the refusal to withdraw a juror on motion of defendant. When senior counsel for plaintiff was summing up, he said:

"This case was tried once before, and plaintiff went on the witness stand and told his story; he told identically the same story before you."

At this point counsel for defendant objected and made the motion which we are now considering. Counsel for plaintiff withdrew the remark; whereupon the trial judge instructed the jury they were to ignore the incident and determine the case exclusively upon the evidence presented before them. The notes of testimony show that during the examination of the witnesses several references

had been made, without objection from any one, to the circumstance that the case had been tried once before; hence the jurors must have been fully aware of that fact, and we do not feel it is at all probable the entirely inadvertent remark of counsel prejudiced the cause of the defendant. *O'Malley v. Public Ledger Co.*, 257 Pa. 17, 101 Atl. 94.

The assignments of error are all overruled, and the judgment is affirmed.

(257 Pa. 537)

In re DISSTON'S ESTATE.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. WILLS \S 802(2)—DEVISE TO WIDOW—ELECTION TO TAKE AGAINST WILL—EFFECT.

Devisees or bequests, subordinate to a life estate in a widow and contingent upon her death, or payment of which is postponed until then, becomes presently payable upon her election to take under the intestate laws, which as to claims under the will, is equivalent to her death.

2. WILLS \S 802(2)—TRUST—WIDOW'S ELECTION TO TAKE UNDER WILL—ACCELERATION OF REMAINDER.

Where testator devised his residuary estate in trust, and, after providing an annuity for his sister-in-law, directed that the remaining income, and, on the annuitant's death, all the income, be divided equally between his widow, his son, and a daughter, and that at the widow's death the son and daughter should each receive one-half of the principal, and, on the death of either before her, devised remainders over of such deceased child's share of the income, the widow's election to take against the will terminated the trust as though she had died, and accelerated the son's interest, his share of so much of the principal as remained after the widow had been paid her share under the intestate laws, subject to the annuity.

3. WILLS \S 439—CONSTRUCTION—INTENT.

In the construction of a will the effort is to find and carry out the testator's chief intent with a minimum disturbance of the general plan of the will.

4. WILLS \S 802(2)—EFFECT OF WIDOW'S ELECTION—PRESUMPTION OF TESTATOR'S KNOWLEDGE.

A testator is presumed to know that a widow's statutory rights are paramount, and that she may take against his will, that her election to do so is equivalent to her death for the purposes of distribution and that, unless his will plainly indicates a contrary intent, the remainders are thereby accelerated.

5. WILLS \S 802(2)—REMAINDERS—ACCELERATION—INTENT.

An intent that there shall be no acceleration may be shown by inevitable implication, as where the will itself fixes a definite time for distribution independently of the life tenant's death, or makes express provision as to the effect of her refusal to take under the will, or where a trust is created, not to guard the life interest, but for the benefit of a person other than the life tenant or remaindermen, or where during the life estate the whole income is given to the life tenant and to another, whom, for apparent reasons, the testator would specially desire to enjoy his bounty to its full extent, or where the contingency upon which the remaindermen are to take is such that the persons entitled can only be ascertained on the life tenant's death.

6. WILLS §455—CONSTRUCTION—INTENT — DEPARTURE.

The literal provisions of a will may be departed from so as to carry out what appears to be a superior or preferred intent, but where that is done, the object is always to approximate as nearly as possible to the testator's scheme, which has failed by reason of intervening rights or circumstances.

7. WILLS §802(2)—REMAINDERS—ACCELERATION.

Where a widow was to receive part of the income of an estate for life, and the balance during her life was given to testator's children, with remainders of principal to them at her death, her election to take under the intestate laws terminated a trust created to hold the estate intact for her benefit, and accelerated the estates of the children as effectually as though she was to enjoy the entire income for life; and the fact that the remainders are contingent, or that alternate remainders are created in the event of the death of such children in her lifetime, will not make an exception to the rule if such alternate remainders appear to be only substitutionary.

Appeal from Orphans' Court, Philadelphia County.

William Dunlop Disston appeals from a decree dismissing exceptions to adjudication in the estate of William Disston, deceased. Reversed, and record remitted for distribution.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WAL-LING, JJ.

Joseph Giffillan, of Philadelphia, for appellant.

MOSCHISKER, J. The question in this case is whether or not a certain interest in remainder has been accelerated by the election of a widow to take against her husband's will. The court below held in the negative, and William Dunlop Disston, the remainderman in question, has appealed.

The testator, William Disston, died April 5, 1915, leaving a will wherein he devised his residuary estate in trust to keep the principal invested, collect the income, and pay therefrom to Estelle M. Dunlop, a sister-in-law, \$10,000 per annum during the term of her natural life; the remaining income, and, after the death of the annuitant, all income, to be divided equally between the testator's wife, his son (the appellant), and a daughter, Pauline Disston, the share of the latter being placed in trust. The testator then provided that in the event of the death of either his son or daughter, leaving issue, during the lifetime of his widow, the share of income of the one so dying should be paid to his or her issue; that should either of his children die without issue during the lifetime of his widow, the income of the one so dying should be paid in equal shares to the widow and surviving child so long as the former lived; further, that upon the death of such surviving child without issue, during the lifetime of his or her mother, all income, subject to the payment of the before-mentioned annuity,

should go to the testator's wife. As to the principal, subject to the annuity, at the death of his widow, the testator gave one-half of his residuary estate to his son, providing, however, that should the son then be deceased, the share in question should go to the latter's issue. The other half he directed should be retained by the trustees named in his will, the income therefrom to be paid to his daughter for life, with remainder to her issue. He then provided that, if either of his children should be dead, without issue, at the decease of his widow, the share of the one so dying should be paid to or held for the survivor. Finally, should both children be so deceased, he gave the principal of his residuary estate to his nephews and nieces or their issue living at the time.

The testator's widow elected to take against his will, and, at the audit of the executors' account in the orphans' court, the son claimed one-half of so much of the principal of the estate as remained after his mother had been paid her share under the intestate laws; but he conceded that a sum sufficient to meet the annuity should be set aside for that purpose. The court below determined, however, that the son's share must remain in trust so long as the widow lived, in order to prevent him from controlling the principal during that period, and to permit the alternate gifts in remainder to become effective should he die in his mother's lifetime. The appellant claims this was error; that both his and his sister's shares of the principal of the testator's estate were accelerated by their mother's election to take against her husband's will; and that, after a sufficient sum is set aside to assure the payment of the annuity, he is entitled to an absolute award of one-half the residue.

[1] The relevant rules of law are well settled with us. In *Ferguson's Estate*, 138 Pa. 208, 219, 20 Atl. 945, 946, speaking by Mr. Justice Mitchell, we state the cardinal principle thus:

"Devises or bequests, subordinate to a life estate in the widow and contingent upon her death, or payment of which is postponed until then, become presently payable upon her election to take under the intestate laws. As to its effect upon all claims under the will, her election is equivalent to her death. This is the general rule, and if there are any exceptions, they must depend on the expression or unavoidable implication of a contrary intent of the testator."

In *Vance's Estate*, 141 Pa. 201, 213, 21 Atl. 643, 645 (12 L. R. A. 227, 23 Am. St. Rep. 267), we said:

"Law must have a settled and uniform rule, and it is that as to the provisions in a will for legacies subordinate to a life interest in the widow and contingent upon her death, or payment of which is postponed till then, her election to take against the will is equivalent to her death."

In *Woodburn's Estate*, 151 Pa. 586, 589, 25 Atl. 145, we determined that this cardinal rule governed where, as in the case at bar,

the testator gave his widow, for life, "not the income of one-third, but one-third of the income of the whole" of his estate. We there said:

"To ascertain and secure such third, the whole estate had to be kept together, and such was undoubtedly the testator's intention."

[2] The language last quoted is applicable here. It is apparent from a reading of the will that the testator's paramount intention was to create a trust during the life of his widow, so that she might enjoy the income from, not one-third of his estate, but one-third of the income from his whole estate, and that, after thus providing for his wife, the primary object he had in view was to benefit his children. In other words, the testator intended to leave his residuary estate, subject only to his sister-in-law's annuity, for the benefit of his wife and children, the former to receive one-third of the income for her life, and each of the latter a like proportion for the same period. When his widow's interest should terminate, he intended his two children to take the whole principal, the son's share being absolute, and the daughter's continuing in trust; and it seems evident that he postponed this distribution until his widow's death for the reason that he desired the entire estate held intact, to secure her one-third of the income therefrom, rather than to set aside one-third of the principal for her benefit. Finally, the alternate remainders, after the devise to his wife and children, are substitutionary in character, and inserted to prevent the occurrence of a lapse should either or both of the children die during the continuance of the trust created for the purpose just indicated. This being the evident scheme of the will, and the plan having been interfered with by the widow's election to take her share under the intestate laws, the acceleration of the remainder interests given to testator's children would carry out his principal intent, and also adhere to his general plan better than continuing the trust so that the secondary objects of his bounty might be afforded an opportunity to derive a possible benefit in the future.

[3.4] In a case like the one before us the effort must be to find and carry out the testator's chief intent with a minimum disturbance of the general plan of the will. After his wife, the testator's children were the natural and primary objects of his bounty, not their issue, still less nephews and nieces or their issue, and the alternate provisions for others, after the testator's children, were undoubtedly intended as substitutionary, in case the latter died during the life of their mother, should she take under the will; but, as said by Mr. Justice Mitchell, in *Vance's Estate*, supra, 141 Pa. p. 209, 21 Atl. 643, 12 L. R. A. 227, 23 Am. St. Rep. 267, a testator is presumed to know that a widow's statutory rights are paramount, and that she may take against his will; to which we now add that a testator is presumed to know also the gen-

eral rule that the election of a widow to take under the intestate laws is equivalent to her death, and that, unless his will plainly indicates a contrary intent, remainders are accelerated accordingly.

[5] Of course, an intent that there shall be no acceleration may be shown by inevitable implication, as, for instance, where the will itself fixes a definite time for distribution independently of the widow's death or expressly provides as to the effect of her refusal to take thereunder (*Reighard's Estate*, 253 Pa. 43, 53, 97 Atl. 1044); or where a trust is created not simply to guard the widow's life interest, but also for the benefit of a third party other than either the widow or remaindermen (*Young's Appeal*, 108 Pa. 17, 22); or, again, where during the life of a widow the whole income is given to her and another, the latter of whom, for apparent reasons, the testator would specially desire to enjoy his bounty to the full extent indicated—a mother, for example—and, after the life estate of the wife, remainders are limited to others in addition to the mother, so that, in case of acceleration, the income intended for the latter would be materially diminished during, in all probability, an appreciable period of time (*Portuondo's Estate*, 185 Pa. 472, 39 Atl. 1105); or where the contingency upon which the remaindermen are to take is such that, in the nature of things, the persons entitled can be ascertained only by the physical death of the widow; and perhaps other instances might be cited. Some of these exceptions and the Pennsylvania cases dealing therewith are well considered by Judge Porter, of the Superior Court, in a recent opinion handed down in *Wyllner's Estate*, 65 Pa. Super. Ct. 396, a case much like the present; and interesting discussion by that eminent jurist the late Judge Penrose upon the general subject now before us may be found in *Key's Estate*, 4 Pa. Dist. R. 134.

[6] To sum up our conclusions on the law and facts here involved: In a case such as the one at bar, the literal provisions of a will may be departed from so as to carry out what appears to be a superior or preferred intent; but, when this is done, the object in view must always be "to approximate as closely as possible to the scheme of the testator which has failed by reason of intervening rights or circumstances." *Ferguson's Estate*, 138 Pa. 208, 220, 20 Atl. 945, 946.

[7] Where the widow, so long as she lives, is to receive a part of the income of the whole estate, and the balance of income, during her life, is given to testator's children, with remainders of principal to the same children at the widow's death, her election to take under the intestate laws will terminate a trust created for the purpose of holding the estate intact for her benefit, and accelerate the estates of the children just as effectually as though the provision for the widow were that she was to enjoy the entire income during her life

(Woodburn's Estate, *supra*); and the fact that the remainders given to the children may be contingent (Coover's Appeal, 74 Pa. 143, 147), or that alternate remainders may be provided for in the event of the decease of such children in the lifetime of the widow (Wyllner's Estate, *supra*), will not take a case out of the operation of the general rule, if, on a view of the whole will, or the particular part in question, such alternate remainders appear to be merely secondary or substitutionary in character. See other cases *supra*. As already indicated, we are of opinion that the trust created by the present testator was not intended to continue until the actual death of his widow, but only so long as she might have an interest in the estate passing under his will. When she elected to take against that instrument, the testator's full intent could not be carried out, and the trust came to an end to the same extent as though the widow had physically died. Hence the appellant's interest was accelerated, and the learned court below should have so held.

The decree is reversed, and the record remitted for distribution in accordance with the views herein expressed.

(257 Pa. 478)

IN RE MCGINLEY'S ESTATE.

Appeal of TRACEY et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. WILLS §316(1) — CONTEST — ISSUE — DEVISAVIT VEL NON — RIGHT TO SUBMISSION.

In determining the right to an issue devisavit vel non, the test is whether, after a review of the whole testimony, the trial judge would sustain a verdict against the will as in accord with the manifest weight of the evidence.

2. WILLS §316(2) — MENTAL CAPACITY — EVIDENCE.

Evidence held insufficient to authorize an issue devisavit vel non on the ground of the testatrix's unsoundness of mind.

3. WILLS §316(3) — UNDUE INFLUENCE — EVIDENCE.

Evidence held insufficient to authorize an issue of devisavit vel non on the ground of undue influence.

4. WILLS §316(1) — EVIDENCE — MUTUAL WILLS.

Evidence in a will contest held to authorize an issue as to whether the testatrix and her husband had entered into an agreement between themselves and contestants to make mutual and reciprocal wills, devising their property to contestants in consideration that contestants would take care of them during their lives.

5. WILLS §58(1) — CONTRACT TO DEVISE — VALIDITY.

One may enter into a valid contract to dispose of his real or personal property by will in a particular way.

6. SPECIFIC PERFORMANCE §86 — CONTRACT TO DEVISE.

A contract to dispose of real or personal property by will in a particular way may be specifically enforced.

7. FRAUDS, STATUTE OF §75 — PAROL CONTRACT TO DEVISE — EXECUTION.

When a valid contract to dispose of property by will in a particular way has been proved, the will becomes a writing containing the terms of the agreement and satisfying the statute of frauds.

Appeal from Orphans' Court, Berks County.

Catherine T. Tracey and another appeal from a decree of the orphans' court dismissing appeal from decree of register of wills, in estate of Susan McGinley, deceased, admitting decedent's will to probate. Reversed and an issue awarded.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

Cyrus G. Derr and Walter B. Freed, both of Reading, for appellants. Ira G. Kutz, of Reading, for appellees.

MESTREZAT, J. Catherine T. Tracey and Rose M. Rehrer, nieces of Susan McGinley, deceased, who survived her husband, Stephen McGinley, presented their petition to the orphans' court of Berks county, averring, *inter alia*, that Stephen McGinley and Susan McGinley had, in pursuance of a contract between themselves and the petitioners, made mutual and reciprocal wills on May 22, 1914, in which they had devised their property to the petitioners in consideration that the latter would take care of them during life; that the register of wills had admitted to probate, against their objection, a paper writing purporting to be the last will and testament of Susan McGinley, dated April 6, 1915; that petitioners had filed their appeal from the decision of the register admitting the paper to probate; and prayed the court to award a citation to the legatees named in the alleged will of April 6, 1915, to show cause why said will should not be adjudged void, and why a precept should not be issued to the court of common pleas directing that an issue be framed to determine whether Susan McGinley was the victim of hallucinations and delusions, was of sound and disposing mind, whether the execution of the will was procured by fraud or undue influence, and "whether the paper writing dated May 22, 1914, signed by the said Susan McGinley, is such a mutual and reciprocal will as to prevent the said Susan McGinley from revoking the same after the death of the said Stephen McGinley." A citation was awarded to which an answer was filed denying the mental incapacity of Susan McGinley, that she had hallucinations and delusions, and that the will was void, and also denying the alleged facts averred in support of the allegation that the will was void. The orphans' court refused to issue devisavit vel non, and the contestants have appealed.

We have carefully examined the evidence, and agree with the learned judge of the court below that it is insufficient to justify a ver-

dict that at the date of the will, April 6, 1915, the decedent was of unsound mind or was subject to hallucinations and delusions concerning the contestants, or that the will was procured by fraud or undue influence.

[1] In determining the right to an issue, the test is whether, after a review of the whole testimony, the trial judge would sustain a verdict against the will as being in accord with the manifest weight of the evidence.

[2, 3] The subscribing witnesses, one of whom wrote the will, the physician of the decedent, the alderman of the ward who had transacted her business for years, and another reputable witness testified that her mental condition was good at the time she executed the will. It appears from this testimony that the decedent furnished the data to the scrivener for preparing the will, and he testified he read the will to her, and her conversation was clear and natural, her hearing and sight were good, and she knew what she was doing, what property she possessed, and to whom her estate was to go. The contestants introduced testimony to show that on one occasion the decedent had in, an excited manner, ordered the name of one of the contestants to be taken off the books of a trust company, and on several occasions had made remarks in answer to greetings of friends on the street which indicated a weak intellect and a loss of memory. Several other incidents were shown which are of little or no weight in establishing mental infirmity in the decedent. A jury would not be permitted to find mental incompetency or undue influence from such testimony, and the court was right in refusing the issue for such reason.

[4-7] We cannot assent to the learned judge's conclusion that the oral evidence submitted in conjunction with the wills of May 22, 1914, was insufficient to justify the court in granting an issue to determine whether the parties entered into the agreement as alleged by the contestants. This, as will be observed, was one of the questions which was raised by the pleadings, and was considered by the court in determining whether an issue should be sent to the common pleas. Susan McGinley, the decedent, and Stephen McGinley, her husband, each made a will on May 22, 1914, by which they gave all their property, after the death of the survivor of them, to Mrs. McGinley's two nieces, the contestants in this proceeding. These wills were written by the same scrivener, executed at the same time, witnessed by the same parties, and are identical in form and effect, the name of the principal beneficiary in each being the only difference. The contestants introduced evidence to show that the two wills were executed, mutually and reciprocally, in pursuance of an agreement between the McGinleys and their nieces that, if the latter continued, as formerly, to care for their uncle and aunt as long as both lived, they were to have all the property of the McGinleys after the death of

the survivor, and that the nieces performed their part of the contract, having taken care of Stephen McGinley until his death on September 9, 1914, and of Susan McGinley until within three weeks of her death, when she left the home of the nieces without cause and without their consent or agreement. It is therefore claimed that Mrs. McGinley violated her contract with her husband and her nieces, and, after his death, attempted to revoke her will of May 22, 1914, by making another will on April 6, 1915, the subject of this contest, by which she excluded her nieces and gave to strangers the estate which she owned in her own right and that which she received by her husband's will.

It is well settled that one may enter into a valid contract to dispose of by will of his property, real or personal, in a particular way, and that such will is irrevocable and the contract will be specifically enforced. There are many examples of the recognition of this doctrine in this state and other states. *Cawley's Est.*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; *Smith v. Tuit*, 127 Pa. 341, 17 Atl. 995, 14 Am. St. Rep. 851; *Wright's Est.*, 155 Pa. 64, 25 Atl. 877; *Shroyer v. Smith*, 204 Pa. 310, 54 Atl. 24; *Lewallen's Est.*, 27 Pa. Super. Ct. 320; *Park v. Park*, 39 Pa. Super. Ct. 212; *Frazier et al. v. Patterson et al.*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003, and notes. In *Thompson on Wills*, § 28, the learned author says:

"Mutual wills—that is, where two persons execute wills reciprocal in their provisions, but separate instruments—may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such mutual wills, it is necessary to prove such wills were executed in pursuance of a contract or a compact between the parties and that each is the consideration for the other."

When such contract has been proved, the will becomes a writing containing the terms of the agreement, and satisfies the statute of frauds. *Shroyer v. Smith*, 204 Pa. 310, 54 Atl. 24.

We think the evidence submitted to and considered by the court was sufficient to send the case to a jury to determine the existence of the alleged contract between the McGinleys and the contestants, and whether the latter performed their part of the agreement. The court concedes that the wills of May 22, 1914, put in evidence, have the earmarks of mutual wills. The contestants introduced parol evidence in support of the contract. One of the witnesses was Fletcher E. Nyce, assistant treasurer of the Pennsylvania Trust Company of Reading, and for many years the financial adviser of the McGinleys. He testified, *inter alia*, as follows:

"About the middle of July, 1914, I was down to see Mr. and Mrs. McGinley; and at that time Mr. McGinley told me. He said, 'Mr. Nyce,' he said, 'Susan and I have agreed to make wills, and we went out to see Pat Breen, and we had him draw the wills.' He said, 'Mrs. Rehrer'—he called her Rosie—'you go up

and get them and let Mr. Nyce see them.' And Mrs. Rehner went upstairs, and in a little while she came down with the two papers. I looked at them and read them both, and I said, 'Well, Mr. McGinley, this is fine; this is fine.' He said, 'Yes, the girls have left their homes and came to us to take care of us. You see, there is Susan, she can't do anything, she is helpless, and I haven't been able to do anything for quite a long time, and Susan and I have agreed to give the girls everything that was left if they would stay with us and take care of us until we are gone; the girls have been kind to us.' And he said, 'Isn't that right, Susan?' And she said, 'Yes, papa; that's right,' she said; 'The girls are to have all, if only they will stay with us, and we promised them if they would stay with us we would give them all we had when we are gone.'"

He further testified that Mrs. McGinley and Mrs. Rehner were present during the conversation, and that the former repeated the words of her husband three or four times. Two or three days after Mr. McGinley's death, Mr. Nyce saw Mrs. McGinley again, and she said:

"Mr. Nyce, poor Steve, he couldn't last any longer. Now, I am going to the hospital, and these girls will be here to have everything after my death."

He identified the wills of May 22, 1914, as the two papers shown him on the occasion of his visit to the McGinleys in July, 1914. The McGinleys owned property of the value of about \$4,000 and were childless. In the later years of their lives Mr. McGinley was afflicted with cancer of the face and Mrs. McGinley suffered a paralytic stroke. It appears that Mrs. McGinley went to a hospital in September, 1914, and returned to her nieces early in October, and remained there until the following April, when she went to reside with Mr. and Mrs. Babb, to whom she devised the greater part of her estate by the will of April, 1915. The contestants offered proof that they performed their part of the contract by taking care of Mr. McGinley until his death in September, 1914, and of Mrs. McGinley until she left them, without any reason or cause, about three weeks prior to her death.

This and other testimony and circumstances in the case tend, as the contestants claim, to show the existence of the alleged contract, and that the wills of 1914 were made by the McGinleys to carry into effect the agreement made between them and their nieces. Nyce's testimony, if believed, shows, not a promise by the McGinleys to make wills in the future, but that "Susan and I have agreed to make wills, and we went out to see Pat Breen and we had him draw the wills." The wills were produced and Mr. Nyce read them. Mr. McGinley repeated the contract which had been made, and gave the reasons for making it, saying:

"The girls have left their homes and came to us to take care of us. You see, there is Susan, she can't do anything, she is helpless, and I haven't been able to do anything for quite a long time, and Susan and I have agreed to give the girls everything that was left, if they

would stay with us and take care of us until we are gone; the girls have been kind to us."

This statement by McGinley would justify the jury in finding that the nieces had agreed to the terms of the contract and had then left their homes and were performing their part of it. The conversation was in the presence of Mrs. McGinley, who consented to what was said by her husband and repeated the terms of the contract three or four times. Mrs. Rehner, one of the nieces, was also present at this interview, acquiesced in the contract as stated by the McGinleys, and, at Mr. McGinley's suggestion, went upstairs and got the wills for Mr. Nyce, showing that she knew of the wills and had them in her possession or knew where they were kept. Mrs. McGinley, after the death of her husband, confirmed the existence and terms of the contract by admitting, shortly before her death, that the nieces would have everything after she was dead.

This proceeding was conducted by the parties, and the question as to the validity of the alleged contract was determined by the court below, on the theory that the contract, if valid, could be set up to defeat the probate of the will of 1915. In conformity with our practice, we have disposed of the appeal in like manner, and hence it is sufficient to say that we think the evidence justifies awarding an issue to determine whether an irrevocable contract was made between the parties as alleged by the contestants. The competency of the witnesses and of the testimony offered in the court below is not raised upon this record, and we express no opinion in regard to it, whether on the application for or on the trial of the issue.

For the reasons stated, the decree is reversed and an issue is awarded.

(257 Pa. 473)

ZENZIL et al. v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. RAILROADS ⚡335(5) — NEGLIGENCE — SIGNALS.

The object of signals is to give notice that a train is about to occupy the track, and a failure to give such signals is immaterial where one in daylight walks into a train after the engine has passed.

2. RAILROADS ⚡346(1) — ACCIDENT AT CROSSING — BURDEN OF PROOF.

Plaintiff in an action for injury from a train at a permissive crossing had the burden of showing that the accident happened at such crossing.

3. RAILROADS ⚡350(1) — ACCIDENT — PERMISSIVE CROSSING — EVIDENCE.

In such case, where plaintiff's contradictory and conflicting testimony presented no question as to whether the injury occurred at such permissive crossing, so that a nonsuit was properly granted.

4. NEGLIGENCE ⚡136(7) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Where the burden of proving plaintiff's negligence is upon defendant, it is the province of

the jury to pass upon the conflicting statements in plaintiff's own testimony.

5. RAILROADS **↔350(14)—CROSSINGS—CARE AS TO CHILDREN.**

In an action for personal injury to a boy nine years of age from defendant's train, his contributory negligence was, by reason of his age, a question for the jury.

Appeal from Court of Common Pleas, Lackawanna County.

Trespass by Stephen Zenzil, a minor, by his father and next friend, Peter Zenzil, and by Peter Zenzil, in his own right, against the Delaware, Lackawanna & Western Railroad Company, to recover damages for personal injury. From an order refusing to take off a compulsory nonsuit, plaintiffs appeal. Order affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Thomas P. Duffy and Joseph F. Gilroy, both of Scranton, for appellants. J. H. Oliver, D. R. Reese, and Warren, Knapp, O'Malley & Hill, all of Scranton, for appellee.

WALLING, J. This suit is for injuries caused to a child by a freight train.

Defendant's double track railway extends in a northerly and southerly direction through Dalton borough in Lackawanna county. The station is on the east side of the easterly or north-bound track; opposite it, on the west side of the westerly or south-bound track, a side track branches therefrom and extends southerly toward Scranton, so that to the south of the station there are three parallel tracks. A short distance to the west there is a residence street, parallel with the railway, the lots on the east side of which extend back to the right of way. One of the lots, known as the Von Storch lot, is about 300 feet south of the station, and adjoining this lot on the north is the Ives lot. At the time in question there was a path leading from said street diagonally across the Von Storch lot to the right of way at the southeast corner of the Ives lot, where there was a board across the railroad ditch and there pedestrians were accustomed to cross the tracks, as a short cut in going to and from the station. It appears to have been so used sufficiently to be regarded as a permissive crossing. The Ives lot being higher than the tracks, was graded down in the form of a terrace, and there, about 25 or 30 feet north of the Von Storch lot, steps led down to the right of way, but the evidence failed to show that people were in the habit of crossing the tracks at that point. In other words, the evidence did not tend to show two permissive crossings. Peter Zenzil was in defendant's employ as a track hand and lived near the station on the east side of the tracks. On August 13, 1913, his son, the plaintiff, then nine years of age, was out with three other boys slightly older than himself, and early in

the afternoon they were on the west side, where for a time they watched a ball game and then came to the railroad. The evidence is not clear whether they came by the path or by the public road to the station. At any event they then went up on the rear end of the Ives lot where a man was cutting or trimming a tree; and the boys played tag there and possibly on the right of way as there was no fence between. It was then after 1:30 p. m., and a north-bound passenger train came and stopped at the station. The evidence tends to show that the boys were then on or near the side track waiting for the train to move so they could cross the tracks in the direction of plaintiff's home, when a long freight train, with an engine at each end, came up the grade from the north on the west main track, and as it was passing plaintiff's clothes were caught by one of the cars and he was thrown so that his left foot was seriously injured, seemingly under a car wheel. His testimony is that he was standing on the ends of the ties of the siding next to said track, and was hit by the train, and that as he states "it pulled me down a little ways." He does not say nor seem to remember what part of the train struck him; but William Doggett, one of the boys with plaintiff, and the only other witness of the accident who was called, says in substance that there were 50 to 60 cars in the freight train, and all the boys were playing on the bank until about one-third of the train had gone by, and that the accident happened after about 20 cars had passed. He also locates the place of the accident a considerable distance, probably 50 to 100 feet, north of the so-called permissive crossing. One part of plaintiff's own testimony would indicate that he was hurt at or near such crossing, while other parts of his evidence locate the place of accident at points to the north thereof. And his testimony is confused and contradictory. There is negative evidence that no warning was given of the approach of the freight train, except that it made some noise coming up the grade. The only evidence of defendant's negligence is that tending to show absence of due warning of the train's approach.

This appeal was taken from an order of the trial court discharging the rule to take off the compulsory nonsuit that had been granted at the conclusion of plaintiff's testimony. An examination of the record fails to disclose sufficient evidence to sustain a verdict against the defendant.

[1-3] The evidence of William Doggett, that part of the train had passed before the accident, finds support in the circumstances and is not contradicted. If true it is difficult to see how the alleged lack of warning contributed to the accident. The object of signals is to give notice that the train is about to occupy the track; but when the en-

gine has passed and the cars are following one after another it is the best possible evidence that the company is occupying its track. The alleged lack of formal signals is not material in the case of one who in daylight walks into a train that is and for some time has been passing before him. And aside from that the evidence would not sustain a finding that plaintiff was hurt at the permissive crossing. His own evidence as to that being conflicting and that of his own witness being directly to the contrary, the court was not bound to submit the question to the jury. This principle is stated and the authorities in support thereof cited in the opinion of Mr. Justice Potter, filed at the present term of this court, in the case of *Magier v. Philadelphia & Reading Railway Co.*, 101 Atl. 731.

In our case the burden of proof was upon the plaintiff to establish, *inter alia*, the fact that the accident happened at the permissive crossing, and, as his own testimony on that question was so contradictory and conflicting as to present to the jury no basis for a finding, except a mere guess, the nonsuit was properly granted. See *Mulligan v. Lehigh Traction Co.*, 241 Pa. 139, 88 Atl. 318, and *Cawley v. Balto. & Ohio R. R. Co.*, 44 Pa. Super. Ct. 340.

[4] In certain cases it is the province of the jury to pass upon conflicting statements in plaintiff's own testimony. *Ely v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 158 Pa. 233, 27 Atl. 970; *Strader v. Monroe County*, 202 Pa. 626, 51 Atl. 1100; *Sloan v. Philadelphia & Reading Ry. Co.*, 225 Pa. 52, 73 Atl. 1069. But in those cases the conflicting statements were on the question of contributory negligence where the burden of proof was on the defendant. In *Ely v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 158 Pa. 238, 27 Atl. 971, *supra*, Mr. Justice Mitchell in delivering the opinion of this court says:

"Had the testimony referred to a subject as to which the burden of proof was on the plaintiff, the result might have been different, for the court is not entitled to submit evidence which will merely enable a jury to guess at a fact in favor of a party who is bound to prove it."

[5] This case is not ruled by *Plepke v. Philadelphia & Reading Ry. Co.*, 242 Pa. 321, 89 Atl. 124; there an engine and tender were running backward upon a public street, at or near a crossing where small children were standing upon the track, and no signal was given of the approach of the engine or effort made to avoid the accident, and this court held that the case was for the jury. Of course children are entitled to greater protection than adults, and it is the duty of those in charge of trains to avoid wanton or reckless injury even to trespassers, yet there is no allegation or evidence of such injury in this case, and it is not shown that those in charge of the train saw the boy before the

unfortunate accident. On account of plaintiff's age the question of contributory negligence would be for the jury.

The assignment of error is overruled, and the order discharging the rule to take off the nonsuit is affirmed.

(257 Pa. 522)

WOOD v. CARSON.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. LANDLORD AND TENANT ⇨231(8)—ACTION FOR RENT—DIRECTED VERDICT.

In an action for rent, defended on the ground of the lessor's breach of a contemporaneous parol agreement to make certain repairs, and that the premises contained certain wells, held, on the evidence, that a verdict for plaintiff was properly directed.

2. LANDLORD AND TENANT ⇨231(2)—LEASE—EVIDENCE.

Where the lessee, when sued for rent, failed to establish the lessor's alleged contemporaneous contract for repair and his representations of a proper water supply, the exclusion of evidence as to the consequences of the alleged breach was proper.

3. LANDLORD AND TENANT ⇨150(1)—REPAIRS—IMPLIED COVENANT.

Without an express agreement there is no implied obligation on the landlord to repair the demised premises.

4. LANDLORD AND TENANT ⇨125(2)—IMPLIED COVENANTS—FITNESS FOR USE.

Without an express agreement the lessor does not impliedly undertake that the premises are fit for the purposes for which they are leased.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for rent by John S. Wood against John W. Carson. Directed verdict for plaintiff for \$1,877.60 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, O. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Robert Mair, Wayne P. Rambo, and Ormond Rambo, all of Philadelphia, for appellant. Frank R. Shattuck, of Philadelphia, for appellee.

MOSCHZISKER, J. May 13, 1899, plaintiff and defendant entered into a written contract whereby the latter leased from the former a lot of ground with the buildings thereon for a term of five years from June 1, 1899, at an annual rent of \$1,500, payable in equal monthly installments. Defendant remained in possession of the demised premises until August 31, 1901, when, having paid in full to that date, he removed therefrom. The property remained untenanted for about eight months, and the present action was brought to recover the rent which accrued during that period. At trial binding instructions were given for plaintiff, who recovered a verdict for \$1,877.60. Judgment was entered accordingly, and the tenant has appealed.

[1] Defendant, who is in the dye business, alleges that, prior to and contemporaneously

with the execution of the lease sued upon, he and the plaintiff entered into a verbal contract, whereby the latter agreed to make certain repairs to the demised property, so as to render it suitable for use as a dyehouse; further that plaintiff represented to him there were five good wells of water on the premises, which would furnish a supply ample for the needs and requirements of defendant's business; that the agreement and representations in question induced defendant to sign the lease, but that the plaintiff failed to make the promised repairs, and, instead of five good wells of water, there was but one, which did not meet defendant's needs and requirements; finally, that, after repeated demands upon plaintiff, the latter refused either to make the repairs called for in the prior and contemporaneous parol agreement, or to do anything toward furnishing the quantity of water necessary for defendant's dyehouse; and that, for these reasons, he was obliged to and did remove from the leased premises.

At trial, however, the defendant failed to prove the grounds upon which he relied. In the first place, he admitted that the lease was drafted by him, and not by the plaintiff; but he gave no explanation as to why the alleged parol agreement had been omitted therefrom, the only mention of repairs in the written contract being an express provision that the lessee should keep the property in good condition, and so deliver it to the lessor at the end of the term, "reasonable wear and tear excepted." Next, while the defendant produced testimony to show that weeks prior to the execution of the lease, on an occasion when he viewed the buildings, there had been some conversation concerning the repairs which he desired, should he rent the property, yet he failed to show that any contract to make these repairs was entered into either at that time or when the lease was subsequently executed and delivered. As to what took place at the latter date, the testimony is not only too vague and indefinite to prove a contract to make any certain repairs, but defendant did not even offer to prove that the plaintiff, John S. Wood (then alive, but now deceased), was actually present at the time; furthermore, he failed to show that the plaintiff's son, James L. Wood, who he testified brought the lease to him already executed by the lessor, was duly authorized to enter into a parol contract such as the one alleged, on behalf of his father.

When we come to consider the subject of the water supply, the defendant's case is even weaker; for it appears that, while there was more or less prior talk concerning the wells, yet at the time of the execution and delivery of the lease all that was said upon the matter was this: The defendant mentioned to the plaintiff's son, "He [the lessor] assures us that we are getting a good plenty of water," and James L. Wood replied, "Yes,

sir; there are five wells of good water here, and you will have a sufficiency." The lease contains no mention of the water supply, and there was no testimony to show that the defendant at any time informed the plaintiff how much he required for his business, or that the latter ever in any manner represented or contracted to give him any fixed quantity.

James L. Wood, who appeared as a witness for the plaintiff, admitted that his father had agreed to certain enumerated repairs, but stated all these had been made, and we find no contradiction of this testimony; moreover, Mr. Wood did not say there had been a contract for any repairs whatever, but he designated the result of the various conversations on that subject simply as an "understanding." In addition we find nothing in this witness' testimony from which it appears that he was authorized by his father to enter into contracts on the latter's behalf; nor are there any other proofs in the case which would justify a finding to that effect.

[2] Under all the circumstances, the trial judge committed no error in refusing to permit testimony concerning the consequences of the nonfulfillment of the alleged contemporaneous contract for repairs or of the lack of a proper water supply, nor did he err in striking out evidence concerning conversations on these subjects alleged to have been held some weeks prior to the execution and delivery of the lease or months subsequent to that date. We have, however, considered all the printed testimony, stricken out or otherwise, and also the offers refused; and, after so doing, we see no reversible error in the ultimate conclusion reached by the court below.

The authorities relied upon by the defendant in no sense rule here. *Wolfe v. Arrott*, 109 Pa. 473, 477, 1 Atl. 333, stands on its own facts. There the landlord not only assured the tenant that certain conditions existed, but "guaranteed" such to be the case, and, "in consideration of these assurances and guaranty," the tenant signed the lease. Then again in that case it was not held that the lessee was entitled to remove from the premises and stop paying rent, but only that he had a right to deduct from the rent due the amount which, after demands upon the landlord to make good his guaranty, he had been obliged to pay out in order to render the leased premises habitable. The only subsequent report in which we find *Wolfe v. Arrott* mentioned is *Moore v. Gardiner*, 161 Pa. 175, 177, 28 Atl. 1018, where the former case is distinguished. In the latter we affirmed a judgment for the plaintiff under circumstances somewhat like those at bar, saying that it was not of "any avail to allege certain verbal communications between the parties prior to and at the time of the execution of the lease," since "they were not incorporated into the lease, and there are no facts in evi-

dence which would justify the alteration of the lease so as to include them."

In *Smith v. Harvey*, 4 Pa. Super. Ct. 377, 380, relied upon by the appellant, the tenant had actually refused to sign the lease, on the ground that there was no provision contained therein as to the certainty of the water supply; whereupon the landlord said, "We will consider it the same as though it was in there, and I promise you that any shortage of water shall be remedied at once," which assurance and promise then and there induced the defendant to sign.

[3, 4] There is no sufficient evidence at bar to take the present case out of the general rule stated by Mr. Justice Sharswood in *Moore v. Weber*, 71 Pa. 429, 432, 10 Am. Rep. 708, that:

"The lessee's eyes are his bargain; he is bound to examine the premises he rents, and secure himself by covenants to repair."

Or, as further stated by President Judge Rice, in *Davis v. Pierce*, 52 Pa. Super. Ct. 615, 617:

"In the absence of an express agreement, there is no implied obligation on the landlord to repair demised premises, nor does he impliedly undertake that they are fit for the purposes for which they are rented."

The assignments of error are all overruled, and the judgment is affirmed.

(257 Pa. 456)

STONE v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. EMINENT DOMAIN §134—MEASURE OF DAMAGES—PROSPECTIVE USE.

In an action for damages for land condemned, the jury, in ascertaining the measure of damages, may consider not only the present use and condition of the property, but that to which it was adapted at the time of the taking, and its present value for any future use that could reasonably be anticipated, excluding speculative values.

2. EMINENT DOMAIN §222(5)—DAMAGES—CHARGE.

A charge that the jury might consider different elements of damages in respect to the land condemned, such as inconvenience in getting from one part of the farm to another, the destruction of a spring, damage to an orchard, and the cutting off of the view, and so add a total of the entire amount of damages to the farm as a whole, was not objectionable as permitting the jury to fix the specific sum for each element of damage separately, and to aggregate the several amounts in their verdict.

3. EMINENT DOMAIN §141(1)—DAMAGES—EVIDENCE.

Such several elements were admissible as affecting the market value of the land, and not otherwise.

4. EMINENT DOMAIN §255—DAMAGES—INSTRUCTION—APPEAL.

Where defendant did not request a more extended charge as to the elements of damages for plaintiff's condemned land, or submit points for specific instructions, it could not complain of a failure to give an adequate instruction.

5. EMINENT DOMAIN §222(1)—DAMAGES—ADEQUACY OF INSTRUCTION.

Where the court enumerated the contentions and summarized the testimony of experts on the question of damages, its instruction for the jury to find damages to the plaintiff's farm in its entirety at the time of the taking, and referring to the credibility of the witnesses, leaving the determination of the amount of the verdict to the jury, was not, as a whole, inadequate.

6. EMINENT DOMAIN §203(4)—DAMAGES—RENTAL VALUE.

While the rental value of property may be considered in forming an opinion as to its market value, where it is adaptable only for a certain purpose, evidence as to its rental value is inadmissible where it is adaptable for a number of purposes.

7. EMINENT DOMAIN §203(4)—EVIDENCE—CROSS-EXAMINATION—RENTAL VALUE.

Where plaintiff and another testified that the value of condemned property for farming purposes did not represent its actual value, and that it had a greater value for other purposes beyond that of the ordinary farm, the refusal to permit defendant on cross-examination to question the witnesses as to the rental value of the property if used exclusively for farming purposes was not reversible error.

8. TRIAL §64—EVIDENCE IN REPLY—SCOPE—VALUE—SALES AND SELLING PRICES.

Where defendant was permitted without objection to cross-examine plaintiff's witnesses as to other sales of land in the vicinity of plaintiff's condemned land, plaintiff was properly allowed on redirect examination of his witnesses and on cross-examination of defendant's witnesses to ask for the selling prices of other similar land in the vicinity.

9. EVIDENCE §155(1)—ENTIRE TRANSACTION.

Where a witness testifies to part of a transaction, the opposing party may insist upon the complete transaction being shown, even though such evidence be otherwise inadmissible.

Appeal from Court of Common Pleas, Lackawanna County.

Action by John L. Stone against the Delaware, Lackawanna & Western Railroad Company. Verdict for plaintiff for \$13,865, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, O. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

J. H. Oliver, H. A. Knapp, and D. R. Reese, all of Scranton, for appellant. John P. Kelly and A. D. Dean, both of Scranton, for appellee.

FRAZER, J. Defendant appeals from the judgment of the court of common pleas entered on a verdict for plaintiff awarding the sum of \$13,865 damages for land taken, or injured, by the relocation, straightening, and widening of defendant's right of way. The errors assigned are to the charge of the court, and various rulings on the admission and rejection of testimony touching the question of damages.

[1] The first assignment of error complains that the portion of the charge quoted was erroneous in that it permitted the jury to fix the damages not upon the value of the property for the purposes for which it was

actually available at the time of the appropriation, but upon the value incident to the possible future growth of the community. The trial judge stated in part that:

"The witnesses gave their reasons for arriving at the conclusion that this was not only a very valuable piece of land as a farm; that it was available for town lots or plots in larger or smaller tracts; that within the last 25 or 30 years a good many plots of land have been laid out and have been sold at various prices, and basing their opinions upon the sale of lands thereabouts and of the possible future growth of the community, they arrived at the figures to which they have testified. This is a proper way of arriving at a conclusion under the facts of this case, and it is for you to take into consideration their accuracy and whether their opinions are entitled to the weight plaintiff asks to be given to them."

The jurors, in our opinion, were not misled by this instruction. The rule in ascertaining the measure of damages is that the jury may consider not only the present use and condition of the property, but such use to which it was then adapted, and prospective advantage at the time attaching to it a present value, or any purpose to which it could reasonably be anticipated the land would in the future be applied, excluding, however, speculative values. *Marine Coal Co. v. Pittsburgh, McKeesport & Youghiogheny R. R. Co.*, 246 Pa. 478, 92 Atl. 688. The instruction quoted is not open to defendant's objection that the jury was permitted to find speculative damages. Plaintiff's land was suburban property and, as stated in the charge, a number of similar tracts in the neighborhood had been recently plotted and sold as building lots. The possibility of utilizing the land in question for this purpose was not therefore merely remote and speculative, but a legitimate prospect for consideration by the witnesses and the jury in forming their opinion as to its present value.

[2, 3] The second assignment complains of that part of the charge which permitted the jury, in fixing the damages to the land as of the time of the taking, to consider the "different elements that enter into the damages, such as the inconvenience in getting from one part of the farm to the other, the destruction of the living spring, the damage to the orchard, the cutting off of the view, the use of the old road as compared with the new one which was put in by the defendant company, and in this way to add a total, as it were, of the entire amount of damage caused to the farm taken as a whole." This instruction defendant contends authorized the jury to ascertain these various items of damage separately, and arrive at a total by adding them together. No claim is made that the enumerated elements were not proper for the consideration of the jurors in forming their estimate of the damages, but that the instruction permitted the fixing of a specific sum for each element separately, and by aggregating the several amounts reach a verdict. As separate items the evi-

dence would be improper. The several elements were admissible, however, as affecting the market value of the land, and not otherwise. *Parry v. Cambria & Indiana R. R. Co.*, 247 Pa. 169, 93 Atl. 336. While the latter portion of the excerpt standing alone is misleading, the trial judge begins this part of the charge by instructing the jury to find the damage to the farm in its entirety as it was at the time of the taking, and that in arriving at the extent of the injury they might "take into consideration the different elements that enter into the damages," following this statement with a reference to the items quoted above. In view of the introductory statement the clause as a whole is not open to criticism.

[4, 5] The third assignment alleges the charge as a whole to be inadequate. The court's instructions were quite brief considering the amount of testimony taken; no request, however, was made by defendant for a more extended charge, nor were points submitted asking for specific instructions. Consequently defendant is not in a position to complain of what was not said to the jury; and this court will not reverse a lower court, under such circumstances, unless the tendency of the charge as a whole was to the prejudice of the party against whom a verdict was returned, and was not, in expression or tone, a fair and unbiased judicial presentation of the case. To what extent the trial judge will go into details in discussing the evidence is necessarily largely within his discretion. *Fowler, Executrix, v. Smith*, 153 Pa. 639, 25 Atl. 744; *Ensminger v. Hess*, 192 Pa. 432, 43 Atl. 1001. The court gave a brief outline of the case, enumerated the contentions of each party, and the substance of the testimony of the expert witnesses relating to the question of damages, instructed the jurors they were to find the damage to the farm in its entirety as it was at the time of the taking, and referred briefly to the question of credibility of witnesses, leaving to the jury to determine the amount of the verdict. A careful consideration of the charge as a whole fails to show such inadequacy as to require the granting of a new trial.

[6, 7] The fourth and ninth assignments are to the refusal of the court to permit defendant, on cross-examination of plaintiff and one of his witnesses, to ask the rental value of plaintiff's farm. Both witnesses testified the value of the property for farming purposes did not represent the actual value of the land; that it had a greater value for other purposes, such as a country estate for a person living in the city desiring a suburban residence, or for building sites, and that its value was beyond the ordinary farm intended exclusively for agricultural purposes. One witness testified he was unable to fix the value as farming land, and did not consider it from that point of view. The witnesses generally were asked the rental

value, or the amount received as rent from the place for farming purposes. While the rental value might be a proper element to consider in forming an opinion of the market value of a property under certain conditions, or in a case where its use was for agricultural purposes exclusively, yet the facts of this case and the testimony all tends to show the property was adaptable for other purposes, and possessed a much higher value for such purposes than if used for general farming. In fact it appears land was too valuable in that locality to be a paying investment from the standpoint of a farmer. To take an extreme illustration, the rental value for farming purposes of a piece of land in the heart of a city would be of little value as a standard for fixing the market value of the property. In fact the income from rents never can constitute an exclusive standard for that purpose. *Forster v. Rogers Bros.*, 247 Pa. 64, 93 Atl. 26. In view of the testimony in the present case the action of the trial judge is not ground for reversal.

[8] The fifth to the eighth assignments, inclusive, refer to the action of the trial judge in allowing plaintiff, on redirect examination of his own witnesses, to ask them to state the selling prices of other similar properties in the neighborhood. The eleventh to the eighteenth assignments, inclusive, complain of the action of the court in permitting plaintiff, on cross-examination of defendant's witnesses, to show the prices received for particular sales of real estate in the neighborhood. These assignments raise substantially the same question and can be considered together. The court below, in its opinion discharging the rule for a new trial, gave as a reason for its action in admitting such testimony, that defendant first introduced the subject-matter by proving prices obtained for other properties in the neighborhood, and having brought out the prices paid for particular properties, plaintiff was entitled to follow that line of examination by showing additional sales, and thus place before the jury the entire information upon which the witness based his opinion. The question as to when, and under what circumstances, evidence of the prices obtained for other properties in the neighborhood is admissible we have considered in numerous cases, and definitely settled. The most recent expression of opinion on the subject will be found in *Rea v. Pittsburgh & Connellsville R. R. Co.*, 229 Pa. 106, 78 Atl. 73, 140 Am. St. Rep. 721, *Roberts v. Philadelphia*, 239 Pa. 339, 86 Atl. 926, *Girard Trust Co. v. Philadelphia*, 248 Pa. 179, 93 Atl. 947, and *Llewellyn v. Sunny-side Coal Co.*, 255 Pa. 291, 99 Atl. 869.

In the first case cited, following the general rule that while a consideration of particular sales in the neighborhood will not be allowed to be offered in chief, we said questions regarding such sales are proper in cross-examination to test the accuracy of the witness, and the extent of his knowledge;

and, following the principle laid down in *Davis v. Penna. R. R. Co.*, 215 Pa. 581, 64 Atl. 774, 7 Ann. Cas. 581, to the effect that the largest latitude should be allowed on cross-examination in cases of this class, state:

"In fact, any and every pertinent question may be put to him on cross-examination which will enable the jury to place a fair estimate upon his testimony as to the damages sustained" by the improvement or taking.

In the *Roberts Case* we held that witnesses testifying on behalf of plaintiff to values could not be cross-examined as to prices at which other properties sold for in the neighborhood, or at which other properties were held for sale, and said:

"It is admissible on cross-examination of a witness to inquire whether he knew of certain sales made of properties in the neighborhood, only because the value of the opinion he has expressed depends in a large degree upon his familiarity with ruling prices. Except as he have such knowledge he is not qualified to testify; the greater that knowledge the better is he qualified to speak, and the greater the weight of his opinion. To introduce the prices, however, at which the properties sold is to suggest to the jury a comparison which they are unable to make in order to determine what credit they are to give the witness. No warrant can be found in any of our cases for such practice."

The defendant relies on the *Roberts Case* as establishing a different rule from that laid down in the case of *Rea v. Pittsburgh & Connellsville R. R. Co.*, supra. This contention is without foundation, however, as appears from the case of *Girard Trust Co. v. Philadelphia*, supra. In that case this court held that an expert who bases his estimates of value of property upon prices obtained on sales of similarly located land in the neighborhood may be cross-examined to test his accuracy and knowledge as to the conditions of these sales, including the prices. It is there stated:

"There is nothing in the opinion in the *Roberts Case* which, in any manner, or to any degree, altered or was intended to change the established rules relating to the examination of expert witnesses; * * * but, generally speaking, even on cross-examination, such a witness cannot in the first instance be interrogated concerning the prices brought at sales not relied upon by him in making his original estimate of value, although, if he has relied on some sales in the neighborhood, he may be asked, without mention of prices, if he knew of other sales of properties similarly located and whether he considered them, and, if not, why not. The course which the investigation may take after that depends largely upon the discretion of the trial judge, constantly keeping in mind the fact that the cross-examination is merely to test the good faith and accuracy of knowledge of the witness, and that prices paid at particular sales of other properties are not, in themselves, evidence of the market value of the land in controversy."

Probably the last case on the subject is *Llewellyn v. Coal Co.*, supra, where we said (255 Pa. 296, 99 Atl. 871):

"The rule as established by our cases is that, while a party cannot bring out on cross-examination evidence of the price paid for other property, unless the witness has already testified that his opinion is based on his knowledge of the

sales of such property, yet, if he has so testified, he may be cross-examined as to prices, for the purpose of testing his good faith and credibility."

In the present case defendant was permitted, without objection, to cross-examine witnesses for plaintiff concerning other sales of realty, and the prices obtained therefor. In offering testimony of this kind it is but natural that the party should use sales least favorable to his opponent, and the result of the cross-examination to test the credibility and extent of knowledge of the witness as to such sales might leave the jury in possession of only a part of the facts forming the basis of the witness' opinion. Additional facts, such as the prices of other properties in the neighborhood similarly situated, may also have been considered as the basis of the opinion given, and unless these matters are placed before the jurors they are in no position accurately to gauge the value of the testimony. Under such circumstances when defendant questions the witness regarding other sales the door for the admission of such testimony is open. To what extent the investigation along this line should be carried is a matter within the sound discretion of the trial judge, as was stated in *Girard Trust Co. v. Philadelphia*, supra.

[8] A familiar rule of evidence is that where a witness testifies to part of a transaction, the opposing party may insist upon the complete transaction being shown, even though such evidence be otherwise inadmissible (*Postens v. Postens*, 3 Watts & S. 127; *Hamsher v. Kline*, 57 Pa. 397); and we see no reason why that rule should not be applied in cases of this class. *McElheny et al. v. Pittsburgh, Va. & Charleston Ry. Co.*, 147 Pa. 1, 5, 23 Atl. 392, relied upon by the trial judge was a proceeding to assess damages for the appropriation of plaintiff's land by defendant company. In that case in a per curiam opinion it is said:

"The single assignment of error is to the admission of evidence as to the location and height of the highway bridge. It is sufficient to say, in answer to this objection, that the subject was introduced by the appellant (defendant) upon the cross-examination of the plaintiffs' witness. If we concede that it would not have been competent evidence in chief on the part of plaintiffs, the defendant having brought it out, the plaintiffs were clearly entitled to follow it up by the questions referred to."

In the recent case of *Penna. R. R. Co. v. City of Reading*, 249 Pa. 19, 94 Atl. 445, the same rule was applied. In proceedings for the assessment of damages for the taking of land, a witness called by defendant to testify to market values, on cross-examination, was asked whether he had previously demanded more than a stated sum for damages to his property, and admitted having asked a greater amount, and we there held the court was not chargeable with error in permitting him, on redirect examination, to

state he recovered a less amount than he had previously demanded.

While the scope of the testimony in this case went beyond the confines of former rulings of this court in the admission of testimony relating to prices paid for other properties similarly situated, the trial judge did not abuse his discretion in permitting the introduction of evidence of prices of sales in the community other than those brought out by defendant in cross-examination. The special instances referred to by defendant might well be cases where the consideration, for reasons with which we are not concerned, was much less than the market value of the property. Other elements not known to the jury may have entered into the transactions and affected the prices. The rule which excludes evidence of specific value should therefore require the admission of testimony showing the prices of all sales in the immediate neighborhood relied upon by the witness if the opposite party so wishes, in order that the real basis of the knowledge upon which the witness testifies may be laid before the jury.

The judgment is affirmed.

(257 Pa. 513)

BOLDEN v. GREER.

(Supreme Court of Pennsylvania. April 16, 1917.)

MASTER AND SERVANT §417(3½) — WORKMEN'S COMPENSATION PROCEEDING—PARTIES —APPEAL.

Under Act June 2, 1915 (P. L. 754) § 425, giving an implied right of appeal to any party interested in a proceeding under the act, an insurer claiming to be interested in the proceeding should make itself a party to the record by seeking to intervene, and where it did not do so, and the record did not show its interest in the proceeding, though it had filed an answer for the employer, its appeal from the award, taken for the employer, will be quashed.

Appeal from Court of Common Pleas; Philadelphia County.

Proceeding by Mahala Bolden against Austin G. Greer, Jr., for compensation under the Workmen's Compensation Act. From a judgment affirming an award by the Workmen's Compensation Board, the Fidelity & Casualty Company of New York, insurer, appeals. Appeal quashed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZIER, and WALLING, JJ.

William G. Wright, of Philadelphia, for appellant. A. S. Ashbridge, Jr., and Andrew R. McCown, both of Philadelphia, for appellee.

BROWN, C. J. This appeal is by the Fidelity & Casualty Company of New York from the action of the court below affirming an award by the Workmen's Compensation Board to an injured employé. If this company has any standing as an appellant, its right to ap-

peal must be found in section 425 of the act of June 2, 1915 (P. L. 754). By that section an implied right to appeal is given to any party interested in a proceeding instituted under the act, but it must affirmatively appear from the record that the party appealing is so interested. At no stage of this proceeding did appellant ask to be allowed to intervene as an interested party. True, it filed an answer for the employer to the petition of employé for an award of compensation, and appealed for the employer from the award; but nowhere in the proceeding, either before the referee, the compensation board, or the court below, does it appear that it was an insurance carrier, carrying insurance covering the case of the appellee. Orderly procedure requires that a party claiming to be interested in a proceeding conducted under the Workmen's Compensation Act shall make himself a party to the record by asking to intervene, unless it affirmatively appears from the record itself that he is actually a party in interest. As the record in the case before us discloses no right of appeal in the appellant, appellee's contention that its appeal be quashed must prevail. Appeal quashed.

(257 Pa. 534)

In re LOUGHRAN'S ESTATE.

Appeal of HOUSE of GOOD SHEPHERD
IN CITY of PHILADELPHIA et al.(Supreme Court of Pennsylvania. April 16,
1917.)EXECUTORS AND ADMINISTRATORS \S 225(8)—
PRESENTATION OF CLAIMS—TIME.

Claims against an estate for loss resulting from decedent's breach of trust in misappropriating the proceeds of a mortgage received from her husband's estate, of which she was life tenant and trustee, not presented until 24 years after such breach, 9 years after the appointment of an administrator pendente lite of the trustee's estate, and 2 years after the appointment of an administrator d. b. n. c. t. a., were properly disallowed.

Appeal from Orphans' Court, Philadelphia County.

Appeals by the House of the Good Shepherd in the City of Philadelphia and others, from a decree dismissing exceptions to adjudication in the estate of Bridget Loughran, deceased. Appeals dismissed.

The facts appear in the following opinion by Anderson, J., in the orphans' court, sur exceptions to the adjudication:

Admitting for the sake of the argument that the laches of the claimants in this case did not begin until the death of the testatrix, March 20, 1902, yet the fact remains that at her death the claimants became at once entitled to an accounting of whatever remained in her hands of the estate of her husband, and, if they had been so inclined, notwithstanding the contest over her will they could after his appointment on April 25, 1902, have cited the administrator pendente lite to file an account. Webb's Estate, 20 Wkly. Notes Cas. 275. For, although it has been held that an administrator pendente lite cannot distribute the estate of his decedent, that being

the duty of the executor under the will or the administrator d. b. n. c. t. a., yet the very purpose of such an appointment is not only to gather together the assets of the estate, but also to protect the creditors as well as distributees and legatees. Park v. Marshall, 4 Watts, 382; Logan's Estate, 21 Pa. Co. Ct. R. 455; Wimpenny's Estate, 11 Phila. 20. Otherwise creditors of a perfectly solvent estate might be kept out of their just claims for years, awaiting the determination of litigation over a will in which they are not interested. The claim of the estate of John Loughran was not a claim for distribution, as in Fow's Estate, 20 Phila. 128, but was the claim of a creditor of Bridget Loughran.

The claimants, however, rested quiescent until some time in 1911, 9 years after the death of the testatrix and appointment of the administrator pendente lite, and 2 years after the appointment of the administrator d. b. n. c. t. a. Meanwhile witnesses acquainted with the testatrix and her affairs and who could have been called to testify what she had done with the assets of the trust estate may have died, and the facts forgotten by those who are still living. It is for this very reason that the statute of limitations prevents the collection of claims unless an action is begun within 6 years from the time they accrue; and that statute, or a rule analogous to it, is enforced in the orphans' court. York's Appeal, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65; Higgins's Estate, 22 Pa. Dist. R. 179, and cases cited. And while it is true that in an injunction affidavit sworn to by the testatrix stated that she had conveyed this mortgage of \$6,000 to Terrence Loughran without consideration and for the purpose of securing possession of the estate, it is also true that a demurrer to the bill was sustained and the bill subsequently dismissed with the consent of the plaintiff. The abandonment of the suit raises the inference either that the testatrix was mistaken in her allegation, or that she was repaid the value of the mortgage. And the fact that at her death she left no personal property of any kind raises the presumption that that which she had acquired from her husband was used by her under the ample powers given her by her husband's will.

It seems to the court, therefore, that it is too late now, 24 years after the occurrence and many years after her death, to ask to charge her estate with a mortgage received from her husband's estate simply because in a suit begun by her 21 years ago she declared that she had passed it away without consideration, an allegation which according to the record she failed to substantiate. The claimants have rested on their rights too long, and the policy of the law prevents us or the evidence produced from finding the fact that Bridget Loughran did not properly expend the proceeds of the mortgage which passed to her as life tenant under her husband's will.

The court dismissed the exceptions. The exceptants appealed.

Argued before BROWN, C. J., and STEWART, MOSCHISKEK, FRAZER, and WAL-LING, JJ.

E. Spencer Miller, James Fitzpatrick, and A. A. Hirst, all of Philadelphia, for appellants. Henry A. Hoefler and Michael Francis Doyle, both of Philadelphia, for appellees.

PER CURIAM. These appeals are dismissed, at the costs of appellants, on the opinion of the learned court below dismissing the exceptions to the adjudication of the account by the auditing judge.

(257 Pa. 487)

WILLS et al. v. FISHER.

(Supreme Court of Pennsylvania. April 16, 1917.)

VENDOR AND PURCHASER §130(8)—TITLE OF VENDOR—PURCHASER FROM EXECUTORS.

Where the owner of half of a lot erecting a building upon his own half and the adjoining half, and the executors of the owner of the other half, having power to sell realty, charged themselves on their account with cash from the first owner as proceeds of the house and lot, a finding of a conveyance by the executors was warranted, although there was no deed upon record, so that a party claiming under the first owner could convey marketable title.

Appeal from Court of Common Pleas, Lancaster County.

Assumpsit by Samuel R. Wills and another, executors of the will of Mary L. Baer, deceased, against J. Fred Fisher, to recover the purchase price of real estate. Judgment for plaintiffs for \$14,579.90, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER,
and FRAZER, JJ.

T. Roberts Appel, of Lancaster, submitted for appellant.

BROWN, C. J. Under testamentary power given them, the executors of Mary L. Baer agreed to sell to appellant property known as 141 East Orange street, in the city of Lancaster, and to give him a good and marketable title for the same. This lot of ground has a frontage of 64 feet 4½ inches. On December 31, 1828, John Baer acquired an unquestionable title to the western half of it, and on the same day John Ehler acquired a similar title to the eastern half. Mary L. Baer was the widow of Reuben A. Baer, in whom there was vested at the time of his death a recorded title to the western half of the lot, formerly owned by the said John Baer, his father. Some years before Reuben A. Baer's death he erected a large dwelling house on the lot, which extended over the eastern as well as the western half of it. By his will he devised all of his real estate to his widow. In this action, brought to recover the purchase money for the lot sold to appellant, his defense in the court below was that Reuben A. Baer had not acquired a good title to the eastern half of it, formerly owned by John Ehler. The title to the other half is not questioned. The learned judges of the court below, before whom the case was tried without a jury, held that the title of Baer to the Ehler part of the lot was good and marketable, and on this appeal from the judgment entered against the purchaser, the sole question is Baer's title to that part of the lot.

No deed could be found from John Ehler or his executors to Reuben A. Baer for the eastern half of the lot. Ehler died, leaving a will dated March 31, 1860. By its terms

he directed that his wife should have the rent and income for life from his "one-storied brick dwelling house and other buildings and lot or piece of ground belonging thereto, on the north side of the said Orange street, between Duke and Lime streets, bounded on the east by property of E. C. Reigart, Esq., on the west by property of John Baer, on the north by a public alley." This is undoubtedly the property known in the present controversy as the eastern half of the Baer lot. Ehler directed that, upon the death of his widow, it should be sold by his executors, and by their account, filed in the orphans' court of the county on November 20, 1869, they charged themselves as follows, under date of October 3, 1868: "Cash from R. A. Baer, proceeds of sale one-story house and lot on Orange St., \$2,750." The court below found as a fact that this charge "without doubt" related to the eastern half of the Baer lot, or the property involved in this controversy, and this finding has not been assigned as error. The purchase money for Ehler's lot, received by his executors from R. A. Baer, was included in the balance shown to be in their hands by their account, and by the report of an auditor, duly confirmed, this was distributed, in accordance with the terms of Ehler's will, among his three sons, whom he had named as his executors. In view of this, no one of them, if living, could make any claim to the property, and no one making claim under them can set up any sort of title to it. As legatees under their father's will, the sons received the proceeds of the sale of the lot, and common honesty and the law alike forbid that a party may have the price of land sold and the land itself. *Johnson v. Fritz*, 44 Pa. 449; *Maple v. Kussart*, 53 Pa. 348, 91 Am. Dec. 214.

Judgment affirmed.

(257 Pa. 523)

In re HUDDY'S ESTATE.**Appeal of MOORE.**

(Supreme Court of Pennsylvania. April 16, 1917.)

WILLS §547 — CONSTRUCTION — ESTATE DEVISED.

Under a will bequeathing an estate in trust to a niece for life, and on her death to pay the income, in equal shares to her five children and to the children of any of her children that had died, such children to take their parent's share until the death of the last of such niece's children, and then for distribution between her grandchildren and the issue of any deceased grandchild per stirpes, the interest of one of the niece's children dying in her mother's lifetime without issue terminated, and her executor was not entitled to her share of the income accruing between her death and the period of final distribution.

Appeal from Superior Court.

Appeal by Edwin H. Moore, surviving executor of Helen W. Fagan Moore, deceased,

from a decree of the Superior Court, reversing a decree of the orphan's court, dismissing exceptions to adjudication in the estate of Henry Huddy, deceased. Decree affirmed, and appeal dismissed.

From the record it appeared that Henry Huddy, the testator, died on April 24, 1904, leaving a will by which he provided, *inter alia*, as follows.

"Third—I give and bequeath the following legacies free of collateral inheritance tax to wit: "To the five children of my niece, Eliza M. Fagan, to wit: Emma, Clara, Helen, Edgar and Benjamin Fagan, each the sum of three thousand dollars (\$3,000).

"Fourth. All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever situate, I give, devise and bequeath unto the Fidelity Insurance, Trust and Safe Deposit Company, in trust, to hold and invest the same, and to keep the same invested in such securities as I may leave or in such other securities as they may deem for the best interests of my estate, and to collect the income thereof, and to pay the same unto my niece, Eliza M. Fagan, for and during all the term of her natural life. From and immediately after her decease, then to pay the said income in equal shares to her children as above set forth and to the children of any of her said children who may be deceased, such children to take their parents' share, until the death of the last of my said niece's children. When that occurs, I direct that the principal of my estate shall be divided in equal shares between my said niece's grandchildren and the issue of any grandchildren who may be deceased, per stirpes. It is my will that the income so to be paid to my niece and her children shall be paid quarterly, and shall not be subject to assignment, anticipation, or alienation, nor to the debts of any of the beneficiaries, but that the same shall be held to be applied for their maintenance and support."

Helen Fagan married Edwin H. Moore, and died without issue on April 6, 1910, leaving a will by which she appointed as executor her husband, Edwin H. Moore. Eliza M. Fagan, the testator's niece, died on December 27, 1912. The trustee thereupon filed an account, by the final adjudication of which it was decreed that the executor of Helen W. Moore was entitled to one-fifth of the income derived from the estate.

The lower court dismissed the exceptions to the adjudication. Clara H. Fagan appealed.

Further facts appear in Huddy's Estate, 63 Pa. Super. Ct. 34, and in the following opinion of the superior court by Kephart, J.:

The question raised on this appeal relates to the nature and distribution of the estate to which the children of Eliza M. Fagan were entitled under the will of Henry Huddy. The testator gave his estate to the Fidelity Insurance, Trust & Safe Deposit Company to hold and invest "and to collect the income thereof and to pay the same unto my niece, Eliza M. Fagan, for and during all the term of her natural life. From and immediately after her decease, then to pay the said income in equal shares to her children as above set forth and to the children of any of her said children who may be deceased such children to take their parent's share, until the death of the last of my said niece's children. When that occurs, I direct that the principal of my estate shall be

divided in equal shares between my said niece's grandchildren and the issue of any grandchildren who may be deceased, per stirpes. It is my will that the income so to be paid to my niece and her children shall be paid quarterly, and shall not be subject to assignment, anticipation or alienation, nor to the debts of any of the beneficiaries, but that the same shall be held to be applied for their maintenance and support." One of the children of Mrs. Fagan, Edgar Fagan, died in the lifetime of the testator. Another child, Helen, who was married to Edwin H. Moore, died without issue April 6, 1910, after having made a will in which she appointed her husband an executor. Eliza M. Fagan, the testator's niece, died December 27, 1912. The contest here arises over the distribution of the income bequeathed to Helen Fagan Moore. The conclusion of the orphans' court was that the interest bequeathed to her was an estate *pur autre vie*; that it was vested and that it continues until the death of the survivor of the grandchildren of Eliza M. Fagan, and that the case is within the interpretation applied in *Little's Appeal*, 81 Pa. 190, *Leech's Estate*, 228 Pa. 311, 77 Atl. 555, and *Harned's Estate*, 54 Pa. Super. Ct. 47. It was held that as the bequests to the children of Mrs. Fagan were "to her children as above set forth," that is, *nominatim*, there was no right of survivorship and that as there was a presumption against intestacy the gift was absolute to Mrs. Moore during the life of the survivor of her nephews and nieces. The view presented by the appellant is that the will exhibits an intention on the part of the testator to preserve the estate for the grandchildren of Eliza M. Fagan and their issue until the death of the survivor of the grandchildren of Mrs. Fagan when division is to be made per stirpes; and in the meantime to provide for the support of his niece and her children for their lives and that the case is not controlled by any presumption of intent or affected by the doctrine of survivorship but should be disposed of in the same manner as was done in *Rowland's Estate*, 141 Pa. 553, 21 Atl. 735, in which it was held that the administrator of a deceased son of the testator to whom was bequeathed a proportionate share of the income of the estate and who died without issue was not entitled to the share bequeathed to that son; that the provision for payment to the testator's children or the issue of any who may have died created two classes: Children of the testator, and issue of deceased children; and that as the son died without issue he fell out of the first class and was not represented in the second. The cases relied on by the court below were all determined on the ground that no intention of the testator was disclosed to give any other effect to the bequest than that of an absolute gift. It is contended here, however, that there is a definite expression of an intention inconsistent with the conclusion that any other person than the niece or her children or the issue of her children can take under the will. A comparison of this will with that in *Rowland's Estate* shows a very close resemblance. In the latter there was a direction to divide annually the net balance of income equally per stirpes and not per capita between the testator's children and the issue of his children that may at any time have died leaving issue, until the death of the survivor of said children, the principal of the estate to be held until the death of every one of the testator's children and at the death of the last of them to be divided equally per stirpes between the issue then living of the testator's children. In the pending case the will provided for the payment of the income in equal shares to the testator's children who had been named in a preceding part of the will and the children of any who may be deceased, such children to take their parents' share. Payment was to be made quarterly the fund not to be

subject to assignment, anticipation and alienation, nor to the debts of any of the beneficiaries, but was to be held to be applied for their maintenance and support. No distinction is apparent in the two cases which leads us to a conclusion that Rowland's Estate should not control the one which we are called on to decide. The situation of the son in the former case is identical with that of the appellee here, and the evidence of intention is indeed stronger in this case than in the other, for the bequest is not only protected by a spendthrift's trust, but is especially appropriated to the maintenance and support of the legatee. The "beneficiaries" referred to in the will are no others than the niece, Mrs. Fagan, her children, and her grandchildren. These are the persons for whose benefit the property is set apart and the purpose of the testator is apparent to so control its destination as to result in their benefit and advantage exclusively. The other view of the case diverts it to strangers and subjects it to possible liability for the debts of those who are alien to the testator's blood and strangers to his bounty. If the distributees are treated as two classes, viz. the children of Mrs. Fagan and her grandchildren, as was done in Rowland's Estate, no question of survivorship arises, nor is there an intestacy. The deceased legatee had a vested interest in the income for her own life. The distinction sought to be drawn between Rowland's Estate and this case, because in the former there was provision for an annual division of the income per stirpes, is not convincing in view of the fact that a quarterly division was provided for by the testator here and it was directed that the grandchildren should take their parents' share, which is as clearly an arrangement for distribution per stirpes as if a technical phrase had been used for that purpose. The fact that payment was to be made in one case annually and in the other every three months is not a controlling consideration. In Little's Appeal, supra, there were no words in the will to show an intent to limit the gift of the income to the legatee for her own life. There was no gift over of the income on the death of Mrs. Little, nor was there anything in the will showing an intention to provide otherwise than that the estate should pass to her legal representatives at her death. The absence of a gift over and of an expressed intention as to the use and enjoyment of the income gave support to the determination of the court that the gift was absolute in the first taker *pur autre vie*. Of like import is Hildebrant v. Hildebrant, 42 Pa. Super. Ct. 190. In Leech's Estate, supra, there was express provision for payment to the widow of either of the testator's sons as such son might by his last will direct and appoint, and there was no feature of the whole will which suggested an intention to give less than a full and absolute estate in the income to the legatees. All of the cases following Little's Appeal are distinguished by the absence of any purpose of the testator to appropriate the estate exclusively to a class of legatees, and in that respect this case belongs to the class of which Rowland's Appeal and Babcock's Estate, 18 Pa. Dist. R. 453, are illustrations. Our conclusion is that by the terms of the testator's will the distribution was limited to the children of Eliza M. Fagan and their issue for the purpose stated in the will and that the interest of Helen Fagan Moore in the income terminated with her death. It follows, therefore, that the decree should be reversed, and distribution made accordingly.

Edwin H. Moore, surviving executor of Helen W. Fagan Moore, deceased, appealed from the decree of the superior court.

Argued before BROWN, C. J., and STEWART, MOSCHIZSKER, FRAZER, and WALLING, JJ.

John D. McMullin, of Philadelphia, for appellant. A. H. Wintersteen, of Philadelphia, for appellee.

PER CURIAM. The clearly expressed intention of the testator confines the distribution of the income from his estate to the children of his deceased niece, Eliza M. Fagan, and their issue. This was the correct conclusion of the Superior Court. Huddy's Estate, 63 Pa. Super. Ct. 34. Helen Fagan Moore, a grandniece, having died without issue, her interest in the income terminated with her death. Rowland's Estate, 141 Pa. 553, 21 Atl. 735.

Appeal dismissed, and decree of superior court affirmed at appellant's costs.

(257 Pa. 503)

YORK v. MARSHALL.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. REPLEVIN \Leftrightarrow 4—SEIZURE BY PUBLIC OFFICIAL—QUASHING WRIT.

Under Act April 3, 1779 (1 Smith's Laws, p. 470) § 2, a writ of replevin to recover property seized by a public official is unauthorized, and, where issued will, on motion, be quashed.

2. REPLEVIN \Leftrightarrow 4 — SEIZURE OF PERSONAL PROPERTY—REMEDY.

Where the state veterinarian, acting on behalf of the state live stock sanitary board, seized plaintiff's cattle and established a special quarantine on plaintiff's land in order to make a tuberculin test, as directed by Act July 22, 1913 (P. L. 928), and thereafter, without plaintiff's consent, broke into the field and removed the cattle to another quarantine station, plaintiff's remedy, if any, was by an action of trespass, and not by a writ of replevin.

Appeal from Court of Common Pleas, Bradford County.

Replevin by David B. York for cattle seized by C. J. Marshall, State Veterinarian. From an order quashing the writ, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

H. K. Mitchell, of Troy, and Harold M. McClure, of Lewisburg, for appellant. David J. Fanning, Dist. Atty., of Troy, Horace W. Davis, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for appellee.

MESTREZAT, J. Certain cattle belonging to the plaintiff being suspected of having tuberculosis, defendant, the state veterinarian, acting for and on behalf of the state live stock sanitary board of Pennsylvania, seized them on July 27, 1916, and established a special quarantine of the cattle for 60 days in a field on lands in possession of the plaintiff, for the purpose of making a tuberculin test, as directed by the act of July 22, 1913

(P. L. 928). On September 4, 1916, the defendant, without the consent or knowledge of the plaintiff, broke the lock on the gate leading into the field in which the cattle were originally quarantined, and removed them from the plaintiff's premises to the stable of one C. W. Mitchell, and there established another special quarantine for 4 days, for the purpose of testing the cattle. The plaintiff, claiming that the defendant was acting without lawful authority in taking and retaining the cattle, issued this writ of replevin, September 5, 1916, while the cattle were under the second quarantine, and they were delivered to him by the sheriff.

The Attorney General of the commonwealth presented a petition to the court below setting forth at length the action of the defendant in seizing and detaining the plaintiff's cattle and the alleged legal authority therefor, and averring, *inter alia*, that the defendant was a state officer, that he was acting under the authority of the state, and the cattle were lawfully in his custody, and that the acts of the plaintiff and officials in issuing and serving the writ of replevin were irregular, improper, and unlawful, and moved the court to quash the writ, award treble costs to the defendant, and to grant a rule on the prothonotary to show cause why an attachment should not issue against him for having issued the writ, knowing the same to be for goods and chattels seized by a public officer acting under the authority of the state. The rule on the prothonotary was entered and he filed an answer averring that there was nothing in the pleadings or the writ to show and he had no knowledge, that the suit was being brought against the state of Pennsylvania or any officer in his official capacity. The plaintiff's answer denied the authority of the defendant to remove the cattle from plaintiff's field and take them into defendant's custody, or to administer tuberculin to the cattle for the purpose of testing them, and averred that the writ of replevin would lie against the defendant, although an officer of the commonwealth, as the defendant had exceeded his lawful authority in taking the cattle into his possession.

The court below declined to award treble costs to defendant, discharged the rule on the prothonotary, and quashed the writ. The learned judge filed an elaborate opinion in which he not only assigned his reasons for refusing treble costs and discharging the rule and quashing the writ, but also discussed the powers and duties of the state veterinarian and of the state live stock sanitary board under the legislation of the state. The plaintiff has appealed.

We think the learned court was right in quashing the writ. Whether the defendant exceeded or abused the powers conferred upon him as state veterinarian is not an issue in this suit, and therefore we express no

opinion on the subject. In an appropriate action, it can be judicially determined whether the defendant, as such official, was justified under the laws of the commonwealth in taking and retaining possession of the plaintiff's property.

[1] Section 2 of the act of April 3, 1779 (1 Smith's Laws 470; 4 Purd. [13th Ed.] 4136), provides as follows:

"All writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized or taken in execution, or by distress, or otherwise, by any sheriff, naval officer, lieutenant or sublieutenant of the city of Philadelphia, or of any county, constable, collector of the public taxes, or other officer, acting in their several offices under the authority of the state, are irregular, erroneous and void; and all such writs may and shall, at any time after the service, be quashed (upon motion) by the court to which they are returnable, the said court being ascertained of the truth of the fact, by affidavit or otherwise."

The third section of the act provides:

"The court, besides quashing the said writs, may and shall award treble costs to the defendant or defendants in such writs; and also, according to their discretion, order an attachment against any prothonotary or clerk, who shall make out or grant any such writ, knowing the same to be for goods or chattels taken in execution, or seized as aforesaid."

[2] It is clear that the plaintiff, as the owner of the cattle in question, was prohibited from issuing the writ of replevin against the defendant who seized and held the cattle in his official capacity as state veterinarian. The plaintiff does not deny that the defendant is state veterinarian, and, as such, is a state officer. It is conceded that in taking possession of plaintiff's cattle, the defendant was acting in his official capacity, and hence "under the authority of the state," and therefore the writ was "irregular, erroneous, and void," and was properly quashed. But it is contended by the plaintiff that the defendant seized the property without process issued by any court and without legal authority, and that he cannot take refuge behind his office and title to prevent the recovery of the property in an action of replevin. This contention is wholly untenable, either on principle or precedent. The appropriate remedy, as is well settled, for an illegal or unauthorized act committed by an officer acting in his official capacity, is an action of trespass, unless a special remedy is given by statute. If, as the plaintiff alleges, the defendant was without authority or transcended his authority under the act of 1913, he was a trespasser; but the plaintiff must seek redress for the injury in an appropriate action. He cannot set up the illegality or irregularity of the seizure of his property in this action; the remedy is trespass. *Stiles v. Griffith*, 3 Yeates, 82; *Pott v. Oldwine*, 7 Watts, 173; *Elkins v. Griesemer*, 2 Penn. 52; *McJunkin v. Mathers*, 158 Pa. 137, 27 Atl. 873.

For the reasons stated, the order quashing the writ of replevin is affirmed.

(257 Pa. 361)

STANTON et al. v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. MUNICIPAL CORPORATIONS §225(4)—REGULATION OF MARKET HOUSES—ACTS OF ADMINISTRATIVE OFFICER—EFFECT.

Act March 7, 1901 (P. L. 20), giving cities of the second class the power to provide and enforce suitable market regulations as the council may prescribe places the exclusive custody of market house property in the council, and the use and regulation thereof can be effected only by the corporate act of the council and the mayor by a duly enacted ordinance, so that the unauthorized acts of the city's administrative officers in appropriating to other use real estate conveyed to it for public market uses on condition that should it cease to be continued in such use it should revert to the grantor, could not divest it of title.

2. DEEDS §168—CONDITION SUBSEQUENT—FORFEITURE.

Plaintiffs claiming a forfeiture for breach of a condition subsequent contained in a conveyance of land to a municipality must clearly and strictly establish the breach, as courts of law lean against a forfeiture, and as forfeitures are so odious in equity that they will be enforced only in a clear case, and never in a doubtful case.

3. EJECTMENT §109—BREACH OF CONDITION SUBSEQUENT—VERDICT.

In ejectment for land conveyed to a municipality on condition that it should use it for public market purposes, and that if it should be appropriated to any other use the estate should revert to the grantor and his heirs, where it appeared that the property had been temporarily used as a public playgrounds, with the permission of the city's administrative officers, but it did not appear that the city council, as solely empowered thereto by Act March 7, 1901 (P. L. 20), had ever authorized its appropriation to such use or ever had notice that it was being put to such use, a verdict was properly directed for the defendant city.

Appeal from Court of Common Pleas, Allegheny County.

Ejectment by Lewis Stanton and others against the City of Pittsburgh for a parcel of land situated in that city. Verdict for defendant by direction of the court, and judgment thereon, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, MOSCHISKER, FRAZER, and WALLING, JJ.

Asa L. Carter, J. Boyd Duff, and Richard Townsend, all of Pittsburgh, for appellants. Charles A. O'Brien and B. J. Jarrett, both of Pittsburgh, for appellee.

BROWN, C. J. James Adams, by deed dated May 1, 1833, and duly recorded, conveyed to a municipal corporation known as the "Burgess and Council of the North Liberties of Pittsburgh" certain real estate, the title to which is involved in this ejectment. The borough of North Liberties was consolidated with the city of Pittsburgh by act of assembly approved April 1, 1837 (P. L. 132). The grant of the land had annexed to it the following condition subsequent:

"Provided always nevertheless, and it is expressly covenanted and agreed by the said parties of the second part (the borough) for themselves and their successors to and with the said parties of the first part (James Adams and his wife), their heirs, executors and administrators, and it is hereby declared to be one of the express provisions and conditions of this grant that they, the said parties of the second part, and their successors, shall and will hold, occupy, use, possess and enjoy the said described lots and pieces of ground heroby granted or intended so to be, with the appurtenances, as a market place and for the purposes of a public market, for the use of the citizens of the borough aforesaid, and the same is hereby appropriated solely and exclusively for that purpose, and for no other purpose whatever: Provided, that the said parties of the second part are hereby permitted to dig and excavate cellars under and for the use of stalls in the said market, and build, put up and erect, over part of the market house hereinafter mentioned to be built and erected on the lots aforesaid, a suitable and convenient council chamber for the meetings and the use of the burgess and council aforesaid, and for no other purpose whatever, the said chamber to be constructed so as not to obstruct the free use and enjoyment of the market place aforesaid; and it is hereby covenanted and agreed by the said parties of the second part, for themselves and their successors, to and with the said parties of the first part, their heirs, executors and administrators, and it is hereby expressly declared to be a further provision and condition of this grant that the said parties of the second part will and shall immediately build and erect a suitable and convenient market house on the lots aforesaid, to be used as a public market house, as aforesaid, and that they, the said parties of the second part, or their successors, shall and will not bargain, sell, convey, lease, dispose of, or appropriate any of the said described lots hereby granted or any part thereof to or for any other purpose than that of a public market and the purposes specified, as aforesaid; and it is hereby covenanted and agreed, and it is hereby expressly declared to be another condition of this grant, that if the said parties of the second part or their successors shall at any time hereafter bargain, sell, convey, lease, dispose of or appropriate the said described lots hereby granted or any part thereof, or the buildings thereon erected or intended so to be, to any person whatsoever or for any other purpose than that specified, as aforesaid, then and in such event this indenture and the estate hereby granted shall cease and become null and void and of no effect, and the said estate and lots and pieces of ground hereby granted, with the appurtenances, shall instantly revert to the donor and his heirs. * * *

The plaintiffs, as heirs of James Adams, base their right to recover on the ground that the city of Pittsburgh has committed a breach of the foregoing condition, in that the land has been used for other than market house purposes, (1) part of it by the Pittsburgh Playground Association, (2) another part of it, under lease, for the sale of meats, etc. The defendant offered no testimony, and, at the close of much evidence produced on the part of the plaintiffs, the court directed a verdict for defendant by affirming its point asking for the same. This was followed by judgment on the verdict.

[1] No evidence was offered by plaintiffs showing that the mayor or councils of the city of Pittsburgh, by any affirmative or

formal act, ever authorized the use of the land for any other than market house purposes, in strict accordance with the conditions of the deed from Adams, and our review of the evidence and of the offers made by the plaintiffs, which were rejected, has led us to the conclusion of the learned court below, that the duly constituted municipal authorities have done nothing in relation to the property in controversy that would work a forfeiture of the title to it. Nothing more appears from the evidence than that certain administrative officers of the city had permitted the temporary use of part of the property by the playground association for playground purposes. But this was not sufficient for recovery by the plaintiffs. The defendant is a city of the second class, governed by the act of March 7, 1901 (P. L. 20), which provides that it shall have the power to lease, sell, and convey its real property, to make all contracts in relation thereto, to provide and enforce suitable general market regulations, to contract with any person or persons, or association of persons, companies or corporations, for the erection and regulation of market houses and market places, on such terms and conditions, and in such manner as councils may prescribe. This legislation places the custody of market house property in the exclusive control of councils, and the disposition, regulation, and use of the same can be effected only by the corporate act of councils and the mayor, by an ordinance duly enacted. There is no proof whatever that the councils authorized the acts upon which the plaintiffs rely for recovery, either directly or by any delegation of power to an administrative officer; and it cannot be successfully contended that the unauthorized act of an administrative officer of a municipality can divest its title to valuable property.

[2] As plaintiffs are claiming a forfeiture, they must clearly and strictly establish it. Courts of law lean against it, and it is so odious in equity that it will be enforced only in a clear case, and never in a doubtful one. *Newman v. Rutter*, 8 Watts, 51; *McKissick v. Pickle*, 16 Pa. 140; *Pickle v. McKissick*, 21 Pa. 232; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Moss v. Pittsburgh*, 203 Fed. 247, 121 C. C. A. 445.

[3] By the terms of the condition in the grant a forfeiture can be declared only if the city of Pittsburgh shall "bargain, sell, convey, lease, dispose of, or appropriate the said described lots hereby granted, or any part thereof, or the buildings thereon erected or intended so to be, to any person whatsoever, or for any other purpose than that specified as aforesaid." As already stated, nothing is to be found in the evidence submitted by the plaintiff showing that the city of Pittsburgh had violated the foregoing condition, and no rejected offer of the plaintiff would have shown that it had done so. Though

the record is voluminous and the assignments of error very numerous, the whole situation is thus well briefly summarized by the learned court below in its opinion denying the motions for a new trial and for judgment non obstante veredicto:

"The plaintiffs' case then rests on an attempt to show that the councils and mayor had notice of and ratified the temporary and unauthorized use, and thereby committed a breach of the condition of the deed and a forfeiture of the title. Much latitude was given in the reception of evidence in order to show notice, if any, to council and the mayor or of any affirmative act on the part of the proper constituted authority of the city that would show any ratification of the temporary use of the land for playground purposes. The evidence shows that no notice of any kind was given to or received by council for the use of the land for playground purposes or that any action was ever taken in relation to the use of the land for other purposes than those of a market house. The only affirmative act of the council which had any indirect bearing on the issue involved was that council made general appropriations in quite large amounts for recreation grounds or recreation purposes; for example, in the year 1910 the sum of \$65,610 was an item in the general appropriation bill for recreation grounds. No appropriation was ever made by council to any playground association. The city had a number of recreation grounds and they were located in many different places within the city limits. The only specific act in relation to the matter of appropriations and to the playground association is the drawing of small amounts on request of the playground association that the controller considered, and that actually was, a trespasser on the city property. There is no evidence in the case that council had any knowledge when the appropriations were made that any part of the Adams market property was being used for playground purposes. The burden was on the plaintiff to show that this particular playground was included as one of the particular subjects of the appropriation for recreation grounds. The city defendant cannot be bound by an unauthorized act of the city controller or his interpretation of his authority in paying out money on a question affecting the city's right to its real estate which would cause a forfeiture thereof. The condition of the deed is 'that if the said parties of the second part or their successors shall at any time hereafter bargain, sell, convey, lease, dispose of or appropriate said described lots, or any part thereof, to any other person or for any other purpose than specified. * * *'. The plaintiffs are seeking to enforce a forfeiture for a breach of the above conditions. We find no evidence or exclusion of offers of evidence, if received, that would cause a submission to a jury, or that would or ought to sustain a verdict for plaintiffs."

Judgment affirmed.

(357 Pa. 507)

STAMFORD ROLLING MILLS CO. v. ERIE R. CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. APPEAL AND ERROR ~~§~~99—DECISIONS REVIEWABLE — DISSOLUTION OF FOREIGN ATTACHMENT.

An appeal from an order dissolving a foreign attachment will be entertained where the facts are not in dispute and the question presented is purely one of law.

2. ATTACHMENT ~~§~~47(2)—BURDEN OF PROOF—REQUISITE FACTS.

The burden of proof is upon an attaching creditor to establish the facts necessary to maintain the attachment.

3. ATTACHMENT ~~§~~63—GOODS IN TRANSIT—STATUTE.

Where goods have been shipped under a negotiable bill of lading, they are not subject to foreign attachment while in transit, or after their stoppage in transit, whether the carrier continues to hold them as carrier, or as a warehouseman or bailee, as Act March 11, 1909 (P. L. 24) § 25, relating to warehouse receipts, and Act May 19, 1915 (P. L. 554) § 39, relating to the sale of goods, are identical in effect with Act June 9, 1911 (P. L. 843) § 24, expressly protecting such goods from attachment, unless the bill of lading has been surrendered or its negotiation enjoined.

4. COMMERCE ~~§~~81—ATTACHMENT—GOODS IN INTERSTATE COMMERCE—STATE LAWS.

Act June 9, 1911 (P. L. 843) § 24, providing that where goods are delivered to a carrier and a negotiable bill of lading is issued they cannot thereafter be attached while in the carrier's possession by garnishment or otherwise, unless the bill is first surrendered to the carrier or its negotiation enjoined, does not interfere with interstate commerce in respect to the attachment of cars within the state, though engaged in interstate commerce.

Appeal from Court of Common Pleas, Susquehanna County.

Action by the Stamford Rolling Mills Company against Jacob L. Lipton, doing business under the name of the Acme Iron & Steel Company, with writ of foreign attachment against the Erie Railroad Company, garnishee. From an order dissolving the attachment, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-LING, JJ.

R. W. Archbald, of Scranton, J. Y. Brinton, of Philadelphia, and E. R. W. Searle, of Montrose, for appellant. William A. Skinner, of Susquehanna, for appellee.

POTTER, J. The Stamford Rolling Mills Company, a corporation of the state of Delaware, issued a writ of foreign attachment in the court of common pleas of Susquehanna county, Pa., against Jacob L. Lipton, doing business as the Acme Iron & Steel Company, defendant, and the Erie Railroad Company, as garnishee. It appears that on May 23, 1916, the Acme Iron & Steel Company shipped from Cleveland, Ohio, over the New York, Chicago & St. Louis Railway and its connecting lines a carload of "copper scrap," consigned to its own order at Springdale, Conn., directing that notice be given to plaintiff at its New York office. The railroad delivered to the shipper what is known as an order bill of lading for the contents of the car. The bill of lading, with a sight draft attached, was presented to plaintiff on May 25, 1916, but payment was refused. Thereupon defendant directed the carrier to stop the shipment in transit, and on or about June 10, 1916, the car was stopped at Susquehanna,

Pa., while in possession of the Erie Railroad Company. On June 28, 1916, the present writ of foreign attachment was issued to attach the contents of the car, and the railroad company was summoned as garnishee. Upon petition of the latter, a rule to show cause why the attachment should not be dissolved was granted, an answer filed and depositions taken, and an order made dissolving the attachment on the ground that the bill of lading was negotiable, and that, as the bill had not been surrendered to the carrier or its negotiation enjoined, the goods could not be attached.

[1] Plaintiff has appealed, and counsel for appellee has filed a motion to quash the appeal on the ground that it does not lie to an order dissolving a writ of foreign attachment. If it were necessary to review the decision of the court below upon any question of fact, this appeal would not be entertained. But the fifth assignment of error brings before us the entire proceeding and shows the basis of the court's action in dissolving the attachment. There is no conflict as to evidence, no question as to credibility of witnesses, no facts in dispute. The question presented is purely one of law, and as such it may be reviewed. By plaintiff's answer it is expressly admitted that the bill of lading was a negotiable instrument. Being negotiable, section 24 of the act of June 9, 1911 (P. L. 843), protects the goods which it represents from attachment or garnishment, "unless the bill be first surrendered to the carrier or its negotiation enjoined." The garnishee avers in its petition that the bill has not been surrendered to it, and that its negotiation has not been enjoined. This averment is not denied by the answer, and there is neither allegation nor proof that it has been surrendered or that its negotiation has been enjoined. The burden of proof was upon the attaching creditor to establish the facts necessary to maintain the attachment.

[2, 3] Whether the garnishee, after the stoppage in transit of the goods, continued to hold them as carrier, or was then to be regarded as a warehouseman or mere bailee, the result is the same. The act of March 11, 1909 (P. L. 24) § 25, relating to warehouse receipts, and the act of May 19, 1915 (P. L. 554) § 39, relating to the sale of goods, both contain provisions on the subject under discussion which are identical with the provision of the act of 1911. The language of the statutes is plain, and leaves no room for construction. Unless the bill of lading has been surrendered or its negotiation enjoined, the goods are not subject to attachment. The court below was therefore entirely right in dissolving the attachment.

[4] There is no merit in the suggestion that, as this was an interstate shipment, the effect to be given to the bill of lading is a question of general law. Even if this were so, we do not know that it would make any difference.

In the absence of a statute protecting the carrier under such circumstances, plain common sense would prevent the surrender of the goods under attachment while a negotiable bill of lading for them was outstanding, which might convey title to the goods to a third party. But the plaintiff in this case sought the aid of a state court, in pursuance of a purely statutory remedy, and is bound by the terms of the state law. As a matter of fact, no federal statute has been cited which gives to a creditor the right to a writ of foreign attachment. Moreover, our act of 1911 in no way interferes with interstate commerce. On the contrary, its effect is to prevent interference which might otherwise be attempted by attachment of goods in transit. In *Penna. R. R. Co. v. Hughes*, 191 U. S. 477, 488, 24 Sup. Ct. 132, 135 (48 L. Ed. 268), Mr. Justice Day said:

"It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

In *Davis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 217 U. S. 157, 177, 30 Sup. Ct. 463, 469 (54 L. Ed. 708, 27 L. R. A. [N. S.] 823, 18 Ann. Cas. 907), it was expressly held that cars engaged in interstate commerce may be attached under state laws. Mr. Justice McKenna said:

"It is very certain that when Congress enacted the Interstate Commerce Law (Act Feb. 4, 1887, c. 104, 24 Stat. 379) it did not intend to abrogate the attachment laws of the states."

Counsel for appellant also argues that the restriction applies only to goods in transit, and that if stopped, as they were in this case, the protection ceases, and they become liable to attachment. The statute, however, applies so long as the goods are in the possession of the carrier. The language is:

"If goods are delivered to a carrier by the owner, * * * and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise."

Aside from this, as previously stated herein, even if the capacity in which the carrier holds the goods be changed, by the stoppage in transit to that of warehouseman, or of bailee generally, the acts of March 11, 1909, and May 19, 1915, above cited, would continue the exemption.

The assignments of error are overruled, and the judgment is affirmed.

(357 Pa. 519)

MCGINLEY et al. v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. RAILROADS §282(11) — NEGLIGENCE — SHOOTING OF TRESPASSER—EVIDENCE.

In an action against a railroad for injury to a boy negligently shot by defendant's special officer while stealing a ride on a freight train, case held for the jury.

2. DAMAGES §99—INJURY TO INFANT SON—AMOUNT.

The father of the injured boy, suing jointly with the son, was entitled to recover compensation for the loss of the son's wages between the time of the injury and his majority.

3. DAMAGES §26, 172(1)—PERSONAL INJURY —FUTURE EARNINGS.

A minor suing for personal injury may recover for future loss of earnings, in determining the amount of which the jury may consider what he had earned after the accident and before his disability became permanent.

4. TRIAL §278—INSTRUCTIONS—OBJECTION.

Counsel must call the court's attention to an erroneous reference to any fact stated in its charge, so that it may be corrected before the jury retires, and otherwise it cannot be taken advantage of.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by James M. McGinley, by his father and next friend, Nell McGinley, and by Neil McGinley, against the Philadelphia & Reading Railway Company, to recover for personal injury. Judgment for plaintiffs, and defendant appeals. Affirmed.

From the record it appeared that on September 16, 1914, three boys decided to go to Tamaqua to seek work. They planned to ride a certain freight train without paying their fares. They entered the train yard by the street entrance, passed the railroad watchman, asked him about the train, walked to a nearby point in the yard and awaited the train. They boarded it while moving, and the train did not stop until halted a few minutes later to take off the boys. Their intention to board the train or their presence on it were known at once. The railroad officers were notified by telephone that the boys were on it, and were ordered to take them off. The man who did the shooting boarded the train at or about the same time they did. When the train stopped a few minutes later, the boys were found on the bumpers between different cars some distance apart. Upon seeing one of the boys the officer who did the shooting drew his revolver and told that boy to come down. He did so. In company with the second officer he walked that boy forward, and, seeing the plaintiff between the two cars, said, "Here is another fellow," and without further word pointed his revolver at the plaintiff and shot him as he turned to get off the car on the opposite side. There was no felony, either committed or intended, nor any evidence of suspicion of one. The charge preferred by the officers immediately afterwards was train riding as to one and as to the plaintiff carrying concealed weapons. The bullet entered the boy's hip joint. Operation failed to remove it, and he was maimed for life. He was 19 years old at the date of the accident. His earning capacity was almost totally destroyed. The trial judge charged the jury in part as follows:

If there is to be a verdict against the defendant, the father is entitled to receive such a sum

of money as will make up to him for the loss of such wages as his son probably would have made between the time of the accident and his twenty-first birthday, November 18, 1916. If there is to be a verdict against the defendant, you may, besides giving the young man compensation for the pain and suffering up to the present endured, and such as may come on him in the future, make allowance in respect to diminution of his earning power; that is, you may compensate him for his future loss of earnings. As to what those will be the case is not very clear. He may live to be an old man; he may be cut down in his prime; he may die young. Just what he would earn as a machinist's helper—I think that was his original occupation—I cannot say. You have heard what the witnesses have said on that point and will take it into account.

Verdict for plaintiff, James M. McGinley, for \$10,000 and for Neil McGinley for \$1,000 and judgment thereon.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

William Clarke Mason, of Philadelphia, for appellant. J. Morris Yeakle, of Philadelphia, for appellees.

PER CURIAM. [1-4] This case was for the jury, and the learned trial judge would have erred if he had affirmed defendant's point asking that a verdict be directed in its favor. Complaint is made of certain portions of the charge as inaccurately referring to the testimony. If any fact was inaccurately or erroneously stated in the instructions to the jury, it was the duty of counsel for defendant to call the trial judge's attention to his inadvertence, that the same might be corrected before the jury retired. Nowlis v. Hurwitz, 232 Pa. 154, 81 Atl. 143. We discover no error in the trial judge's comment on the testimony, as he left it to the jury to freely determine what the real facts were, and to return their verdict in accordance therewith. While there was no evidence of what the plaintiff had earned before he was injured, there was testimony that after the accident, and before his disability became permanent, he was earning \$8 per week. That was sufficient for the instructions which are the subject of the fourth and fifth assignments of error. The jury could well have found that the plaintiff's earning capacity before he was crippled was at least equal to what it was afterwards.

The assignments of error are overruled, and the judgment is affirmed.

(257 Pa. 547)

PRENDERGAST et al. v. WALLS et al.
(Supreme Court of Pennsylvania. April 16, 1917.)

NUISANCE — §61 — GARAGE IN RESIDENTIAL DISTRICT — INJUNCTION.

The operation of a public service garage will be enjoined where it appears that the district was exclusively residential, that the garage was within a short distance of large church edifices,

a parochial school and modern houses, that it will necessarily create noises, odors, and dangers, interfere with church services, reduce the values of surrounding property, increase the insurance rate, and tend to the removal of persons living in the neighborhood.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Edmond F. Prendergast and others against Walter Walls and others to enjoin the erection and maintenance of a garage. From a decree for plaintiffs, defendants appeal. Appeal dismissed, and decree affirmed.

It appeared by the record that the defendants proposed to erect a one-story building for automobile garage purposes at the southwest corner of Thirty-Eighth and Chestnut streets, in the city of Philadelphia. The complainants were the owners of property in the neighborhood.

The essential facts appear in the sixteenth, twenty-first, twenty-second, and twenty-third findings of fact by the chancellor as follows:

"16. The neighborhood immediately surrounding the place where the proposed garage is to be erected is exclusively residential in character. It is exceptionally quiet, well adapted for persons desiring homes of modest size and within comparatively short distance from the central portion of the city. Each of the said churches are imposing edifices of magnificent proportions and represent the expenditure of much labor and wealth. Nearly all of the houses in the region are modern in construction, some of them with extensive lawns, large and architecturally beautiful. There are no manufactories or factories in the immediate vicinity. The general conditions were aptly described by Mr. Carson when he testified that it was a 'serene, peaceful, and delightful region for residences of people wishing to be near to the center of the city who have a dislike for railroad trains or long rides on the elevated.' The sentiments inspired by their homes and their religious associations, the desire to preserve and protect their dear ones and those under their charge in the enjoyment of the peace and safety which they presently possess alone actuate the plaintiffs in the conduct of these proceedings. The defendants' motives do not appear of record. There are many less expensive locations in that vicinity on the market which could be used as a public service garage without constituting a nuisance and without injury to others."

"21. If this garage is erected and operated according to the plans and specifications, there will necessarily be noises, odors, and dangers. Automobiles will be passing in and out of the said garage intermittently during the entire day and night; there will be pounding upon metals; testing of the engines at varying rates of speed to which will be incident the continuous explosions of gasoline in the motors of varied intensity; speeding and racing of motors. These noises will occur during the day and the night and would be heard for various distances, depending upon the then existing conditions; the odors from the gasoline and oils will be disagreeable and offensive; smoke will be emitted from the motors of the automobiles in varied quantities depending upon the kind of machines, the skill of the operator, the atmospheric and other conditions, all of which would be more or less noticeable in the immediate neighborhood and unpleasant to the persons with whom it came in contact. The entrance and exit of

the automobiles over the Thirty-Eighth street pavement into the garage during the day and night will be dangerous to the pedestrians (especially the children) passing along those streets. It will ex necessitate (particularly in winter) the more or less continuous sounding of horns, noise, and confusion. All of these matters would seriously and permanently interfere with the peaceful enjoyment of the plaintiffs' homes and the residences of the tenants of the properties belonging to the plaintiff Penfield; the lives and safety of the children attending the parochial schools would be endangered; the worshipping in the several churches hereinbefore specifically mentioned, more particularly the St. James Church, would be seriously interfered with; the beauty of the services marred. The conduct of the garage would result in the congregating of a number of persons in and about the property. This would have a pernicious effect upon the children who pass and repass the garage. The storage of 500 gallons of gasoline in the ground (the top of the tank being two feet below the ground), the storage of the automobiles, the keeping of the quantities of oils necessary for the operation and lubrication of the automobiles, smoking by attendants and others, the use of electric current near the gasoline and oils, the adjusting of carburetors, replacing of tires, moving and washing of the cars at night, back-fire of motor cars, explosions of gasoline, will all result in added danger from conflagration. All of which will have the effect of reducing the values of the properties surrounding the garage and will tend to the removal of the tenants presently living in the neighborhood. It will increase the rates of insurance, will impose additional burdens upon the surrounding properties, and will decrease the net return therefrom.

"22. Defendants were duly notified that the erection and maintenance of a garage upon the premises mentioned would be objected to, and that proceedings would be instituted to restrain such erection.

"23. The maintenance of a public service garage at the southwest corner of Thirty-Eighth and Chestnut streets will be a nuisance, distinctly prejudicial to the welfare, comfort, safety, and peace of the persons residing in the immediate vicinity, to those attending the schools and to those worshipping in the said churches."

The chancellor reached the following conclusions of law:

1. Plaintiffs are entitled to the free use and enjoyment of their respective properties without undue interference by the defendants. To the extent to which such use is denied or interfered with by the defendants, they create a nuisance against which plaintiffs are entitled to equitable relief.

2. The maintenance of a public service garage at the southwest corner of Thirty-Eighth and Chestnut streets will unreasonably and unduly interfere with the use and enjoyment by the plaintiffs of the properties respectively owned and leased by them.

3. Plaintiffs are entitled to an injunction perpetually restraining the defendants from maintaining a public service garage at the southwest corner of Thirty-Eighth and Chestnut streets, in the city of Philadelphia.

The lower court entered a decree perpetually restraining defendants from maintaining or conducting a public service garage at the locality in question, and placed the costs of the proceeding upon the defendants. Defendants appealed.

Error assigned, among others, was the decree of the court.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

James W. Laws, Elton J. Buckley, and Frederick J. Geiger, all of Philadelphia, for appellants. Thomas Raeburn White, Hampton L. Carson, A. A. Hirst, Joseph Carson, John P. Connelly, Meredith Hanna, Frederick C. Newbourg, Jr., and William B. Bodine, Jr., all of Philadelphia, for appellees.

PER CURIAM. This appeal is dismissed and the decree affirmed, at appellants' costs, on the sixteenth, twenty-first, twenty-second, and twenty-third facts found by the learned chancellor below, which were followed by three correct legal conclusions.

(357 Pa. 377)

In re MCCAULEY'S ESTATE

Appeal of LOVE.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. WILLS §=634(9) — CONSTRUCTION OF DEVISE—VESTED REMAINDER.

Under a will bequeathing a life interest to his widow and directing that on her death the balance be converted into money and divided into three equal parts and bequeathing one of such parts to a sister if living, or, if deceased, then in equal parts to her children and to the issue of such of them as were then deceased, such issue to take such part as their parent would have taken if living, and where the sister died during the lifetime of the life tenant leaving two children, the one who predeceased the life tenant took a vested interest.

2. WILLS §=630(1)—CONSTRUCTION OF LEGACY—VESTED REMAINDER.

Where a legacy is payable at a future time certain to arrive and not subject to conditions precedent, it is vested where there is a person in esse at the testator's death capable of taking when the time of payment arrives, although his interest is liable to be defeated by his own death.

3. WILLS §=630(1)—BEQUEST TO A CLASS—CONTINGENT OR VESTED REMAINDER.

Where the bequest is to a class, the vesting is not postponed because of an uncertainty as to who may constitute the class at the time fixed for the enjoyment of it; and, if there is a present right to a future possession which may be defeated by a future event contingent or certain, there is a vested estate.

Appeal from Orphans' Court, Philadelphia County.

Robert J. Love administrator of the estate of Rebecca N. Love, deceased, appeals from a decree dismissing exceptions to adjudication in the estate of John McCauley, deceased. Reversed, with order for distribution.

Argued before MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Thomas F. McMahon, of Philadelphia, for appellant. Bayard Henry and Thomas Stokes, both of Philadelphia, for appellee.

STEWART, J. [1] The appeal in this case raises the single question whether under the

will to be considered the gift to the children of testator's niece, Anna Jane White, constituted a vested or contingent remainder. The orphans' court held it to be contingent, and made distribution accordingly. The appellant insists this was error. The portion of the will that gives rise to the controversy is found in the latter part of the sixth section, wherein testator makes disposition of a third part of his residuary estate not previously disposed of in the will, and which reads as follows:

"And the remaining third part or share of the proceeds of my residuary estate I give and bequeath to my sister, Anna Jane White, if living, or her children if she be then deceased, in equal parts or shares, and to the issue of such of them as may then be deceased, such issue taking, however, such part or shares as his, her or their parent or parents would have taken if living."

By a previous clause in this same section of the will, testator had given his wife a life interest in his entire estate, and had directed that upon her death the entire balance then remaining of his estate should be converted into money, and divided into three equal parts. He then proceeds to dispose of these parts or shares separately. We are concerned here only with the third given to Mrs. White or her children.

The testator died in 1897. The widow, the life tenant, died in 1915. Mrs. Anna J. White, the sister to whom, if living, was given the entire one-third, died in November, 1899, leaving to survive her two children, Elizabeth W. Weaver and Rebecca N. Love, the latter of whom, intermarried with Robert J. Love, died August 24, 1903, intestate, without issue, leaving to survive her a husband, Robert J. Love, to whom letters of administration on the estate of his deceased wife were granted. On this state of facts the learned auditing judge held that Mrs. Love's right to take was contingent on her surviving the life tenant, and that, having predeceased the life tenant, the latter having survived until 1915, she took nothing under the will. In this conclusion we cannot concur. It is in effect importing into the gift to the children, without any warrant whatever, a condition which the testator attached to and made inseparable from the gift to the mother, namely, that she was to take at the termination of the life estate if she was then living. What reason can there be for inferring that it was testator's intent to subject this alternative gift over to the children to a like condition; that is, survivorship at the expiration of the life tenancy? To do so would be in defiance of accepted rules of construction and make another will for the testator than that he himself published and declared. The testator here attached such condition to the gift to the mother in unmistakable terms, showing that he knew how to effect his purpose where that purpose was to make the gift contingent upon survivorship. The fact that he coupled no such condition as "if then living," to the gift over

to the children is quite as conclusive that he did not intend to subject it to similar contingency. Besides, the gift to the children was as substantive and independent as the gift to the mother which failed, and therefore it is to stand unaffected by the restriction or contingency that attached to the former. 2 Jarman on Wills, § 447. The gift to the parent having failed because of her death during the continuance of the life estate, this feature of the will calls for no further consideration, and we may pass at once to a consideration of the alternative gift "to her children, in equal parts or shares, and to the issue of such of them as may then be deceased, such issue taking, however, such part or shares as his, her, or their parent or parents would have taken if living." It is upon the words "if living" and "if she be then deceased" that the appellee relies as showing that it was the testator's intention to restrict the class of children to such as might be living at the determination of the life estate, and such issue of any deceased child as might then be living. Inasmuch as Mrs. Love died during the continuance of the life estate, and without issue surviving, it is argued that the gift to her, as one of a class, was intended by the testator to be contingent upon her living at the period of distribution, or upon her having left issue who had survived such period. However ingenious the argument that would derive from the words especially urged upon our notice an intention to make the gift to the issue contingent, it must fall of its purpose when it is considered that what is required in such case is not that the words of the will admit of a possible or even a reasonable inference that the testator intended a contingent remainder, but that such intention should appear plainly, manifestly, and indisputably. Certainly it cannot be contended that the words here employed, in the connection in which they appear, are so demonstrative of a purpose to make the gift to the children contingent upon their survival, as to exclude necessarily a contrary purpose, especially in view of the fact that testator knew how to make such a gift contingent in an indisputable way, as is shown by the gift that failed, the gift to the mother "if living," and failed to attach any such provision in the gift to the children; and in view of the further fact that if such construction is to prevail, it necessarily results that testator died intestate as to such interest as Mrs. Love would have taken had she survived, seeing that there is no gift over should she not survive to take, and no disposition is made of that share. There is no suggestion that intestacy was intended. While it is true that the law always seeks to give effect to a testator's purpose, and insists that such purpose is to be derived from the language he has employed, it is no less true that the law favors vested remainders, so much so that it will presume such was the

intention of the testator, except as the language shows indisputably the contrary intent. It necessarily follows that, even granting the contention of appellee so far as to admit that the language of the testator is not inconsistent with the purpose to make the gift to the children contingent, it is, nevertheless, because of what we have indicated as sufficient, if not conclusive, reason for deriving a contrary intention, the real effect is to be determined by applying the established rules of construction. So familiar are these rules to the professional mind that it would lengthen this opinion to no purpose to cite support for the authority of such as we shall state, and which we regard as controlling here.

[2] Where a legacy is made payable at a future time, certain to arrive, and not subject to condition precedent, it is vested where there is a person in esse at the time of the testator's death capable of taking when the time arrives, although his interest be liable to be defeated altogether by his own death.

[3] Where a bequest is to a class, the vesting is not postponed because of uncertainty as to who, if any, may be the constituents of the class at the time fixed for the enjoyment of it.

If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate.

These rules are applicable to and must govern this case. They have been applied in cases almost without number, and while in some of the cases there may be apparent departure from one or more, certainly in none of those cited by the appellee have any of them been disregarded or their authority questioned in any way. The cases which have been supposed at variance, or so distinguished on their facts as to be outside the operation of these rules, including all those cases relied upon by the appellee here, are all reviewed and discussed at length in the recent case of *Neel's Est.*, 252 Pa. 394, 97 Atl. 502, and in *Rau's Est.*, 254 Pa. 464, 98 Atl. 1068, and we feel that nothing can profitably be added to what is said in those cases.

Our conclusion is that under the will of John McCauley the gift to the children of testator's niece, payable at the latter's death, was vested in such of her children as were living at the death of the testator. If this be correct, it must follow that the share of Mrs. Rebecca N. Love, one of said children, was not divested by reason of her death before that of her mother, and that distribution of her interest or share should have been made to her legal representative, this appellant. The judgment of the court below is accordingly reversed, and distribution is ordered to be made in accordance with the view here expressed.

(257 Pa. 560)

LAND TITLE & TRUST CO. v. McGARRITY.

(Supreme Court of Pennsylvania. April 16, 1917.)

LIMITATION OF ACTIONS §25(6) — MONEY LENT.

An action for money loaned by plaintiff's decedent in 1897, not brought until 1910, eight years after decedent's death, was barred by the statute of limitations.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the Land Title & Trust Company, administrator d. b. n. c. t. a. of the Estate of Bridget Loughran, deceased, substituted plaintiff, against Joseph McGarrity to recover money loaned. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, and WALLING, JJ.

Henry A. Hoefler and Michael Francis Doyle, both of Philadelphia, for appellant. William A. Gray, of Philadelphia, for appellee.

PER CURIAM. This action was brought upon a writing of which the following is a copy: "Received of Mrs. Bridget Loughran 6000, payable at the pleasure of Joseph McGarrity." The paper was executed by the defendant and given to Mrs. Loughran some time in 1897. He got the money from her the year before. He was the only witness in the case, having been called by the plaintiff as under cross-examination. According to his testimony, the money was a gift to him by his aunt, but, even if this were not so, the action on the writing was barred by the statute of limitations. Mrs. Loughran died in 1902, and this action was not brought until 1910.

The nonsuit was properly entered, and the judgment is affirmed.

(257 Pa. 545)

MCCOACH, County Treasurer, v. SHEEHAN, Register of Wills.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. COUNTIES §78(1/2) — COUNTY OFFICERS — FEES.

The fees and commissions of a county register of wills payable, under Act July 21, 1913 (P. L. 878), to the county treasurer, are not so payable for his benefit in his private or official capacity, but are paid into the treasury because they belong to the county.

2. COUNTIES §218 — ACTIONS — COUNTY OFFICERS.

An action for money due a county should be brought in its name, and not in the name of its treasurer, and the treasurer's appeal from an unsuccessful action brought in his own name would be dismissed, without prejudice to the county's action.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for commissions by William McCoach, Treasurer of the County of Philadelphia, against James B. Sheehan, Register of Wills of Philadelphia County. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

David McCoach, of Philadelphia, for appellant. Joseph Gillilan and Samuel M. Clement, Jr., both of Philadelphia, for appellee.

PER CURIAM. If James B. Sheehan, register of wills of Philadelphia county, has no right to retain the commissions allowed him by the commonwealth on collateral inheritance tax collected by him for its use, but must pay the same to the county, under the act of July 21, 1913 (P. L. 878), it is the only party to compel him to pay. The learned president judge of the court below recognized this in saying:

"The judgment here entered cannot bind the county of Philadelphia. The fees and commissions of the register are, by the act of July 21, 1913 (P. L. 878), made payable into the county treasurer. They are not, however, to be paid into it for the benefit of the treasurer, either in his private or his official capacity. They are to be paid into its treasury because they belong to the county. In Pennsylvania the county is a juridical person. Section 3 of the act of April 15, 1834 (P. L. 538), declares that it shall have capacity as a body corporate, to sue and be sued by its corporate name, and to take and hold real estate and personal property. By section 5 of the same act it is provided that 'all suits by a county shall be brought and conducted by the commissioners thereof, and in all suits against a county, process shall be served upon and defense made by the commissioners.' An action for the recovery of money due to a county should therefore be brought in the name of the county itself, and not in that of one of its officers, and should be instituted in its name by its commissioners, and not by its treasurer. The latter has no greater right to sue for money payable to him for the use of the county, whether he is mentioned in the præcipe for the writ by his own name alone, or described by the addition thereto of his official title, than he would have while treasurer of a private corporation to initiate an action in his own name for the recovery of money due to it. The proper practice in cases of this character is exemplified in the case of Allegheny County v. Stengel, 213 Pa. 493, 63 Atl. 58. It is to be regretted that the precedent afforded by the proceedings there was not followed in this case, since, unless our views on the subjects above discussed commend themselves to the proper county authorities, the whole matter must be litigated again."

In view of this correct conclusion, the court should have gone further and declined to determine the questions raised by the case stated as not being properly before it. Those questions are not now properly before us, and we cannot pass upon them until they are brought up on an appeal from a judg-

ment in a case to which proper parties are litigants. Appeal dismissed without prejudice to any right the county of Philadelphia may have to recover the commissions which were the subject of the case stated.

(257 Pa. 495)

MUTUAL LOAN & SAVINGS ASS'N OF CHAMBERSBURG v. NATIONAL SURETY CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

INSURANCE — 285 — FIDELITY BOND — MISREPRESENTATIONS — LIABILITY.

A surety company issuing a fidelity bond indemnifying a loan and savings association against loss by its treasurer's misappropriation of funds, based upon the false material declarations of the association's president that a certain character of audit had been held on the treasurer's books and accounts, which would have indicated his dishonesty, and that it had shown favorable results, was not liable on the bond for the treasurer's shortage.

Appeal from Court of Common Pleas, Franklin County.

Assumpsit on a surety bond by the Mutual Loan & Savings Association of Chambersburg against the National Surety Company. Verdict for plaintiff for \$5,988.30, and judgment thereon, and defendant appeals. Reversed, and judgment entered for defendant.

See, also, 253 Pa. 351, 98 Atl. 600.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Donald Thompson, of Pittsburg, Charles Walter and J. A. Strite, both of Chambersburg, Arthur J. Stobbart, of New York City, and George Calvert, of Pittsburgh, for appellant. W. K. Sharpe, O. O. Bowers, and William S. Hoerner, all of Chambersburg, for appellee.

MOSCHZISKER, J. In February, 1912, the defendant company executed and delivered to the Mutual Loan & Savings Association of Chambersburg a fidelity bond in the sum of \$5,000, indemnifying the latter for one year against pecuniary loss by reason of any misappropriation of funds which might be committed by its treasurer, Isaac Stine. This obligation was renewed and in force on March 3, 1913, on which date Stine died, a defaulter, owing over \$8,000 to the association. Shortly thereafter William S. Hoerner, the plaintiff's attorney, notified the defendant of the shortage on Mr. Stine's account. The surety company denied liability; suit was brought on the bond; the case came to trial, and the verdict favored the plaintiff; defendant has appealed.

The plaintiff is a local building and loan association, incorporated under the laws of Pennsylvania; its constitution stipulates the following officers: A president, vice president, secretary, treasurer, board of directors, and an attorney. In addition, the by-laws pro-

vide that a "general manager" who "shall have general charge and management of the business," shall be appointed by the board; that the president shall perform "such duties as usually appertain to that office"; that the secretary shall be the custodian of the papers and securities of the association, keep its records, receipt to the members for moneys paid by them, turning the same over to the treasurer at least once in each week, make reports of the "finances and business of the association"; and, finally, that, "in the absence or disability of the general manager, he [the secretary] may act in his stead." The treasurer is required to "deposit all moneys received by him in the name of the association in some good and solvent bank," to keep accounts, subject to inspection by "the auditing committee" of the association, and to give a bond for the faithful performance of his duties. The attorney is required to give legal advice and to "attend to all legal matters in which the association is interested," with express "authority to enter the appearance of the association in any proceeding." The by-laws further provide that annually the president shall appoint three competent stockholders to act as an auditing committee.

The trial judge, without objection, permitted the defendant to call Mr. Hoerner, the attorney of the association, "as under cross-examination," and from his testimony it appears that in December, 1912, Miss Bassett, its secretary, received, from the bank where Mr. Stine kept his treasurer's account, notice to the effect that interest was due on a loan which, some time previous thereto, the latter was supposed to have paid off with funds specially appropriated for that purpose. The secretary took this notice to Mr. Hoerner, as the attorney for the association, and he had an interview with one of the officers of the bank, who informed him that the obligation in question was still due and unpaid. This evidently made Mr. Hoerner suspicious, for he inquired as to the treasurer's bank balance, which information was refused. The attorney then called upon Mr. Stine, who confessed that he had not paid the note, and that his failure in this respect "was due to his not having * * * enough funds in bank to pay it."

It appears that the plaintiff association had no general manager; that Miss Bassett, the secretary, was in charge of its office, which adjoined the private law office of Mr. Hoerner; and, so far as the evidence indicates, these two looked after the daily routine affairs of the concern. Although the secretary had the knowledge already indicated of the treasurer's default, and turned the matter over to the association's attorney for further investigation, yet the other officers and directors of the institution were not officially informed upon the subject until after Mr. Stine's decease.

The bond in suit provides, *inter alia*, "that, if the employer or any officer becomes aware of the employé * * * committing any * * * unlawful act, the surety shall be immediately notified"; further, that "upon becoming aware of any act which may be made the basis of a claim hereunder, the employer shall give immediate notice thereof to the surety." As already stated, no notice was given to the defendant company by the plaintiff association of its treasurer's default until after the latter's death. It appears that Mr. Stine, who enjoyed good standing and financial credit in life, died insolvent; hence the defendant claimed there had been a material departure to its prejudice from the terms of the bond; but the trial judge instructed that, on the facts at bar, the plaintiff was not "in default with respect to either of said [previously quoted] conditions," and this is complained of in several assignments of error. It is not necessary to pass upon the complaints in question, however, for we are convinced that binding instructions should have been given for the defendant on another point that rules the case as a whole. This we shall next consider.

When the bond in suit was applied for, the plaintiff's president made these written statements: (a) That a thorough examination of the books and accounts of the association would take place, and all "cash, securities, etc., be counted, compared, and verified" in August of each year; (b) that such an examination had in fact been made in the prior August, by the auditors of the association, and the books and accounts were then found correct in every particular. At the trial the men who made the audit in question were called, and admitted that, although they had served the association in this capacity for many years, they did not at any time either count the cash and securities on hand, look at the bank book, or make inquiry at the depository as to the balance in the treasurer's account, contenting themselves by simply inquiring of Mr. Stine whether he had sufficient cash in bank or on hand to cover the balances shown by the books, and accepting his reply as a verity. Likewise it appeared that, had the auditors examined Mr. Stine's bank account or made proper inquiry, they would have discovered an apparent deficit existing at the time of the application for the surety bond, and subsequent audits would have shown an increase in the amount of this shortage. With these facts established by either documentary evidence or uncontested and undisputed testimony, the trial judge instructed the jury that, unless they found the statements contained in the application for the bond "knowingly false and fraudulent" and made "with an intent to deceive" (as to which there was no evidence), their falsity in fact would not defeat a recovery. This instruction, which is directly contrary to the law as laid down by us in *National*

Bank of Tarentum v. Equitable Trust Co. of Pittsburg, 223 Pa. 328, 72 Atl. 794, is complained of in several assignments of error, the appellant contending that, under the established law, on the material facts relevant to this branch of the case, it was entitled to the verdict without regard to the question of plaintiff's intent, the only material issue being as to the substantial truth or falsity of the statements in question.

In the *Tarentum* Case, the defendant executed a fidelity bond on a bookkeeper employed by the plaintiff bank. For the purpose of obtaining this bond, an officer of the latter institution certified that the books and accounts of its employé had been examined and found accurate in every respect. The bookkeeper proved dishonest, and, in a suit against the surety company to compel the latter to make good the amount of the former's speculations, it was shown that he had been systematically stealing from his employer for some time past. The evidence indicated that, "had an effective audit * * * been made by the bank," prior to the application for the bond, in all probability the fraudulent practices of the bookkeeper would have been discovered, and this would have "prevented the issue of any such certificate as was given to the defendant company." The trial judge submitted to the jury the questions whether the statements contained in the certificate accompanying the application for the bond "were untrue or substantially true," with instructions that, if they found the latter to be the case, then there was no defense to the action and the plaintiff ought to have a verdict; but adding that, if they found such statements were "not substantially true and were misleading in regard to the examination of his [the bookkeeper's] accounts," then the verdict ought to be for the defendant. The verdict accorded with this last instruction, and we sustained the judgment entered thereon for the defendant, saying, "The information asked for by the trust company was entirely proper for its guidance in the transaction"; that, "without doubt," the bond was given "upon the faith of the statements contained in the certificate"; and that, under such circumstances, "the bank cannot be heard in disavowal of the representations made by its executive officer, which led the defendant company to agree to continue its responsibility."

In the case at bar, the plaintiff did not attempt to show that any such examination of its books, as stated by its president, when he applied for the bond in suit, had, in fact been made. On the contrary, as to this, it

simply contended that the defendant had failed to prove the statements, with reference to the last prior audit to have been fraudulently made with an intent to deceive. In all essential particulars, the false statements in the present case are identical with those in the *Tarentum* Case. In each instance the surety company was misled by material written declarations, to the effect that a certain character of audit had been held upon the books and accounts of the person whose honesty was to be underwritten, and that such audit had shown certain favorable results, whereas, in point of fact, there had been no such audit as certified, and, had it been held, the dishonesty of the person about to be bonded would undoubtedly have been indicated. The two cases, however, are sought to be distinguished by the court below on the ground that, in the one cited by appellant, the plaintiff certified that its employé's books, etc., had been examined by "us," while the certificate at bar states the examination had been made by auditors. We do not see any force in this attempted distinction. The plaintiffs in both instances being corporations, of course, in making their examinations, they had to act through individual representatives, be they auditors or otherwise. It was the duty of the president of the plaintiff association to ascertain the nature of the audit inquired about and depended upon by the defendant, before certifying its character to the possible prejudice of the latter.

We have examined the authorities relied upon by counsel for the appellee, holding that for certain purposes bonds such as the one in suit are viewed in the law as insurance contracts; but none of them either expressly or impliedly overrules the *Tarentum* Case, which governs here. The material facts, that bring the present controversy within the principle of the authority just cited, are established by documentary evidence, and not only uncontested but undisputed testimony, given in most part by officers or members of the plaintiff association; the verity of these facts is not attacked, only their sufficiency in law; and, finally, the inferences and conclusions to be drawn therefrom are certain and inevitable. Under the circumstances, the learned court below should have given binding instructions for the defendant. *Marks v. Anchor Savings Bank*, 252 Pa. 304, 310, 311, 97 Atl. 399, L. R. A. 1916E, 906. The fourteenth assignment, which complains of the refusal so to do, is sustained.

Judgment reversed and here entered for defendant.

(116 Me. 507)

RANKIN v. FARRAND.

(Supreme Judicial Court of Maine. Sept. 18, 1917.)

APPEAL AND ERROR §1008(1)—FINDINGS OF JUSTICE—REVIEW.

Findings of a justice in equity suit have the force of a verdict, and will not be reversed unless manifestly contrary to the evidence.

Appeal from Supreme Judicial Court, Knox County, in Equity.

Bill by Edward E. Rankin, trustee, against Helen Farrand. Bill dismissed, and plaintiff appeals. Appeal dismissed, and bill dismissed, with costs.

Argued before CORNISH, C. J., and SPEAR, BIRD, HANSON, and MADIGAN, JJ.

A. S. Littlefield, of Rockland, for appellant. Edward K. Gould, of Rockland, for appellee.

PER CURIAM. This bill in equity was brought by a trustee in bankruptcy to set aside two conveyances made to the defendant by her husband who was declared an involuntary bankrupt nine months thereafter.

The plaintiff sets up two grounds for relief: First, that the conveyances were without consideration and therefore void as to existing creditors; and, second, that they were made for an inadequate consideration and for the purpose of hindering, delaying, and defrauding creditors; the defendant participating in the fraud.

The sitting justice, after hearing the cause and fully considering the evidence, found that the proof was "not sufficient to sustain the essential allegations of the bill necessary, to be established to entitle the plaintiff to the relief prayed for." He therefore ordered the bill to be dismissed.

This finding has the force of a verdict of a jury, and is not to be reversed unless it is manifestly contrary to the weight of the evidence. After carefully considering the record and the arguments of counsel, the court is of opinion that the finding of the sitting justice was fully justified on both branches of the case, but we think the defendant is entitled to costs.

The entry will therefore be:

Appeal dismissed.

Bill dismissed, with costs.

(116 Me. 508)

MAINE MILL SUPPLY CO. v. FINKELMAN.

(Supreme Judicial Court of Maine. Sept. 20, 1917.)

1. APPEAL AND ERROR §1002 — REVIEW — VERDICT.

Where there are sharp contradictions on many points, the appellate court will not set aside a verdict not manifestly wrong and grant

a new trial, although the witnesses for the unsuccessful party outnumber those of the successful party.

2. APPEAL AND ERROR §263(1)—PRESERVATION OF GROUNDS OF REVIEW.

Where plaintiff did not call the court's attention to the misstatement of defendant's claim before the jury retired or request additional instructions, exceptions to the charge will not be sustained.

3. APPEAL AND ERROR §1064(1)—INSTRUCTIONS—COMMENTS ON EVIDENCE—HARMLESS ERROR.

Any statement in the charge as to the nationality of the parties was harmless, where the parties and the witnesses on both sides were of the same nationality.

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Assumpsit by the Maine Mill Supply Company against D. Finkelman. Verdict for defendant, and plaintiff brings exceptions. Motion and exceptions overruled.

Argued before CORNISH, C. J., and KING, BIRD, HANSON, and MADIGAN, JJ.

Benjamin L. Berman, of Lewiston, and Jacob H. Berman, of Portland, for plaintiff. Robert M. Pennell, of Portland, for defendant.

PER CURIAM. This is an action of assumpsit on a check for \$200 dated January 17, 1916, drawn by the defendant and made payable to the order of the plaintiff. Payment upon the check was seasonably stopped. The vital point at issue was one of fact namely, whether, as the plaintiff claimed, the check was given in payment of merchandise purchased and of other agreed items; or as the defendant contended, was given without consideration, and as a personal loan to one Alpren, one of the parties interested in the plaintiff corporation. The jury found in favor of the defendant.

[1] Upon plaintiff's motion for a new trial it is sufficient to say that a careful study of the evidence does not warrant the setting aside of the verdict. There are sharp contradictions on many points, and while the witnesses for the plaintiff outnumber those for the defendant, we are unable to say that in the light of all the circumstances the true weight of the evidence was so manifestly on the side of the plaintiff as to compel the rejection of the verdict.

[2, 3] Nor can the plaintiff's exceptions to a portion of the charge of the presiding justice be sustained. No error in law is claimed. The court was simply summarizing, as was his duty, the contentions of the parties. If, in so doing, any misstatement was made as to the defendant's claims, attention should have been called to the specific fact, so that the error could be corrected before the jury retired. If the court failed to fully state the claims of the plaintiff, additional instructions should have been requested. Neither was done. Any statement as to the nationality of

the parties was harmless, as the parties and witnesses on both sides were of the same nationality, as abundantly appears.

Motion and exceptions overruled.

(92 Conn. 90)

CORBIN, Tax Com'r, v. BALDWIN et al.
BALDWIN et al. v. CORBIN, Tax Com'r.
 (Supreme Court of Errors of Connecticut.
 Aug. 2, 1917.)

1. TAXATION ⚡850—"INHERITANCE TAX"—
NATURE.

Inheritance or succession taxes are not taxes laid upon persons or property, or, strictly speaking, taxes at all, but rather death duties, levied as exactions of the state in the course of the settlement of estates, as an incident to the devolution of title by force of its laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inheritance Tax.]

2. TAXATION ⚡876(1)—INHERITANCE TAX—
EXEMPTIONS — INSTITUTIONS RECEIVING
"STATE AID."

Within Pub. Acts 1915, c. 332, § 3, exempting from inheritance taxes all property passing to or in trust for the benefit of any corporation or institution located in the state which receives state aid, educational, charitable, and other corporations which are granted exemptions from general taxation, in recognition of the devotion of their property to public purposes, are institutions receiving state aid, and are entitled to exemption, since the word "aid," in its ordinary significance, has a broad and comprehensive meaning, and includes help and assistance of whatever kind and by whatever means or method provided, and there is nothing in the conditions and circumstances under which the statute was enacted, the subject-matter, the context, related legislation, or antecedent legislative history to restrict its meaning.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, State Aid.]

3. STATUTES ⚡188—CONSTRUCTION—MEAN-
ING OF LANGUAGE USED.

The presumption is that the words of a statute are used in their ordinary signification.

4. TAXATION ⚡860 — INHERITANCE TAX —
STATUTORY PROVISIONS—CONSTRUCTION.

An intention to impose inheritance taxes on property devised or bequeathed to public charitable uses, and thereby divert some portion of the estate to some other public use than that within the mind or purpose of the testator, will not be deduced from language not clearly expressing or indicating such intention.

5. TAXATION ⚡860 — INHERITANCE TAX —
STATUTORY PROVISION—CONSTRUCTION.

The rule that a portion of a statute exempting something from the operation of the general rule prescribed by the statute should receive a strict construction is subject to limitations, and does not apply to the construction of Pub. Acts 1915, c. 332, § 3, exempting property passing to corporations or institutions receiving state aid from the inheritance tax imposed by that act.

6. TAXATION ⚡895(7)—INHERITANCE TAX—
DEDUCTIONS.

In computing the amount of an inheritance tax, there should be deducted, from the total amount of the appraisal local taxes paid to the tax collector, inheritance taxes paid in another state and an income tax paid to the United States internal revenue collector.

7. TAXATION ⚡886½ — INHERITANCE TAX —
RATE OF TAXATION.

It was error to assess an inheritance tax on property not exempt at the rate of 8 per cent.

instead of 5 per cent. on \$49,000, 6 per cent. on the next \$200,000, and 7 per cent. on the balance.

Wheeler and Roraback, JJ., dissenting.

Case reserved from Superior Court, New Haven County; Donald T. Warner, Judge.

Proceeding to assess an inheritance tax on the estate of Justus S. Hotchkiss deceased. From an order and decree of the probate court determining the amount of the tax, William H. Corbin, tax commissioner, and Simeon E. Baldwin and others, executors, appealed to the superior court, which reserved the appeals for the advice of the Supreme Court of Errors upon the demurrers filed by the tax commissioner to the answers to the reasons of appeal on the executors' appeal, and the demurrers to the reasons of appeal on the tax commissioner's appeal. Judgment advised.

Justus S. Hotchkiss, late of New Haven, died possessed of an estate appraised in the inventory thereof at approximately \$2,000,000. By his will he made bequests and devises to various persons and corporations. Among them were the First Ecclesiastical Society of New Haven, the General Hospital Society of Connecticut, the New Haven City Burial Association, the Home for the Friendless, the Lowell House, and Yale University, the latter being the residuary legatee and devisee. In the course of the administration of the estate, the court passed an order and decree adjudging (1) that the gifts to the First Ecclesiastical Society, the General Hospital Society, the New Haven City Burial Association, and Yale University were exempt from the payment of an inheritance tax; (2) that those in favor of the Home for the Friendless and the Lowell House were subject to such tax; and (3) that the amount of tax due the state was \$58,082.80, the same being figured at 8 per cent. From so much of this order and decree as established the above exemptions the tax commissioner appealed, his appeal being the first-named of the above-entitled cases. From that portion which subjected the gifts in favor of the Home for the Friendless and the Lowell House to the tax the executors appealed, their appeal being the second of the two cases. The appeal by the executors also embodied reasons of appeal alleging that the court erred in failing to make certain deductions from the total amount of the appraisal of the estate and the gains to be added thereto, and in computing the amount of tax payable at the uniform rate of 8 instead of a graduated rate of 5, 6, and 7 per cent.

George E. Hinman, Atty. Gen., and Charles W. Cramer, of Hartford, for Tax Com'r. Henry Stoddard, J. Dwight Dana, and John W. Bristol, all of New Haven, for executors.

PRENTICE, C. J. (after stating the facts as above). By the will of Mr. Hotchkiss, six corporations were made the beneficiaries of

gifts. One of these gifts, to wit, that to the General Hospital Society of Connecticut, confessedly is not subject to the payment of an inheritance tax. The tax commissioner contends that the other five are. Their beneficiaries, on the other hand, assert that they are exempt from such payment. These conflicting claims form the principal subject of these appeals.

These five beneficiaries include Yale University, a corporation chartered for educational purposes; the Home for the Friendless, and the Lowell House, the first chartered to carry on a benevolent and charitable work, and the second organized under the general law for a similar purpose; the First Ecclesiastical Society of New Haven, an ecclesiastical and religious corporation; and the Proprietors of the New Haven Burial Ground, designated in the will as the New Haven City Burial Association, incorporated for the purpose of maintaining a burial ground, and having as its sole property land exclusively used for such purpose. All of them enjoy at the hands of the state exemptions from taxation.

The record makes it clear that, if the gifts to these beneficiaries are to pass to them free from an inheritance tax, it must be by force of that provision of the statute which exempts "all property passing to or in trust for the benefit of any corporation or institution located in this state which receives state aid." Public Acts of 1915, c. 332, § 3. It also makes it equally clear that the sole claim to exemption by virtue of this statutory provision, which any of the corporations involved can successfully assert, is one founded upon the tax exemptions with which they are and for years have been favored at the hands of the state. In making this statement we do not ignore certain facts recited in the answer of Yale University demurred to, and thus presented by it in aid of its position, but they are at best of minor importance, and do not impress us as adding materially, if at all, to the strength of its position. Its claim to exemption must, therefore, rest for its support upon the proposition which it, in common with the other beneficiaries before the court, advances that the gift to it is one which it is entitled to receive without diminution by reason of the imposition of a succession tax, for the reason that it is a corporation in receipt of state aid through the medium of exemptions from taxation conferred upon it at the hands of the state.

[1] The claim thus made by the five corporations is not, it is to be borne in mind, that they are entitled to receive the gifts in their favor free from succession tax through the direct operation of statutes prescribing tax exemptions in their favor. Their claim, on the other hand, gives full recognition to the well-established law of this jurisdiction, that so-called inheritance or succession taxes are not taxes laid upon either persons or property, or, strictly speaking, taxes at all, but rather death duties, levied as exactions of

the state in the course of the settlement of estates, as an incident to the devolution of title by force of its laws. *Hopkins' Appeal*, 77 Conn. 644, 649, 60 Atl. 657; *Warner v. Corbin*, 91 Conn. 532, 100 Atl. 354. It concedes that, if the gifts to them are to escape these death duties, it must be not for the reason that they are taxes in the ordinary sense, but for the reason that the so-called inheritance tax law specifically excludes them from its operation as having been made to corporations in receipt of state aid through the medium of tax exemptions.

[2] The question at issue thus becomes narrowed to one of statutory construction. The law provides that property owned by a resident of this state at his decease, which shall pass by will or the general law of distributions to corporations or institutions in receipt of state aid, shall so pass inheritance tax free. Public Acts of 1915, c. 332, § 3. The tax commissioner contends that the corporations and institutions receiving state aid, within the true meaning and intent of this provision, are limited to those receiving pecuniary assistance by direct state appropriation, and that those corporations and institutions otherwise aided and assisted by the state's action are not included. His counsel urge that this portion of the act is to be interpreted as though it contained the qualifying words "by appropriations" or language of similar purport, so that it read "state aid by appropriations" or equivalent language. The beneficiaries of the gifts assert, on the other hand, that all those corporations and institutions aided or assisted financially in whatever way, and whether by direct appropriation of state funds, or by the provision of material agencies for the conduct of their work, or by the enhancement of their financial resources by excusing them from the payment of taxes, are to be regarded as recipients of "state aid" as that term is employed in the statute.

In *Beach v. Bradstreet*, 85 Conn. 344, 353, 82 Atl. 1030, 1033, Ann. Cas. 1913B, 946, we said that "the ordinary definition of 'aid' is help, support, or assistance," and that "state aid is support or assistance furnished by the state." The qualifying word "state" is of no importance, save as indicating the source from which the aid comes. "Aid" is the word which possesses significance for our present inquiry, and that word, as its definition clearly discloses, is one whose ordinary meaning is broad and comprehensive, and inclusive of help and assistance of whatever kind and by whatever means or method provided. There are various means and methods which may be resorted to by individuals in furnishing aid and assistance. The same is equally true of the state. It may, of course, make direct appropriations or payments by which the treasury of the recipient is replenished. If, instead, it excuses a corporation or institution from the payment of taxes, it gives aid, assistance, and support

to such corporation or institution just as much and just as efficiently as it would by the appropriation of an amount equal to the taxes the corporation or institution would be required to pay were there no exemption. The result in either case, although accomplished by different means, is precisely the same. The difference is one of method, and not of kind or degree of aid furnished. In the one case the money is paid over and paid back; in the other, no money passes. In both the result, as reflected by the treasury of each of the parties, is the same. If the language of the statute is to be accorded its ordinary and natural meaning, our conclusion must, therefore, be that state aid embraces aid given by means of exemptions from taxation as well as by other means, as, for example, by appropriations.

[3] While this is true, and the presumption is that the words of the statute were used in their ordinary signification, it does not necessarily follow that the term "state aid" was not used therein in some less comprehensive sense, or in the qualified and restricted sense for which the tax commissioner contends. His claim, therefore, calls for our inquiry as to the legislative intent, involving a consideration of the language used, its context, pertinent antecedent legislative history, related legislation, the subject-matter with which the language deals, its operation as it may be interpreted, the conditions and circumstances under which it was enacted, and all other matters calculated to throw light upon the subject of inquiry.

First and foremost we have the language of the statute. The natural and ordinary meaning of the term which is the subject of consideration does not, as we have already had occasion to observe, harmonize with the interpretation the tax commissioner would have us put upon it, and its context throws no additional light upon the sense in which it was employed.

Counsel for the tax commissioner, in aid of their contention, point to the use of the term in the indices of the Revision and Session Laws and in the body of Statutes. Our examination of the indices referred to, as well as others, discloses that under the heading of "State Aid" references are repeatedly made to statutes providing for the payment of moneys in aid of various objects. Such references are so made with undoubted propriety, since such payments are unquestionably state aid. It also reveals that in nearly as many instances statutes providing aid and assistance by other means than the payment of money to the objects to be benefited are referred to under that head. References of the two kinds are indiscriminately intermingled. This is noticeably so in the Revision, where the majority are to statutes of the latter character. As for the statutes themselves, there are two instances which have come under our observation in which the

term "state aid," judging by the context, was used in the limited sense of aid by appropriations or direct payment. Rev. Stat. §§ 183, 1368. Our attention has not been called to others of that character. Scant proof, surely, is thus furnished of an accepted, customary, or common statutory use of the term in the narrow sense contended for. Far more suggestive of the meaning in which it was employed in the statute of 1915 is the fact that in the opinion in *West Hartford v. Connecticut Fair Asso.*, 88 Conn. 627, 630, 92 Atl. 432, handed down only a few months before its enactment, we characterized tax exemptions as state aid.

Looking outside of legislation to the conditions and circumstances under which the act of 1915 was enacted, the subject-matter with which it deals, and its operation, there are several matters of large significance as bearing upon both the rule of interpretation which should be employed and the interpretation which should be given to the language in controversy.

Foremost of these is the public service character of tax-exempted corporations and institutions, and the public service performed by them which furnishes the sole reason for the existence of their exemption. While it may be true, and doubtless is, that tax exemptions have at times been granted with too great liberality and with scant regard for their fundamental reason, such is not the case in the vast majority of instances, and manifestly is not in the case of any of the parties before the court.

It is to be borne in mind that exemptions are made and can be made lawfully only in recognition of a public service performed by the beneficiary of the exemption. They are not bestowed, as is too often unthinkingly supposed, as a matter of grace or favor. If lawfully granted, as most are, and as we for present purposes are bound to assume that all are, they are granted in aid of the accomplishment of a public benefit and for the advancement of the public interest. It is in recognition of their position as an agency in the doing of things which the public, in the performance of its governmental duties, would otherwise be called upon to do at its own expense, or which ought to be done in the public interest and without private intervention would remain undone. *Yale University v. New Haven*, 71 Conn. 316, 332, 42 Atl. 87, 43 L. R. A. 490. In the fullest sense of the word, the exemptions are given for the assistance and help of the private endeavor in its effort to advance the public interest or to perform some share of the public governmental duty.

This is true not only theoretically but practically. The extent of the public service, and of that service within the range of governmental duty, which is performed by private beneficiaries operating through the medium of tax-exempted institutions and corporations

is enormous, and the importance and value of it in its purely public aspects incalculable. The amount of taxes which are lost to the state and its political subdivisions by reason of exemptions are of trifling consequence as compared with the sums coming from private sources which are spent for the public weal. They are trifling as compared with those spent for purposes governmental in their character, and which but for the private expenditure would become a charge upon the public treasury if the governmental duty of an enlightened modern state is to be performed.

The history and service of Yale University, one of the present beneficiaries having the largest interest under the will before us, furnishes a forcible illustration of the truth of the foregoing observations. The numerous charitable institutions of the state, among which are two of the institutions before the court, furnish other incidents as striking. But we may well take as a single example the typical one afforded by Yale.

It had its origin in a profound conviction on the part of the leaders of the infant colony that the public welfare demanded the establishment within its borders of a school of higher education, where young men might be prepared and trained to render the best public service to the community and state. The task of providing such a school in those days was no small one, but the urgency of the need, if the colony was to prosper and maintain the necessary standard of intelligent and capable leadership, was so keenly felt and appreciated that, in spite of the difficulties, the longed-for institution came into its first modest existence. Its charter expressed the feeling of the time as to the place it was intended it should occupy as a public agency when it characterized the purpose of the projected school as one wherein "youth may be instructed in the arts and sciences, who, through the blessing of Almighty God, may be fitted for public employment both in church and civil state." The history of the institution thus founded need not be followed through the succeeding years further than to observe that from the first it has enjoyed exemption from taxation, and not infrequently was made the recipient from the state of direct financial help.

Can any one, who reads the story of Yale's beginning and development, doubt that our fathers in founding it did so to provide what they thought to be a much needed agency of public service, that the colony, and subsequently the state, in making direct gifts and tax exemptions in its favor, were actuated by the same high purpose, and that the tax exemptions early made and through the years since maintained was made for the conscious purpose of giving substantial aid to the undertaking whose work it was felt was and would continue to be fraught with great public benefit to community and state?

The same appreciation of the public service rendered by institutions of higher education has led many of our sister states to make large expenditures from the public treasury in the establishment and maintenance of such institutions. The Eastern states have, for the most part, been spared the necessity of making these expenditures by reason of the willingness of private benevolence to assume the task elsewhere shouldered by the state. In this way Connecticut has been favored. Its institutions and colleges are able to rely for their support upon private contributions and endowments, with only such state assistance as results from exemptions from taxation. The assistance gained through these exemptions has been of no small help in the conduct of their work and of no small proportions. But that from private sources has been far greater. The latter fact should not be allowed to obscure the public character of the work carried on by them. Neither should the former be forgotten when credit for the support of that work is being given to those who have furnished substantial aid.

The public policy of this state and of the colonial government which preceded it has, from its early days, been governed by a recognition of the public character deserving of public assistance and support of not only Yale's work, but also of that of other educational and charitable institutions and related institutions generally. In 1684 it was provided "for the encouragement of learning and promoting of publique concernsments" that all houses or lands given or held for "the mayntenance of the ministry or schooles or poore" should remain to the uses for which they were given and be exempted out of the list of estates and be rate free. 3 Col. Rec. 158. In 1702 this act was succeeded by a broader one, furnishing the basis of our present statute of charitable uses (Revised Statutes, § 4026), which embraced within its provisions land, tenements, hereditaments, and other estate given by colony, town, village, or persons for the maintenance of the ministry of the gospel, schools of learning, relief of poor people, or any other charitable use. Acts and Laws of the Colony 1702, p. 64. This act contained the general exemption provision, and continued in force until 1821. At that time the exemption clause was dropped from it, and since then the general policy of exemption indicated has been followed by general and special legislation to the extent, at least, of substantial, if not total, exemption. Rev. 1821, title 56, chap. 1, § 3.

This legislative history has no present importance save as it shows the long-time consistent policy of the colony and state in not violating the ordained sanctity of property dedicated by gift of its owner to public charitable uses by depleting its amount or effectiveness for the purpose of its dedication, through the levy of a tax or the imposition of other state burden upon it. If now it is

proposed to reach out and take toll of such gifts in the process of the devolution of title, it marks a new and radical departure in policy in striking contrast with that which heretofore has characterized our governmental history. Such a departure is one which a court will be slow to find to be within the legislative intent, unless indicated by clear and unambiguous language.

Every dollar which Yale University has received or may receive, by gift or otherwise, is irrevocably dedicated to a public charitable use. Rev. Stat. § 4026; *Connecticut College v. Calvert*, 87 Conn. 421, 428, 435, 88 Atl. 633, 48 L. R. A. (N. S.) 485. When the title to property vests in the University, that property "passes out of the domain of private property," and becomes devoted forever to a public charitable purpose. *Yale University v. New Haven*, 71 Conn. 316, 333, 42 Atl. 87, 43 L. R. A. 490. The same is true of the funds held or received by the other beneficiaries in court. A generous public spirit prompted Mr. Hotchkiss to withdraw a large portion of his large estate from the domain of private property, capable of use for private enjoyment of profit, and to devote it to the public charitable uses represented by it and them.

[4] It is doubtless within the power of the state, by means of succession taxes so-called, to appropriate to itself some portion of the estate so undertaken to be devoted, and thereby divert it to some other public use not within the mind or purpose of the testator, but its intention to do that thing will not be deduced from language not clearly expressing or indicating such intention. *Evergreen Cemetery Asso. v. New Haven*, 43 Conn. 234, 242, 21 Am. Rep. 643.

[5] The claim of counsel for the tax commissioner that, since that portion of the act under consideration embodies an exemption from the operation of the general rule prescribed by the act, it should receive a strict construction, is not well made. The rule of construction thus appealed to is one which has its limitations, as is clearly pointed out in *Yale University v. New Haven*, 71 Conn. 316, 329, 42 Atl. 87, 43 L. R. A. 490, and the present situation is one which comes well within them.

Turning now to the history of inheritance tax legislation in this state for light which it may throw on the subject of inquiry, we find that the first legislative attempt in that direction was made in 1889, when a statute was enacted laying such taxes, but specifically exempting property passing to or for some charitable purpose defined as including "gifts to any educational, benevolent, ecclesiastical or missionary corporation, association or object." Public Acts of 1889, chap. 180, § 1. In the matter of exemption, the law remained unchanged until 1897, when, in reframing the act, nothing was said upon that subject. Public Acts of 1897, chap. 201. This silence, incomprehensible as it may appear in view of the traditional policy of the state,

continued until 1911, save for the passage in 1909 (Public Acts of 1909, chap. 218) of an act exempting "gifts of paintings, pictures, books, engravings, bronzes, curios, bric-a-brac, arms and armor, and collections of articles of beauty or interest, made by will to any corporation or institution located in this state for free exhibition and preservation for public benefit." At the session in 1911 an act, consisting of seven lines only, was passed which provided for the exemption of all gifts thereafter made by will to or for the benefit of any corporation or institution located in the state "which receives state aid by appropriations provided for by the General Statutes," and further providing that the exemption should extend to all like gifts theretofore made to or for the benefit of such corporations or institutions on which a succession tax had not been paid. Public Acts of 1911, chap. 148. In 1913 the succession tax law was extensively revised, and in that revision all property passing in trust for any charitable purpose to be carried out within the limits of this state, or to or for the use of municipal corporations of the state for public purposes, and gifts of the kind covered by the amendment of 1909 were exempted from the tax imposed by the act. Public Acts of 1913, chap. 231, § 2. Then followed the act of 1915, again remodeling and elaborating the law, and containing the provision under consideration in the place of that embodied in the act of 1913.

This history, with its frequently recurring changes, is barren of indication as to the intended meaning of the phrase under consideration, except such as may be derived from the legislation of 1911 and subsequent years.

From the latter legislation it would appear that the General Assembly had become awakened, in some degree at least, to the lack of wisdom shown in the act of 1897, in that the state was made to take toll of all private benefactions coming within the jurisdiction of courts of probate, whether or not they were made in favor of organized agencies engaged in the performance of a work in the interest of the public welfare. How full that awakening was, as shown by the amendment of 1911, is not altogether apparent. It is curiously phrased, in that it in terms limits the state aid by appropriations to appropriations by general statutes. Whether the inclusion of that qualification was inadvertent or intentional we have no means of knowing. If the latter was the case, the act was one of very narrow application, since appropriations by general statute are very exceptional. If the former, and the intention was to confine the exempted corporations and institutions to those receiving state aid through appropriations, it was intended to be what counsel for the tax commissioner say that the act of 1915

provides in the absence of any qualifying words at all.

Whatever the legislative intent was which the amendment of 1911 attempted to express, that embodied in the act of 1913 is unmistakable. Apparently the General Assembly had come to realize that a sound public policy dictated that the state should not appropriate to itself for use for its public purposes generally property, or any portion of property, which had been dedicated by its late owner to public charitable uses, and that consistency of state action demanded that such appropriation should not be made where, for a similar reason, taxation was foregone. At any rate, and for some reason it regarded as sufficient, it provided broadly that all property passing in trust for a charitable purpose should be exempt from the payment of inheritance taxes, thus going back to and adopting the policy embodied in the original act of 1889.

Our legislation having thus, after a wide departure and sundry experiments, come back to where it begun, and to a policy consistent with that which has marked our traditional attitude toward corporations and institutions engaged in service for the public weal, in harmony with our treatment of the property of such corporations and institutions in other respects, and supported, as we have seen, by dictates of sound reason, did the General Assembly of 1915 intend to depart again and take a step back from the position assumed in 1913? If it did, the way was open for it to accomplish that result by the use of plain and simple language—some such language, for instance, as that which the amendment of 1911 suggests. It would have been the simplest thing in the world to have expressed it in unmistakable language, and it is little short of inconceivable that if it was the legislative purpose to limit the exemption to gifts to corporations and institutions in receipt of state aid through the medium of appropriations, that it did not say so unequivocally, and not leave the desired limitation to be supplied by interpretation. The tax commissioner's claim asks us to supply such unexpressed qualification. It asks us to say that when the General Assembly used the term "state aid"—a term of comprehensive meaning, as we have seen—it meant such aid furnished by a particular means and in a particular method. We are unable to see any valid reason for so limiting the language it used, and thus supplying by implication the words without which the desired qualification is not suggested.

Certainly no inference that the term "state aid" in the 1915 act was intended to be understood with the qualification that the aid should be by state appropriation or direct payment from the treasury can reasonably be drawn from the fact that the same words "state aid" appear in the 1911 act, accom-

panied with the qualification that the aid should be by appropriations. Rather is the omission of the qualifying words once used confining the aid to that by appropriations suggestive of an intentional omission of them.

Neither does the fact that different language was used in the act of 1915 from that of the act of 1913 furnish a substantial basis for an inference that a radical departure from the rule prescribed in the former law was intended, much less the particular departure claimed by the tax commissioner. It might well be that the change of language was prompted by a desire to supply a definite and precise test in place of one less precise, and to confine the benefits of the exemption to corporations and institutions whose public service character had received legislative certification by grants of aid either directly or by exemption from taxation. But whether so or not, and whatsoever other inferences may fairly be drawn from antecedent legislation, the fact remains that the General Assembly of 1915 did not use language indicating, with any reasonable degree of certainty, its purpose to impose succession taxes upon property passing, upon the death of its owners, to corporations and institutions which, by reason of their character as corporations and institutions receiving, holding, and administering property solely in the interest of the public welfare, were in the enjoyment of the aid of the state by way of exemptions from taxation.

[8, 7] The court of probate, in making its computations for the purpose of determining the amount of tax to be paid by the executors, and in framing its order and decree, made, as the tax commissioner concedes, two errors. One of these was in omitting from its deductions from the total amount of the appraisal of the inventory and the gains to be added thereto to obtain the net estate passing to beneficiaries the following items, to wit: (1) \$9,017.97 paid by the executors to the state of New Jersey as inheritance taxes; (2) \$1,399.90 paid by them to the tax collector of New Haven as taxes; and (3) \$708.99 paid by them to the United States internal revenue collector as an income tax. By reason of these omissions, which total \$11,126.86, the total amount passing to beneficiaries, as ascertained, was too large to that extent. This error is one which requires a modification of the decree in several places, and renders incorrect the court's final determination and adjudication as to the amount of tax due. The other error arose from the computation of the tax to be paid at 8 per cent. upon the net estate not exempt, whereas it should have been figured at 5 per cent. on \$49,500, 6 per cent. on \$200,000, and 7 per cent. on the balance. Corrections, as to which the parties are agreed should be made in the decree wherever these errors or their results appear.

The superior court is advised to render its

judgment (1) affirming so much of the order and decree of the court of probate as adjudged that the gifts to Yale University, the First Ecclesiastical Society of New Haven, and the New Haven City Burial Association are exempt from the payment of an inheritance tax; (2) modifying said order and decree so that it shall declare that the legacies to the Home for the Friendless and the Lowell House are likewise exempt; (3) amending it by incorporating therein the corrections outlined in the paragraph of the opinion immediately preceding this rescript; and (4) making such other incidental changes in it as may be necessary in order that it may correctly state the results flowing from the modification, amendments, and corrections thus made.

No costs will be taxed in favor of any of the parties in this court.

SHUMWAY and TUTTLE, JJ., concurred.

WHEELER, J. (dissenting). Five beneficiaries under Mr. Hotchkiss' will claim exemption from the payment of the succession tax by virtue of the statute which exempts "all property passing to or in trust for the benefit of any corporation or institution located in this state which receives state aid." The question for decision is whether each of these beneficiaries is "a corporation or institution which receives state aid." P. A. 1915, chap. 332.

Each of these beneficiaries has been receiving from the state an exemption from ordinary taxation. The only basis upon which their claim is supported in the majority opinion is that the exemption from ordinary taxation accorded them is the receipt by them of state aid. The issue is thus a narrow one. Does the term "state aid," as used in the succession tax law of 1915, include aid rendered by way of exemption of property from taxation?

The court relies for its conclusion upon (1) the ordinary meaning of "state aid," (2) our judicial definition of the term; (3) the absence of anything in our statutes indicating that the use of this term is other than its ordinary one; (4) the history of our succession tax; (5) the existence of a public policy in favor of the exemption of these institutions and corporations from the succession tax.

We will take up these points in order. The court quotes our definition of "state aid" from *Beach v. Bradstreet*, 85 Conn. 344, 353, 82 Atl. 1030, Ann. Cas. 1913B, 946, "State aid is support or assistance furnished by the state," and says that the qualifying word "state" is of no significance save as indicating the source of the aid. Hence it is argued any form of support or assistance furnished by the state, whether by money grant, or by excusing corporation or institution from the payment of taxes, falls within

the ordinary and natural use of language under the term "state aid."

As it seems to us, the word "state" in the term "state aid," and in the definition of *Beach v. Bradstreet*, is all-important, for there can be no state aid unless the state furnishes the support or assistance.

The opinion quotes a part of our definition in *Beach v. Bradstreet*. We shall get a clearer view of the definition if we have it before us entire:

"The ordinary definition of 'aid' is help, support, or assistance. 'State aid' is support or assistance furnished by the state to its institutions, organizations, or individuals for a public purpose. It is a term of our statutes applied to pecuniary assistance furnished by the state to towns, schools, etc., and for internal improvements—all recognized public purposes."

Our definition called for (1) support or assistance, (2) furnished by the state, (3) for a public purpose.

To "furnish" is to provide for, to give. It presupposes the giving of pecuniary assistance or support directly. One would not, in the natural use of language, speak of furnishing assistance to A. when what was done was not to give A. something, but to relieve A. from paying a public obligation due the state. Affirmative, and not merely negative, action is required.

The definition in *Beach v. Bradstreet* was intended to include aid furnished by the state, either in a pecuniary way, or by way of support furnished through appropriations made to that end. This becomes doubly clear when we read this definition in connection with the statute there under consideration.

Since the state cannot furnish either pecuniary assistance or support unless there be an existing appropriation under law for a particular purpose, the furnishing of support is in reality the furnishing of pecuniary assistance. The definition of *Beach v. Bradstreet* does not include as "state aid" the indirect assistance afforded one by relief from the payment of taxes. When that opinion was rendered no such claim was made before the court and the court had no thought of it.

The majority opinion meets the contention of the tax commissioner that the use of the term "state aid" in our statutes is in the sense of pecuniary assistance, or support, by the statement that it finds scant proof of such an accepted statutory use of this term from its use in the indices of our statute and in the two sections of the statutes to which it alludes in the opinion. If these instances were all that the statutes revealed, certainly their conclusive character could not be maintained. The contention of the tax commissioner rests upon a much broader base than this.

We shall not attempt an exhaustive review of our statutes, but will point out the use of this term in the body and title of our statutes, in the heading and marginal

notes, and in the indices of our statutes, sufficiently to establish that the recognized statutory use of this term conforms to our view of its meaning.

In the Revision of 1902 we find four references to state aid in the body of statutes. Sections 3019, 183, 184, and 1368.

In Public Acts 1913, chap. 25, P. A. 1911, chap. 187, and P. A. 1903, chap. 161, references to state aid are made in the body of the statute. In all of these instances in which this term appears in the body of the statute it refers to pecuniary assistance.

The term is used in the heading of sections 3019, 2889, and 2242 of the General Statutes, and in each instance it refers to pecuniary assistance.

This term is found in the title of Public Acts 1913, chap. 172; P. A. 1913, chap. 25; P. A. 1911, chap. 183; P. A. 1909, chap. 82; P. A. 1907, chap. 232; and P. A. 1905, chap. 226. In each of these instances the statutes refer to pecuniary assistance.

The marginal notes to the following statutes contain this term and the statutes refer to pecuniary assistance: Public Acts 1915, chap. 335; Public Acts 1913, chaps. 167, 172; Public Acts 1911, chap. 187; Public Acts 1907, chap. 216; and Public Acts 1903, chap. 102.

In the index to the Revision of 1902, under the term "state aid," one-half of the references are to direct pecuniary aid, and one-half to support furnished by the state through appropriations made to that end.

In the indices of Public Acts of 1913, 1911, and 1907, this term is used in reference to statutes affording direct pecuniary aid.

Neither in the Revision of 1902, nor in any public act thereafter, is the term "state aid" used in the sense of an exemption from taxation. We have made an examination of the statutes preceding 1902, but necessarily it has not been a completely exhaustive one, and in no single instance have we found that "state aid" was used in the statutes in the sense in which my Brethren use it. No instance of such a statutory use was pointed out to us by counsel for the beneficiaries and none has been found by the court. Under these circumstances, no conclusion is permissible but that the use of the term "state aid" in the Public Acts of 1915 was that which had always obtained in our statutes, viz. assistance furnished by the state by direct pecuniary grant, or support furnished by the state through an appropriation duly made.

Our Private Acts show that the property of many corporations and institutions devoted to charitable purposes are by their charter exempt from taxation in whole or in part, while the property of many other corporations devoted alike to charitable purposes is not exempt. Under the court's interpretation of "state aid," bequests and

devises to all of these institutions and corporations which are not exempt from taxation, and which do not receive from the state assistance either in money grant or support, are subject to the succession tax. So that under our law not every corporation or institution devoted to charitable ends is exempt from the payment of ordinary taxes as the court assumes, nor from the payment of the succession tax. This inequality which the court finds so glaring an injustice is not relieved by the court's extension of the meaning of "state aid" to exemptions from taxation.

Again some of these corporations and institutions are exempt in whole and some in part indicating differences in legislative policy towards these institutions and corporations. By the court's interpretation of "state aid" these differences are ignored and the least exemption from taxation carries with it complete exemption from the payment of the succession tax. The court ignores a settled legislative public policy and recognizes a public policy which has never existed. Again some of these institutions are made exempt from taxation provided the town of their domicile so votes. These inequalities and inconsistencies consequent upon the court's interpretation would be avoided if "state aid" is accorded its settled statutory meaning. If it is held to include exemptions from taxation these will be perpetuated.

Is it likely that the General Assembly intended that corporations and institutions to which it had accorded a partial exemption from taxation should, by reason of this exemption, receive complete exemption from the payment of any and all succession taxes upon bequests and devises to it, no matter how large? The history of exemption in our succession tax legislation, far from supporting the theory that a tax exemption is state aid, is persuasive that "state aid," as used in the succession tax act of 1915, was not intended to include aid by way of a tax exemption. Our first succession tax act made all property within the jurisdiction of the state subject to this tax, other than property passing by will or by the intestate law to or for the use of some charitable purpose, or purpose strictly public within the state. Public Act, 1889, chap. 180, § 1.

Public Act 1897, chap. 201, repealed the act of 1889, and enacted a succession tax act which omitted this exception. Under this act all property devoted to a charitable purpose was subject to the succession tax. So the law remained until the passage of Public Act 1911, chap. 148, which provided that all gifts by will to or for the benefit of any corporation or institution located in this state, "which receives state aid by appropriations provided for by the General Statutes, * * * shall be exempt from the payment

of any succession tax." For the first time in the history of our succession tax acts the receipt of state aid was made a condition of exemption. When the act of 1911 was passed, state aid was given to some 17 hospitals through appropriations made by public act. Public Acts 1909, chap. 118, and section 2852. In the session of 1911, these grants to hospitals were made through the Special Laws, and these appropriations to our hospitals comprised then, as now, the greater part of all state aid by way of appropriations by direct gift or by support furnished. It would be futile to claim that state aid by appropriations includes aid by way of exemption from taxation.

In Public Act 1913, chap. 231, the act of 1911 was repealed, and it was provided that any property passing by will or inheritance in trust for any charitable purpose shall be exempt from the succession tax. There has thus been nothing up to this time to indicate that the receipt of an exemption from taxation was state aid, or that it was intended in any of these acts to include within the exemption from the succession tax property exempt from ordinary taxes. The act of 1913 indicates a return to the early policy of exemption of the 1889 act.

Public Act 1915, chap. 332, recast the succession tax law, repealed the act of 1913, and re-enacted the act of 1911, except that it omitted the words, "by appropriations provided for by the General Statutes." The reason for the omission is apparent. Up to the passage of this act it must be conceded that there were only two forms of state aid known to our statute law, viz. one by direct gift and one by the furnishing of support by means of an appropriation made for that purpose. State aid by way of an exemption from taxation was unknown to our law. Prior to the session of 1911, state aid, as we have pointed out, had been furnished certain designated hospitals by direct appropriation, and with the session of 1911, and thereafter, these appropriations were made in the Special Laws. A re-enactment in 1915 of the act of 1911 would have omitted from its benefits the very institutions to whom state aid had been the most generously extended. At this time it was understood that, while the majority of the appropriations for state aid were made in the Special Laws, some also were made by the Public Acts, and some aid was extended by way of support made through appropriations of public moneys for that purpose.

Under these circumstances, the General Assembly, desiring that all corporations and institutions receiving state aid should be exempt from the payment of the succession tax, could not limit the beneficiaries to those receiving state aid by appropriations, otherwise those receiving state aid by way of support would have been excluded, but by making the receipt of state aid the condition of exemption it would include the two classes

which had, up to that time, been the sole recipients of state aid. The reason supporting this form of exemption is found in the fact that increased payments by the state will be avoided by the exemption to institutions receiving state aid, but, in the case of institutions and corporations to whom the state makes no payment or furnishes no support, no such reason exists for making the exemption.

We do not think it is of any practical importance whether the rule of strict or liberal construction of this act is adopted, since with either construction the result must be the same. Since the court has adopted the liberal rule of construction, it is well to instance the rule which the authorities make applicable to a case where an exemption is claimed from a general scheme of taxation. "Such exemptions are neither presumed nor allowed, unless there appears from the language of the statute or charter to be a clear intention on the part of the Legislature to make an exception to the general rule." *Cooley on Taxation* (2d Ed.) 204; *Ford v. Delta & Pine Land Co.*, 164 U. S. 663, 17 Sup. Ct. 230, 41 L. Ed. 590; *In re Hickok's Estate*, 78 Vt. 259, 62 Atl. 724, 6 Ann. Cas. 578. "Statutes purporting to grant exemptions from general taxation are to be strictly construed." *Cooley on Taxation*, 205. We agree with the Attorney General when he says, "If the General Assembly had intended to exempt all property passing to corporations or institutions exempt from taxation, it is fair to assume that it would have expressed that intent by express language, as in the New York statute and in the laws of Vermont." My Brethren say that it is inconceivable that the General Assembly did not in words limit the meaning of "state aid" if such was its intent. Until the passage of the act of 1915, "state aid," as used in our statutes, had a recognized meaning, and its use in other statutes will be presumed to be with a similar meaning unless the contrary appears. There is nothing in the act of 1915 which tends to show that it was intended by the use of "state aid" in this act to add to its statutory meaning assistance resulting from a tax exemption.

The Special Commission on Taxation in its report to the General Assembly in 1917 described the tax laws enacted in 1915 as "greater both in number and importance than the General Assembly had ever before made at a single session." Among the 16 principal changes enumerated was "the whole inheritance tax law was recast. * * * The exemptions of trusts for charitable purposes within the state, other than gifts to municipal corporations of this state for public purposes, were repealed." If this committee had thought that corporations and institutions which were tax exempt were not subject to the succession tax it cannot be doubted that it would have pointed out that, in spite of

the repeal of the 1913 provision, the greater number of trusts for charitable purposes were not effected by this repeal.

Unquestionably the committee were of the opinion that, under the act of 1915, all such trusts, except those receiving aid in the way of money or support, were by the act made subject to the succession tax. The committee further reported: "We recommend the exemption from succession taxes of all testamentary gifts to corporations created under the laws of Connecticut for charitable purposes." Would it have so reported if it had been of the opinion that all corporations exempt from taxation were in receipt of state aid? The significance of the conclusion of the committee is the greater from the fact that its chairman was former Chief Justice Baldwin.

Contemporaneous construction of this act is of great weight. So far as we can learn, the claim that tax exemption is state aid has never before been raised in any proceeding, and no official has ever acted in the view that a charitable trust which was tax exempt was for that reason in receipt of state aid.

The majority opinion finds in the legislative history of the exemption from ordinary taxes of property dedicated by gift to public charitable uses a policy of colony and state that no part of such gifts shall be depleted through the levy of a tax or the imposition of other state burden upon it. And the court finds in a present proposal to make any of these gifts subject to the succession tax "a new and radical departure in policy in striking contrast with that which heretofore has characterized our governmental history." We fear the strong sympathy of the court with the charitable purposes of these corporations and institutions which claim an exemption from the payment of the succession tax has momentarily caused it to forget that between 1897 and 1911 such gifts were subject to the succession tax, and between 1911 and 1913 they were so subject unless the corporations or institutions to which they were given were the recipients of state aid through appropriations under the General Statutes. There was no "new and radical departure"—merely a return to a former policy of taxation.

We refrain from expressing our view upon the wisdom of imposing a succession tax upon any corporations or institutions devoted to charitable purposes. We regard that decision as within the legislative function. The General Assembly enact statutes, the judiciary do not.

That Connecticut had, as a rule, exempted corporations and institutions devoted to charitable purposes from the payment of ordinary taxes indicated a public policy as to this class of exemptions. It did not indicate a public policy as to a totally different form of raising revenue by means of death charges. Our first succession tax law was passed in 1889; necessarily our public policy as to

succession taxes originated after this date. It was no part of a policy originating long before the succession tax law was passed.

We have held that succession taxes are death duties, charges upon the right or privilege of devolution, and not taxes upon property or person. *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 690; *Warner v. Corbin*, 100 Atl. 354. Since succession taxes are a totally different concept from the ordinary tax, it follows that a public policy concerning the ordinary tax has no relation to a succession tax. The history of our succession tax laws furnishes an unanswerable argument to the contention that the public policy of the state has been and is against making all gifts to corporations and institutions devoted to public purposes subject to the succession tax. After an experience of 10 years exempting from the payment of the succession tax all property of such corporations and institutions devoted to charitable purposes, the exemption was repealed and so remained for 14 years. This change in our policy was taken with deliberation.

The General Assembly enacted the 1897 statute through its knowledge that the living often failed to pay their just share of the cost of government, and that it was justice to the state that in the final settlement of the estate of the dead the debt of the deceased to the state should, at least in part, be paid before payments should be made to the objects of his bounty, even though these were charitable trusts. We have approved of this as a legitimate reason for succession taxes, and so have the United States Supreme Court. *Hopkins' Appeal*, 77 Conn. 644, 649, 60 Atl. 657; *Plumber v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998.

That the General Assembly of 1897 intended an entire reversal of the early policy is perfectly clear from a reading of the acts of 1889 and of 1897. The fact that all corporations and institutions devoted to charitable purposes were, under the act of 1897, for 14 years subject to the succession tax, is conclusive of the existence during that time of a public policy favorable to the imposition of a succession tax upon charitable trusts of this character. The change in 1911, exempting only those corporations and institutions which receive state aid "by appropriations provided for by the General Statutes," indicated a change in public policy to the end that such of these corporations and institutions as received state aid by appropriations through the General Statutes should be exempt from the payment of succession taxes. The change in 1913 indicated a reversal to the early policy exempting all institutions and corporations devoted to charitable purposes. The change in 1915 indicated a partial reversal of the policy of exemption of 1913. There was no indication in the language used or in the title or history of this act that it was the public policy to make every corpora-

tion and institution which was exempt from taxation free from the payment of the succession tax.

The tax commission report to which we have referred accompanied its recommendation that all charitable trusts be made free from the succession tax by a bill carrying out this recommendation. The General Assembly of 1917 enacted several of the recommendations of this commission, but re-enacted the part relating to the exemption of corporations and institutions receiving state aid just as it appeared in the act of 1915. The General Assembly thus refused to follow the recommendation of the commission, and exempt from the succession tax "all property passing to or in trust for the benefit of any corporation incorporated under the laws of this state solely for charitable purposes." So that the latest expression of the public policy of the state is a refusal to adopt the policy which the majority opinion holds to be the established public policy of the state.

Under the court's ruling, every corporation or institution which is exempt from ordinary taxation, in whole or in part, is free from the succession tax. And this holds whether the corporation or institution be devoted to charitable purposes or not. Surely the General Assembly never intended to exempt business corporations from the succession tax, although they might be exempt from the payment of ordinary taxes. Under the court's construction of this act, its effect, instead of restricting the exemptions of 1913, would enlarge them beyond those known in any of our succession tax laws.

The General Assembly which passed the 1915 act faced a serious financial situation. The expenses of the state for outlay its revenue. The Governor of the state recommended, and the General Assembly passed, much taxation legislation enlarging the old and discovering new sources of revenue. In that crisis it would indeed have been strange had Governor and General Assembly intentionally have released from the operation of the succession tax charitable trusts which are tax exempt, but do not receive state aid, when the amount involved was a very substantial sum. The Tax Commission of 1917 reported as their estimate from their recommendation that Connecticut charitable corporations be made exempt from the payment of succession taxes the following: "Reduction of succession taxes charged to Connecticut charitable corporations, probably on the average about \$200,000." This is state history, and it tends strongly to show that the General Assembly did not intend, by the act of 1915, to include under state aid tax exemptions granted corporations and institutions.

We concur in the decisions upon the other points involved in these appeals.

RORABACK, J., concurred.

(257 Pa. 552)

WRIGHT v. BRISTOL PATENT LEATHER CO.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. TRIAL §180—JUDGMENT ON THE VERDICT—STATUTE.

Where a jury has disagreed, a party who has submitted a point for binding instructions in his favor has the right to move the court for judgment on the record under authority of the Act of April 20, 1911 (P. L. 70).

2. CONTRACTS §176(1) — CONSTRUCTION — QUESTION FOR JURY.

Where there is nothing doubtful or ambiguous as to the intention of the parties as disclosed by their contract, its construction is a question of law for the court.

3. CONTRACTS §271—RESCISSION—NOTICE.

A notice for the rescission of a contract must be clear and unambiguous and convey an unmistakable purpose to insist on the rescission.

4. CONTRACTS §284 — RESCISSION—METHOD.

Where a contract reserves to one party the right to rescind it, and prescribes the mode in which it may be done, or makes the doing of certain acts a condition to the right to rescind, such party cannot rescind in any other way, nor without complying with the conditions.

5. SALES §124, 127—RESCISSION—NOTICE—RESTORATION.

A party having a right to rescind a contract of sale and who elects to do so must give notice to the seller and offer to return the thing sold before suing to recover back his money, unless the consideration is entirely worthless.

6. SALES §124—FRAUD—RESCISSION—RESTORATION.

Rescission on the ground of fraud and failure of consideration, etc., is a right in equity to a restoration of the consideration, and the party claiming the restoration must return the property or reconvey the title.

7. SALES §124 — RESCISSION—SUFFICIENCY.

Under a contract for the sale of a secret formula, executed September 1, 1913, providing that the buyer should have the right at any time after the first payment to discontinue the use of the formula, and that on notice of discontinuance and the return of the formula by registered mail he should be relieved from liability for further payment, a failure to return the formula until April 10, 1914, did not effect a rescission so as to relieve the buyer from payments to that date, notwithstanding his claim that the formula was worthless, and that, as he had memorized it, its return was unnecessary.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Lucy W. Wright against the Bristol Patent Leather Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts appear in the following opinion by Rodgers, J., in the court of common pleas:

This is an action in assumpsit to recover the balance due upon five installment payments on the total sum of \$5,000, under a contract for the absolute sale of the use of a certain secret formula to prepare patent leather without sun drying. Defendant reserves to itself a special right to rescind at any time before final payment, upon compliance with certain conditions.

[1] The case was tried before a jury on January 4 and 5, 1917. Plaintiff presented a point for binding instructions in her favor for \$1,500, with interest, which was refused. The jury dis-

agreed and was discharged. Plaintiff now moves for judgment in her favor in accordance with the provisions of the act of April 20, 1911 (P. L. 70). That the plaintiff, having submitted a point for binding direction in her favor has the right to move the court for judgment, in accordance with the act of April 20, 1911 (P. L. 70), has been decided in the case of *Farmers' & Breeders' Mutual Reserve Fund Live Stock Insurance Co. v. Curran*, 65 Pa. Super. Ct. 352, in an opinion by Kephart, J.

The material facts proven upon the trial are substantially as follows: The contract is dated the 15th day of September, 1913. For a period of about six months prior to the date of the contract for the sale and purchase of the formula in question the defendant company had been carrying on experiments with a fluid mixture furnished them by the plaintiff to enable it to test the merits and value of the process for use in its business, before committing itself to the contract.

Section 3 of the contract provides the method by which the defendant might terminate or rescind the contract, and thereby relieve itself of the payment of the various installments fixed therein. The portion of said section important in this cause is as follows: "The party of the first part shall have the right at any time after the first payment has been made to discontinue the use of such formula or process and method of treatment and upon said discontinuance, notice of which has been sent by the party of the first part to the party of the second part by registered mail to the last-known address of the party of the second part, together with the return of said formula, the party of the first part shall not be required to make any further payments and all liability on the part of the party of the first part of any kind whatsoever under this contract shall cease and terminate absolutely," etc.

Defendant failed to return the paper containing the formula by registered mail, as provided for in this section of the contract, until April 10, 1914. Plaintiff claims, therefore, that under its terms she is entitled to a payment of \$500, which became due January 1, 1914, and a payment of \$1,000, due March 1, 1914. The defendant claims that it is entitled to have a jury pass upon the following questions:

(a) Was the formula worthless to the defendant in its business, and therefore was there a failure of consideration?

(b) Was the plaintiff guilty of fraud and misrepresentation as to her formula or process as a means of inducing defendant to make the contract?

(c) Did defendant in letters dated December 16, 1913, December 18, 1913, and December 24, 1913, substantially perform the contract, even though its performance was not according to the terms set forth in the agreement?

Accepting its position in its strongest sense in the letter of December 24, 1913, to plaintiff, wherein defendant claims it substantially rescinded the contract, we find *inter alia*, this language: "As written you, we can do nothing as regards to sticking until spring, and if you will peruse our letters of the 16th and 18th, you will note that our reasons are ample. When we again run into warm weather, we may take the subject up again with you, at which time we will resume our payments as per our agreement. We are sorry that our experiments were not successful enough to warrant our making further payments and the cost of further experiments."

In connection with this letter the president of the defendant company admitted in his testimony at the trial that it was the intention of the defendant to resume experiments with the process at some future time. Therefore defendant appears to have held out the suggestion to plaintiff that payment under the contract would be renewed or resumed in the summer sea-

son. In this attitude of defendant probably may be found the reason for its failure to return the formula to plaintiff by registered mail. The president of defendant company testified that the failure to return the paper containing the formula was due to the fact that he considered it worthless; that he had memorized its contents, placed it in his safe, and had forgotten it entirely.

[2] In our opinion, the case hinges upon the question as to whether the defendant, in order to be released from further payments under the contract, was not bound to return the paper containing the formula to plaintiff by registered mail, as provided in the contract. Here the parties themselves, after about six months of negotiating and experimenting with this process for treatment of patent leather, have provided the terms on which the contract they finally entered into should be abrogated. It is undisputed that defendant did not pursue the method of rescission provided therein. We are persuaded that neither plaintiff nor defendant can dispense with such manner of cancellation or rescission without the consent of the other. Where there is nothing doubtful or ambiguous as to the parties' intentions as disclosed in the contract, the effect of them is for the court to decide as a question of law.

[3] In *Black on Rescission of Contracts*, vol. 2, § 574 (1916), the general rule is laid down as follows: "To be effective, a notice for the rescission or termination of a contract must be clear and unambiguous, conveying an unquestionable purpose to insist on the rescission. And where the conduct of one having the right to rescind a contract is ambiguous, and it is not clear whether he has rescinded it or not, he will be deemed not to have done so."

[4] And again in the same work (volume 2, § 513 [1916]) the rule is held to be that: "Where a contract reserves to one of the parties the right to rescind it, and also prescribes the mode in which such right shall be exercised, or provides that certain specified acts shall be done by that party as a condition upon his right to rescind, it must be strictly followed, and the party cannot rescind in any other mode nor without complying with the conditions." To the same effect is the doctrine in *Ruling Case Law*, vol. 6, p. 922.

[5, 6] The principle in Pennsylvania is well settled that, where a party has a right to rescind a contract, and elects to do so, he must give notice to the vendor and offer to return the thing sold before suit to recover back his money, unless the thing which was the consideration of the contract be entirely worthless; also that rescission on the ground of fraud, failure of consideration, etc., is a right in equity to a restoration of the consideration, and the party claiming the restoration must return the property attained or reconvey the title. *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654; *Beetem's Administrators v. Burkholder*, 69 Pa. 249; *Howard v. Turner*, 155 Pa. 349, 26 Atl. 753, 35 Am. St. Rep. 883.

In *Rumsey v. Shaw*, 212 Pa. 578, 579, 61 Atl. 1109, 1110, it was held that: "When a party relies upon a rescission of a contract, he must show that he elected to rescind with reasonable promptness upon the discovery of the fraud, and must tender a return of the property or security which was the subject-matter of the contract. *Cornelius v. Lincoln National Bank*, 15 Pa. Super. Ct. 82."

Butler et al. v. School District of the Borough of Leighton, 149 Pa. 351, 24 Atl. 308, was an action for the price of furnaces furnished to schoolhouses under a written contract. A period was fixed within which the test of the furnaces was to be made, which period was to be extended for two months if desired in writing before the first limit was reached. The directors failed to give notice to the plaintiff on or before

the date agreed upon, that the furnaces did not meet the requirements of the contract. There was some evidence that the secretary met plaintiff accidentally and told him that there was complaint concerning the heaters. The court below left it to the jury to say whether or not the conversation amounted to notice. On appeal the court below reversed, and the Supreme Court held (149 Pa. 355, 24 Atl. 306): "Where there is a sale upon trial, with a time fixed by the parties, a failure to return the goods or give notice in accordance with the agreement makes the sale absolute."

In *Southwark Mills Co. v. Slepín*, 46 Pa. Super. Ct. 296, it was held that: "Provisions in a contract of sale that cancellation of orders can only be made for breach of contract, and then only within five days after delivery of the goods, and that the purchaser is not entitled to allowance for defects unless claimed within ten days after delivery, are proper and reasonable, and will be enforced by the courts according to their terms."

Morrow v. Campbell, 7 Port. (Ala.) 41, 31 Am. Dec. 704, is a case similar in its facts to the case under consideration. There the plaintiff sued on an agreement in which he sold defendant a patent right for land in Arkansas. By its provisions defendant agreed to pay \$500 unless the contract was rescinded on or before October 1, 1833, by return of the deed of sale of said right to the plaintiff. On or before that day plaintiff was informed that the deed of sale was lost and that defendant abandoned the contract. Verdict for defendant. Held on appeal. Judgment reversed. Collier, C. J., said (7 Port. [Ala.] 44, 31 Am. Dec. 706): "It has, however, been urged that, as the deed could subserve no purpose in the hands of the plaintiff, there could be no necessity for requiring its return before the rescission of the contract. Would not its retention place it in the power of the defendant to sell patent rights to the prejudice of the plaintiff's interests? Be this as it may, the parties themselves have provided the terms on which their contract shall be abrogated, and neither can dispense with them, without the consent of the other."

[7] We are of opinion that the construction of the contract and the various letters which were offered in evidence were for the trial judge; that the defendant has interposed no legal defense, and that plaintiff was entitled to an affirmation of her point for binding instructions; that the return of the paper containing the formula, by registered mail, to plaintiff, was a condition precedent that the defendant was obliged to comply with before it could relieve itself of liability to pay the installments as they fell due under the contract. There was no definite and unambiguous notice of rescission given plaintiff by defendant until April 10, 1914. This was a letter from defendant's attorneys to plaintiff, in which the formula was returned to her. Having failed to return the formula until after two installments had fallen due under the contract, the defendant became liable to plaintiff for the installments of \$500 which fell due January 1, 1914, and of \$1,000 due March 1, 1914, with interest thereon from their respective due dates.

We, therefore, sustain the plaintiff's motion, and now enter judgment in her favor and against the defendant for the sum of \$1,766.24, being the plaintiff's claim of \$1,500 (the two installments above mentioned), with interest to date.

On the trial the jury disagreed, and the court thereafter entered judgment for the plaintiff on the record in the sum of \$1,766.24, being the amount of the claim with interest. Defendant appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Elton J. Buckley, of Philadelphia, for appellant. Grover C. Ladner and Charles I. Cronin, both of Philadelphia, for appellee.

PER CURIAM. This judgment is affirmed, on the opinion of the learned court below directing it to be entered.

(257 Pa. 561)

JOSEPH v. NAYLOR.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. DAMAGES ⇐151—PLEADING—EXEMPLARY DAMAGES.

As a general rule of pleading, it is not necessary to claim exemplary damages by name; it being sufficient if the facts alleged and the proofs be such as to warrant their assessment.

2. HUSBAND AND WIFE ⇐349—DEBAUCHING WIFE—PUNITIVE DAMAGES.

A husband may recover punitive damages for the debauching of his wife, not only by way of compensation, but as punishment, as, when a wrongful act is done intentionally, without just cause or excuse, malice is presumed.

3. HUSBAND AND WIFE ⇐326, 334(1)—ALIENATION OF AFFECTIONS—DAMAGES.

The fact that husband and wife may not be living together harmoniously when the wife's affections are alienated does not affect the husband's right to recover therefor, although the circumstance may be considered in mitigation of damages.

4. TRIAL ⇐146—WITHDRAWAL OF JUROR—IRRELEVANT REMARKS—OBJECTION.

In an action to recover for debauching plaintiff's wife and for the alienation of her affections, the refusal to withdraw a juror on defendant's motion because of her immaterial and irrelevant remarks while testifying was not reversible error, where no objection thereto was made until she stopped a long tirade, and where the irrelevant testimony was stricken out, and there was no exception to the court's refusal to withdraw a juror.

5. TRIAL ⇐146—WITHDRAWAL OF JUROR—IRRELEVANT REMARKS.

In such case, where defendant admitted his illicit relations with plaintiff's wife, but denied that he was afflicted with a venereal disease or communicated it to her, as alleged, the trial judge did not abuse his discretion in refusing defendant's motion for the withdrawal of a juror because of her remarks while on the stand that she had seriously wronged her husband "for something [meaning the defendant] that is half rotten," and "all I ask the court is to compel him to remove the bandages from his legs, and that will show you he is rotten," where, prior to such remarks, the defendant's condition had been so fully discussed that they could have had no prejudicial effect upon the jury, especially where his counsel had made no objection to the first admission of evidence as to his physical condition.

Appeal from Common Pleas, Philadelphia County.

Trespass by Luther Joseph against Morris Naylor to recover damages for the debauching of plaintiff's wife and for the alienation of her affections. Verdict for plain-

tiff for \$3,000, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Henry J. Scott, of Philadelphia, for appellant. John Reynolds, of Philadelphia, for appellee.

MOSCHZISKER, J. Plaintiff, Luther Joseph, sued in trespass to recover damages for debauching his wife and alienating her affections. He obtained a verdict for \$3,000, upon which judgment was entered, and the defendant has appealed.

We shall not go into the nasty details of the evidence further than to outline the facts essential to a proper consideration of the questions brought before us for determination. Plaintiff was married in 1891, and lived with his wife, in comparative happiness, for nearly 20 years. The latter met the defendant about February, 1911, and almost immediately they entered upon a course of marital infidelity. The wife thereupon became indifferent to her husband and treated him accordingly. Although plaintiff's work took him away from the city for considerable periods, yet he always supported his spouse by generous allowances from his wages, and upon returning to his home, from time to time, occupied the same room with her. On these occasions, however, after becoming acquainted with the defendant, Mrs. Joseph failed to show affection for her husband, and persistently refused him the rights of that relation. Finally, in 1915, plaintiff discovered that his wife was suffering from a loathsome and destructive venereal disease, which she had contracted from the defendant, and forthwith left her, subsequently commencing the present action.

At trial the defendant did not deny his illicit relations with plaintiff's wife, but contented himself with a denial of the allegation that he was afflicted with a venereal disease and was responsible for the unclean condition of the latter. The several assignments of error are summarized in appellant's statement of the questions involved under three heads: (1) Since punitive damages were not specially claimed and no express malice against the plaintiff was shown, was it proper to submit the question of such damages to the jury? (2) Did the court below err in refusing to withdraw a juror when the wife of the plaintiff, as a witness interjected "irrelevant, immaterial matter and objectionable remarks"? (3) Was like error committed when plaintiff's wife, "after a vituperative attack on defendant, fainted on the witness stand and was removed therefrom by a nurse and doctor"?

[1-3] As a general rule of pleading, "it is not necessary to claim exemplary damages by name; it being sufficient if the facts alleged and the proofs be such as to warrant their

assessment." 8 R. C. L. § 169, p. 628. It is the settled rule in this state that a husband may recover punitive damages for the debauching of his wife, not only by way of compensation to the plaintiff, but as punishment of the defendant (*Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515; *Mathels v. Mazet*, 164 Pa. 580, 30 Atl. 434); for, when a wrongful act is done intentionally, without just cause or excuse, malice is presumed (*Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367). See, also, *Wirsing v. Smith*, 222 Pa. 8, 18, 70 Atl. 908. The fact that a husband and wife may not be living in perfect harmony when the latter's affections are alienated does not affect the right of the former to recover in an action such as the one at bar, although the circumstance may be considered in mitigation of damages. *Durning v. Hastings*, 183 Pa. 210, 38 Atl. 627. The authorities just cited are more than sufficient to dispose of appellant's first complaint; we may add, however, that all the issues properly involved in this case were submitted to the jury in a fair and correct charge.

[4] The first assignment of error, covering the matters set forth in the second question involved, might well be dismissed by the mere statement that defendant took no exception to the ruling there brought into question; but it is only fair to note that no objection was entered to the "irrelevant, immaterial matter and objectionable remarks" now complained of, until the witness reached the end of a long tirade, whereas the trial judge states he would have stopped the testimony, had counsel asked him so to do, at any objectionable point. Moreover, it appears that a ruling was in fact made, striking from the record all the irrelevant and hearsay evidence referred to in the assignment now under consideration.

[5] As to the complaints covered by the third question involved, the only matter therein which requires serious consideration is the further improper remark made by the plaintiff's wife, when upon the stand, to the effect that she had seriously wronged her husband "for something [meaning the defendant] that is half rotten," adding:

"All I ask the court is to compel him [defendant] to remove the bandages from his legs, and that will show you he is rotten."

At argument we were impressed that this was such a serious breach it must have proved prejudicial to the defendant, and that the incident imperatively called for the withdrawal of a juror. A careful reading of the entire body of the evidence, however, shows that prior to the offensive utterances just quoted the case was so thoroughly impregnated with the allegation that the defendant was and had for years been a diseased man, whose legs were sore with syphilis, that we do not now feel it at all likely the remarks in question had any material prejudicial effect upon the jury. The notes of testimony show that

this element in the case—Mr. Naylor's alleged physical rottenness—was first introduced, without objection on the part of the latter, when counsel for the plaintiff proved by Mrs. Joseph her own diseased condition and that this was due to intercourse with the defendant. At that time this whole subject was gone into ad nauseam, and the witness testified that defendant had said she was not the first woman who accused him of giving her syphilis; that he also informed her of the fact that he had serious trouble with his legs, due to that disease. The trial had been on for some time, and the plaintiff's wife made the objectionable remarks now before us when she was overwrought by a long, skillfully conducted cross-examination, which likewise may account for her condition when she left the stand; but, however that may be, under the peculiar circumstances at bar, we are not convinced the trial judge abused his discretion when he refused to withdraw a juror and continue the case.

The assignments of error are overruled, and the judgment is affirmed.

(257 Pa. 489)

NAZARETH FOUNDRY & MACH. CO. v. MARSHALL et al.

(Supreme Court of Pennsylvania. April 16, 1917.)

1. DISMISSAL AND NONSUIT §81(2)—RULE TO TAKE OFF NONSUIT—STATUTE.

Under Act March 11, 1875 (P. L. 6), providing for nonsuit with leave to move the court in banc to set the same aside, a rule to take off a nonsuit must be considered and disposed of by the court in banc, and not by the trial judge alone.

2. APPEAL AND ERROR §105—ORDERS APPEALABLE—NONSUIT.

No appeal lies to the entry of a nonsuit, but only to the refusal to take it off.

3. PRINCIPAL AND SURETY §81—CONSTRUCTION OF BOND—SATISFACTION.

Under a bond given after the obligee had sold to the principal obligor two engines which were in turn sold by the obligor to two paper companies, providing that if after trial and after the obligor had used every effort to make them satisfactory to the purchasers they were rejected by the purchasers and promptly returned to the obligee in good condition, except for reasonable wear, the penal sum of \$8,000 should be reduced by the sum of \$1,400 on return of one engine, and \$2,000 on the return of the other engine, the payment of the full amount of the purchase money or the return of both engines in good order would satisfy the bond, and on the return of one engine in bad order the obligor would be liable for the expense of restoring it to as good condition as when shipped.

4. EVIDENCE §131—CONDITION OF ENGINE—RELEVANCY.

In such action, testimony of a witness, who was familiar with the kind of engine and its construction, as to the condition of the engine a week before the trial, was admissible, where there was other evidence that it was in the same condition when returned.

Appeal from Court of Common Pleas, Northampton County.

Assumpsit on a bond by the Nazareth Foundry & Machine Company against Frank J. Marshall and others. From a final order refusing to take off a compulsory nonsuit, plaintiff appeals. Reversed with a procedendo.

Argued before MESTREZAT, POTTER, MOSCHZISKEB, FRAZER, and WALLING, JJ.

W. H. Kirkpatrick, of Easton, for appellant. Edw. J. Fox, Jas. W. Fox, and F. B. McAlee, all of Easton, for appellees.

POTTER, J. This was an action of assumpsit brought to recover upon a bond given by defendants to plaintiff, dated July 24, 1913, for the sum of \$8,800. The bond contains a recital that the Marshall Machinery & Supply Company is indebted to plaintiff in a sum of about \$1,800 in addition to the cost of construction of two Marshall paper-making engines, and that it is deemed advisable by all parties interested that the former company furnish a good and sufficient bond to plaintiff, conditioned for the prompt payment of the purchase price of the two engines. The condition of the bond is that the Marshall Machinery & Supply Company should pay or cause to be paid to plaintiff company the sum of \$1,400 within three days after one engine should be received from the Cylinder Paper Company, and also the sum of \$2,000 within three days after the other engine should be received from the John Lang Paper Company. It was further made part of the condition that:

"If after due trial, and after Mr. Marshall has used every effort to make the above-mentioned engines satisfactory to the purchasers, and the said engines or either of them are rejected by the said purchasers, and promptly returned to the Nazareth Foundry & Machine Company in as good a condition as when shipped, reasonable wear and tear excepted, that then and in any such case, the penal sum payable under this bond shall be reduced by the sum of \$1,400 if the machine shipped to the Cylinder Paper Company is returned, and \$2,000 if the engine to be shipped to the John Lang Paper Company is returned."

In plaintiff's statement of claim it is admitted that the engine shipped to the Cylinder Paper Company had been accepted and paid for by the purchaser, and that the price, \$1,400, had been received by plaintiff, but it is averred that the purchase price of the other engine had not been paid, and that the engine had not been returned to plaintiff in good condition. Plaintiff claimed to recover on the bond \$2,205.97, with interest. In the answer and counterclaim of defendants it is averred that the Marshall Machinery & Supply Company had paid its entire indebtedness to plaintiff, and that, in accordance with the terms of the bond. Mr. Marshall had used every effort to make the engine which had been returned satisfactory to the purchaser, but that the same had been rejected and re-

turned to plaintiff in as good condition as when shipped, reasonable wear and tear excepted. Upon the trial, after plaintiff's testimony was concluded, defendants' counsel moved for judgment of compulsory nonsuit on the ground chiefly that no proof had been made that the Marshall Machinery & Supply Company had ever received from the John Lang Paper Company the sum of \$2,000, the price of the machine shipped to that company. The trial judge granted the motion, whereupon plaintiff's counsel moved for a rule to strike off the nonsuit, which was denied, as was a motion to strike off the nonsuit. Plaintiff has appealed.

[1, 2] The first and second assignments allege error in the refusal of a rule, and of a motion to take off the nonsuit. The motions were made immediately after the nonsuit was entered, and they were at once denied by the trial judge. This was not in compliance with the statute which authorizes the entry of compulsory nonsuits. Act March 11, 1875 (P. L. 6) § 1, provides that a judgment of nonsuit may be entered "with leave, nevertheless, to move the court in banc to set aside such judgment of nonsuit," and a writ of error (now appeal) is given only to the refusal of the court in banc to set aside the nonsuit. No appeal lies to the entry of the nonsuit, but only to the refusal to take it off. *Bausbach v. Reiff*, 237 Pa. 482, 488, 85 Atl. 762. In that case it was said:

"The act of 1875, above referred to, provides expressly that such rule [to take off the nonsuit] shall be considered and disposed of by the court in banc, not by the trial judge alone. The act contemplates consideration of the questions involved by the court in banc. This they did not receive in the present case."

The same thing may be said of the case at bar. The trial judge himself refused the motion to strike off the nonsuit, and the questions involved did not receive the consideration of the court in banc, as is contemplated by the act of assembly.

No opinion was filed, and we can gather the reasons, for the entry of the nonsuit only by reference to those stated by counsel for defendants in their motion. The principal one was that the plaintiff did not prove that the Marshall Machinery & Supply Company had received from the John Lang Paper Company the price of the engine, being the sum of \$2,000. To relieve the obligors, it must appear, either that the Marshall Machinery & Supply Company had paid to plaintiff the respective sums of \$1,400 and \$2,000 within three days after the receipt of those sums from the purchasers of the engine, or that, after due trial and after Marshall had used every effort to make the engines satisfactory to the purchasers, the engines had been promptly returned to plaintiff in as good condition as when shipped, reasonable wear and tear excepted. There was ample evidence at the trial to show that the engine was not returned in the condition required to

comply with the terms of the bond. If this was the case, the defendants were not relieved of their obligation upon the bond. The nonsuit was therefore improperly entered, and the refusal to take it off was error.

[3] The argument of counsel for appellant that the bond should be construed as a primary and principal obligation "to pay the whole indebtedness of the Marshall Company" is not sound. The bond is merely one for the payment of money, to be discharged on the performance of certain conditions. The only question to be determined is whether those conditions have been performed or not. We are unable to find in the bond any agreement on the part of the obligors "to pay the overdue account." Reference to that account appears to have been made only to show the reason for requiring the full purchase price of the engines to be paid to plaintiff. There is an express recital that the bond is to be conditioned "for the prompt payment of the purchase price of the two engines," and an alternative condition that the return of the large engine in good condition shall entitle the defendants to a credit upon the bond of \$2,000. The amount named in the bond, \$6,800, was clearly a penal sum, as there is no pretense that the real debt exceeded \$3,400. Had the full amount of the purchase money been paid, the bond would have been satisfied, or if both engines had been returned in good order, reasonable wear and tear excepted, a credit equal to the amount of the purchase money must have been allowed. Under the evidence of plaintiff, the engine intended for the John Lang Paper Company was returned in a damaged condition. For whatever amount was necessary to restore that engine to as good a condition as when shipped, reasonable wear and tear excepted, the plaintiff was entitled to recover from the defendants in this action.

[4] The third assignment is to the action of the trial judge in sustaining an objection to the offer of plaintiff's counsel to show by the witness Firth, who was familiar with the kind of engine in question and its construction, that he had examined the engine a week before the trial, and the condition in which he found it at that time, the preceding witness, Fry, having testified that at the time of the trial the engine was in just the same condition, with the exception of rust, as when it was returned. The testimony of this witness was admissible, and it was error to sustain the objection.

In the fourth assignment complaint is made of the action of the court below in sustaining defendants' objection to the admission in evidence of four letters written by plaintiff to the Marshall Machinery & Supply Company. The letters were offered for the purpose of showing that plaintiff had refused to accept the return of the engine in relief of defendants' bond. This question is unimportant, as both sides agree that, under the terms of the bond, the question of the ac-

ceptance of the engine by plaintiff is immaterial to the decision of the case.

The first, second, and third assignments of error are sustained, and the judgment is reversed with a procedendo.

(357 Pa. 566)

HAYES v. ARCADE REAL ESTATE CO.

(Supreme Court of Pennsylvania. April 23, 1917.)

1. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS OF FACT.

Findings of fact of the lower court supported by evidence will not be interfered with by the Supreme Court in the absence of clear error.

2. PARTY WALLS §10—INJUNCTION—FINDINGS—EVIDENCE.

In a suit to compel an adjoining landowner to remove such part of an underpinning wall as encroached on plaintiff's land more than allowed by Act May 7, 1855 (P. L. 464), and to compel the closing of certain openings and windows in the new part of the wall, evidence held to sustain findings that the underpinning wall was necessary to support the party wall and protect plaintiff's building; that it had been constructed according to the best practice; that it encroached no more than was actually necessary to support the building and the lateral pressure; and that it was not used above the surface in connection with a new building constructed entirely on defendant's land.

3. PARTY WALLS §8(3)—LATERAL SUPPORT.

An adjoining owner who made no use of a party wall to support his building and who was obliged to underpin the party wall by reason of excavations on his own land was required to furnish lateral support sufficient to sustain the surface in its original condition and to do the excavation on his own land in a proper and careful manner.

4. PARTY WALLS §8(4)—ENCROACHMENT—INJUNCTION.

In a suit to compel an adjoining owner to remove a part of an underpinning wall encroaching on plaintiff's land more than allowed by Act May 7, 1855 (P. L. 464), where it appeared that the work was done openly and in accordance with plans on file in the bureau of building inspection, plaintiff, who had made no complaint of an encroachment of the underpinning wall until 14 years after the completion of defendant's building, would not be permitted to question the necessity of the encroachment, where, at most, it was only a technical trespass not the subject of equitable interference.

5. PARTY WALLS §2—UNDERPINNING WALL—RIGHTS OF PARTIES.

Where neither a party wall nor an underpinning wall necessitated in the construction of a building was used for its support, and where the entire party wall to the bottom of the underpinning wall might be removed without affecting the stability of the building, the mere physical attachment between the buildings and the attachment of girders to the party wall was not sufficient to make the party wall and the underpinning wall, as a whole, a party wall, and subject the builder to the liabilities and restrictions as to the use of a party wall.

Appeal from Court of Common Pleas, Philadelphia County.

Bill for injunction by William A. Hayes, surviving executor and trustee under the will of Joseph Grandon, deceased, against the Arcade Real Estate Company. From a de-

cree on final hearing dismissing the bill, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Alex. Simpson, Jr., and Joseph G. Magee, both of Philadelphia, for appellant. John Hampton Barnes, of Philadelphia, for appellee.

FRAZER, J. Plaintiff's bill was to compel defendant, an adjoining owner, to remove such portion of an underpinning party wall, constructed by defendant and alleged to encroach on the land of plaintiff, to a greater extent than ten inches allowed by the Act of May 7, 1855 (P. L. 464) and to compel defendant to close certain openings and windows in a new portion of the party wall constructed by defendant. The bill was dismissed, and plaintiff appealed.

The material facts of the case are not disputed. The parties are owners of adjoining lots on Market street, Philadelphia, being Nos. 1432 and 1434, respectively. On these lots about 50 years ago were constructed two buildings, each 3 stories in height, with a party wall consisting of an 18-inch stone foundation extending 7 feet below the surface, and a brick wall 9 inches thick, extending from the surface of the ground to the roof.

[1] Plaintiff made alterations in premises 1432 Market street for the purpose of fitting the property for use as a saloon, and in doing so constructed a lining wall on his lot against the foundation wall to afford additional support to the interior construction, making the part of the wall on plaintiff's property approximately 13 inches in thickness. In 1901 defendant removed the old building at No. 1434, and began the erection of a 13-story office structure, known as the Commercial Trust Building. The plan of the building contemplated a construction resting on its own foundations, without depending for support upon the party wall, which defendant considered to be of insufficient strength to sustain the new structure. In excavating for foundations defendant was obliged to go considerably below the foundation of the old party wall, and in the course of the work was required to provide for its support. For this purpose defendant shored up the wall temporarily, made the excavation for the foundation, which extended 30 feet below the surface, and constructed on this foundation immediately under the party wall a subfoundation, or underpinning wall, 48 inches thick, which extended 18½ inches on plaintiff's ground, and 29½ inches on defendant's property. Upon completion of the underpinning to within a foot of the bottom of the old party wall, the two were connected by filling the remaining space with bricks

until the party wall rested on the subfoundation. The added underpinning, when completed, extended 4 or 5 inches further on plaintiff's property than the old wall as it existed previous to that time. Having provided for the safety of the party wall, defendant next proceeded to construct the foundation for its building. The work was begun with concrete foundations, known as "footings," 9 feet long and laid perpendicular to the party wall and extending into the underpinning wall in recesses cut for that purpose until they practically reached the party line. After the footings were in place the spaces in the underpinning wall were closed with cement. Upon the footings are placed columns supporting a cantilever steel construction on which rest the upright steel columns of the building, running to the top and supporting the girders at each floor, thus creating a form of construction used for the purpose of distributing weight over a large area of surface. The end of the construction extended into the 4-foot wall to within about 5 inches of the property line. The beams when in place were imbedded in concrete, thus making the foundation a solid mass of steel and concrete resting on footings entirely within the line of defendant's property, independent of the party wall, and connected therewith only because of the concrete filling between the two walls. On this foundation the steel columns of the building rested. In putting the cross-girders in place a cut into the party wall of about 4 inches became necessary, and when in place the beams extended into the wall a distance of $1\frac{1}{2}$ inches, the remaining space being filled with concrete. Following the completion of the steel structure, a lining wall, supported by the steel frame, was constructed against the party wall and extended upward, receding outward at the top of the underpinning wall, and following the line of the old wall until the top was reached, at which point it was built over for a distance approaching $4\frac{1}{2}$ inches to the party line. From this point the wall known as a "curtain wall" extends upward to the roof of defendant's building, within the line of defendant's property, and is independent of the party wall, though in contact with it, by reason of the use of concrete filling in the cracks at the joints. The removal of the old wall would not in the slightest degree affect the stability of the new.

[2, 3] The court below found the underpinning wall necessary to support the party wall and protect plaintiff's building; that the work was done by competent contractors in accordance with the best practice and usage in the business; that it encroached on plaintiff's premises no further than actually necessary to support the building and lateral pressure of the ground; and, further, that no use was made by defendant of either it or the party wall above the sur-

face in connection with its building, which was constructed independently of such wall, and rested entirely on its own foundation, laid on defendant's ground. The court also reached the conclusion that the channeling of the party wall for the purpose of setting the girders, the contact of the curtain wall of defendant's building with the party wall, the extension of the curtain wall over the party wall at the top of the latter, and the cementing of the cracks to make the party wall weathertight, without using it as support for defendant's wall, was not such use of the party wall as entitled plaintiff to have his bill sustained. So far as the findings of fact are concerned, they are fully supported by the evidence, and present no cause for interference by this court. *Anthracite Lumber Co. v. Lucas*, 249 Pa. 517, 95 Atl. 80; *Law v. First Nat. Bk. of Pittsburgh*, 247 Pa. 493, 93 Atl. 635; *Duffey v. Jennings*, 247 Pa. 388, 93 Atl. 508; *Mt. Oliver Boro. v. Goldbach*, 244 Pa. 56, 90 Atl. 435. There remains to be considered only the correctness of the legal conclusion, based on the court's findings.

As to the construction of the underpinning wall, the case of *Sharples v. Boldt*, 218 Pa. 372, 67 Atl. 652, sustains the conclusion of the trial judge. Since defendant has made no use of the wall or foundation to support the building, and as the necessity for the underpinning arose by reason of excavations on defendant's land, the duty of defendant involved lateral support; consequently the case does not fall within the provisions of the statutes relating to the construction of party walls. Defendant's duty to provide lateral support was merely to sustain the surface in its original condition, and excavate on its land in a proper and careful manner and without negligence. The practical difficulties in the way of a determination of the precise extent of this responsibility, and whether the duty has been performed in a given case, make necessary and advisable, in actual practice, for the abutting owner in excavating to take the precautions necessary to assure absolute protection to the adjoining building by underpinning to the depth of the new excavations. In addition, the municipality, under its police power to safeguard the public, usually requires such action to be taken. It was in the discharge of this duty with reference to lateral support, and in compliance with the requirements of the bureau of building inspection, that this underpinning wall was constructed, and this brings the situation directly within *Sharpless v. Boldt*, supra, where it was said (218 Pa. p. 379, 67 Atl. 654):

"If plaintiffs had built first in such way as to require the additional thickness of wall, they must have put all but ten inches of it on their own land. But the additional thickness in this case was altogether for plaintiff's benefit, appellant not using the wall at all, and having no necessity for such thickness. The building inspector in ordering such additional thickness of wall as he deemed proper for public safety

did not specify on which land it should be located, and the appellant assumed that it was to be on plaintiffs'. As it was for plaintiffs' benefit, and appellant could not be compelled to put it on his own land, he was entitled to assume that it was to be on plaintiffs'."

[4] The trial judge further found the work was done openly and in accordance with plans on file in the bureau of building inspection, and that no complaint was made by plaintiff of the encroachment until 14 years after the completion of defendant's building. Under the circumstances, plaintiff might readily have discovered the manner of construction at the time the work was being done, and should not be permitted at this late date to question the necessity of the encroachment, which, at most, is only a technical trespass, not the subject of equitable interference, and not even entitling plaintiff to nominal damages. *Sharpless v. Boldt*, supra.

[5] The remaining question is whether the fact of the absence of an actual line of separation between the underpinning and the party wall and defendant's wall, though the latter was self-supporting and independent of the continued existence of the party wall, is sufficient to fasten upon the whole the character of a party wall and subject defendant to liabilities and restrictions governing the use of such wall. The cases relied upon by plaintiff to establish the affirmative of this proposition have been examined, and do not go to that extent, as the following discussion will show:

Milne's Appeal, 81 Pa. 54, merely decided that a landowner who starts the foundation as a party wall upon the property line, and uses it as a support for his wall, cannot escape the burden incident to the use of such wall by constructing the upper part entirely within the line of his property. There it was not denied that the party wall foundation was used for the support of the defendant's new wall, and the lower court said, in an opinion affirmed on appeal (81 Pa. p. 56):

"The character of the wall must be determined in part from its foundation. If the builder starts the latter upon the line, and thus takes the land of the adjoining owner, he must carry it up strictly as a party wall, or at least in such manner as to give the adjoining owner all the benefits of such a wall. Otherwise the land of the latter would be taken without any corresponding benefit."

In *Western National Bank's Appeal*, 102 Pa. 171, a party wall had been constructed and used for many years. Changes were made in both buildings. The owner of one built an additional lining wall, which was bolted to the old wall, for the purpose of sustaining the lateral pressure from the adjoining building. Subsequently the owner of the latter building removed the lining wall and erected a new and higher one, also constructing an additional lining wall against the old, until it reached the top of the latter, over which it extended, treating it as a par-

ty wall. A bill was filed by the adjoining owner to restrain such use of the structure, alleging the wall was not originally constructed equally on the lots of both parties. The court dismissed the bill, stating (102 Pa. p. 182):

"There is no evidence to repel the natural inference from the acts of the parties that they intended it for a party wall. It has been so used ever since."

And it was held that the mistake as to the location of the line did not change the result.

In *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Odd Fellows*, 50 Pa. Super. Ct. 255, the wall in question was conceded to be a party wall, and the only question was, as here, whether defendants made use of it in the erection of their building, and the court found the facts sufficient to warrant a finding of such use.

In the present case the evidence amply sustains the conclusion of the trial judge that defendant made no use of the party wall, or the foundation thereunder, either for the purpose of support or for the purpose of protection. The testimony shows the entire party wall, from the roof of plaintiff's building to the bottom of the underpinning of the foundation wall, can be removed at any time without in the slightest manner affecting the stability of the Commercial Trust Building. A physical attachment between the buildings, due to the filling of the space between the party wall and plaintiff's new wall with cement and to the fact that one girder appears to have protruded nearly two inches into the party wall, is conceded. If, however, mere physical contact alone were made the criterion for determining the existence of a party wall, two entirely distinct and separate brick walls could not be constructed adjoining each other on the property line without combining the two as a party wall, unless a clear unused vacant space is permitted to remain between them, as otherwise the mortar used in laying the bricks must necessarily adhere to and to some extent attach the two walls together. While the grillage work of the foundations of defendant's building was recessed into the four-foot underpinning wall, and upon completion of the work the empty spaces filled with concrete, making the whole a solid mass when hardened, the latter wall was not necessary to or a part of the support of defendant's building. Its presence was due entirely to the necessity for support of plaintiff's building. As the wall extended thirty inches on defendant's lot, it would, but for this, have had the use of the land, and the only alternative would have been to build the excess width solely on plaintiff's land, as might properly have been done. *Sharpless v. Boldt*, supra.

Decree affirmed, and appeal dismissed at appellant's costs.

(257 Pa. 575)

CAVENY v. CURTIS et al.

(Supreme Court of Pennsylvania. April 23, 1917.)

1. TENANCY IN COMMON ~~§~~39—RIGHTS OF COTENANT—AGREEMENT AS TO USE OF PROPERTY.

One tenant in common is without authority to bind his cotenants by an agreement concerning the use or control or affecting the title of the joint property.

2. EVIDENCE ~~§~~441(6)—PAROL EVIDENCE—WRITTEN CONTRACT—FRAUD OR MISTAKE.

A written contract of agency for the sale of land cannot be varied by an agent's parol agreement, where there is no allegation that anything was omitted therefrom by fraud, accident, or mistake, or that such parol matter was the inducement for the execution of a contract to purchase.

3. EQUITY ~~§~~326—PLEADING AND PROOF.

Plaintiff in equity does not recover on proofs alone, but on his pleadings and proof, and must aver all matters necessary to his recovery, and implied allegations or proof of matters not alleged are no basis for equitable relief.

4. VENDOR AND PURCHASER ~~§~~83—MERGER OF PRIOR AGREEMENTS—INDEPENDENT COVENANTS.

The general rule that preliminary agreements relating to the sale of land become merged in the deed does not apply to independent covenants or provisions in an agreement of sale not intended by the parties to be incorporated in the deed, in which case a delivery of the deed is a part performance of the contract, which remains binding as to its further provisions.

5. INJUNCTION ~~§~~114(1)—PARTIES.

A bill to restrain defendants from conveying land to a third person without incorporating in the conveyance certain restrictions as to use of the property on the ground that plaintiff had purchased property from defendants subject to certain restrictions, and that at the time of the conveyance it was agreed between himself and defendants' agent that the adjoining property should be sold subject to the same restrictions, was defective for want of parties, where such third person was not made a party to the bill.

6. COURTS ~~§~~480(2)—INJUNCTION—JURISDICTION OF COMMON PLEAS COURT.

The common pleas court sitting in equity has no power to restrain a conveyance of realty in which minors are interested, where the sale has been approved by the orphans' court under Acts March 29, 1832 (P. L. 180), and Act June 16, 1836 (P. L. 682), and where the injunction would modify the decree of the orphans' court.

Appeal from Court of Common Pleas, Montgomery County.

Bill in equity for an injunction by William E. Caveny against H. Agnes Curtis and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

Nicholas H. Larzelere, Charles Townley Larzelere, and Franklin L. Wright, all of Philadelphia, for appellant. William H. Peace and William Drayton, both of Philadelphia, and Montgomery Evans, of Norristown, for appellees.

FRAZER, J. Plaintiff appeals from a decree of the court of common pleas of Mont-

gomery county, dismissing a bill in equity brought to restrain a conveyance of realty made without inserting in the deed certain restrictions forbidding the use of the property for offensive purposes.

Defendants were tenants in common of a tract of land containing about 52 acres, and, desiring to sell the same, written authority was given to a real estate dealer, Maurice J. Hoover, to dispose of the property; the agreement stipulating the minimum price for which various parts of the land might be sold, and also containing the following provisions:

"All land on the Mill Road to have restrictions as to cost of buildings and position of houses with reference to the road with the adjoining properties. All lands to be sold with restrictions as to offensive occupations. The sale of the minors' interest to be approved by the orphans' court."

The interest of the minors was represented by the Montgomery Trust Company, one of the defendants, their duly appointed guardian, which company, with the other parties in interest, signed the agency agreement with Hoover. On August 29, 1911, Hoover entered into an agreement of sale with plaintiff, by which he agreed to sell to the latter a part of the tract consisting of three acres—

"subject to the following restrictions: That at no time hereafter forever shall said premises, or any part thereof, be used or occupied for the manufacture, brewing, distilling or sale of spirituous or malt liquors, nor shall said premises or any part thereof or any building erected thereon at any time hereafter be used or occupied as a tavern, drinking saloon, bone boiling establishment, tannery, slaughterhouse, glue, soap, candle, starch or gunpowder manufactory, or other offensive or dangerous purposes; and that at no time hereafter forever shall more than one dwelling be erected on said premises, and that the cost of said dwelling shall not be less than five thousand dollars; also that no dwelling shall be erected nearer than forty feet to the line of Waverly Road and further that any stable or garage that may hereafter be erected shall be built on the rear of said lot and not nearer than five feet to any party line."

The agreement also contained this clause: "The sale is made subject to the approval of the orphans' court."

Plaintiff testified that at the time the agreement of sale was made there was exhibited to him the agency agreement, and a typewritten paper setting out the restrictions he was told by Hoover would be incorporated in the deeds for all other lands in the tract, and that these restrictions were practically the same as those contained in the agreement of sale. A deed to plaintiff, restricting the use of the property as above indicated, was prepared, and the sale duly approved by the orphans' court. At the time of the settlement, November 28, 1911, plaintiff made inquiry concerning the restrictions intended to be incorporated in deeds for other properties sold out of the tract, whereupon counsel for defendant dictated the following paper:

"It is hereby agreed and understood that the lands now belonging to H. Agnes Curtis and D. Foster Hewett and the Montgomery Trust Company, guardian, which adjoin the land conveyed to William E. Caveny by deed dated November 6, 1911, on the northeast, southwest and northwest, shall be sold subject to the restrictions as they appear of record, in said deed, which is now lodged for record in Norristown."

This paper was signed by H. Agnes Curtis and W. Drayton, "Attorney for Montgomery Trust Company, Guardian." D. Foster Hewett, the other defendant, was not present at the time, and did not sign the agreement, nor was it signed by the husband of H. Agnes Curtis, nor by the guardian of the minor defendants, except through its attorney, Mr. Drayton. Subsequently, on December 9, 1912, Hoover entered into an agreement for sale of 7 acres of the tract to George H. Lorimer, "clear of incumbrance and easements, * * * subject to the approval of the orphans' court." Upon the court's approval of the sale, plaintiff filed the present bill to restrain the carrying out of the contract, alleging a violation of the agreement made with plaintiff concerning the imposing of restrictions on the entire tract. Demurrers to the bill were overruled, answers filed, and, after hearing, a decree nisi was entered, restraining the conveyance to Lorimer without inserting restrictions against offensive occupations, it appearing that the tract sold was not so situated as to be within the clause prohibiting the erection of buildings costing less than \$5,000. Subsequently exceptions filed to the decree were sustained and the bill dismissed.

Defendants denied the existence of a type-written paper showing the restrictions to be placed on other properties, which paper plaintiff testified had been exhibited to him at the time of executing his agreement to purchase a portion of the tract. The court, however, found the transaction to be as described by plaintiff, and that plaintiff at that time was shown either the original or a copy of a previous deed for part of the same tract to Charles Sinkler, which, with certain exceptions mentioned by the court, contained the restrictions subsequently inserted in plaintiff's deed. The court also found that defendants adopted no general plan or building scheme for the improvement of the tract from which an intent to impose similar restrictions upon all parts conveyed might be inferred; hence the case must be considered solely from the standpoint of the oral and written agreements between the parties.

[1] We deem unnecessary a consideration of the question whether or not the act of the attorney for the guardian in signing the agreement of November 28, 1911, was within the scope of his authority or was ratified by the guardian, or whether Mrs. Curtis had power to create a restriction upon her property without the consent of her husband,

because one of the tenants in common did not sign the agreement or authorize it to be signed for him, and therefore, so far as the right to specific performance of the contract is concerned, the bill was properly dismissed. One tenant in common is without authority to bind his cotenants by an agreement concerning the use or control, or affecting the title, of the joint property. *McKinley v. Peters*, 111 Pa. 283, 3 Atl. 27. "Under ordinary circumstances neither tenant in common can bind the estate or person of the other by any act in relation to the common property, not previously authorized or subsequently ratified, for cotenants do not sustain the relation of principal and agent to each other, nor are they partners. * * * A contract by one tenant in common in relation to the whole estate being voidable at the election of his cotenants not joining in said contract." 38 Cyc. 101, 104. This principle is sustained by the citation of a large number of cases in various jurisdictions.

[2,3] Another question for determination is the effect of the parol agreement as to restrictions on other parts of the property, which the court found was made by Hoover, the agent, viewed in the light of the written authority of the latter, providing for "all lands to be sold with restrictions as to offensive occupations." While this left the exact nature of the restrictions an open question, and apparently within the discretion of the agent, there can be no doubt the requirement itself is mandatory, and the verbal agreement by the agent to put restrictions in all other deeds was merely his act in following out the provisions of his written authority to sell. As was pointed out by the court below, the bill does not aver the parol agreement was omitted from the writing by fraud, accident, or mistake, or that it was the inducement for the execution of the contract of purchase by plaintiff. A plaintiff in equity does not recover on proofs alone, but on his pleadings and proofs. He must aver in his bill all matters essential to entitle him to recover, and neither implied allegations nor proof of matters not alleged can be made the basis for equitable relief. *Thompson's Appeal*, 126 Pa. 367, 17 Atl. 643; *Luther v. Luther*, 216 Pa. 1, 64 Atl. 868; *Frey v. Stipp*, 224 Pa. 390, 73 Atl. 460.

[4] The general rule is that preliminary agreements and understandings relating to the sale of land become merged in the deed. This rule, however, does not apply to independent covenants or provisions in an agreement of sale not intended by the parties to be incorporated in the deed. In such case the delivery of the conveyance is merely a part performance of the contract, which remains binding as to its further provisions. *Selden v. Williams*, 9 Watts, 9; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Close v. Zell*, 141 Pa. 390, 21 Atl. 770, 23 Am. St. Rep. 296. The present is an illustration of this exception to the general rule. There

was apparently no intention that the provision as to the prohibition in deeds for other parts of the same tract should be inserted in the deed to plaintiff. His conveyance is complete as it stands, and there is no question of altering its provisions by the insertion of a clause omitted by fraud, accident, or mistake. The mistake, if any, was in failing to insert the provision in the agreement of sale. No averment to that effect is found in the bill, however. Neither is there an averment to the effect that the promise formed the inducement for the execution of the agreement of sale. In fact, that agreement is not mentioned. That restrictions were to be inserted in all deeds is conclusively shown in the written authority of the agent, and that the parol promise was made to insert in all deeds prohibitions similar to those in plaintiff's deed is found by the court below and supported by the evidence. It is equally clear, however, that plaintiff's bill contains no averments entitling him to the relief asked.

[5] The bill is also defective for want of necessary parties. It asks the court to restrain defendants from making conveyance to Lorimer without including therein the clause forbidding the use of the property for the purposes specified. Lorimer would be directly affected by such decree, and is entitled to be heard; consequently he is a necessary party to the bill. *Monessen Boro. v. Monessen Water Co.*, 243 Pa. 53, 89 Atl. 829.

[6] Assuming the defects mentioned above were corrected by amendment, a further question remains, involving the right of a court of equity to enter a decree which in effect modifies the decree of the orphans' court. Two of the co-owners of the land are minors, and their interests are represented by a guardian, a party defendant. The acts of the guardian with respect to the property of the minors are necessarily under the supervision of the orphans' court. Furthermore, the agreement to convey in each case stipulated the sale was made subject to the approval of the orphans' court, which was duly obtained. Upon application for leave to sell to plaintiff, that court was without knowledge of the additional agreement to impose restrictions on the remaining land, and so far as is known, was not asked to pass on the question of the advisability of the guardian entering into such agreement. Should a decree be entered in this proceeding restraining the sale to Lorimer without incorporating the restrictions as to the use of the property, the effect will be to modify the decree of the orphans' court approving the sale, and thus permit the action of that court to be attacked in a collateral proceeding.

Jurisdiction of guardians and their accounts was given to the orphans' court by

the Acts of March 29, 1832 (P. L. 190), and June 16, 1836 (P. L. 682), and in recognition of this jurisdiction the parties expressly stipulated that each sale was made conditional upon the approval of that court. In the exercise of its discretion, that court was entitled to have before it all facts relating to each sale for which approval was asked, having either a bearing or influence in the disposition of the matter. The jurisdiction of that court, by statute and by act of the parties, became exclusive in this controversy (*Johnstone v. Fritz*, 159 Pa. 378, 28 Atl. 148), and an application which tends to affect in any manner its decree heretofore entered must be made direct to it.

The decree of the court below in dismissing the bill is affirmed, without prejudice, however, to the right of plaintiff to apply to the orphans' court for amendment of its decree in conformity with the agreement and intention of the parties, if it appears the sale to Lorimer has not been consummated by payment of the purchase money, and final return made of the sale.

(258 Pa. 51)

HAMMOND v. HAMMOND.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. DEEDS \S 93—GRANTS—CONSTRUCTION.

The words of a grant are to receive a reasonable construction in accord with the intention of the parties.

2. EASEMENTS \S 54—SCOPE OF GRANT—CONSTRUCTION.

That the grantee of a right of way over the land of another for 20 years used it without constructing a bridge over a stream in line of his easement, using a ford during that time, does not thereafter preclude him from erecting a bridge.

3. EASEMENTS \S 12(1) — CONSTRUCTION — GRANT.

A grant of an easement is to be construed in favor of the grantee, and includes whatever is reasonably necessary to the enjoyment of the thing granted.

4. WATERS AND WATER COURSES \S 171(1)—INJURIES FROM FLOWAGE—CONSTRUCTION OF BRIDGE—RIGHT OF GRANTEE.

Defendant was granted a right of way over the lands of plaintiff, and the way crossed a stream. For 20 years defendant used a ford for crossing, and after the erection of a bridge an extraordinary flood, which could not have been foreseen, occurred. The bridge caused the waters to back up and flood part of plaintiff's land. Held that, as one having a right of way over the land of another may substitute a bridge for a ford as a means of crossing a stream, where the method of crossing has not been designated, provided the bridge is constructed so as to cause the least practical damage to the owner, and ample room is left for the natural flow of water, even in case of ordinary flood, defendant was not liable for the flooding of plaintiff's land; the bridge being constructed with plaintiff's knowledge and acquiescence and in such a manner as to furnish ample room for the natural flow of water, even in case of ordinary floods.

5. APPEAL AND ERROR \S 751—REVIEW—QUESTIONS PRESENTED.

Assignments of error, not embraced in the questions involved, cannot be considered on appeal.

Appeal from Court of Common Pleas, Franklin County.

Action by Martin F. Hammond against Philip A. Hammond. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

John W. Hoke, of Chambersburg, for appellant. Irvin C. Elder and Walter K. Sharpe, both of Chambersburg, for appellee.

WALLING, J. This action of trespass involves the authority of one having a right of way over the land of another to substitute a bridge for a ford as a means of crossing a creek, where the method of such crossing was not designated in the original grant. In 1893, Martin P. Hammond, the owner of a large farm in Fannett township, Franklin county, conveyed a part thereof to his son, Philip A. Hammond, the defendant; and as the premises so conveyed did not extend to the public highway, the deed provides that:

"It is further agreed that the said Philip A. Hammond, his heirs and assigns, is to have the free and uninterrupted use, liberty, and privilege of a road 20 feet in breadth from the said premises across the creek to the public road, now, hereafter, and forever."

The creek is known as "Spring Run," and at the place in question extends parallel with and a short distance from the highway. Defendant and his family had occupied the premises so conveyed to him for about 4 years prior to 1898, and such occupancy has continued to the present time, and the only practical means of access thereto is the right of way included in the deed. At the time of the conveyance, for many years prior thereto, and for over 21 years thereafter, the only means of crossing the creek at this point was a ford, except a log on which pedestrians could walk. In times of high water it was difficult, and occasionally for 2 or 3 days at a time impossible, to ford the stream. Sometimes, in order to keep out of the water, the occupants of a buggy had to sit on the back of the seat, and sometimes it could only be forded on horseback. On various occasions ice in the creek rendered the ford unsafe. This method of crossing the creek was especially objectionable on account of defendant's children going to and from school. In 1914, to obviate the difficulties above mentioned, and that the private road might be the better fitted for the purpose for which it was granted, defendant built therein a bridge across the creek of the width of 10½ feet. This was done by the construction of a stone abutment on each side and two stone piers in the bed of the creek, on which a wooden bridge was placed. The cost of this improvement was \$134. Prior to the building of the bridge, to wit in 1906, Martin P. Hammond had deeded the balance of the farm to his son, Martin F. Hammond, the plaintiff herein,

who since that time has been in possession of the same; his farm buildings being on the other side of the public road, nearly opposite the end of this bridge. The center of the creek is the boundary line between plaintiff and defendant. Plaintiff had full knowledge of the building of the bridge, made no objection thereto, and in fact on one or two occasions assisted in the work. There was no negligence shown in the manner in which the bridge was constructed; but on August 21, 1915, a flood greater than ever known before came down this valley, carried away the bridge at the public road crossing just above and also the wooden part of defendant's bridge, which was landed on plaintiff's land, and which the latter permitted to be placed back in position without objection. This flood overflowed the public road and extended to plaintiff's dwelling house and to some extent into his cellar; the amount of damage done thereby, however, is not shown. It is a fair conclusion that defendant's bridge at that time obstructed the flow of water to some extent and increased the amount that reached plaintiff's premises, but such effect would not result from an ordinary flood. The learned trial judge charged the jury that defendant might lawfully build the bridge, if reasonably necessary to afford himself and family a safe passage over the right of way in question, provided the bridge was so constructed as to cause plaintiff no appreciable damage under ordinary circumstances. The jury found for the defendant, which was in accordance with the evidence, and we discover no reversible error in the record.

[1-3] The manifest intent of the grant was to afford the occupants of the farm conveyed to defendant a safe and convenient passage to the public road at all times, in wet weather as well as dry weather. We cannot impute to the grantor the intent of affording access to and from the farm in question only in times of low water. He might have limited the grant to the ford only but he did not. The words of a grant are to receive a reasonable construction in accord with the intention of the parties. *Mercantile Library Company of Philadelphia v. Fidelity Trust Co.*, 235 Pa. 5, 83 Atl. 592. The fact that the defendant did not proceed immediately to build the bridge does not prove that the parties construed the grant as precluding him from that right; and the fact that there was then no bridge at that point is not controlling; neither is the fact that for 21 years thereafter defendant and his family managed to exist there without a bridge. As defendant had possession of the private road during all that time, he lost no right by failing to improve it. A grant is to be construed in favor of the grantee, and includes whatever is reasonably necessary to an enjoyment of the thing granted. "The grantee of a defined

way has the right to do whatsoever is necessary to make it passable or usable for the purposes named in the grant." *Senhouse v. Christian et al.*, 1 Term Rep. 560, 570. See, also, *Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Rep. 122, and *White v. Eagle & Phoenix Hotel Co.*, 68 N. H. 33, 34 Atl. 672.

[4, 5] The grantee of the free and uninterrupted use of a private road may improve it in such manner as to make it fit for the purpose expressed in the grant, and in so doing may construct a bridge over a ravine or creek, if it be done in such way as to cause the least practicable damage to the owner of the servient tenement; however, ample room must be left for the natural flow of the water, even in time of flood, except it be so great as to be beyond ordinary human experience, when it is regarded as an act of God, for which man cannot be held responsible. The flood in August, 1915, seems to have been of that nature. As the bridge in question had been built and rebuilt with the full knowledge and acquiescence of the plaintiff, we are not prepared to hold that the court below erred in saying that the burden was on him to show that defendant had a safe and convenient way to travel before the bridge was built; in any event, that matter is not embraced in the statement of the questions involved. Considering all the evidence admitted, as to the trouble about the wood lot, it did plaintiff no possible harm, and affords no ground for disturbing the judgment. It does not seem necessary to refer in detail to all of the assignments of error, for in our opinion the entire evidence would not sustain a verdict for plaintiff, even for nominal damages.

The assignments of error are overruled, and the judgment is affirmed.

(253 Pa. 22)

IN RE WATMOUGH'S ESTATE.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. WILLS §21—TESTAMENTARY INCAPACITY—INQUIRY.

Where a will is attacked on ground of testamentary incapacity, the inquiry must relate to the period of time during the testator's life when the will was executed, published, and declared.

2. WILLS §55(1)—TESTAMENTARY INCAPACITY—SUBMISSION OF ISSUE—EVIDENCE TO WARRANT.

An issue *devisavit vel non*, requested on the ground of testator's testamentary incapacity, held properly refused; all testimony, save that of a physician as to testator's visions of red devils, showing that testator was competent.

3. WILLS §163(3)—UNDUE INFLUENCE—MERETRICIOUS RELATIONS.

Where testator, who had no near relatives, his next of kin being a nephew, devised and bequeathed the bulk of his estate to a man and wife, the fact that testator entertained meretricious relations with the wife does not raise a presumption that the will was the result of her

undue influence, but such influence must be proven as any other independent fact.

4. WILLS §166(3)—UNDUE INFLUENCE—SUBMISSION OF ISSUE—EVIDENCE—SUFFICIENCY.

Where a will was attacked, and an issue *devisavit vel non* requested, it appearing that the testator disinherited his next of kin, who was his nephew, and devised and bequeathed the bulk of his fortune to a man and wife, held, that evidence of undue influence was insufficient to warrant the issue *devisavit vel non*, despite claims that testator sustained meretricious relations with the wife.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of John G. Watmough, deceased. From a decree of the orphans' court, affirming a decree of the register of wills, admitting to probate a paper purporting to be the last will of deceased, William Watmough Grier and another, who petitioned for issue *devisavit vel non*, appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRA-
ZER, JJ.

William Clarke Mason, Howard S. Baker, and Franklin S. Edmonds, all of Philadelphia, for appellants. Maurice Bower Saul, of Philadelphia, and Buckman & Buckman, of Langhorne, for appellees.

STEWART, J. The appeal is from the decree of the orphans' court of Philadelphia county, affirming the action of the register of wills in admitting to probate a paper purporting to be the last will of John G. Watmough, deceased, and in refusing to award an issue *devisavit vel non* with respect to the same. The paper is assailed on two grounds—want of testamentary capacity and undue influence.

[1, 2] With this appeal comes an appendix of nearly 1,600 pages of testimony. If our review of the case should seem disproportioned to this volume of testimony, we would not have it supposed that because of this fact any of the testimony has been overlooked. Much of it sheds but little light on the real controversy, and that which relates to those features of the case which under our rules of law are dominating can be presented and discussed within reasonable limits. For illustration: In considering the first ground of attack, namely, want of testamentary capacity, the inquiry must relate to that period of time when the will was executed, published, and declared. This is true, especially in this case, for the reason that there is nowhere even a suggestion that the person who executed the paper as his last will, in his seventy-seventh year at the time, had ever in his long life been lacking in mental vigor, if we except the brief period of 14 days when, 45 years before, he was restrained of his freedom because of excessive drink. When considering the question of testamen-

tary capacity, we may therefore eliminate from consideration as much of the testimony as relates to his temperament, personal habits, and disposition, prior to the March preceding the execution of the will, when, for the first time, his personal and family physician, called on behalf of contestants, testifies that he discovered symptoms of mental decline. It is upon the testimony of this witness, Dr. Roussel, the contestants place their main, if not entire, reliance, to sustain their allegation of want of testamentary capacity. Aside from this witness' testimony, there is absolutely nothing in the evidence to raise even a suspicion of mental unsoundness in the testator. As we read his testimony, it admits of no other deduction than that, with exceptional opportunities for knowing and judging his mental state, extending over 8 years next prior to the death of the testator, he never observed anything in his conversation or conduct that led him to suspect mental decline in any degree until the 17th of March next preceding the 6th of June, when the will in question was executed. During all these years he was the medical attendant upon Mr. Watmough, who was a sufferer from hardening of the arteries, a mild cardiac degeneration, and sclerotic kidneys, the latter of which, while at first not strongly evidenced, became toward the latter part of his life more pronounced. In January preceding his death, an attack of acute inflammation of the gall bladder developed. The witness having thus defined the physical ailments for which he was treating his patient, his attention was then directed to the attendance he gave him during the months of October, November, and December, 1912. During these months he visited the patient at his home about every other day, increasing his visits to three and four times a day as his illness progressed. These visits he testified were made generally in the evening, and they averaged in length from an hour to an hour and a half, not that so much time was employed in administering professional relief, or in the study of the patient's condition, but because the witness enjoyed conversing with the patient, who, as he admits, was a man of superior attainments, of wide experience, extensive travel, and an intelligent and capable disputant. In these conversations they discussed current events, public men and policies, and whatever there was of general interest.

We refer to these facts to confirm what we have said as to this witness' opportunities to know the mental condition of Mr. Watmough, and emphasize the further fact that during this period of time, down to March 17, 1913, the witness calls to mind not a single irrational word or deed on the part of the patient, nothing in his speech or behavior that led him to suspect that he was not mentally sound. Indeed, he admits that he had no such suspicion until an occurrence on the

17th of March, when during an evening visit, after his patient had had a sleepless night before, because of the intense pain he had endured, the patient said to the doctor, "I am all right now; I am well." To this the doctor replied, "Oh, the pains are much better, are they?" "Well yes," the patient replied, "they are better; I still have them, but the three red devils told me this morning, or during the night, that they were about to leave me." To this witness replied, "You are speaking figuratively of the pains." "Nonsense," said the patient, "you do not understand what I tell you." Asked by the witness what he meant, he replied, "Simply that they stood on my belly and on the bed, and said they were going to leave me, and told me I was going to improve." The witness testified that this was the first thing that attracted his attention to a change in the mental condition of the patient; and this he defined as a visual hallucination, associating it with what he defined as an auditory hallucination, referring to a statement made by the patient that he had heard a call during the night which had caused him to go out to the yard in the middle of the night. When further interrogated as to these hallucinations, the witness replied:

"A call which excited his attention and caused him to go to the yard in the middle of the night. Now, this may or may not have been. There might have been, for example, a call from the yard. That may or may not have been an evidence of auditory delusion. The absolute strong points are the questions of these visual evidences of red devils, even with forked tails detailed that they told him certain things, the fact that he had seen them."

In the same connection he testified that he could recall nothing that the patient ever told him that he had heard from the red devils other than what related to his personal health. Solely because of this visual hallucination, as the witness denominated it, with respect to seeing red devils, and its occasional recurrence, and because he had reached the conclusion, based on this fact alone, that his patient was a victim of senile dementia, and no opportunity had been afforded him at the particular hour of the day when the will was executed to examine him to see whether at that particular hour he was free from the delusion with respect to the red devils, it remained with him a disputable question whether the testator had at that time testamentary capacity. He admitted time and again that there were days during the month of June, 1913, when he was entirely free from the delusion and entirely clear in his mind, when he knew his relatives, had an intelligent understanding of the value of his estate, knew how much income he derived therefrom, and knew as well the persons he intended to make the objects of his bounty. To this extent the witness went, but no further; and yet he visited his patient the evening of the day the will was executed, and learned from him, not only that he had made his will that day, but facts relative to the

disposition he had made of his property. If, upon being told that the patient had that day executed a last will, and that by the will he had given to the maid, who had virtually been his housekeeper, the munificent gift of \$100,000, any question arose in the witness' mind as to the competency of the patient to make a will, it is at least surprising that he should have overlooked such fact in his lengthy examination. An undisputed fact in the case is that 2½ months after the execution of the will, during which time, according to the witness, the patient was steadily declining in vigor, without hesitation on his part, or any question as to the patient's sanity and the ability to dispose intelligently of his property, so far as we are permitted to know, the witness accepted from his patient a free gift of \$2,000 with which to buy for himself an automobile.

Against this uncertain and inconclusive testimony—and we include the medical experts' testimony as well, to which we have made no special reference—there is the testimony of the two witnesses to the execution of the will, one of whom had drafted it, and both of whom were entirely reputable gentlemen, had long known Mr. Watmough, one of them having sustained professional relations with him, who say that when the will was executed the testator was in possession of his faculties, that he had himself dictated the provisions in the will, had been fully informed with respect to all it contained, and that the will had been executed with no one present excepting the testator and themselves, supplemented by the testimony of a great number of witnesses, among them gentlemen of high professional standing, with large experience in dealing with questions of this character, and who—some of them at least, notably the late John G. Johnson, Esq., speaking from observation and conversation with the testator within a very few days of the date of the will—with one voice attest the testator's mental soundness. Granting the delusion testified to by Dr. Roussel, it is manifest that it was not such a delusion as was incompatible with the retention of the general powers and faculties of the mind; nor is there the slightest indication that it exerted any influence whatever in the disposition made by the testator of his estate. The evidence, as we read it, not only affords no ground to support a finding of testamentary incapacity, but it abundantly sustains a finding to the contrary.

Turning now to the second ground of assault, a somewhat fuller statement of facts is here required to comprehend the significance of the evidence produced by one side and the other. The testator, at the time of the execution of the will, was in his seventy-seventh year. He was then childless and a widower; his wife, between whom and himself there had always been the closest confidence and endearment, had died May 27, 1911. He himself died October 10, 1913, leav-

ing as his next of kin a half-brother, James H. Watmough, the children of a deceased half-brother, the children of a deceased half-sister, and William W. Grier, son of a deceased sister, who is an appellant here. The testator was a man of large estate, exceeding a half million dollars in value, which he had always managed himself, and, so far as appears, with intelligent judgment. He had resided for many years at 2114 Walnut street, Philadelphia, and continued his residence there after his wife's death. Following the death of his wife, he retained in his service his wife's maid, Zalie Faget, whom he installed as his general housekeeper, to whom he gave exclusive charge of his household affairs, employing at the same time other domestic employes and servants. He lived in a manner corresponding to his estate; he was a man of education and culture, and of refined tastes; he had few intimates, and still fewer confidential friends; he had but little intercourse with his kindred, and during the later years of his life none; he frequently expressed indifference toward them, in return for what he regarded their indifference towards him; he had withdrawn from active business years before, and was living in retirement; he found his enjoyment in wide travel and in indulging his taste in acquiring a large collection of curios and such bric-a-brac as appealed to him. In the latter he had invested a large sum of money, and his collection of them was valuable. It was this fondness for rare articles of virtue that brought him into relation with one Ferdinand Keller, who was a dealer in such articles, at first in a small way. This was as early as 1881, when Keller's store was on Ridge avenue. There the testator occasionally visited him until in 1883, upon testator's advice, Keller moved his place of business, as well as his residence, to 216 South Ninth street. This latter property had been purchased by the testator and was by him, in 1888, conveyed—his wife joining in the deed—to Keller's wife, for a nominal consideration. Meanwhile the acquaintance between Keller and the testator, begun in 1881, ripened into an intimacy which developed into a confirmed and avowed friendship and mutual trustfulness, which continued unabated during all the remaining years of testator's life. It included as well the individual members of Keller's family, which consisted of his wife and three children. During all these years, except during such periods as the testator was absent from the city, he was almost a daily visitor to Keller's place of business, where he was accustomed to spend several hours on each occasion, occupying for the most part a room back of the store which was used by Keller as a repair room. In this room he met frequently Mrs. Keller, who assisted her husband in his business, and their children, and would occasionally there join with them at lunch. Certain it is that

this association between the testator and the Keller family, and his fondness for each member of the family, was well known to the testator's wife, for during her lifetime she frequently accompanied her husband to Keller's store, sometimes with a view to make purchases, at times for no other purpose than to meet and talk with the different members of the family. That she held them in high esteem, particularly Mrs. Keller, is evidenced by the consideration she showed the latter by visiting her, inviting her to her own home, and the letters written to her, in which she always addresses her in most familiar and affectionate terms; some inviting her to come to her home to tea and to bring with her the "dear children" and Keller, and others expressing her appreciation of kindness shown her by Mrs. Keller. These letters fully attest her affectionate regard for the Kellers as a family. Letters from testator to Keller, covering the same period, 1886 to 1911, some from Europe, others from distant parts of this country, and others from his home, some on business, others of purely friendly and social character, all abound in expressions of deepest concern, not only for Keller, but for Mrs. Keller and the individual members of his family, concluding with, "God bless and prosper you all and reunite us again," "With much love to all," "Love to dear Mrs. Keller, yourself, dear Tillie and Janet, your devoted friend," "Ever your devoted friend," and like affectionate expressions.

Testator bought a great part of his collection of curios, which he valued so highly, from or through Keller. That the latter derived much advantage through his patronage, not only in trade, but through his generosity as well, cannot be doubted; but, whatever may have been Keller's or Mrs. Keller's motive in extending to the testator the many acts of kindness shown him, it is too manifest to admit of question that his feeling for the Kellers was that of sincere affection. By will made in March, 1907, after making a few pecuniary bequests, he left his entire remaining estate to his wife for life, with remainder to the Kellers. In April, 1911, he executed another will, prepared by J. H. Buckman, Esq., whereby he gave all to his wife for life, except certain bequests, and what he called his "collection," to Keller, telling Mr. Buckman at the time that Keller was his dearest friend—the best he ever had, the only friend who had stuck to him through thick and thin. In a later will of December, 1912, eight months after the death of his wife, drawn by the late John G. Johnson, Esq., he made the following bequests: One of \$10,000 to William W. Grier, one of the contestants and next of kin, which, as there stated, was fixed in that amount because the legatee was possessed of an independent fortune of his own and seldom visited or communicated with the testa-

tor; one of \$20,000 to Zalle Faget; another aggregating \$50,000 to the three children of Ferdinand and Matilda Keller; another to Ferdinand Keller, whom he describes as his good friend, of \$15,000, with a like sum to Mrs. Keller, the wife; another to the wife of testator's half-brother, James H. Watmough, of \$50,000. Following some minor bequests and a specific devise, he gave the entire balance of his estate to Keller and his wife, or the survivor of them. By codicil to this will, dated January 5, 1912, without changing in other respects the terms of this earlier will of December 12th in any other regard, he substituted as executors of the will John G. Johnson, Esq., and Ferdinand Keller.

We refer to these wills as showing the mental attitude of the testator towards the Kellers, both during the lifetime of his wife and following upon her death, as well his attitude toward his kindred. They show unmistakably a set purpose on his part of long standing to make Keller and his family his principal beneficiaries. This was the condition of affairs upon the death of Mrs. Watmough and immediately following. The testator's manner of life was much the same after as before. As age was creeping on, his physical infirmities increased, and he became the victim of disease, often painful in the extreme, and increasing in virulence, until the summer of 1913, when the will, the subject of this controversy, was executed. Four months thereafter he died. During this period of invalidism he required much personal attention. The only person from whom he seems to have received any was Zalle Faget, she who had been his wife's maid, and whom he retained in his employ as general housekeeper, and the Kellers, whom he visited at their store with the same frequency as before, so long as he was able. His social intercourse was apparently limited to the Keller family. His intimacy with them and his fondness for them may seem strange, when the difference in station and rank is considered; but the evidence puts it beyond question that somehow or other they had become the chief objects of his beneficent concern.

[3, 4] This brings us to the will which is the subject of the present controversy, executed June 6, 1913. This will was drafted at the direction of the testator by Charles J. McDermott, Esq., at the office of John G. Johnson, Esq., and executed at testator's own home, in the presence of Mr. McDermott and Maurice Bower Saul, Esq., both of whom testify that no one but themselves and the testator were present at the time. The first item in this will gives to Zalle Faget, "now in my employ, and who was maid to my dear wife, Caroline Drexel Watmough, in her lifetime," the sum of \$100,000, "in appreciation of her kindness to my beloved wife." Separate bequests, one only amounting to as

much as \$1,000, were made to his servants, conditioned on their being in his employ at the time of his death; then follows this direction:

"All the rest, residue and remainder of my estate I give, devise and bequeath to my friends, Ferdinand Keller, Sr., and Matilda Keller, his wife, in equal parts, or in case only one of them shall survive me, then to the survivor of them."

Of this will he appointed his "two friends"—he so speaks of them—John G. Johnson, Esq., and Ferdinand Keller, Sr., executors. Upon the facts and circumstances before stated, and upon testimony yet to be referred to, the appellants rest their contention that the will was a product of an undue influence operating upon the mind of the testator at the time of its execution, which substituted another's will for his own. It is not pretended that the testator was subjected to physical coercion of any kind; the sole contention being that, because of criminal relations he is alleged to have sustained towards Mrs. Keller, the wife of Ferdinand, he was subjected to a moral constraint which so entered into the making of the will as to make it the expression of another's desires rather than his own; in other words, that he was no longer a free agent. At this point, the young woman, Miss Faget, to whom is given a legacy of \$100,000, may drop out of the case. It is only fair to her to say here that there is not a particle of evidence in the case that would support a finding that either alone or in combination with others she contributed in any way to the procurement of the will, not even to the extent of solicitation that she should be a beneficiary thereunder. The argument in support of the general charge assumes that the will is inofficious, in that it denies to those upon whom the law would cast the inheritance in the absence of a will all participation in the estate, and then proceeds to derive from the evidence, in explanation, a meretricious relation with one of the chief beneficiaries under the will, from the influence of which testator could not and did not escape, but which was operative in his mind and controlling when the will was executed.

Unquestionably, within the literal meaning of the term, the will was inofficious. The weight to be given this circumstance depends upon the degree of kinship in which the party disinherited stands toward the testator. A will disinheriting a child or children dependent, and substituting in their stead, as beneficiary, one with whom the testator sustained illicit relations, would be not only inofficious, but unnatural, and a strong presumption would arise in such case that the testator, even though of testamentary capacity, was nevertheless in thralldom of some kind inconsistent with free agency. The more remote the degree of kinship, the feebler becomes the presumption, until it reaches the point where it becomes negli-

ble. The nearest of kin in this case was a nephew, the son of a deceased sister, and here the contestant. To this nephew by a former will was given a legacy of \$10,000. It was the belief of the testator that he was a person of independent fortune. This legacy was omitted from the last will; the testator assigning as a reason for the omission that the nephew seldom visited him or had any communication with him. Whatever the presumption in such case, it was more than met and overcome by the evidence showing the reasons testator gave for disinheriting the nephew; this evidence being unchallenged and no attempt having been made to show that the reasons on which testator relied rested on any mistake of fact. Certainly the fact that the will was inofficious can be of minor significance in such a case. It in no wise conflicts with contestant's theory that a meretricious relation with Mrs. Keller produced the will; nevertheless it adds little, if anything, in support of such contention.

We do not stop to inquire into the disputed question of fact, for the reason that it has not the significance that has been attached to it throughout this case. Granting the improper relation charged, such circumstance in itself would not make the will illegal. A testator, so long as he is a free agent, has a right to give his property to whom he pleases; nor does the fact that with the chief beneficiary in the will he sustained improper relations raise any presumption that the will was made under a constraining influence exerted by the paramour. Such influence, if alleged, must be proven, as any other independent fact, by adducing such additional evidence as would warrant no other reasonable inference than that the influence of the relation not only produced the will by actual or moral constraint to a degree that the testator was unable to resist. We find no such evidence in the case; nothing that even indicates anxiety or concern on the part of the Kellers as to the will, opportunity by either that the testator make a will, much less that he make them beneficiaries thereunder, or that they or either of them were taken into testator's confidence with respect to the will about which we are inquiring. No combination or conspiracy is shown to delude, deceive, or by artifice of any kind to accomplish the execution of the will. There is nothing in the evidence to show that testator was not at perfect freedom to express his own desires, independent of the wishes of any other. The impression left upon an impartial mind, after reading the evidence in the case, must be that in making the will he was master of himself, and that in disposing of his estate, acting with entire freedom of choice, he gave it to beneficiaries who, though not related by kinship, yet stood higher in his affectionate regard than those who were so related, in consequence of long

continued association and intimacy, which ripened, as we have said, into closest friendship, with mutual trust and confidence. We do not deem it necessary to enter into any discussion to vindicate the legal rules and principles which we have applied in considering the case. Our Reports abound in cases where they have been explained and applied with judicial sanction and approval, to an extent that further effort to that end would be unprofitable, especially in view of the very careful and exhaustive review of the authorities bearing on the subject by our Brother, Von Moschizsker, in the recent case of Phillips' Estate, 244 Pa. 35, 90 Atl. 457. We are of opinion, upon a careful examination of all the evidence in the present case, that a verdict against this will could not properly be sustained.

The decree of the court refusing an issue is accordingly affirmed, at the costs of the appellants.

(258 Pa. 70)

In re SHOVER'S ESTATE.

(Supreme Court of Pennsylvania. May 7, 1917.)

WILLS §140—NUNCUPATIVE WILLS—VALIDITY.

A nuncupative will, made by testatrix while suffering from blood poisoning resulting from bee sting, cannot be sustained, where for at least 36 hours after making the will she could have dictated a will, had a scrivener been secured, as might readily have been done, and such will cannot be upheld on the ground that she could not with her own hand have signed the will, because of blood poisoning, for she might have made her mark, or authorized some one to sign her name.

Appeal from Orphans' Court, Northampton County.

In the matter of the estate of Mary Alice Shover, deceased. From a decree setting aside probate of a nuncupative will, and refusing an issue devisavit vel non, Otto Shover, administrator c. t. a., and others, appeal. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHIZSKER, FRAZER, and WALLING, JJ.

H. M. Hagerman, of Bangor, for appellants. Everett Kent, of Bangor, for appellees.

WALLING, J. Mary Alice Shover, a widow residing on a farm in Northampton county, died July 25, 1915, at the age of about 48 years. For some months she had been afflicted with kidney trouble, apparently not serious, when, on or about July 4, 1915, she was stung on the left arm by a bee, blood poisoning resulted, and she was confined to her bed on and after July 13th. Proponents' evidence tends to show that on Monday morning, July 19th, Mrs. Shover, in the presence of witnesses called by her for that purpose, made parol testamentary disposition of her

estate, consisting of personal property amounting to about \$4,000, and bequeathed same to the proponents, two of whom were her stepchildren and the third a member of her household, to the exclusion of contestant, who was her father and next of kin. This so-called nuncupative will, having been reduced to writing, was admitted to probate by the register of wills, from which contestant took an appeal to the orphans' court, where, after full hearing and an exhaustive consideration, a decree was entered setting aside the probate of said alleged will, and also refusing an issue on the ground that no substantial dispute had arisen upon a material question of fact.

We have examined the record and agree with that conclusion. A nuncupative will can be sustained only when made during the last sickness of the testator, and in such extremity thereof as precluded a written will. See *Mellor v. Smyth*, 220 Pa. 169, 69 Atl. 592. The orphans' court found on abundant evidence that Mrs. Shover could have made a written will when she made the alleged oral will and for at least 36 hours thereafter; that is, up until Tuesday evening. There is some dispute as to her condition on Wednesday and Thursday, and admittedly she was unconscious from Thursday night until her death on Sunday morning. In fact, all the evidence is to the effect that she was in sound and disposing mind during the entire day Monday. True, she was suffering, and her arms and hands were badly swollen, from the effect of the blood poisoning; but she was just as capable of dictating a written as an unwritten will, and had ample time to do so. The circumstance that she might not have been able to sign the will with her own hand is of no moment, she could have made her mark or authorized some one to sign her name. The use of a telephone or automobile would have brought a scrivener to her bedside any time within an hour. And yet during that entire day and evening no effort was made to secure the preparation or execution of a written will, or any valid reason given why it was not done, and the court below found that the same condition existed during the following day, and all that time Mrs. Shover made no request for a scrivener, and did nothing looking to the making of a written will, although according to the evidence she realized the serious nature of her illness, and her mind was on the subject of a testamentary disposition of her property early Monday morning. Under such circumstances it is vain to argue that she was precluded from making a written will by the extremity of her last sickness. A much less opportunity to make a written will has often been held sufficient to prevent the probate of one not written. *Porter's Appeal*, 10 Pa. 254; *Butler's Estate*, 223 Pa. 252, 72 Atl. 508; *Munhall's Estate*, 234 Pa. 169, 83 Atl. 66.

Mrs. Shover had ample opportunity to make a written will on Monday, and hence the evidence as to how an attempt on her part to do so later in the week might have affected her physical condition was unimportant, as was that seeking to show expressions of hostility by her against the contestant. As she was manifestly not precluded from making a written will by the extremity of her last sickness, the other questions in the case are not important.

The assignments of error are overruled, and the decree is affirmed, at the cost of appellants.

(258 Pa. 64)

COMMONWEALTH v. KOONTZ et al.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. ABANDONMENT \Leftrightarrow 2—WHAT CONSTITUTES. The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person, and becomes the subject of appropriation by the first taker; it being in that respect distinguished from all other modes by which ownership may be divested.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abandonment.]

2. TURNPIKES AND TOLL ROADS \Leftrightarrow 29 — RIGHT OF WAY—“ABANDONMENT”—WHAT CONSTITUTES—SALE.

A deed conveying land for right of way, as well as a house and lot, to a turnpike company, provided that, in case the turnpike should be abandoned, the house and lot should revert to the grantor, his heirs and assigns. Subsequently the turnpike company conveyed its road to the commonwealth for a consideration. Held that, as a sale is not an “abandonment,” the characteristic of which is a voluntary relinquishment of ownership, and, as that word has a definite meaning, the transfer of the turnpike to the state was not an abandonment, entitling the grantor or his heirs to retake the house and lot.

Appeal from Court of Common Pleas, Franklin County.

Ejectment by the Commonwealth of Pennsylvania against Mary C. Koontz and Levi L. Horst. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

J. A. Strite and Edwin D. Strite, both of Chambersburg, for appellants. William H. Keller, First Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth.

WALLING, J. In 1863, the Harrisburg, Carlisle & Chambersburg Turnpike Road Company bought the land here at issue, comprising 80 perches, of Alex. K. McClure, as a tollgate house property. It was a part of Mr. McClure's farm, and situate in Franklin county, on the turnpike between Chambersburg and Shippensburg. The deed therefor contains a provision as follows, viz.:

“That, if the said turnpike company shall at any time remove said gate house from the said premises, then the said Alex. K. McClure, his heirs or assigns, shall have the first right to purchase said house and lot at an appraisal to be fixed by the appraisers, two to be chosen by the parties hereto and the two so chosen to select a third, and, in case the said turnpike road shall be abandoned by said turnpike company, then the house and lot hereby conveyed shall revert to said Alex. K. McClure, his heirs and assigns.”

In 1867, Mr. McClure sold the balance of the farm to Levi Horst, the deed for which contains the following reservation, viz.:

“The house known as the tollgate house with 80 perches of ground having been conveyed by the said party of the first part to the Chambersburg & Carlisle Turnpike Road Company, to use and enjoy the same so long as said property shall be used as a tollgate by said company, this conveyance to said Horst is made subject to the rights of said turnpike company, and when said tollgate property shall be abandoned as a tollgate by said company it shall pass to said party of the second part, his heirs and assigns, in fee.”

By sundry conveyances, etc., Horst's title became vested in the defendants. The half acre was used as a tollhouse property until 1915, when by amicable agreement the turnpike company sold and conveyed the said turnpike road to the commonwealth of Pennsylvania for \$25,000, which sale embraced all of said company's property used in connection with the said road or appurtenant thereto, including bridges, tollhouses, and other structures, and all road materials and equipment on hand, etc., and especially including the half acre here at issue, with the buildings and appurtenances, together with all rights and easements embraced in the McClure deed therefor. The state highway commissioner acted for the commonwealth in the acquisition of the turnpike road, which at once became a state highway free from tolls. The purchase of the road did not include the franchise of the turnpike company.

[1, 2] In our opinion the trial court was right in holding that the sale to the commonwealth was not an abandonment of the land in question whether it be considered as real or personal property.

“The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person, and becomes the subject of appropriation by the first taker. In this respect it is distinguishable from all other modes by which ownership may be divested. Thus it is in the matter of the cessation of ownership that abandonment is distinguished from a transfer by sale or gift; but if the title be continued in another by any of the modes known to the law for the transfer of property, it has been no abandonment, because the right first acquired still exists and the continuity of possession remains unbroken.” 1 Ruling Case Law, 2.

“A sale or conveyance of a property is not an abandonment, within the meaning of a clause in a deed that the property shall revert to the grantor upon its abandonment by the grantee. The word ‘abandonment’ has a well-defined meaning in the law, which does not embrace a sale of conveyance of the property. It is the

giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property and the external act by which this intention is executed; so that it may be appropriated by the next comer." *St. Peter's Church v. Bragaw*, 144 N. C. 120, 56 S. E. 688, 10 L. R. A. (N. S.) 633, 636.

"There can be no such thing as abandonment in favor of a particular individual or for a consideration. Such act would be a gift or sale. An abandonment is 'the relinquishment of a right, the giving up of something to which we are entitled.' * * * If it were made for a consideration, it would be a sale or barter; and if without consideration, but with an intention that some other person should become the possessor, it would be a gift." *Stephens v. Mansfield*, 11 Cal. 863, 865.

The above and other authorities cited for appellees sustain the contention that a transfer of property from one party to another for a consideration is not an abandonment. And in that respect we see no controlling difference between the sale of a turnpike road and that of other property. In this case it is the abandonment of the turnpike road, and not of the franchise, that under the proviso in the original deed gives rise to the reversion. In *West Philadelphia Pass. Ry. Co. v. Philadelphia & West Chester Turnpike Road Co.*, 186 Pa. 459, 40 Atl. 787, the defendant, having the right to maintain and operate a street railway in the western end of Market street, Philadelphia, expressly and by statutory authority, released to the city all its rights, privileges, franchises, etc., in said street, and over 20 years later attempted to build a street railway therein, but was enjoined on the ground that defendant had relinquished and in fact abandoned all its rights in the street. However, the question whether a sale of property constitutes an abandonment was not before the court in that case. In *Black v. Elkhorn Mining Co.*, 163

U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221, a locator of an undivided interest in a mining claim, who had neither bought nor paid for the same, sold his interest and left the property; and it is there held that he had no such vested interest in the mining claim as, after his death, would entitle his widow, who had not joined in such sale, to a dower interest therein. The locator is there referred to as having abandoned his claim, but the question as to the sale of the property constituting an abandonment was not necessarily involved in the decision of the case.

A grant is in general construed against the grantor; and here the rights of the parties were fixed by the deed to the turnpike company, and were not affected by the stipulations in the later deed to Levi Horst. As the former deed was to the turnpike company, its successors and assigns, the company was within its rights in making the sale to the commonwealth. There is nothing to justify the conclusion that a sale of the turnpike road caused a forfeiture of the title to the half acre; nor any provision in the first deed that the property should revert to the grantor when the turnpike ceased to be a toll road. The clause giving Mr. McClure the first right to purchase on the removal of the gatehouse might seem to negative such an intent; and as the gatehouse has never been removed, the right to that option has not arisen. The law will not imply a different agreement from that which the parties have made. *Aye v. Philadelphia Co.*, 183 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696. Mr. McClure might have provided that the house and lot should revert upon a sale of the turnpike road; but, as he did not, we must construe the deed as it is written.

The assignments of error are overruled, and the judgment is affirmed.

(11 Del. Ch. 363)

MESSICK v. JOHNSON et al.

(Court of Chancery of Delaware. Sept. 26, 1917.)

EXECUTION \S 171(4)—**SALES—INJUNCTION.**

Where defendant, who was seeking to have land claimed by complainant sold to satisfy a judgment obtained against a former owner, who had conveyed to complainant's grantor before rendition of the judgment, offered no evidence to show fraud in complainant's title, sale will be enjoined, for otherwise complainant's title would be clouded, though complainant would have no opportunity to attack the validity of defendant's judgment.

Bill for injunction by William R. Messick against Ella S. Johnson and Jacob West, Sheriff. Defendants enjoined.

Injunction bill. By the bill the complainant seeks to enjoin a sale by the sheriff under a writ of venditioni exponas issued on a judgment obtained by Ella S. Johnson, one of the defendants, in the Superior Court in and for Sussex County. The facts appear in the opinion previously filed in this cause, reported in 98 Atl. 218.

Woodburn Martin, of Georgetown, for complainant. Robert C. White, of Georgetown, for defendants.

THE CHANCELLOR. In the opinion filed with the order overruling the demurrer to the bill the material facts alleged in the bill were stated. Afterwards the defendant, Ella S. Johnson, filed an answer admitting substantially all the allegations of the bill and denying the title of the complainant, which she said was fraudulent and therefore null and void. She also filed a cross-bill setting out the character of the fraud, and asked that the deed evidencing the title of the complainant be annulled. Testimony on both sides was taken by depositions before an examiner. The complainant put in evidence his paper title, and the defendant, Ella S. Johnson, only offered evidence as to the refusal of the Deputy Register of Wills to accept the resignation of Everett M. Barr as administrator of Hettie A. S. Kollock. At the final hearing the cross-bill was on motion of the complainant therein, Ella S. Johnson, the defendant in the original cause, dismissed. There was, therefore, no change in the facts to be considered, except evidence that the resignation of Barr as administrator had been refused.

Inasmuch as all of the material questions raised were passed on in the opinion on the demurrer, and the defendant, Ella S. Johnson, did not offer any evidence as to the fraud with which she charged the title of the complainant to be tainted, but on the contrary withdrew the cross-bill, and as I adhere to the views expressed in the opinion heretofore filed in this cause, which were based largely on decisions of the courts of Delaware, including the Court of Errors and

Appeals, the complainant will be awarded a final decree for a permanent injunction enjoining the defendants from selling the premises of the complainant for the payment of the judgment recovered against the administrator of Hettie A. S. Kollock.

The case of Hall v. Greenly, 1 Del. Ch. 274, cited by the solicitor for the defendant does not conflict with this view taken. In the cited case Chancellor Ridgely refused to set aside a voluntary deed made by a father to his two minor sons, the land having been sold by the sheriff in execution of judgments against the father recovered subsequently to the deed but contracted prior to it, and left the complainant to take his more effective remedy in an action at law. There were also other reasons assigned. In the case before this court the equity of the bill is to prevent the cloud on the title which would otherwise arise in case the sale is made.

It is not necessary to decide whether that judgment was irregular and invalid by reason of the resignation of the administrator before the institution of the action on which the judgment was entered, for the result would be the same even if the judgment be valid.

The complainant as the owner of land may, though he be not in possession thereof, enjoin a sale thereof to collect a judgment obtained against a prior owner who before recovery of the judgment had conveyed the land to one under whom the complainant took title, and the basis of the jurisdiction is the prevention of the creation of a cloud on the title of the complainant which would result from such sale, where the complainant could not attack the validity of the judgment.

The costs of all parties will be imposed on the defendant, Ella S. Johnson.

Let a decree be entered accordingly.

(11 Del. Ch. 468)

In re WHEELER'S ESTATE.

(Orphans' Court of Delaware. New Castle.

Aug. 1, 1917.)

1. **TRUSTS** \S 198—**SALES OF TRUST PROPERTY—PURCHASE BY TRUSTEE—VALIDITY.**

When a trustee or other fiduciary purchases at his own sale, the transaction is not void, but voidable, and until it is rendered void, or his liability is fixed, he takes and holds the legal title.

2. **EXECUTORS AND ADMINISTRATORS** \S 372 — **SALES FOR PAYMENT OF DEBTS—COMPLETION OF BID.**

A judgment was recovered against a married woman in her lifetime, and after her death her husband, as administrator, became a party to an amicable action on the judgment pursuant to which the property was sold. The husband, who had a statutory right to one-half of the land for life after the payment of her debts, became the purchaser for the amount of the judgment, costs, and taxes. Eight years later, and after the husband's death, the property was sold for the payment of his debts. *Held*, that the purchaser would not be relieved from the completion of the purchase, as there was no irregularity in

the husband becoming a party to the amicable action, and he was not required to bid more than sufficient to protect himself; and the court will not relieve a bidder, when the legal title would pass subject to some alleged outstanding equities, which might or might not exist or be enforceable.

**3. EXECUTORS AND ADMINISTRATORS ¶329(1)
—SALES FOR PAYMENT OF DEBTS—PROPERTY
SUBJECT TO SALE.**

The record facts did not constitute notice to the husband's creditors, or put them on inquiry as to any defect in or cloud upon his title, and they were entitled to have the land sold for their benefit.

**4. EXECUTORS AND ADMINISTRATORS ¶388(4)
—SALES FOR PAYMENT OF DEBTS—REPRESENTATIONS AS TO TITLE.**

A purchaser of land sold for the payment of a decedent's debts under an order of the orphans' court is not entitled to rely on any representation as to the title made by the administrator or his counsel.

**5. EXECUTORS AND ADMINISTRATORS ¶388(4)
—SALES FOR PAYMENT OF DEBTS — CAVEAT
EMPTOR.**

Where land sold for the payment of a decedent's debts under an order of the orphans' court had been purchased by the decedent at a sale under a judgment against his deceased wife at a time when he was her administrator and also life tenant, the principle of caveat emptor, which is peculiarly applicable to judicial sales, might be invoked.

Proceeding for the sale of real estate of George E. Wheeler, deceased. On application by the administrator for forfeiture of a deposit by the purchaser. Purchaser directed to pay the balance of the purchase money or forfeit the deposit.

Statement of the Case.

Land of a decedent, George E. Wheeler, was sold by order of the orphans' court for the payment of his debts; his personal estate being insufficient for the purpose. At the sale the purchaser paid part of the purchase money and having failed to pay the balance before the date for the return of the sale, the administrator asked that the deposit be forfeited. Thereupon the purchaser filed his reasons for declining to take the title and pay the balance of the purchase money.

It was alleged that the property was purchased in 1908 by Lemira Wheeler, the wife of George E. Wheeler, the decedent, and the consideration in the deed to her was \$1,750. In 1887 a judgment was recovered against Lemira Wheeler, and was revived in her lifetime. After her death in 1907, without having had children by George E. Wheeler, her husband became her administrator and in 1908 became as administrator a party to an amicable action in the Superior Court on the judgment, pursuant to which the property was sold on a venditioni exponas to the January term, 1909, to George E. Wheeler for a sum just sufficient to pay that judgment, costs and taxes, and on confirmation of the sale a deed was made to him by the sher-

iff on January 25, 1909, since which time and until he died he has been in possession of the property.

After his death the administrator of George E. Wheeler by petition to the orphans' court setting forth the debts of George E. Wheeler and the insufficiency of his personal estate to pay them, obtained an order for sale as above stated.

The objections were heard upon the facts stated by the purchaser in his statement of reasons respecting the title by Chancellor Curtis, sitting as presiding judge.

Artemas Smith, of Wilmington, for administrator. Walter J. Willis, of Wilmington, for purchaser.

CURTIS, P. J. The limitations on the conduct of a fiduciary respecting the purchase of the property in his control are established in Delaware as strictly as anywhere else. No person is permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use.

In *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76, an administrator at a sale by him in 1789 of land of his decedent for the payment of debts purchased the property through another person to whom on confirmation of the sale by the orphans' court the land was conveyed, and by him reconveyed to the administrator. In 1817 the heirs at law filed a bill against the administrator to have him, who still owned the property, declared a trustee for them. The court recognized the principle invoked as being "a general rule of public policy depending, not upon the circumstances of the case, but upon general principles, that however honest the circumstances of any individual case may be, the general interests of justice require the purchase to be avoided in every case." In that cited case the court refused relief on two grounds: (1) Nearly thirty years' delay and acquiescence; and (2) the conclusiveness of the title by confirmation of the sale by the orphans' court (except on appeal) as that court had complete power to inquire into the matter.

The same strict rule was stated and applied in *Downs v. Rickards*, 4 Del. Ch. 416. There Rickards, who had been appointed guardian of minors after an order had been made by the orphans' court appointing another person trustee to sell land of the minors, purchased through some one else the minors' land. The sale was confirmed, Rickards being then the guardian, and a deed was made. Subsequently the minors by bill sought to establish a trust for their benefit, based on actual and constructive trust to exist, first because independent of actual

fraud it was within the rule which prohibits a trustee to purchase land held by him as trustee, and second because there was also legal fraud. The disability of a trustee extends to sales conducted by others as to those conducted by himself. "The principle is," as Chancellor Bates expressed it, "that one shall not act for himself in any matter with respect to which he has duties to perform or interests to protect for another. * * * The principle looks, not merely to prevent fraud in the management of the sale, but to the broader object of relieving trustees from any possible conflict between duty and self interest." Its application is of the widest and includes all persons holding fiduciary confidential relations with others respecting property, and fairness and adequacy of the price are immaterial. The court also held that the confirmation of the sale was not a bar to the equitable relief.

In the case of *Eberhardt et al. v. Christiana Window Glass Co. et al.*, 9 Del. Ch. 284, 81 Atl. 774, the same principle was applied to a purchase of property of the company by a director of the company.

It was also urged as an objection to the title, that because George A. Wheeler was a life tenant of the property owned by his wife his purchase of the remainder at the sheriff's sale inured to the benefit of the tenants in remainder, the heirs at law of his wife. Under some circumstances a tenant for life who acquires the title under a judicial sale made to collect the debt of a prior owner, holds it for the benefit of the remaindermen as well as for his own benefit. *Co. Litt.* § 453, 267; *Washburn on Real Property* (5th Ed.) 120; *Allen v. De Groodt*, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626. But it is not necessary to so hold under the facts in this case.

Assuming, however, that these principles would have been applied to a timely action by the heirs at law of Lemira Wheeler, wife of George E. Wheeler, against George E. Wheeler, and a trust set up for the benefit of the heirs at law, the question still remains whether at this time, and under the circumstances here present, the purchaser at the sale held by the administrator of George E. Wheeler can rightly refuse to take the title to the land which he bought.

[1,2] When a trustee, or other fiduciary, purchases at his own sale he takes the legal title and holds it until the transaction is rendered void or his liability is fixed. In other words, the transaction is not void, but voidable. 18 Cyc. 771. Many circumstances may exist which would bar the heirs at law of Lemira Wheeler from a right to hold George E. Wheeler to be a trustee for their benefit, such as an actual acquiescence. Again, George E. Wheeler had an interest in the land when sold by the sheriff. He had a statutory right to hold one-half of the real estate of his wife for life after the payment

of her debts. There was no irregularity in his becoming a party to an amicable action upon the judgment held by McCann against Lemira Wheeler, for if the debt was due and unpaid the administrator rightly co-operated with the creditor to save costs in the procedure for the collection of the debt. Neither does it appear that there was any irregularity on the part of the administrator in the settlement of the personal property of his deceased wife.

The only evidence of fraud suggested here is the inadequacy of the price for which George E. Wheeler bid in the property. But that is not shown, for he was buying land in which he had a life estate, and the value of that interest does not appear. He did not do wrong in not bidding more than was necessary to pay the encumbrance which was ahead of his interest. He had a right to bid to protect himself, and was not bound to bid more, and was certainly under no legal or equitable duty to bid up to the value of the property, if that had been in excess of the value of his own interest.

[3] Since the purchase of the land by Wheeler the rights of third persons have intervened, viz. his creditors, for whose benefit the last sale was made. They, or some at least of them, are not necessarily chargeable with notice of any defect in or cloud upon the title which he had. The record facts do not constitute such notice, or put them on inquiry. As the personal estate of George E. Wheeler is insufficient to pay his debts, his creditors may have it sold for their benefit. The equities of the heirs at law of Lemira Wheeler, if any there be, in the proceeds of sale needed for the payment of the debts of the decedent may be adjusted even after the title has passed to the purchaser at the sale by the administrator.

[4] The purchaser at the sale is not entitled to rely on any representation made as to the title by the administrator, or his counsel. In *re Estate of Donaghy*, 9 Del. Ch. 441, 80 Atl. 721; 11 *Ruling Case Law*, 414. While a court which authorized a judicial sale may feel justified in relieving a bidder from compliance with the terms of sale where it is clear that title to the property sold would not pass to the purchaser, still the court would not be justified in so doing when clearly the legal title would pass subject to some alleged outstanding equities which might or might not exist, or be enforceable. This present case is of the latter class. Lapse of about eight years should also be taken into consideration in this present matter.

[5] It is also quite just in this case to invoke the principle of *caveat emptor*, which is peculiarly applicable to judicial sales. 11 *Ruling Case Law*, § 414. In *Smith v. Wildman*, 178 Pa. 245, 35 Atl. 1047, 36 L. R. A. 834, 56 Am. St. Rep. 760, the court said that the disappointment in the title to be acquired by the sale is not ground to relieve the pur-

chaser from compliance with the terms of sale.

Therefore, chiefly for the reason that the sale is made for the benefit of creditors of George E. Wheeler, the other considerations being also given weight, the purchaser should be required to pay the balance of the purchase money or forfeit the amount deposited at the time of the sale.

(11 Del. Ch. 277)

WOLCOTT, Atty. Gen., ex rel. MALONEY et al. v. DOREMUS et al.

(Court of Chancery of Delaware. April 30, 1917.)

1. NUISANCE §61—PUBLIC NUISANCE—INJUNCTION—CRIMES.

An act interfering with public rights, by affecting public health or safety, or interfering with use of public property, though indictable, may be enjoined as a public nuisance.

2. NUISANCE §75—PUBLIC NUISANCE—INJUNCTION—EVIDENCE.

That an act may be enjoined as a public nuisance, the evidence must be clear and convincing, and it being conflicting, and injury to the public being doubtful, injunction should not issue.

3. NUISANCE §61—PUBLIC NUISANCE—NOISES.

It is the effect on persons of average sensibilities or animals of normal temperament which determines whether a noise is a public nuisance.

4. NUISANCE §61—PUBLIC NUISANCE—NOISES.

The effect of a noise on a person of average sensibility, necessary to render the noise a public nuisance, must be real, actual, physical discomfort.

5. NUISANCE §61—PUBLIC NUISANCE—NOISES.

The effect of a noise on a horse of normal temperament traveling on a highway, to make the noise a public nuisance, as rendering the highway unsafe, must be to injure or frighten it.

6. NUISANCE §75—INJUNCTION—COSTS.

Defendants must pay the costs of an action to enjoin a public nuisance, where it existed at the time bill was filed, though abated by their acts before final hearing.

Action by Josiah O. Wolcott, Attorney General, on the relation of Michael W. Maloney and another, against Thomas E. Doremus and others, as officers and members of an unincorporated association. Preliminary injunction dissolved.

See, also, 95 Atl. 904.

Information in the nature of an injunction bill to restrain the shooting at targets on the grounds occupied by the Du Pont Trapshooting Club. The cause was heard on the information, answer, testimony of witnesses produced before and heard orally by the Chancellor and exhibits. The facts sufficiently appear in the opinion of the Chancellor.

Robert Penington, of Wilmington, for the relators. William S. Hilles and J. P. Laffey, both of Wilmington, for the defendants.

THE CHANCELLOR. The cause is an information in the nature of a bill filed by the Attorney General on the relation of two

citizens to perpetually enjoin the members of a trapshooting club from continuing a public nuisance. After answer filed an application for a preliminary injunction was heard on the information, answer, ex parte affidavits and exhibits. It having been proved that shot from guns used in the trapshooting fell into the public road on which the premises of the club abutted, and that the safety of persons using the highway was seriously endangered thereby, an injunction was awarded enjoining the shooting from all the traps of the club until the further order of the Chancellor. Afterwards the defendants filed a motion to dissolve the preliminary injunction, based largely on allegations that since the granting of the injunction the location of all of the traps and the direction in which the shots were fired were so changed as that it was impossible for shot to reach the highway. Testimony of many witnesses was heard in the cause in January, 1916, and in lieu of oral arguments briefs of counsel were filed March 12, 1917.

In the opinion filed when the preliminary injunction was granted the general facts were fully stated, and it is not necessary to review them here, except as to the new matters shown. It was shown that travelers along the road cannot be struck by shot fired from guns by persons using the traps as now arranged. But these traps were all moved much closer to the public road, and the gunners would now stand in handicap contests at firing points in the traps which are about 45, 55, 105, 165 and 205 feet from the public road. The traps as newly arranged have not in fact been used, the rearrangement thereof being made after the preliminary injunction had been issued against shooting from any of the traps. Under the old location of the traps the one closest to the road was about 183 feet distant therefrom. It is clear, therefore, that danger to the users of the highway from shot from the guns fired from the traps as now located is now eliminated from the case as a ground for relief, but that the traps are all much closer to the road. There was no allegation of disorder, breaches of the peace, or other improprieties at the club.

[1, 2] In order to determine whether a public nuisance will result from a further operation of the club under the changed conditions, two questions of fact must be found as to the effect of noises from the firing of the guns: (1) Whether animals traveling in the public road will be frightened or injuriously affected thereby; and (2) whether the health or comfort of the community has been, or will be, injuriously affected thereby.

The jurisdiction of the court in such cases is not in dispute, and is the same whether the acts complained of are also indictable or not, for the fact that the keeping of a nuisance is a crime does not deprive the Court of Chancery of power to enjoin the

nuisance. The same is true whether, or not, it is by statute made a misdemeanor for the club to keep and use the trapshooting conveniences within 300 yards of the public road. The criminality of the act will neither give or oust jurisdiction which otherwise attaches.

As a general proposition a court of equity cannot enjoin the commission of crime, for its powers relate to civil rights. Where, however, the rights of the public are interfered with, the court has jurisdiction to enjoin the wrongful acts. 4 Pomeroy on Equity Jurisprudence, § 1043; 2 Morawetz on Private Corporations, §§ 921-923; 1 Wood on Nuisances, § 14. The jurisdiction attaches where the public health or safety is affected, or the use of public property interfered with. The use made of their property by persons owning land abutting a highway may be a public nuisance if the highway be made unsafe for travel thereon, and a Court of Chancery will prevent the injury though it cannot punish the offender.

In two Delaware cases the power of the Court of Chancery to enjoin as a public nuisance an act interfering with public rights was recognized, though not applied. *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435, 470; *Gray v. Baynard*, 5 Del. Ch. 499. In *Murden v. Lewes* (Del.) 96 Atl. 506, which concerned a physical obstruction of a highway, it was said that "a nuisance is public when it affects rights to which every citizen is entitled," and it follows, of course, that a nuisance which affects the right of travelers on a public highway, or the health of the community, is a public nuisance. *Joyce on Nuisance*, § 5, p. 11. To give the Court of Chancery jurisdiction to enjoin a public nuisance, the evidence must be clear and convincing. If the evidence is conflicting and the injury to the public is doubtful, the Chancellor should not act. 4 Pomeroy on Equity Jurisprudence, § 1439; *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435, 470. Each case presented to the court must be tested by its own circumstances. *Gray v. Baynard*, supra.

[3-5] Of course, noises alone may constitute a nuisance. Whether a particular kind or volume of noise in a particular locality is, or is not, a public nuisance, depends upon the effect thereof on persons of normal nerves and sensibilities, and of ordinary tastes, habits and modes of living, and not on persons who are delicate bodily and abnormally nervous, or ill. The effect produced must be a real, actual, physical discomfort produced upon a person of average sensibilities. These principles are so well established and so reasonable that it is not deemed necessary to cite authorities on the point. Indeed, the solicitor for the relators in his brief does not dispute the principle, and makes the test of habits to be substantial discomfort to persons of ordinary sensibilities. So, also, to render the highway unsafe, the effect of noises on

horses, or other animals passing along the highway, must be such as to injure or frighten a horse of normal temperament, or as is frequently held, horses of "ordinary gentleness." *Joyce on Nuisances*, § 256; *Wood on Nuisances*, p. 402; *Wabash, etc., Co. v. Farver*, 111 Ind. 195, 12 N. E. 296, 297, 60 Am. Rep. 696; *Stone v. Langworthy*, 20 R. I. 602, 40 Atl. 832, 833; *Patton, etc., Co. v. Drennon*, 104 Tex. 62, 133 S. W. 871.

The character of the noises will not be altered by moving the traps closer to the public road. As to the character of the noises it was shown that the club had a large membership, was used not only by members but also by visitors who were made welcome, and the traps were used for large tournaments, which lasted several days. It was claimed for it that the club was, or would be made, very prominent in that kind of sport, and was in fact the largest of its kind in the world. On some days at least 5,000 shots were fired. In one year 250,000 targets were used on 104 days of shooting. The effect of from 10 to 25 persons shooting together, though not simultaneously, was described as a fusillade of explosive noises, as a bombardment, and the like.

(1) Has the highway been rendered unsafe because noises from the firing of the guns will frighten or injuriously affect the horses and other animals being used by travelers on it? There was evidence that certain horses passing along the highway while trapshooting was in progress at the traps as originally arranged were in fact frightened, and at least one became uncontrollable and ran away. But it was not clear in all cases that horses were actually struck by shot and so were not frightened by the noises only, and the fair inference from the testimony is that they were hit by shot. The effect of moving the traps nearer to the public road has not been tried. Of course the character of the noise was not altered by the change of location of the traps. It is clear, however, that the volume would be greatly increased by the use of all the traps so much closer to the road. An effort was made by the defendants to show that the volume of sound reaching the road would be less than formerly, because the guns from the traps nearest the road would be pointed away from and not towards the road; but the effort was scientifically unsound and the theory is rejected.

The testimony, both theoretical and experimental, as to the effect of the peculiar noises made by the trapshooting on the premises is conflicting in some respects. With respect to almost every horse which has been struck by shot, it is clear that an injury would be done to it. An animal would ordinarily be made what is called "gun shy," or peculiarly nervous on hearing a similar sound elsewhere, and by associating the occurrence with the place would be made especially nervous in the same locality. But this special objection does

not now exist, for by the new arrangement of the traps shot cannot reach the public road. Almost all of the cases where according to the testimony horses have been frightened to such an extent as to cause them to get beyond control were those where the animals were struck by shot, or were temperamentally abnormally nervous.

It has been difficult to determine the effect of the noises only on horses in the road. The opinions of expert and other witnesses vary greatly. One thing is quite certain; the movement of the traps closer to the road will increase the probability of injurious effect on animals in the road. While the weight of testimony of persons of experience with horses was that the peculiar noises made by trapshooters on the premises of the club were such as to alarm and frighten normally tempered horses, and to that extent injure them and increase the danger to their drivers, still inasmuch as there was reliable testimony to the contrary, and there was an absence of testimony that any normally tempered horse had been so affected by the noises only during the period of five years in which the shooting was done, it does not seem just or equitable, or within the limitations of the discretion of this court, to prohibit all shooting on the premises of the club. The evidence of the state is not "clear and convincing," as is required and is in fact conflicting. In case of serious doubt arising from conflicting testimony, the court should leave the matter to be settled by another tribunal, where the fact of the injury to the public rights could be ascertained by a jury.

Inasmuch, then, as the evidence on this point is really conflicting and the injury to the public doubtful, that alone constitutes here a proper ground for withholding the interposition of the extraordinary power of this court asked for.

(2) Has the health or comfort of the community been really affected by the noises made by the club? Without reviewing the testimony it is clear that it was not shown either theoretically by experts, or practically by particular instances, that actual physical discomfort was produced upon persons of normal health and sensibilities. The disturbance of the rest of two normally healthy night workers in the community does not justify the relief sought. The testimony of the complainants on this branch of the case does not come up to the requirements to obtain injunctive relief, and there were many witnesses living in the vicinity who testified to the absence of material annoyance by the day shooting. In this connection it should be noted that an entirely different problem would probably arise in case the practice of shooting at night was resumed. But inasmuch as the practice had ceased at the time the information was filed, it cannot now be a ground for present relief.

Upon neither of the two grounds, therefore, should the court by injunction prevent the use of the premises by the club for the purpose of shooting at targets from the traps as now arranged.

[8] Inasmuch, however, as there was ample evidence that at the time the bill was filed the shot fired by gunners from the traps fell into the public road, rendering it unsafe to travelers using it, and a public nuisance was thereby created, the defendants must pay all the costs of the cause.

Let a decree be entered accordingly.

(11 Del. Ch. 349)

ILLINOIS FINANCE CO. v. INTERSTATE RURAL CREDIT ASS'N.

(Court of Chancery of Delaware. Aug. 7, 1917.)

1. ASSIGNMENTS §121—SUIT BY ASSIGNEE—RIGHT TO SUE IN HIS OWN NAME.

Rev. Code 1915, § 2627, making all bonds, specialties, and notes in writing, payable to any person, or order, or assigns, assignable, and authorizing the assignees or indorsees to sue thereon in their own names, does not apply to a contract giving plaintiff's assignor an exclusive agency for the sale of stock in the defendant company.

2. ASSIGNMENTS §121—SUIT BY ASSIGNEE—RIGHT TO SUE IN HIS OWN NAME.

An assignee of an unassignable contract can sue in equity in his own name, but at law must sue in the name of his assignor.

3. EQUITY §46—ACTIONS BY ASSIGNEES—REMEDY AT LAW.

Though generally a court of chancery is not ousted of its jurisdiction simply because courts of law extend their jurisdiction, the jurisdiction of suits by assignees of unassignable choses in action, formerly exclusive in equity, is not now recognized as even concurrent with law courts, unless adequate relief is not afforded at law.

4. ASSIGNMENTS §127—ACTIONS BY ASSIGNEES—JURISDICTION OF EQUITY.

In an action for unliquidated damages for breach of a contract giving plaintiff's assignor an exclusive agency for the sale of stock in the defendant corporation, though the bill stated facts upon which the damages could be assessed without difficulty, if complainant's theory was correct in law, it was not sufficient to sustain the jurisdiction of equity that complainant sued as the assignee of a chose in action.

5. EQUITY §11—FRAUD—ACTIONS BY ASSIGNEES—JURISDICTION OF EQUITY.

The relief sought being damages for the breach of the contract, allegations of fraud and collusion between defendant and complainant's assignor could not confer jurisdiction on a court of equity.

6. ASSIGNMENTS §127—ACTIONS BY ASSIGNEES—JURISDICTION OF EQUITY.

That the bill sought a declaration of complainant's rights under the contract, a cancellation of a subsequent assignment by his assignor, or a reinstatement of the contract, did not give jurisdiction, as he did not need any such declaration, cancellation, or reinstatement in order to obtain damages at law.

7. DISCOVERY §3—LEGAL REMEDY—JURISDICTION OF EQUITY.

General interrogatories, attached to the bill making inquiry as to what documents defendant had relating to the matters set forth in the bill, did not authorize equity to assume jurisdiction, as discovery of such documents could be had at law, under Rev. Code 1915, § 4223,

authorizing the court, in actions at law, to order the production of books or writings containing pertinent evidence.

8. ASSIGNMENTS — JURISDICTION OF EQUITY.

A prayer for an accounting did not give jurisdiction to equity, in the absence of any allegation that it was a mutual or complicated account, or even that there were numerous items.

9. ACCOUNT — ACTIONS FOR ACCOUNTING — JURISDICTION OF EQUITY.

The jurisdiction of a court of equity respecting accounts, except between fiduciary and beneficiary, or where discovery is requisite to the relief sought, does not exist, where the items are all on one side.

Suit by the Illinois Finance Company against the Interstate Rural Credit Association. On demurrer to the bill. Demurrer sustained.

Statement of the Case.

In substance the bill shows that E. H. Watson had made a contract with the defendant company, by which he was given an exclusive agency to sell shares of stock of the defendant company, collect from the purchasers payments for the stock, pay all the expenses of making the sales, such as agents' commissions, office expenses, etc., and retain from the proceeds as his compensation a fixed percentage thereof of any sales made by him, or otherwise made. It was agreed that the contract could be assigned by Watson. The capital stock of the company of one million dollars had not then been sold. This contract was afterwards assigned to the complainant, with the knowledge of the defendant company. Thereafter the complainant company sold a large amount of stock of the defendant company, and received certain moneys therefor. Later the defendant company denied that the complainant company had any interest in the contract, and prevented the further performance by the complainant of it, though the specific nature of this claim was unknown to the complainant. It was alleged that over \$750,000 par value of the stock of the defendant company was unsold, and that the complainant had a right to sell all of this stock and retain commissions amounting to at least \$500,000, but that the defendant company deprived the complainant of the profits which would have accrued to it under the contract, and has refused to pay the same to the complainant, and owed the complainant at least \$50,000 more for sales made by the complainant, making the aggregate of the claim of the complainant against the defendant \$550,000.

The prayers of the bill were (1) to ascertain and establish the rights of the complainant in and to the contract; (2) to cancel a supposed subsequent assignment of the contract by Watson to the defendant company; and (3) that the defendant account for and pay over to the complainant all sums due under the contract.

Attached to the bill were general interrogatories as to what contracts, assignments and other papers relating to the matters contained in the bill are in the possession of the defendant company or any agent, officer or other person subject to the control of the company.

To this bill the defendant demurred (1) for want of jurisdiction, there being a remedy at law; (2) because Watson is a necessary party; and (3) there is no ground for equitable relief.

Marvel, Marvel, Wolcott & Layton, of Wilmington, for complainant. Robert H. Richards and James I. Boyce, both of Wilmington, for defendant.

THE CHANCELLOR. [1] The complainant is the assignee of a contract, by its terms made assignable, and the other party to the contract had notice of the assignment. Choses in action are not assignable at common law, and the statute which makes assignable certain kinds of evidences of indebtedness otherwise not assignable and gives to the assignee a right to sue thereon in his own name, does not apply to the contract under consideration. Revised Code of 1915, § 2627, p. 1271.

[2] An assignee of an unassignable contract can sue in equity on the contract in his own name, but at law must sue in the name of his assignor. Whether the provision of the contract making it assignable gave to the assignee thereof a right to sue thereon at law in his own name need not be considered in view of the conclusions reached.

[3] Courts of equity have taken jurisdiction to grant relief to the assignee of a chose in action, because he could there bring the suit in his own name. It is also true that in general the Court of Chancery is not ousted of its jurisdiction simply, as Lord Eldon puts it, "because a court of law happens to fall in love with the same or a similar jurisdiction." An interesting and exhaustive statement of this point is to be found in 1 Whitehouse on Equity Practice, §§ 21-24, and the author's conclusions are supported in Story's Equity Jurisprudence, § 80, and Pomeroy's Equity Jurisprudence, §§ 173-180.

The jurisdiction of suits by assignees of unassignable choses in action, formerly exclusive in equity, is not now recognized as even concurrent with law courts, unless it be shown that adequate relief is not afforded at law. 1 Whitehouse on Equity Practice, §§ 18, 22; 1 Pomeroy's Equity Jurisprudence, § 281; 2 Story's Equity Jurisprudence, § 1057b; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Walker v. Brooks, 125 Mass. 241. In 4 Cyc. 95, 96, and 5 C. J. 203, other authorities are cited. The court in Walker v. Brooks, supra, comments on a passage in an early edition of Story's Equity Juris-

prudence at section 1057(a) in opposition to the doctrine above stated, and in the later editions a different statement is made. See § 1057(b) of 13th Ed.

Pomeroy (9 Equity Jurisprudence, § 281) refers to the practical abandonment by equity courts of jurisdiction over suits by the assignee of choses in action as a striking illustration of the change which has taken place, where courts of law have assumed the power to grant a simple, certain and perfectly efficient remedy. The author also says this:

"As a general rule a court of equity will not now entertain a suit brought by the assignee of a debt or of a chose in action which is a mere legal demand."

The point seems to have been passed on by Chancellor Johns in the case of *Cochran v. Cochran*, 2 Del. Ch. 17. There the assignee of a judgment filed a bill against the heirs at law of the defendant in the judgment to collect the amount claimed to be due thereon, and the court held that the only ground urged to show jurisdiction, the fact that there was no personal representative of the deceased defendant, was not sufficient, as there was a sufficient remedy at law. The Chancellor evidently found that as the legal remedies were sufficient the fact that the assignee of the judgment must use the name of the original plaintiff did not of itself justify the court in taking jurisdiction, and the ground urged being inadequate, dismissed the bill. In the later case of *State v. Wilmington Bridge Co.*, 2 Del. Ch. 58, the same Chancellor found such other need of equitable relief even for the recovery of a legal demand, viz., a right of a principal to an account from the agent and a need for discovery from the defendant.

[4] In the case under consideration the main relief sought is damages for breach of a contract for service, and the amount is unliquidated, though the bill states the facts upon which an assessment of the damages could be made without difficulty if the complainant's theory on the subject be correct in law. Therefore, if no other ground for equitable relief exists, it is not enough to sustain the jurisdiction of the court that the complainant brings his suit as the assignee of a chose in action. The complainant recognizing this principle urges that this court has jurisdiction because of the discovery sought and because an account is sought.

[5,6] The fraud which the complainant says Watson perpetrated, and the assumed though not alleged collusion between Watson and the defendant, cannot confer jurisdiction, for the relief sought is damages for the alleged breach of the contract. Neither does the complainant need any declaration of its rights or a cancellation of the second assignment to the defendant, or a reinstatement of the contract in order to obtain damages at law. Indeed, it is claimed that be-

cause of the defendant's notice of the complainant's rights the complainant is entitled to damages notwithstanding the collusive acts between Watson and the defendant company by way of re-assignment, surrender, or otherwise, and Lord Hardwick is cited as authority, in *Le Neve v. Le Neve*, Amb. 436; and also Pomeroy's Equity Jurisprudence, § 591, though no authority would seem necessary to support such an obviously true proposition.

[7] Does this court have jurisdiction because of the interrogatories which the complainant has attached to the bill? These interrogatories are very general, being inquiries as to what documents the defendant has relating to the matters set forth in the bill. Assuming that they are proper in form, the complainant may in an action at law for damages for breach of the contract obtain at any time pending the cause discovery of such documents as fully as it could in this court. Revised Code of 1915, § 4228. Discovery is not in this case a ground for assuming jurisdiction.

[8,9] An accounting is prayed for, but there is no allegation that it is a mutual or complicated account, or even that there would be numerous items in it. The jurisdiction of a court of equity respecting accounts, except between fiduciary and the beneficiary, or where discovery is requisite to the relief sought, does not exist where the items are all on one side. 1 Story's Equity Jurisprudence, §§ 458, 459. Indeed, if the complainant should sue at law for breach of the contract, the complainant would need no account of sales made of shares or of the expenses incurred in so doing, for this would be the defendant's proof to lessen the amount of the damages recovered upon proof made of the contract, the assignment of it to the complainant and the refusal of the defendant to permit performance, and the consequent loss. It is not, therefore, a case where equity has jurisdiction to order an account.

In view of the conclusions here reached, it is not necessary to decide whether Watson was a necessary party.

For these several reasons the jurisdiction of this court is not established, and the demurrer to the bill should be sustained.

Let an order be entered accordingly.

(11 Del. Ch. 233)
ELLIOTT v. JONES.

(Court of Chancery of Delaware. May 10, 1917.)

1. SPECIFIC PERFORMANCE ~~68~~—CHATELAIN—DECREE.

Specific performance of a contract respecting personal property may be decreed, although it is limited to personal property peculiar and individual in character, such as a patent, or which has a special value on account of associations connected therewith.

2. SPECIFIC PERFORMANCE §79 — PERSONAL PROPERTY—RIGHT TO.

Specific performance of a contract between complainant and defendant to purchase and train a horse, which they thought would become valuable as a race horse, may be decreed, where defendant purchased the horse and refused to allow complainant to participate, even though specific performance of the partnership agreement should not be decreed.

3. SPECIFIC PERFORMANCE §108 — PRELIMINARY INJUNCTION.

Where a court of equity had jurisdiction to decree specific performance of that part of a contract which entitled complainant to acquire a half interest in a horse, he and defendant having agreed to purchase the horse jointly, and defendant having purchased it and refused to allow complainant to participate, a preliminary injunction restraining defendant from disposing of the animal prior to trial is properly granted, though specific performance of some of the features of the contract could not be granted.

Bill for specific performance by Edward J. Elliott against Erasmus Jones. On rule requiring defendant to show cause why he should not be restrained from disposing of a horse pending final hearing. Preliminary injunction awarded.

Daniel J. Layton, Jr., of Georgetown, for complainant. Charles W. Cullen and Robert H. Richards, both of Georgetown, and James I. Boyce, of Wilmington, for defendant.

THE CHANCELLOR. The complainant and defendant agreed to join in buying and training a particular horse, which by training could be developed into a valuable race horse, each to furnish half of the money for purchasing and training the animal, and to share equally in the profits of using and selling it. The horse was bought by the defendant, who has possession of it, and denies the rights of the complainant, and refuses to accept payment of the complainant's share of the purchase money. A decree for specific performance is sought to enforce the defendant to transfer to the complainant an undivided one-half interest in the horse; and on allegations that the defendant threatens to dispose of the animal prays for a preliminary injunction pending the cause and a restraining order. On filing the bill a restraining order was granted, and a rule for a preliminary injunction issued. The hearing is on the rule for preliminary injunction on bill and ex parte affidavits.

By his affidavits the defendant did not deny the material allegations of the bill, but questioned the jurisdiction of the court.

[1, 2] While a court of equity will not decree specific performance of an agreement to form a partnership, which being at will is terminable by either party immediately, it will secure to a partner his interest in property to which by the partnership agreement he is entitled. *Somerby v. Buntin*, 118 Mass. 279, 287, 19 Am. Rep. 459. The power of a Court of Chancery to decree specific performance of contracts respecting personal property is not denied. It is limited, how-

ever, to personal property peculiar and individual in character, such as a patent, or which has especial value on account of associations connected therewith, such as heirlooms, or where for some other cause its value is not measurable by a money value reasonably ascertainable as damages in an action at law. Inadequacy of the remedy at law is the basis of the jurisdiction.

The nearest illustration of the jurisdiction is its application to contracts respecting slaves. In days, happily long since past, when slaves were property, the question was litigated in several cases. In Virginia, South Carolina, North Carolina, Tennessee and Mississippi it was decided that a court of equity had jurisdiction to enforce specific performance of a contract for the sale and delivery of a specific slave as distinct from one or several slaves as articles of commerce. See the case of *Summers v. Bean*, 13 Grat. (Va.) 404 (1856), where the authorities are referred to and discussed. In Georgia the rule was not so broad, and the peculiar value of the slave must be alleged and shown, as that they were skilled as house servants, blacksmiths, carpenters, and the like. *Mallery v. Dudley*, 4 Ga. 66.

Suppose a slave possessed mental or physical powers which indicated that with opportunity for training he could become accomplished in some of the arts and sciences, he would surely have such peculiar value, present or prospective, as that his present value could not be ascertained, and a contract respecting him would have been specifically enforced.

By analogy with these cases a particular horse with unique or peculiar traits and qualities different from horses in general, and which has promises of development by training so as to become valuable for speed in racing contests, has a prospective but now unascertainable value, and, therefore, a contract respecting it is properly a subject for a decree for specific performance, because of the inadequacy of legal remedies.

In *Kane v. Luckman* (C. C.) 131 Fed. 609, the court refused to decree specifically an agreement to sell to the complainant a certain number of cows in the absence of evidence that they were endowed with any unique or peculiar traits or qualities that would render their value incapable or even difficult of being ascertained in money, and by inference held that if these elements had existed the relief would have been granted.

[3] At this preliminary stage of the cause the preliminary injunction to maintain in statu quo the rights of the parties to the property in question should not be denied, because of lack of jurisdiction of the subject-matter where the facts upon which the injunction depends are not denied. At this stage of the case it need only be declared that under the allegations of the bill, if they

be proved, some part of the relief sought may be granted.

A preliminary injunction will be awarded upon the giving of an injunction bond with sufficient surety.

(11 Del. Ch. 343)

ELLIOTT v. JONES.

(Court of Chancery of Delaware. June 28, 1917.)

SPECIFIC PERFORMANCE — 79 — DIRECTION — CHATELLETS.

Where complainant and defendant, believing that an animal would make a valuable race horse agreed to join in purchasing it and to share equally the expense of training it and the profits of using and selling it, and defendant bought the horse but refused to accept from complainant payment of his share of the purchase money or to recognize complainant's ownership, specific performance may be decreed to the extent of requiring defendant to convey to complainant by bill of sale an undivided interest in the animal, and enjoining defendant from disposing of it without complainant's consent, though the court could not by its decree require the parties to continue the partnership longer than they desired.

Bill by Edward J. Elliott against Erasmus Jones. Decree for complainant.

Bill for specific performance of an agreement between the complainant and defendant to purchase a particular horse. The cause was heard on bill, answer, testimony of witnesses heard orally by the Chancellor and exhibits. The facts are sufficiently stated in the opinion.

Daniel J. Layton, Jr., of Georgetown, for complainant. Charles W. Cullen, of Georgetown, for defendant.

THE CHANCELLOR. This was a bill for the specific performance of an agreement between the complainant and defendant by which they agreed to join in buying a particular horse possessing, as they believed, qualities which when developed would make the animal valuable as a race horse. They were to share equally the expense of training the horse, and to share equally the profits of using and selling it. The defendant bought the horse and has possession of it, and denies the rights of the complainant and refuses to accept from the complainant payment of his share of the purchase money and the training, notwithstanding tenders by the complainant of performance on his part.

A hearing was had upon the bill and ex parte affidavits upon the motion for a preliminary injunction pending the final hearing of the cause, and for reasons then stated a preliminary injunction was awarded. Thereafter the defendant filed an answer denying the agreement as set forth in the bill, and setting up a similar contract to buy two certain horses, and alleging that the defendant had bought the other horse and refused to recognize the rights of the defendant thereto,

and denied the jurisdiction of the court to enforce specific performance of the contract.

The testimony at the trial showed that the contract was made as claimed by the complainant, and not as alleged by the defendant, and related to the bay mare alone, and the tender by the complainant of \$125, one-half of the purchase money, and offers by the complainant to perform on his part were also proved.

For the reasons set forth in the opinion heretofore filed when the preliminary injunction was awarded, and which it is not necessary to repeat, it is held that this court has jurisdiction to enforce the contract respecting the mare.

It is clear, also, that the complainant is entitled to a decree declaring his rights respecting the mare under the contract, even though this court has not the right to require performance by the parties of all of the terms of it, and even though either party may at any time terminate the contract.

In the case of *Satterthwait v. Marshall*, 4 Del. Ch. 337, *Marshall*, the inventor of a patent, and the complainant formed a partnership to use the patent, and the defendant agreed to assign to the complainant an interest in the patent. A bill for specific performance of the partnership agreement and to require the defendant to assign to the complainant an interest in the patent was filed, and Chancellor Bates held the right to the assignment was absolute, and was not dependent upon the subsequent contingency of forming and prosecuting the partnership; that the court had jurisdiction to decree specific performance of an agreement for an assignment of an interest in a patent, because "a sufficiently certain and adequate redress cannot be afforded by a suit at law"; and that though the court "will not undertake to compel unwilling parties to act in the relation of partners," still "the inability of the court to compel these parties to become or continue copartners under the articles is no objection to a decree for the specific performance of the covenant to assign the shares of the patent."

The principles here announced are applicable in full degree to the case under consideration, and justify a decree for the complainant at least to such extent as this court went in the case cited.

It was shown that both parties believed that the mare had desirable qualities, and was capable of development by training into a race horse of value, and that its value present or prospective could not be now fairly fixed because of the uncertainties in the results of her training.

In this case the court can do no more than require the defendant to convey to the complainant by a bill of sale an undivided interest in said mare, declare that it shall be held by the complainant and defendant as tenants in common subject to the contract so long as it shall remain in force, and enjoining the

defendant from disposing of it during the existence of the contract without the consent of his co-owner.

This court cannot require the parties to continue as partners; or to continue the contract in force for a definite or indefinite period, or for any longer period than either one desires. Neither can this court impose any commands concerning the duties of the parties in performing the contract beyond the declaration of the general terms thereof.

A decree will be entered requiring the defendant to transfer to the complainant an undivided interest in the bay mare to be thereafter owned by the complainant and defendant in equal shares, subject to the terms of the contract. The defendant will also be enjoined from selling, or otherwise disposing of the mare, so long as the contract respecting her shall continue in force. The costs will be put on the defendant.

(11 Del. Ch. 334)

EQUITABLE TRUST CO. v. KENT et al.

(Court of Chancery of Delaware. June 27, 1917.)

(Syllabus by the Court.)

TRUSTS §272(2) — PRINCIPAL AND INCOME — RIGHTS OF BENEFICIARIES.

Where a testator gave pecuniary legacies and the residue to a trustee in trust for his widow and son for life, with remainder over and gave to the executor power to sell real estate, and the executor sold productive and unproductive real and personal estate, collected income consisting of rents, interest and dividends, and paid debts and legacies of the decedent, *held*, that the life beneficiaries were entitled to have equitable income for the first year after the death of the testator; that said income was to be ascertained by determining what sum, if it had been invested from the death of the testator for one year at the rate of 4½ per centum per annum would with the interest amount to the sum of money received by the trustee, the larger sum being principal for the remainderman and the smaller one income for the life tenant.

Bill by the Equitable Trust Company, a corporation, trustee under the will of Lindley C. Kent, deceased, against Roland G. Kent and others, in the nature of an interpleader, and for instructions. Trustee instructed.

Bill in the nature of a bill of interpleader and for instructions to a testamentary trustee. The case was heard on bill and answer, and the facts appear in the opinion of the Chancellor.

Richard S. Rodney, of Wilmington, for complainant. Hugh M. Morris, of Wilmington, for life beneficiaries.

THE CHANCELLOR. Lindley C. Kent, who died February 12, 1916, by his will, after making sundry specific and pecuniary bequests (all of which have been paid), disposed of his residuary estate in four equal parts. One part was given to a trustee to

invest the same and pay the income for the support of a minor son of the testator until he reaches a certain age, on arrival of which he is entitled to the principal, with a provision that if he dies before that time the trust estate held for him is to be divided between the testator's widow and remaining children, and the issue of any child of the testator then dead. Another part was given to the same trustee to pay the income to the testator's widow for her life, and at her death to divide the principal between her children then living and the issue of deceased children. The same corporation was appointed executor and trustee, and the testator authorized his executor to sell and convey real estate of the testator.

On April 3, 1917, the executor filed a first account showing payment of debts and the sum remaining for distribution as residue \$97,586.94, partly in cash and partly in securities. Also that the net income received since the death of the testator to the date of the account was \$5,470.59. The trustee being entitled to two-fourths of the residue has received from itself as executor \$48,793.47, on account thereof. Of this sum \$2,735.30 was income which had accrued prior to the date of the account, and included rent, interest and dividends. In other words, the trustee has received as part of the residuary devise and bequest a sum of money which includes what is clearly principal and what is clearly income when and as received by the executor.

It further appears by the account that the executor pursuant to testamentary authority sold from time to time real estate of the testator and received \$17,325 therefrom, and no income was received by the executor thereon. This sum was included in the sum of \$97,586.94, from which the sum of \$48,793.47 was paid to the trustee as above stated, so that of that latter sum \$8,662.50, being two-fourths of \$17,325, was proceeds of sale of real estate. The proceeds of sale of the real estate was mingled by the executor with the personal estate, and debts and legacies were paid from the general fund. The sum received by the trustee was part of this commingled fund. Part of the real estate and part of the personal property have not yet been converted into money by the executor. The testator had three children, and they and his wife survived him and are still living.

A bill has been filed by the trustee, the Equitable Trust Company, for instructions, the widow individually and as guardian for the minor son of the testator, and the other two children of the testator (who are adults) being parties defendant. All of the defendants have appeared, and admitted the allegations of the bill.

It appears, therefor, that all the persons interested both presently and in remainder

are parties, unless the minor son dies before the age fixed by the will and one or both of the other children of the testator also die before that time leaving issue, whereby the issue (perhaps now unborn) would be substituted for parents. But in any event those now interested, including those with vested remainders in the shares held in trust for the widow and minor son, are parties, and the trustee is now entitled to instructions.

The questions which arise and were discussed at the argument were these: (1) Is the sum of \$2,735.30 received by the trustee as part of the larger sum, and which represents income when and as received by the executor, to be treated by the trustee as principal or income, and if income whether all or part only of it be paid to the beneficiaries as income? Or, more succinctly, are the life beneficiaries entitled to the money received by the executor as income on the clear residue computed from the time of the death of the testator as ascertainable by the accounts of the executor? (2) Is the whole sum received by the trustee, which includes what was principal at the testator's death and income received thereon since, to be treated as principal? (3) Are the life beneficiaries entitled to equitable, instead of actual income, that is to say, to have income such sum as at a fixed rate of interest would have been produced had the total fund received been invested at that rate from the death of the testator?

When by will successive interests are given, whether by direct gifts or to trustees for beneficiaries in succession, the problem as to the right to the first year's income arises in the absence of testamentary intention. When the gift relates to specific property, real or personal, the product or interest therefrom follows the corpus from the death of the testator and belongs to the life tenant: provided, of course, the property is not needed in a proper case for the payment of debts of the decedent. *Custis v. Potter*, 1 *Houst.* 382, 68 *Am. Dec.* 422; *Kinmouth v. Brigham*, 87 *Mass.* 270.

Unquestionably the established rule in Delaware is that a gift of a residuary estate, or a part thereof, in trust for the widow or child of the testator for life, carries income from the death of the testator, and not from a year thereafter. The Court of Errors and Appeals, in 1857, in the case of *Custis v. Potter's Adm'r*, 1 *Houst.* 382, 68 *Am. Dec.* 422, where general pecuniary legacies had been given to nephews and nieces of the testator payable at certain ages, and which ages they attained more than a year after the death of the testator, decided that the legatees were not entitled to interest from the death of the testator, or until they had attained the fixed age. The court said a different rule prevailed when the legatee was a child of the testator; or was a person to whom the testator stood in loco parentis, and no other provision for it was made. It was

also declared that specific bequests, or bequests of the corpus carried their product or interest from the testator's death, unless a testamentary intention to the contrary be shown. The court also referred to gifts of the residue as a further exception to the general rule that general legacies draw interest from the time they are payable; but it was an obiter dictum in this case.

In the case of *Flinn v. Flinn*, 4 *Del. Ch.* 44 (1868), a share of the residuary estate was given to the testator's children to be held by the executor at five per centum per annum, and "to be paid to them as they severally arrive at twenty-one years," with limitation over as to shares of any child who did not attain that age. No other provision was made in the will for the children who were infants. Chancellor Bates, after stating the established rule that legacies to infant children carry interest from the death of the testator and not from a year after, allowed out of the annual interest on their respective shares a sum deemed sufficient for the support of the legatees. *Custis v. Potter* was not cited.

Chancellor Nicholson in *Baker v. Fooks*, 8 *Del. Ch.* 84, 67 *Atl.* 969 (1896), dealt with the case where a sum of money was bequeathed to a trustee to be invested and the income paid to the widow of the testator for life and at her death to become part of the residuary estate of the testator. The trustee filed a bill for instructions, alleging that he had by authority of the Chancellor taken certain investment securities owned by the testator at his death and had received interest and income thereon, the amount thereof varying from year to year. A decree was made giving to the widow for life interest at six per cent. on the legacy to be computed from the death of the testator, but there was in the report of the case no opinion, and therefore the reasons do not appear.

In the case of *Equitable, etc., Co. v. McCurdy* (1916) 98 *Atl.* 220, there was a gift of part of the residuary estate to a trustee to invest and pay the income to the daughter of the testatrix for life, and the trustee received from the executor in payment of the gift investment securities held by the testatrix at her death, and also income which had accrued on these specific securities since the death of the testatrix. This accrued income was awarded to the life beneficiary.

In Delaware the cases seem to limit the application of the rule to the widow or children of the donor, or to some one as to whom he stood in loco parentis, though as stated in *Equitable, etc., Co. v. McCurdy*, the rule has been elsewhere applied to cases where the relationship did not exist. The present case was a gift of residue in trust for a daughter of the testator, so it is not here necessary to extend the rule, though it seems clearly to go beyond children, or those to whom the testator stood in loco parentis, and

applies to all gifts of residue to one for life with remainder over. *Green v. Green*, 30 N. J. Eq. 451.

When the subject-matter of the gift is residue, or an aliquot part of it, then it must be determined what share of it belongs to the life tenant and what to the remainderman. The executor who is given a year in which to settle the estate receives the assets of the decedent in various forms. When and as received some of the estate is clearly principal and some clearly income. In general all of it, after it comes into his hands is principal. From the moneys so received he pays debts, administration expenses, pecuniary legacies, if any, and has a balance which constitutes the residue. He may, or may not have so kept his account as to be able to show what part of the sum remaining was income when and as it came to him. It is manifestly impossible to say that the debts and administration expenses were paid out of what was principal and what was income, for they were commingled, and equally difficult to show whether they were paid from the personalty of the decedent, or from the proceeds of the sale of the real estate. Even if the executor has so kept his account that he can say what portion of the residuary balance was income when he received it, there is always some part of the assets of the testator which did not yield income. It is manifestly difficult, therefore, even in the ordinary case to adjust the rights of the life tenant and remaindermen by determining what was actual income, when and as received. There are cases where it is inequitable or impossible to follow that principle, viz.: Where the testator had money invested in wasting securities, or in bottomry bonds where the principal and income are paid as one sum, and other like cases. There may be delays beyond the year in conversion of assets, or for other reasons the executor may not at the end of the year be able to pay to the trustee the residuary estate. If there be found some equitable general rule to give to the life tenant what is equitably to be considered income from the death of the testator without regard to actual income, it should be adopted.

In *Hill on Trustees*, the learned author says there are four possible solutions, and that the decisions of very eminent judges may be urged in support of each. His classifications, omitting his citations, are these: (1) The tenant for life may be entitled to nothing until the expiration of the twelve months from the testator's death, the income in the meantime being added to and forms a part of the capital of the residue. (2) The beneficiary for life during the first year after the testator's death will take the income of such parts of the estate as are properly invested at the testator's death, or as may become so invested during that year. (3) The life beneficiary may be entitled to

the income arising from the property in its existing state during the first year from the testator's death. (4) The life tenant will take, not the interest actually arising from the property during the first year after the testator's death, but the amount of the interest at three per cent. on such sum as would have been produced at the end of the year by the conversion of the property, i. e. add the income actually received to the principal received, and divide the aggregate by 103, and so obtain equitable in the place of actual interest or income. The last-mentioned solution is that which according to the learned author has the greatest authority in its favor.

It has been held that when it is shown what portion of the residue which came to the trustee was received by the executor as income and what as principal, then the rights of the life tenant and remainderman are thereby fixed, the former taking that which was income when and as received by the executor and the remainder was principal to be held for further income and ultimately for the remainderman. *Lovering v. Minot*, 63 Mass. 151, 156; *Sargent v. Sargent*, 103 Mass. 297; *Ayer v. Ayer*, 128 Mass. 575, 597; *Cushing v. Barrell*, 137 Mass. 25; *Green v. Green*, 30 N. J. Eq. 451; *Hewitt v. Morris*, 1 Turner & Russell, 241; *Allhausen v. Whittell*, 4 Eq. 295; *Wethered v. Safety, etc., Co.*, 79 Md. 153, 28 Atl. 812 (where the court considered that debts of the testator as having been paid from capital and not income).

Where it appears that the trustee received the proceeds of unproductive property an apportionment is made between the life tenant and remainderman so that the former received interest at the usual rate obtained from trust investments from the death of the testator. This is done by ascertaining what sum, if it had been invested from the death of the testator at an arbitrarily fixed rate, to the time of payment to the trustees, would with interest amount to the sum so received by the trustee, and treat that sum as principal to be thereafter held by the trustee for the benefit of the life tenant and then for the remainderman, and give the balance to the life tenant as income. *Allhausen v. Whittell*, 4 Eq. 295; *Lawrence v. Littlefield*, 215 N. Y. 561, 109 N. E. 611 (1915); *Edwards v. Edwards*, 183 Mass. 581, 67 N. E. 658.

The same principle was applied where the testator had an interest in a partnership and the executor received therefrom profits in the settlement of the partnership affairs. *Kinmouth v. Brigham*, 87 Mass. (5 Allen) 270; *Westcott v. Nickerson*, 120 Mass. 410.

The simplest, most practicable and equitable rule is that which *Hill on Trustees* says has the weightiest authority, and which is adopted in *Loring's Trustees' Handbook* at page 122 (3d Ed.), viz. equitable instead of actual income—that is to say, the sum which the life beneficiary would have received at the end of a year after the death of the tes-

tator if the trust fund had been invested at a certain selected rate of interest from the death of the testator. To illustrate, if the fund was \$10,000 and the interest rate be fixed at five per cent., then if that sum be divided by 105 the result, \$9,523.80 will represent principal and the balance, \$476.20 will represent income for one year. This latter sum being five per cent. of the former. This method is the simplest because it is based on simple terms in the calculation thereof; is not dependent on the classifications of the estate by the executor; and disregards the sources from which the fund is produced. It is equitable because it is applicable to productive and unproductive assets; includes proceeds of real estate as well as personalty; disregards proportions of productivity of income; includes all kinds of income such as rents, interest, dividends and accretions; and, which is highly important, gives to the life beneficiary income for the first year unaffected by the delays of executors in administering the estate of the decedent, or in paying over and delivering the trust fund.

It would be applicable whether there was, or was not, an equitable conversion of realty into personalty. It should also be applied in cases where the trustee by authority of the Court of Chancery takes in specie in payment of a legacy property of the decedent, and in this respect the principle adopted with respect to the Pennypacker will in the case of *Equitable, etc., Co. v. McCurdy*, above cited, should not be followed.

The rate of interest should be such as a trustee by careful, conservative investment in suitable trust investments could reasonably realize as interest or income, and should not be the legal rate of interest fixed by law as between debtor and creditor. *Edwards v. Edwards*, 183 Mass. 581, 67 N. E. 658; *Lawrence v. Littlefield*, 215 N. Y. 561, 109 N. E. 611 (1915). In England the rate was in early times based on the income from government securities, and was about three per cent. In this country and community, and at this time, a large rate is so obtained and a rate of four and one-half per cent. is, in my opinion, a just and fair rate. When a clear testamentary intention to the contrary appears, the rule is inapplicable. It is equally inapplicable, as above stated, to specific gifts for successive beneficiaries. The rule is applicable to a gift to trustees for successive holders as well as to direct gifts of successive interests. *Green v. Green*, 30 N. J. Eq. 451; *Wethered v. Safety, etc., Co.*, 79 Md. 153, 28 Atl. 812.

This principle will be applied here, even though in this particular case it is accurately ascertainable from the accounts as kept by the executor of Lindley C. Kent what portion of the trust fund now payable to the trustee was income when and as received by the executor.

Applying the rule to the facts here, it appears that the trustee has received \$48,793.47 on account of the residue one-half of which is \$24,396.73 is held in trust for the widow for life and the other half for the son until he reaches a certain age. By dividing \$24,396.73 by 1.045, the result \$23,346.15 constitutes the principal of the trust estate, which is hereafter to be held in trust for Rosamond C. Kent, the widow of the testator; and the balance, \$1,050.58, is income for the first year from the death of the testator, and is payable to said widow. The same applies to the other sum of \$24,396.73 for the benefit of Lindley C. Kent, Jr., the son of the testator.

Let a decree be entered accordingly.

(11 Del. Ch. 346)

BUPP v. KLEITZ et al.

(Court of Chancery of Delaware. June 30, 1917.)

1. JUSTICES OF THE PEACE §135(4) — ENJOINING EXECUTION—REMEDY BY CERTIORARI.

As the writ of certiorari does not, under Rev. Code 1915, § 4083, effect a stay of proceedings, such writ does not, where irregularities in a judgment rendered by a justice did not appear on the face of the record, afford an adequate remedy at law, preventing a proceeding to enjoin enforcement of the judgment, even though the irregularities might have been brought into the record by some auxiliary proceeding.

2. JUSTICES OF THE PEACE §135(4) — ENJOINING EXECUTION—GROUNDS.

The omission of the return day from a writ of summons issued by a justice of the peace is no ground for enjoining the enforcement of the judgment rendered by the justice, though the writ was irregular, for the purpose of the writ of summons is to give notice to the defendant of the time and place of hearing, and defendant had such notice; the date being filled in by the constable at the time of the service of the writ.

3. JUSTICES OF THE PEACE §135(4) — ENJOINING EXECUTION—GROUNDS.

As Rev. Code 1915, § 4009, allowing a defendant in justice court one adjournment, does not apply to the summary remedy given landlords against holding over tenants, and section 4075 merely declares that a justice may grant an adjournment, the refusal of a justice to grant defendant in summary proceedings an adjournment does not warrant the enjoining of his judgment.

4. JUSTICES OF THE PEACE §135(4) — ENJOINING EXECUTION—GROUNDS.

That the constable, after serving one writ of summons, served another writ specifying a later return day, does not warrant the enjoining of a judgment of a justice based on the first writ, upon the ground of confusion or mistake, for service of the second did not relieve defendant of the duty to appear according to the command of the first.

Bill by Curtis G. Bupp against Bernard Kleitz and others. On rule to show cause why preliminary injunction should be awarded. Rule discharged.

Robert Adair, of Wilmington, for complainant. William T. Lynam, of Wilmington, for defendants.

THE CHANCELLOR. The complainant relies on several informalities to entitle him to an injunction to restrain further proceedings on the judgment against him obtained before the justice of the peace in the action brought by the defendants, Bernard and George Kleitz, to recover possession as a holding-over tenant. (1) The writ of summons when and as issued by the justice of the peace did not contain a statement of the return day thereof, the date and hour, but not the day of the month being filled in by the constable at the time of the service thereof. (2) The justice of the peace refused to grant an adjournment on the day and at the hour fixed by the summons. (3) On the day following the service of the summons another summons for the same cause of action was served on the complainant, returnable at a later date than the first summons, the constable stating that there was an irregularity in the prior writ as the reason for issuing the later one.

There was no dispute as to the foregoing facts at the hearing for a preliminary injunction. The complainant urged confusion, surprise and legal fraud arising from the duplication of writs of summons and proceedings, and that he had a legal defense to the action in that by a written agreement between him and the defendants he was entitled to possession as tenant for a term which had not expired.

It appeared by the bill that two days before the date fixed in the first summons the solicitor for the complainant, who appeared for the complainant at the trial, had received from the attorney for the defendants in this cause, and who appeared for them at the trial before the justice of the peace, notice that he would insist upon trial at the date and hour fixed in the first summons.

[1] None of the matters above referred to appear in the record of the justice of the peace, which is apparently regular in showing jurisdiction of parties and the cause, appearance of the parties, a jury trial, verdict and judgment. Therefore the alleged irregularities, if fatal, are not curable by certiorari. And even if they could be gotten into the record by some auxiliary proceeding, still by the statute the issue of the writ of certiorari does not effect a stay of proceedings. Revised Code of 1915, § 4083. The proceeding against the tenant is statutory and summary, and no appeal is allowed. The only effective remedy available for the complainant, therefore, is in this court, if there be any here.

It is not necessary to consider in this case a question not discussed, viz. whether or not this court has jurisdiction to restrain a proceeding taken by a landlord against a holding-over tenant, for upon the undisputed facts the complainant is not entitled to relief if the court has jurisdiction. In *Marvel v. Ortlip*, 3 Del. Ch. 9, the question of juris-

diction was raised, but not decided, and in *Clough v. Cook*, 87 Atl. 1017, this court recently enjoined the further prosecution of such a proceeding because this court had theretofore taken jurisdiction of the matter by a bill filed by the tenant against the landlord to enforce a covenant for renewal of the lease.

[2] The omission from the writ of the return day when issued by the justice of the peace is not a sufficient ground here to enjoin the proceedings before the justice of the peace. However irregular it may have been in this respect technically (as to which no opinion is expressed) the purpose of the writ was to give notice to the party defendant of the time and place of the hearing, and this notice the defendant had.

[3] There was no ground for equitable relief based on the refusal to grant an adjournment. By the statute the justice of the peace "may" grant an adjournment. Revised Code of 1915, § 4075. His exercise of discretion if reviewable at all in this court, is not a ground for relief in this case where the defendant knew that his landlord would insist on hearing at the particular time. The defendant was not entitled to an adjournment as of course. The provision of the general statute (Revised Code of 1915, § 4009) as to the jurisdiction and procedure of the justice of the peace allowing to the defendant one adjournment does not apply to the summary remedy given to landlords against holding-over tenants, the latter being enacted as a separate chapter with different procedure and with a distinct purpose to avoid all delays of administration.

[4] Neither did the issuance of the second summons properly lead to confusion or mistake, nor did it relieve the tenant of the duty to appear according to the command of the first summons.

In considering all these matters it has been noted that the complainant had from the start of the case the benefit of legal advice.

It being clear that no cause was shown why the preliminary injunction should be awarded, the rule is discharged, and my views on the points raised have been stated because of the consequences to the complainant of a denial of injunctive relief at this time.

Let an order be entered accordingly.

(11 Del. Ch. 286)

JOHN W. COONEY CO. v. ARLINGTON HOTEL CO.

(Court of Chancery of Delaware. May 25, 1917. Supplemental Opinion as to Form of Decree, Aug. 4, 1917.)

1. CORPORATIONS ~~§~~ 562(2)—STOCKHOLDERS—LIABILITY—PROCEEDINGS TO ENFORCE.

General Corporation Law (22 Del. Laws, c. 394), § 20, provides that when the assets of a corporation are insufficient to pay its creditors and the whole capital stock has not been paid in,

each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of the par value of each share, or such proportion as shall be required to satisfy the debts of the company, and further provides that the sum unpaid may be recovered as provided in section 49, after an execution has been returned unsatisfied, as provided for in section 51. Section 21 authorizes the corporation to obtain subscriptions to stock when the whole capital has not been paid or subscribed, and section 22 provides for enforcing the payment of subscriptions by the directors. Section 49 provides that when the stockholders of a corporation are liable to pay the debts of the company, any person to whom they are liable may have an action at law against any one or more of the stockholders, or may have his remedy by bill in chancery, while section 51 declares that no suit may be brought against a stockholder for any debt of the corporation until judgment be obtained against such corporation and execution returned unsatisfied. On bill by a creditor, a corporation was adjudicated insolvent and a receiver appointed. *Held*, that though some of the provisions for enforcing the liability of stockholders on unpaid subscriptions are applicable to a going concern, nevertheless, a court of equity has jurisdiction, on petition of the receivers, to estimate the claims against the corporation, and provide for an assessment against those stockholders who had not paid for their shares or whose subscriptions were unpaid.

2. CORPORATIONS ⇨562(1)—STOCKHOLDERS—DEBTS.

The contingent liability of stockholders for the debts of the corporation in the amount to which they are indebted for their shares is an equitable asset which vests in the receivers, or at least is enforceable by such receivers for the benefit of all creditors who come into the case.

3. CORPORATIONS ⇨562(1)—CAPITAL—DEBT.

Independent of statute, the unpaid capital due from stockholders is a part of the assets of the corporation, and so belongs to it and not to the creditors.

4. RECEIVERS ⇨210—AUTHORITY.

Under Act Gen. Assem. March 19, 1913 (27 Del. Laws, c. 194; Rev. Code 1915, § 3884), in effect making a receiver a quasi assignee, a Delaware receiver of a corporation may maintain without the territorial limits of the jurisdiction suit to enforce an assessment against shareholders.

5. CORPORATIONS ⇨566(2)—RECEIVERS—CREDITORS.

Where a receiver of an insolvent corporation proceeds to enforce the liability of stockholders indebted for their shares, a creditor may have his claim paid from the unpaid balance, even though he has not obtained a judgment against the corporation on which execution was returned unsatisfied; the provisions in General Corporation Law, §§ 49, 51, providing for suit by a creditor in such contingency, not applying to a proceeding by the receiver.

6. CORPORATIONS ⇨228—STOCKHOLDERS—LIABILITY.

Corporate stock issued and outstanding and not paid for is a fund for the benefit of creditors, and, in general, all who hold stock not paid for are liable to creditors for the amount so unpaid.

7. CORPORATIONS ⇨229—CONTRACTS—SUBSCRIPTION CONTRACTS.

A Delaware corporation cannot make a subscription contract which will free the subscriber from the liability to pay for his shares imposed by the General Corporation Law on stockholders for benefit of creditors; the principle being that shares of stock in a corporation are a substitute for the personal liability of partners.

8. CORPORATIONS ⇨243(1)—STOCKHOLDERS—LIABILITY.

Those acquiring corporate stock without a formal subscription take it subject to the statutory liability to make payment in full if necessary for the benefit of creditors.

9. CORPORATIONS ⇨243(1)—STOCKHOLDERS—CREDITORS.

As to creditors, there is no difference between the liability of holders of stock and subscribers to stock to pay the par value of shares if necessary for payment of corporate debts.

10. CORPORATIONS ⇨89(2)—STOCK—PAYMENT—"WORK DONE."

Under General Corporation Law, § 14, and Const. art. 9, § 3, providing for the issuance of corporate stock for "work done," the expression does not include promotion services performed before incorporation, and when the interest of creditors is affected, it should not include prospective labor or work already done and labor to be done.

11. CORPORATIONS ⇨232(3)—STOCK—ISSUANCE.

While under General Corporation Law, § 14, and Const. art. 9, § 3, allowing corporate stock to be issued for work done, the judgment of directors as to the value of such services is conclusive in the absence of fraud, an issue of nearly \$3,000,000 worth of common stock in a corporation for promotion services and services rendered in disposing of preferred stock is fraudulent, and may be attacked by stockholders; there being no attempt even to show that the services were of a value corresponding to the stock issued.

12. CORPORATIONS ⇨244(7)—STOCKHOLDERS—SHARES.

Where the directors for incorporation services and services to be performed issued corporate stock of a value greatly in excess of the value of such services, an innocent purchaser for value who took the shares is exempt from liability to pay any part of their par value.

13. CORPORATIONS ⇨243(6)—TRUSTS—VOTING TRUSTS.

Common stock given as a bonus to purchasers of preferred stock was deposited in a voting trust, the purchasers taking trust certificates, and the trustees holding the legal title to the stock for the purpose of voting it. *Held*, that persons to whom voting trust certificates were issued were the beneficial owners of the stock, and were liable to corporate creditors for the amount unpaid thereon, even though the legal title was in trustees.

14. CORPORATIONS ⇨243(6)—STOCKHOLDERS—LIABILITY.

In such case, all purchasers of the preferred stock who received voting trust certificates for common stock took them as a bonus, there being no intention on the part of the corporation that payment should be made, and hence, notwithstanding the recitals in the certificates of common stock that they were fully paid, they were charged with notice of nonpayment, and were bound to respond if necessary to protect corporate creditors to amounts unpaid on the common stock.

15. CORPORATIONS ⇨232(2)—AGREEMENTS—STOCK.

An agreement between a corporation and its stockholders that corporate stock should be issued otherwise than for money paid or the statutory equivalent is void; hence an agreement that common stock should be issued as a bonus to purchasers of preferred stock is invalid.

16. CORPORATIONS ⇨262(2)—STOCKHOLDERS—PREFERRED SHAREHOLDERS.

Purchasers of the preferred stock of a corporation who received common stock as a bonus

cannot escape liability for amounts unpaid on their preferred shares on the ground that such shares could not have been lawfully issued under General Corporation Law, § 13, declaring that at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital paid in cash or property, for when they acquired the preferred stock, knowing that the common stock was issued as a bonus, they must have known that the only source from which the corporation could obtain capital was from the preferred stock, while creditors might not have known that fact.

17. CORPORATIONS §262(2) — STOCKHOLDERS — PREFERRED SHAREHOLDERS.

In such case, purchasers of preferred stock who received voting trust certificates for common stock issued as a bonus are in the same position as purchasers who received the actual shares, for they were put on inquiry, and an inquiry would have shown that all of the common stock was ordered issued for promotion services, etc., and bonus purposes at the first meeting of the directors and the voting trust was then arranged.

18. CORPORATIONS §262(2) — STOCK — PREFERRED STOCK.

Where a corporation had power to issue preferred stock, but exercised such power ineffectually or informally, stockholders taking the stock are, as against creditors, estopped from urging the invalidity of the issue to escape payment.

19. CORPORATIONS §243(4) — STOCK — PREFERRED STOCK.

The provision of General Corporation Law, § 13, that in no event shall a holder of preferred stock be personally liable for the debts of the corporation does not exempt holders of preferred stock from calls or assessments up to the par value for creditors, but merely exempts them from liability beyond that imposed by section 20.

20. CORPORATIONS §262(2) — STOCK — PREFERRED STOCK — "CAPITAL."

Though General Corporation Law, § 13, declares that at no time shall the total amount of preferred stock exceed two-thirds of the actual capital paid in cash or property, and the word "capital" as distinguished from capital stock means the property of the corporation, holders of preferred stock cannot defeat the issue on the ground that the only corporate assets were those derived from the sale of the preferred shares for the amount of capital paid in cash or property fluctuates, and creditors who are entitled to look to the amounts unpaid on the corporate stock for their protection cannot be required to determine whether the statutory proportion was preserved when the preferred stock was issued.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital.]

21. CORPORATIONS §228 — STOCKHOLDERS — LIABILITY.

In case of insolvency of a corporation, all the moneys due from stockholders who have not paid for their stock constitute a trust fund for creditors, and there is no difference between the preferred stockholders and common stockholders.

22. CORPORATIONS §243(6) — STOCKHOLDERS — LIABILITY.

Though creditors of a corporation knew at the time of extending credit that its common stock was issued as a bonus, holders of such common stock may be required to pay the par value thereof for the benefit of such creditors.

23. CORPORATIONS §249(1) — STOCKHOLDERS — RIGHTS AS CREDITORS.

Stockholders liable to assessment for amounts unpaid on their shares, who are also

creditors, cannot set off the amount which they will be assessed against the debts due them, but must pay their assessment and share in the fund when realized.

24. CORPORATIONS §564 — STOCKHOLDERS — CREDITORS.

Stockholders who took stock with notice of irregularities in the issue thereof and who extended credit to a corporation are not, because of their knowledge, estopped from participating as creditors after they have paid the assessment levied for amounts due on their shares.

25. CORPORATIONS §562(2) — STOCK — ASSESSMENTS.

That a corporation itself made a call on stockholders to pay the amounts due on shares subscribed for does not, after insolvency, prevent the court from making a call or assessment for the protection of creditors.

26. CORPORATIONS §562(2) — STOCKHOLDERS — LIABILITY — ASSESSMENTS.

Where a corporate receiver had been appointed and an assessment against the stockholders who had not fully paid for their shares was necessary, such assessment should not be levied against a stockholder who had been adjudicated a bankrupt, but in the absence of evidence no stockholders will be excluded on the ground of financial irresponsibility.

27. CORPORATIONS §562(2) — STOCKHOLDERS — ASSESSMENTS.

Where the stockholders of a corporation were delinquent in paying for their shares and on insolvency an assessment was necessary, the whole assessment may be made against delinquent stockholders within the jurisdiction of the state wherein the corporation was organized and the receiver appointed, such stockholders having paid being entitled to enforce contributions from other stockholders, and for that purpose to use the decree making the assessment.

28. CORPORATIONS §562(2) — INSOLVENCY — ASSESSMENT AGAINST STOCKHOLDERS.

Where receivers of an insolvent corporation petitioned that its debts be estimated and an assessment levied against stockholders who had not fully paid for their shares, the defense of limitations on the ground of a previous call for payment by corporate directors will not be disposed of, being one which can be raised by individual stockholders when suit is brought to enforce their liability.

29. CORPORATIONS §273 — CREDITORS — INTEREST.

While ordinarily creditors of an insolvent corporation whose assets are being administered by a receiver are not allowed interest beyond the date of the appointment except on liens which bear interest, creditors of a corporation are, where the amounts due from shareholders on unpaid shares exceed the amount of the claims, entitled to have interest calculated on their claims.

30. CORPORATIONS §562(2) — STOCKHOLDERS — ASSESSMENTS.

Where a corporation is adjudicated insolvent, and the receivers appointed petition that the liabilities be estimated and an assessment levied against those shareholders who have not paid the par value of their shares sufficient to satisfy the corporate debts and costs of receivership, etc., the stockholders, though not parties, are so far an integral part of the corporation that they are deemed privy to the proceedings, and for that reason cannot question the propriety of the assessment when made, though it depends in part on estimates.

31. CORPORATIONS §562(2) — PROCEEDINGS — ASSESSMENT.

In a proceeding on petition of receivers to levy an assessment against those shareholders

who had not fully paid for their shares, proof that the corporate books show one to be the owner of specified shares and to be indebted therefor makes out a prima facie case on which the court will fix the liability to be imposed on each share of stock, so that the receivers can test by suit the status of persons supposed to be stockholders and their liability for the amount assessed against them.

32. CORPORATIONS §562(2) — STOCKHOLDERS — LIABILITY — QUESTIONS FOR DETERMINATION.

In a proceeding by receivers to levy an assessment against those stockholders who had not fully paid for their shares, contentions that a particular shareholder was excused from liability because of notations made on his subscription, or because of a release by the board of directors, or because of the bar of limitations are personal defenses which will only be disposed of in a direct proceeding against the shareholder.

33. CORPORATIONS §562(2) — STOCKHOLDERS — LIABILITY — QUESTIONS FOR DETERMINATION.

In a proceeding by corporate receivers to levy an assessment against shareholders who had not paid for their shares, the court will not pass on the defense of one appearing on the books to be a shareholder, and who was a director, which was to the effect that a certificate made out in his name, but assigned, had been exhibited to him to qualify him for a director, and that he had never held the shares appearing in his name which were marked fully paid, but will, for purposes of the assessment, treat him as a shareholder.

34. CORPORATIONS §273 — STOCKHOLDERS — ASSESSMENTS.

Where only one stockholder was a resident of the state wherein the corporation was organized and a receiver appointed, and not only was he financially responsible, but the amount due from him on his unpaid shares was sufficient to discharge all obligations, the receivers, if no other way proves feasible, may, the proceeding being one for the benefit of creditors, be authorized, in a proceeding to levy an assessment against stockholders on their unpaid shares, to collect the entire amount necessary from the resident stockholder, such stockholder to be subrogated to the rights of receivers and creditors against other stockholders whose liability would be fixed by the proceeding.

Supplemental Opinion as to Form of Decree.

35. CORPORATIONS §562(2) — STOCKHOLDERS — LIABILITY.

Where receivers of an insolvent corporation petitioned for the levy of an assessment against shareholders who had not fully paid for their shares, those stockholders who had made payments on their stock in excess of their proportion of the amount necessary to be levied should be excluded, and those stockholders who had made payments on account of their shares should be given credit therefor; some of the stockholders having paid nothing.

Bill by the John W. Cooney Company against the Arlington Hotel Company. In which receivers were appointed. On petition of receivers, creditors of the defendant company were notified to file their claims, notice was given to all persons, including stockholders, of their right to except, and an assessment was levied against delinquent stockholders.

Statement of the Case.

The matter under consideration is the petition of receivers of an insolvent Delaware corporation for authority to collect from stockholders of the company the money not paid on their shares of stock in order that the receivers may pay the debts of the company remaining unpaid after applying thereto the assets of the company which have come into their hands.

On October 28, 1914, a bill was filed in this court against the defendant, the Arlington Hotel Company, by John W. Cooney Company for itself and on behalf of all other creditors of the company for the appointment of a receiver, and therein the complainant alleged that as a creditor it had obtained a judgment against the defendant company; that an execution thereon had been returned nulla bona; that the defendant company was insolvent; and that the assets of the defendant company consist for the most part of unpaid subscriptions to its capital stock. A receiver was prayed for. Later a decree pro confesso was entered, and the defendant was adjudged to be insolvent, and receivers were appointed to wind up its affairs.

Afterwards this present proceeding was instituted by petition of the receivers, setting forth matters which are of record in the cause, viz.: That creditors of the defendant company had been notified to file their claims and notice given to all persons interested, including stockholders, of their right to except to any claims so filed, and that claims of creditors filed and allowed aggregated \$466,739.42. A list, or schedule, of holders of outstanding stock, preferred and common, was annexed with the dates and history of the issue of the shares, and it was alleged that no payments had been made thereon except as specifically stated in the schedule; and further, that no call had been made for the payment of the subscriptions. And further, that T. Coleman du Pont also called Coleman du Pont, one of the stockholders on the list was the only stockholder who resided in Delaware. The cost of the receivership and expenses of collecting from the stockholders their stock unpaid for was estimated at \$100,000.00.

The prayer of the petition was that the court levy an assessment requiring payment by stockholders of such amounts as may be found necessary to pay the debts of the company and the expenses, with leave to bring actions to recover the assessments.

On this petition an order was made requiring the stockholders named in the schedule to appear and show cause, and for notice to them by registered letter. Proof was made of the sending of the notices, and acknowledgments of the receipt thereof by nearly all of the addressees.

Several of the stockholders have appeared to the petition, viz.: Murray A. Cobb, ap-

parently the holder of ten shares of common stock, wherein he denied being a stockholder and denying liability. Z. D. Blackstone, stated in the schedule to be the holder of preferred stock and no common stock, or voting trust certificates, who among other things denied the power and right of the company to issue any preferred stock, because no actual capital had been paid to the company in cash or property. Albert L. Stavely, stated in the schedule to be the holder of preferred stock and also the holder of a certificate under the voting trust, and who had paid in full for his preferred stock. He admits that he subscribed and paid for shares of preferred stock, but never had any common stock or any voting trust certificates. William H. Fenn, stated in the schedule to be the holder of common stock. T. Coleman du Pont, stated in the schedule to be the holder of both preferred and common stock.

Subsequently a hearing was had upon the petition and the answers thereto, and testimony of witnesses was heard orally by the Chancellor and exhibits and records introduced in evidence.

So far as pertinent to the matters now decided, it appeared that the company was created pursuant to a certificate of incorporation recorded January 28, 1911, under the General Corporation Law of Delaware. By it the authorized capital was fixed at \$5,500,000.00, divided into fifty-five thousand shares of par value of one hundred dollars, of which twenty-five thousand shares were to be preferred stock and thirty thousand shares to be common stock, with the following statement: "The common stock shall be nonassessable, full paid." The three incorporators subscribed for shares aggregating one hundred. On January 28, 1911, the incorporators met, organized, adopted by-laws, elected directors and took other formal organization steps, but no other business was transacted.

On February 28, 1911, the first meeting of the directors was held, at which five of the nine persons who had been elected directors were present: Coleman du Pont, Frank M. Andrews, George Howard, Murray Cobb and Frederick E. Chapin, and officers were elected. The following resolution was adopted at that meeting:

"Upon motion duly made and seconded, and by the affirmative vote of all present, the following resolution was adopted:

"Resolved, that as the success of the enterprise will depend largely upon the energy, ability, and integrity of George Howard, Frank M. Andrews and James F. J. Archibald in securing options on the property, promoting, financing and managing the same, and inasmuch as it is desired to offer additional inducements to subscribers of the preferred stock and to remunerate the said George Howard, Frank M. Andrews and James F. J. Archibald for services rendered and to be rendered by them, and by others, therefore shall it be, and hereby is, assigned and transferred to the aforesaid persons the entire issue of the common stock, to be used by them for the purposes named, with the distinct understanding that the

holders of the common stock shall agree to transfer the same to a voting trust consisting of the aforesaid persons, and to receive in lieu thereof trustee certificates, for the purpose of vesting in them the right to vote thereon for a period of five years from the date of the incorporation, such voting trust being created for the purpose of carrying out the purposes aforesaid and the articles of incorporation uninterruptedly during that period."

Afterwards printed subscription blanks were used to obtain subscriptions to preferred stock. Shares of all of the common stock were issued, and the plan for a voting trust as to the common stock was carried out.

Pursuant to the plan of distributing common stock to subscribers to preferred stock, authorized by the directors at their first meeting on February 28, 1911, Howard and Andrews, having in their names as trustees nineteen thousand, eight hundred shares of common stock, made two agreements with the company in the form of declarations of trust, one of December 12, 1911, and the other of September 25, 1911, by which the shares to be so issued as nonassessable and full paid should be held by them as trustees for those to whom the bonus stock was given, the trustees to have a right to vote the shares for a period of years, and to issue to the beneficiaries certificates called "Voting Trust Certificates" representing the several holdings of common stock. These beneficiaries could transfer the certificates, and the trustees undertook to keep books to register these certificates. The forms of these trust agreements are substantially the same and differ as to the time for which they were to run.

Accordingly Howard and Andrews issued under the first of these trust agreements seventeen voting trust certificates, and under the second agreement twenty such certificates, aggregating three thousand, seven hundred and forty-seven and one-half shares, by the agreement with the company these remaining shares for which voting trust certificates were not issued are the property of Howard and Andrews as holders of common stock not paid for.

Some of the subscribers to the preferred stock being in default, the directors on July 7, 1913, made a call for payment of all unpaid subscriptions. Subsequently the enterprise failed, almost all of the property of the company was sold by lien creditors, and receivers appointed in the District of Columbia realized on some assets and paid creditors in part. A bill was then filed in this court, as stated above. The other pertinent facts are stated in the opinion of the Chancellor.

The important provisions of the Constitution and statute referred to in the opinion are these:

Section 3 of article 9 of the Constitution is, as follows:

"No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."

Section 13 of chapter 65 of the Revised Code of 1915, paragraph 1927, authorizes the creation of classes of stock, and then provides, as follows:

"* * * But at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital paid in cash or property."

Sections 20, 49 and 51 of chapter 65 of the Revised Code of 1915, paragraphs 1934, 1963, and 1965 are, as follows:

"Sec. 20. *Stockholders Liability for Part Paid for Stock.*—When the whole capital stock of a corporation shall not have been paid in, and the assets shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of the par value of such share as fixed by the charter of the company or its certificate of incorporation, or such proportion of that sum as shall be required to satisfy the debts of the company, which said sum or proportion thereof may be recovered as provided for in section 49 of this chapter, after a writ of execution against the corporation has been returned unsatisfied, as provided for in section 51 of this chapter."

"Sec. 49. *Liability of Officers, etc.; Actions for.*—When the officers, directors or stockholders of any corporation organized under this chapter shall be liable by the provisions of this chapter to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action on the case against any one or more of them, and the declaration shall state the claim against the corporation, and the ground on which the plaintiff expects to charge the defendants personally; or the person to whom they are liable may have his remedy by bill in chancery."

"Sec. 51. *No Suit against Director or Stockholder Until Judgment against Corporation.*—No suit shall be brought against any director or stockholder for any debt of a corporation organized as aforesaid, of which he is such director or stockholder, until judgment be obtained therefor against such corporation and execution thereon returned unsatisfied."

John R. Nicholson, of Wilmington, and H. H. Glassie, of Washington, D. C., for receivers. Andrew C. Gray, of Wilmington, and H. Preston Gatley, of Washington, D. C., for Albert L. Stavelly. Hugh M. Morris, of Wilmington, and Hugh H. O'Bear, of Washington, D. C., for Z. D. Blackstone. Robert H. Richards, of Wilmington, for William H. Fenn. Thomas F. Bayard, of Wilmington, and Samuel E. Swayze, of Washington, D. C., for Murray A. Cobb. William S. Hilles and Robert H. Richards, both of Wilmington, for T. Coleman du Pont.

THE CHANCELLOR. The Arlington Hotel Company has been adjudged by this court to be insolvent, receivers have been appointed for it, the creditors of the company have proved in this court their claims, and they have been allowed, all the stockholders having had notice of the filing of the claims and been given an opportunity to contest them by exceptions to be taken thereto. It appears as a fact proven in the case that the aggregate of the debts and the estimated cost of administration of the receivership, including the cost of litigation with stockholders to recover from them moneys due and unpaid on

shares of stock held by them, exceeds the amounts claimed to be due upon the shares of preferred stock, and is less than the amount claimed to be unpaid upon the shares of common stock, and is, of course, less than the amount claimed to be unpaid on shares of preferred and common stock taken together.

By their petition representing, among other things, these facts and the names of holders of the two classes of stock, as they appear on the books of the company, the receivers ask the court to authorize an assessment on shareholders of both classes for the payment of the creditors. Of this petition notice was given to all stockholders and some have appeared and filed answers, and the rest have done neither.

[1] The first question to be considered is the one raised as to the jurisdiction of the court respecting the proceeding against the shareholders. It is contended for the shareholders, that even assuming that there is an unpaid balance due from them on their stock up to the par value thereof (which is denied), their liability is to the creditors and not to the company, or its receiver; and that it cannot be enforced by the receivers at all; and if at all, then in no other way than by the method of procedure prescribed by the statute which imposed the liability, though counsel are not more specific as to the method of procedure.

In general the Delaware Incorporation Act authorizes the corporation to obtain subscriptions to stock when the whole capital stock has not been subscribed (section 21); and provides to the directors remedies for enforcing payment of the subscriptions (section 22). These sections are applicable to a corporation while it is a going concern and seem to have no bearing on the questions here raised.

When the assets of the corporation are insufficient to pay its creditors, and the whole capital stock of the company has not been paid in, then by section 20 it is declared that each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of the par value of such share, or such proportion of that sum as shall be required to satisfy the debts of the company. It is not declared in the act to whom this liability is due, and certainly it is not declared that the liability is to creditors only to the exclusion of the corporation, or to a receiver therefor appointed either before or after dissolution to wind up its affairs. This section goes on to provide that the sum unpaid on the stock, or the proportion thereof, required to satisfy the debts of the company, may be recovered as provided in section 49 after an execution against the company has been returned unsatisfied, as provided for in section 51. By section 49 when the stockholders of a corporation are liable under the act to pay the debts of the company, any person to whom they are liable

may have an action at law against any one or more of the stockholders, or "may have his remedy by bill in chancery." By section 51 no suit may be brought against a stockholder for any debt of the company "until judgment be obtained therefor against such corporation and execution thereon returned unsatisfied."

There are other sections in the act which relate to the powers and duties of receivers, or trustees, of corporations, and the method of winding up the affairs of the company, including the filing and allowance of claims of creditors and distribution of moneys of the company by the receivers. But these have generally been considered to refer not to the receivers appointed by the court on the ground of insolvency, or for any other reason than the dissolution of the company, receivers after dissolution being substituted for directors, who upon dissolution become trustees to wind up the affairs of the company. These provisions are unimportant in this case. In order to ensure uniformity of procedure in the administrative details in liquidations it is enacted in the rules of the Court of Chancery, adopted pursuant, as is believed, to legislative authority, the rules are made applicable to all receivers of corporations whether dissolved or not.

When a corporation becomes insolvent the liability of stockholder to pay for his stock is either fixed by section 20, or that section states a liability existing independent of the statute, and it is not now necessary to declare whether they are substantially the same, or what the differences between them are if they are not the same. Obviously the purpose, and the only purpose, of these requirements of the statute is to furnish proof that the debt is due and that the company is insolvent, as the basis of further proceedings against stockholders. A choice of remedies is given to such a creditor; he may either sue a stockholder at law, or may have a remedy by bill in chancery. If he elects to proceed in chancery, he probably would file his bill against one or more of the stockholders, either separately or jointly, and might be given relief in that way, though such a proceeding would be entirely novel in Delaware and would be a distinct and undesirable departure in this court, for it would be using an equity court to enforce the payment of a debt—a thing which could be done as well, if not better, in a court of law. A creditor of a company who has obtained a judgment against it, and whose execution has been returned unsatisfied, may also file a bill against the corporation alone, obtain therein a decree appointing receivers, and in that cause have the claims of all creditors of the company ascertained and allowed, and their priorities and preferences determined. After the assets of the company have been collected the deficiency of assets to meet the ascertained liabilities is established. The receivers may then on behalf of the complainant

creditor, and of all other creditors who may come in by proving their claims in the cause, including creditors who have not theretofore obtained, or do not thereafter obtain a judgment against the corporation for the claims due them from the company, proceed to recover from one or more delinquent stockholders, or all of them the sum or sums unpaid on their stock, or whatever part thereof it is necessary to collect in order to pay the claims of all of the creditors. As a step in such proceeding the court is asked to authorize or direct a levy, call or assessment on the stockholders, and for this purpose to ascertain who the stockholders are, the number of shares held by them, and whether by the records of the company the stock is paid for and the pro rata sum which each should pay to make up the deficiency of assets, and some other matters which will be considered hereinafter. Having fixed these preliminary features, the receivers may be authorized to collect by separate suits at law against the stockholders wherever they are, or their property is found, the amounts due from them, and in such suits the individual defenses of each stockholder are available to them.

In this particular case it is not necessary to decide whether the liability of delinquent stockholders of this company for their unpaid subscriptions to capital stock can be enforced through a receiver only after a judgment has been recovered against the corporation and an execution thereon returned unsatisfied, for the complainant is a creditor of the company, has obtained such judgment and an execution thereon has been returned unsatisfied.

The conclusions as stated above are not in conflict with either the letter or spirit of the statute, and on the contrary are clearly in accord with the spirit thereof. That they are based on the peculiar functions and powers of a Court of Chancery is too obvious to need enlargement. But as the question of jurisdiction is here raised for the first time, the reasons may be amplified.

Clearly section 49 provides alternative remedies of either a direct action at law by a creditor against a stockholder, or a remedy by bill in chancery, for that is the express language of the section. There is, moreover, a good reason for providing alternative remedies. A direct action may not be only an efficient but a just remedy, as, for instance, if but one stockholder was delinquent in paying for his stock and there be but one creditor of the company whose debt was unpaid. In that case only the two persons would be interested, and there would be no need to adjust liabilities among several in proportion to the number of shares held, or other equities between several classes of delinquent stockholders. On the other hand, if there are several creditors and several stockholders, the adjustment of benefits and

liabilities between them is properly cognizable in a Court of Chancery, which has suitable machinery to bring before it all parties interested on both sides of, or having an interest in the cause, and secure to each his advantage and justly apportion his liability to pay.

There is no requirement that the remedy of the creditor by bill shall be directly against the stockholders, for it is not prescribed against whom or even by whom it be filed. The language of the act is broad and general enough to include a bill for the appointment of a receiver of a corporation wherein its insolvency is adjudicated. Obviously it is the suitable court adapted to determine insolvency of the company, collect its assets, ascertain and adjudicate the claims against it and the priorities thereof, as representing both creditors and stockholders; and having power to conclude both stockholders and creditors in such an adjudication the court can finally and conclusively determine the amount needed from all the stockholders and the proportionate part thereof which each must pay, and so fix the liability of stockholders without as well as of those within the jurisdiction by a rule uniform as to all.

[2, 3] Furthermore, this contingent liability of stockholders for debts of the company is an equitable asset which vests in the receivers, or at least is enforceable by such receivers for the benefit of all creditors of the company who come into the cause. Besides, independent of the statute, the unpaid capital due from stockholders always was and is a part of the assets of the company, and so belongs to the company and not to the creditors. In *Sanger v. Upton*, 91 U. S. 56, 61, 23 L. Ed. 220, the court said:

"Unpaid stock is as much a part of this pledge, and as much part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction as between such a demand and any other asset which form a part of the property and effects of the corporation."

Judge Bradford in *Irvine v. Elliott* (D. C.) 203 Fed. 82, 104, pointed out the difference in this regard between the statutory double liability of stockholders and the liability for unpaid subscriptions to stock.

[4] Furthermore, this liability is more effectively enforced through a receiver, for a Delaware receiver may now sue anywhere to enforce an assessment when made. This is surely a consequence of the act of 1913 (27 Del. Laws, p. 479; Revised Code, par. 3884), which in effect makes a receiver a quasi assignee and so removes the limitation of an ordinary receiver to the territorial limits of the jurisdiction wherein he was appointed. *Bernheimer v. Converse*, 206 U. S. 516, 531, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163, followed

by *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

Not only is the present method of giving to the creditors their statutory right against stockholders who have not paid in full for their stock the most efficient way so far as creditors are concerned and the most just way so far as the stockholders are concerned; but it is also the way permitted by the statute. One creditor may file the bill, or one or more or all creditors may join in one bill, or one may act for all of them. So here, one creditor as a step to enforce the stockholders' liability to him has filed a bill in his own and their behalf established insolvency, had receivers appointed, and he and the other creditors have established their claims against the company. The liability will be ascertained by this assessment, individual defenses of a limited character excepted, and the liability when established is binding on all stockholders, and enforceable by the receivers wherever the stockholders and their property may be reached.

[5] It is not a reasonable interpretation of the statute to hold that no creditor can have his debt paid from the unpaid balance due on shares of stock unless he has obtained a judgment against the company and an execution thereon has been returned unsatisfied. Obviously the only purpose of the judgment against the company and the execution on it is to determine that the debt is owing and that there is no property of the company from which it can be collected, or in other words, that the company is insolvent. Both of these elements may be determined in a Court of Chancery by a bill brought by one or more creditors, or as here by a judgment creditor, and the claims of all other creditors allowed, and their priorities, if any, determined, the assets collected and the deficiency of assets over liabilities determined (which has in fact already been done in this case), as well as determining in a proceeding like that of the pending petition the proportionate liability of all stockholders to meet such deficiency in such way as to bind both creditors and stockholders here and elsewhere.

In *Cook v. Carpenter*, 212 Pa. 165, 61 Atl. 799, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, a court of equity sustained its jurisdiction of a bill by assignees of an insolvent company to collect for the benefit of creditors of the company unpaid capital because it was a trust fund for all creditors, who were numerous, whether the proceeding originates in the name of one, or several, or of all creditors.

This present method of enforcing delinquent stockholders' liability to creditors is perfectly fair, because they have notice of every step taken in it. It is equally beneficial to them, because it consolidates proceedings, saves costs and expenses, and gives each a right to contest every step including

the rights of creditors and the liabilities of the other stockholders.

The jurisdiction of this court to determine in this method the matters raised by the petition of the receivers is therefore upheld.

In reaching conclusions as to the other questions in the case, great weight has been given to the decisions of the courts of New Jersey, because of the practical identity of the language of the statutes in the two states, and it is not necessary to go so far as to hold that they are binding as authoritative interpretations of a statute adopted by this state from New Jersey. True by the New Jersey statute in insolvency the remedy against delinquent stockholders on behalf of creditors is expressly given to the receiver, and there is no statement there as to the form of the remedy to be used. But as herein pointed out, a receiver of a Delaware corporation has the same right inferentially, and the form of the remedy mentioned in the Delaware statute is like that used in New Jersey without express statutory authority. Interpretations of the New Jersey statute and practice under it are cogent to influence the Delaware courts in like cases.

Having determined that the present proceeding is a proper one, and that the court has power to make or authorize the assessment on delinquent stockholders for the benefit of stockholders, it is desirable to state the general theory of the character of the liability of such stockholders as distinct from the procedure to enforce it.

If there were no statute on the subject it might be important to consider the several theories which have been advocated and adopted as to the origin, nature and extent of the liability of stockholders to creditors, as for instance whether the holding out theory or the trust fund theory is the correct one, and if pertinent differences of importance result then to adopt one theory rather than the other. Inasmuch as there is a statute which imposes such a liability, that is a sufficient source of liability for the purposes of this proceeding.

[8] All doubts as to the character and basis of stockholders' liability to creditors under the law of New Jersey are finally settled in *Holcombe v. Trenton, etc., Co.*, 80 N. J. Eq. 122, 82 Atl. 618 (which was affirmed by the Court of Errors and Appeals). There the court considered the case of *Donald v. American, etc., Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116, and the remarks there of Judge Dixon, which were so much discussed by counsel, and said this as the final words:

"The doctrine that corporate stock issued, outstanding and unpaid for is a trust fund for the benefit of creditors, is a hard and fast rule imbedded in the decisions of the courts of this and other states, and is never relaxed. In this state [New Jersey], however, the stockholder's liability to creditors no longer depends alone upon the trust fund theory, but is held to be statutory. *Easton, etc., Bank v. American, etc., Co.*, 70 N. J. Eq. 732 [64 Atl. 917, 14 R. A. (N. S.) 271, 10 Ann. Cas. 84]."

Indeed in an earlier case the Court of Errors and Appeals in New Jersey had held the same thing, viz.: *Easton, etc., Bank v. American, etc., Co.*, where the court said:

"But in this state the stockholders' liability to creditors does not depend alone or chiefly upon the theory of 'holding out.' It depends upon the stockholders' voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely a lien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none."

The same view was taken by the United States District Court of Connecticut in a case where the liability of stockholders under a statute of Connecticut similar to that of New Jersey was being enforced. *Rosoff v. Gilbert, etc., Co.* (D. C.) 221 Fed. 972 (1915). With such convincing authority respecting statutes similar to the Delaware statute this court is amply justified in adopting the same view as to stockholders of a corporation created under the laws of Delaware. Corporate stock issued, outstanding and not paid for is a fund for the benefit of creditors, and in general all who hold stock not paid for are liable to creditors for the amount so unpaid. Both the Constitution and statute define what is payment.

[7-9] A Delaware corporation cannot make a subscription contract which will free the subscriber from the statutory liability, for that statute is notice to all who make such contracts and is read into and becomes a part of every stock subscription contract. The fundamental principle is that shares of stock in a corporation are a substitute for the personal liability of partners, and the liability to pay for stock taken up to the par value thereof is a fund for the benefit of creditors of the company, and whoever takes shares of stock of a Delaware corporation assumes that liability for the benefit of creditors in case of insolvency of the company.

Upon holders of preferred stock, who took the shares pursuant to a subscription contract, and upon those who acquired shares of common stock without a formal subscription, the statutory liability is of course imposed. However acquired the constitutional and statutory provisions as to what constitutes payment for stock are part of the contract, express or implied, respecting both kinds of stock. As to creditors, there is no difference between the liability of holders of stock and subscribers to stock, for both are liable.

"In equity and as against creditors, the acceptance of stock without paying for it places the acceptor in the position of a subscriber." See *v. Heppenheimer*, 69 N. J. Eq. 36, 78, 61 Atl. 843, 860 (1905).

[10, 11] Inasmuch as there is a question common to all the holders of shares of common stock, whether holders of certificates of

stock or of certificates of the voting trust, that question should be determined in this present proceeding. The question is, Was the total issue of common stock rightly issued as full paid and nonassessable stock so as to exempt all of it, however held, from assessment for creditors? "Work done" is an equivalent for money, and in the absence of actual fraud the judgment of the directors as to the value of such labor is conclusive. See section 14 of the act.

None of the common stock was paid for in money, and it is not so claimed by any holder thereof. But it is claimed that they were issued for services, or rather that they were paid for by services rendered and to be rendered, and as there is no proof as to the value of the services which were rendered, the stock must be treated as full paid, as it was stated to be on its face when issued by the company. It may be true, as between the corporation and a stockholder, that shares may be issued for services to be performed, though even that is doubtful. *Vineland, etc., Co. v. Chandler*, 80 N. J. Eq. 437, 85 Atl. 213, Ann. Cas. 1914A, 679; *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001; *Shannon v. Stevenson*, 173 Pa. 417, 34 Atl. 218. Contra, *Stevens v. Episcopal, etc., Co.*, 140 App. Div. 570, 125 N. Y. Supp. 573. "Work done" does not include promotion services performed before incorporation. *Herbert v. Duryea*, 34 App. Div. 478, 54 N. Y. Supp. 311, affirmed 164 N. Y. 596, 58 N. E. 1088. But when the interests of creditors are affected "work done" should not include prospective labor as an equivalent for money in exchange for shares of stock. By a strict construction "work done" does not include work to be done, or work done and to be done.

Whether it be moral, legal or actual fraud, or not fraudulent at all, the obvious purpose in issuing all the common stock to Howard, Andrews and Archibald, as set forth in the resolution of the directors at their first meeting on February 27, 1911, was to give them the stock without their having given the legal equivalent therefor. The most that could be claimed for it was that it was issued for services rendered and to be rendered, without stating what part of the \$2,900,000.00 of common stock was issued for past services rendered and what for future services to be rendered. Furthermore the action as to the common stock was taken in the earliest stage of corporate life, viz.: at the first directors' meeting after the formal organization meeting, and at the first time when any business was done by the corporation, or any of its officers as such. When the incorporators met on January 28, 1911, for organization no business was transacted except to elect directors, and the issue of common stock was voted at the first meeting of directors on February 27, 1911, at which meeting officers were elected. With such scanty opportunity for having done work for the corporation

after its organization, and in the absence of any statement of the character or value of such services theretofore rendered, or evidence of any valuation thereof by the directors, the issuing of \$2,900,000.00 worth of stock for services rendered and to be rendered was of itself palpably indicative of an intention to avoid the statute and Constitution, without reference to the other features of the resolution.

In *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666, this court refused to regard as payment for stock the alleged delivery by the stockholders to the company of personal property when it appeared as a fact that though the property had been delivered it had not been paid for, but was in fact paid for by moneys of the company derived from other sources. It was a case of failure of consideration.

In *Holcombe v. Trenton, etc., Co.*, 80 N. J. Eq. 122, 82 Atl. 618, stock was issued in fact for services for promoters, and inasmuch as there was not of record any actual appraisal of the value of such services they were not regarded as payment in full, and the stock so issued was still subject to assessment for creditors as not full paid. But in fixing the liability of such stockholders, the court would have allowed them as credit on the par value of the stock the reasonable compensation for services rendered, if such proof had been made.

[12] In the present case there was no valuation by the directors of the services of the promoters, and there has been no proof offered as to the value of the services which had been rendered by Howard, Andrews and Archibald at the time of the issue of the common stock to them, though opportunity to do so was open to the stockholders. It is readily seen that \$3,000,000.00 of stock was such a gross and, therefore, unlawful overvaluation that counsel did not pretend that there was any appraisal by the directors, or if they had made such a valuation that any sensible person would have accepted their judgment. In the absence of such proof it is now open to this court to say that the directors have not determined that three million of stock was issued for work done, and that no value was given by the stockholders to the company for the common stock. Of course, it is obvious that the stock was to be bonus stock, issued without value. Therefore, it is impossible to escape the conclusion that the shares of common stock have not been paid for in whole or part. In the hands of the original takers, Howard, Archibald and Andrews, they were liable to assessment for creditors after the enterprise failed, and the corporation became insolvent. "Holders of bonus stock are always required to pay for their shares to satisfy the claims of creditors." *Holcombe v. Trenton, etc., Co.* (1912) 80 N. J. Eq. 122, 82 Atl. 618, affirmed without opinion in 82 N. J. Eq. 364, 91 Atl. 1069.

An innocent purchaser for value who took these shares, would have been exempt from liability to pay any part of the par value thereof.

[13, 14] Are any of the holders of common stock who have appeared in the proceeding innocent purchasers for value without notice? Coleman du Pont is not, for he was present as a director at the meeting when the resolution as to the issue of the stock was adopted, and voted for it. Almost all the holders of preferred stock had notice that the common stock had not been paid for, because they received voting trust certificates for bonus stock, and bonus stock means stock issued gratuitously and without payment therefor being made or expected. All to whom the voting trust certificates were issued are for the purposes of this proceeding liable as though shares of common stock to which they were entitled under the terms of the trust were actually issued to them and stood in their names. The beneficial owner of the stock held by the voting trustees are holders of the voting trust certificates and no interest in the stock is held by the trustees except such as are necessary to enable them to execute their trust. *O'Grady v. U. S. etc., Co.* (N. J.) 71 Atl. 1040, 21 L. R. A. (N. S.) 732, 734, 735.

In the case just cited the holder of a voting trust certificate was regarded as the beneficial owner of the stock represented by it in the hands of the voting trustees, and was therefore entitled to file a bill for a receiver of the company as a stockholder thereof, though the legal title be in the trustees. If he has the right of a stockholder, except to vote, he is subject to the liabilities thereof to creditors in case of its insolvency.

[15] Here all who took voting trust certificates were put on inquiry respecting the common stock, and were not entitled to rely upon a statement therein that it was full paid. They did not purchase their stock in the market, but were subscribers to stock of a new enterprise and took with their preferred stock some common stock, the prima facie evidence being that thereby they knew it was bonus stock, i. e., stock for which no legal equivalent was given. There was in the resolution of the directors authorizing the voting trust evidence that the common stock was to be given as a bonus to subscribers to preferred stock. The statement on the certificate of shares of common stock that they were full paid and nonassessable does not relieve from liability to pay therefor any holder or taker thereof, except those without notice of the fact. An agreement between a corporation and its stockholders that corporate stock shall be issued otherwise than for money paid, or other statutory equivalent, is void. *Easton, etc., Bank v. American Brick Co.*, 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84; *Holcombe v. Trenton, etc., Co.*, 80 N. J. Eq.

122, 141, 82 Atl. 618; *Rosoff v. Gilbert Transportation Co.* (D. C.) 221 Fed. 972.

To establish the liability of holders of common stock it is not necessary to allude to the suspicion as to the good faith in the transaction which arises when directors of a company make for the company contracts with themselves as promoters or otherwise, for the transaction is clearly shown to be an attempt to issue and distribute bonus stock.

It is held, therefore, that the common stock was not rightly issued as full paid stock, but was issued without value given, and still remains unpaid, notwithstanding the statement on the face thereof to the contrary; and further, that all the original takers of the stock and holders of voting trust certificates are prima facie liable as holders of common stock, subject to such individual defenses as properly exist.

Furthermore, there is evidence that the common stock was intended from the first to be bonus stock. In the certificate of incorporation it was declared that it should be nonassessable and full paid. At the first meeting of the directors, and before anything had been done by the corporation except the most formal organization acts, and before any payments could have been made on any stock, it was voted that the certificates of common stock when printed should state that they were nonassessable and full paid. The form of subscriptions received for the preferred stock referred to the plan for floating the new enterprise was by preferred and common, the latter to be nonassessable. All this was quite consistent with the plan to issue common stock which could not be assessed for the purposes of the company, and as to which the directors could not make calls for payment in installments or otherwise. In other words, it was to be bonus stock. The conduct of the directors in issuing all the stock, nearly three million dollars of it as full paid and nonassessable for services performed and to be performed, is all consistent with this theory of the purpose of the promoters of the company respecting the common stock. The law of Delaware declared that purpose to be impossible of execution. All who took certificates for common stock were put on inquiry and notice of its character.

[16-20] It has been claimed that the company had no right to issue preferred stock. One of the subscribers to ten shares of preferred stock, Z. D. Blackistone, who paid one hundred and fifty dollars on account thereof, claims that he is not liable to pay the balance of his subscription, on the ground that the company had no power to accept subscriptions for or issue preferred stock. This contention is based on section 13 of the act, which provides a way by which shares of stock could be classified into common and preferred stock with a proviso that "at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital

paid in cash or property." It is claimed that no actual capital was paid to the company in cash or property, all the common stock having been issued for services rendered and to be rendered, and none of it actually paid for. All of the preferred stock, it is claimed, is overissued stock, spurious, illegal and void, and there can be no estoppel even in favor of creditors. Blackistone was not the holder of common stock, and did not receive any voting trust certificates.

This defense is certainly not available to any holder of or subscriber for preferred stock who received common stock as a bonus, or who received voting trust certificates with their preferred stock. If one subscribes to preferred stock under a plan by which subscribers for preferred stock are given shares of common stock as a bonus, and so knew that no value was given for the common stock, it would be grossly inequitable to deny creditors of the company after it becomes insolvent a right to hold preferred stockholders liable on their subscriptions to or holdings of preferred stock for whatever remains unpaid thereon. By taking the bonus stock they know that the only source from which the company may obtain capital is from the preferred stock. They know this and the creditors may or may not, and the latter are entitled to rely on the amount unpaid on the preferred stock up to the par thereof as a fund for the payment of their claims against the company.

Those holders of preferred stock who took voting trust certificates are in the same position, for they are put on inquiry, and an inquiry would have shown that the issue of all of the common stock was ordered at the first meeting of the directors, and the voting trust was also arranged for at that meeting.

By use of the word "capital" instead of the words "capital stock," the section does more than fix the proportion between common and preferred stock. "Capital" means property and "capital stock" means the aggregate of the interests of the stockholders in the property of the company after its debts are paid.

In *Person, etc., Co. v. Lipps*, 219 Pa. 99, 87 Atl. 1081, where a company incorporated under the laws of New Jersey had sued a subscriber for preferred stock, and the defense was that made by Blackistone, the court added into the appraised value of the property of the company the par value of the common stock issued to the defendant Lipps and another, in order to ascertain whether the requirements of the statute were complied with, though it did not appear that the common stock had been paid for. The corporation in this case was a New Jersey company, where the provision in question was at the time the same as the Delaware statute, and is the only one cited or found to be interpretative of the act. So far as it goes the case cited is opposed to the contention made for

Blackistone. The basis of the contention must necessarily have been that the corporation was absolutely without power to issue any preferred stock, for if it had power to do so and exercised it ineffectively or informally, then the stockholders taking the stock would be estopped as against a creditor. This principle is recognized in *Loredo, etc., Co. v. Stevenson*, 66 Fed. 633, 13 C. C. A. 661, cited by counsel for Blackistone.

Cases of overissue of stock were cited to support the contention. In such cases the courts say creditors may know when stock is overissued, and so cannot claim to have been deceived. For the same reason creditors have a right to assume that all the common stock issued was paid in cash or property, and so had a right to assume that the proper proportion between common and preferred stock was thereby maintained. The provision in section 13 that "in no event shall a holder of preferred stock be personally liable for the debts of the corporation," does not exempt holders of preferred stock from calls or assessments up to the par value for creditors, but was intended to exempt them only from liability beyond the par value for the needs of creditors in insolvency as stated in section 20, which relates to all shareholders without regard to classes.

The amount of capital paid in cash or property fluctuates and the proportion of classes of stock fluctuates accordingly. It is imposing on creditors too great a burden to expect them to know whether the proportion has been always maintained. If sometimes not maintained, then is all common stock before or thereafter issued void? A strict interpretation of the statute involves possible entanglements of interests. A safer rule is to permit creditors to look to subscriptions or holdings of common stock as equal to payment in cash or property for the purposes of determining the proportion to be observed between common and preferred stock.

[21] It is contended by some of the stockholders that subscribers to the preferred stock must be required to pay the balance of their subscriptions before the holders of common stock can be called on to pay anything, and this is based on the statement that the amount due on the subscriptions arises from a contract with the company and is therefore an asset of the company which must be collected before the statutory contingent liability is enforced. But there is no foundation for the contention. In case of insolvency all the money due from all kinds of stockholders constitute the trust fund for creditors, and the statute makes no difference between the several kinds of stock. The liability arises from the relationship of the stockholder, whether it be created by contract or be implied from ownership of shares.

[22] It is contended for some of the stockholders that the assessment cannot be made for the benefit of those creditors who at the time of extending credit to the company

knew the circumstances as to the issue of the common stock, viz.: That it was issued in payment for services rendered and to be rendered, and as full paid. There was evidence offered to show such knowledge on the part of some of the creditors who have filed claims, and who will be benefited by an assessment when made and collected.

This may not be the time to ascertain the facts as to such knowledge, for those creditors are not directly present in this proceeding. They are here represented by the receivers, and have had no notice of the contention against them, or opportunity to defend themselves against it. Furthermore, it may be that these matters may better be passed on when the fund for creditors has been gathered in and its distribution is open to adjustment. This seems to be the view of the court in the case cited by the solicitor for the receivers. *Selig v. Hamilton*, 234 U. S. 652, 656, 34 Sup. Ct. 926, 58 L. Ed. 1518, Ann. Cas. 1917A, 104.

But inasmuch as the right of such creditors to look to the stockholders for payment of their claims has been much discussed, and the determination of the question probably has an important bearing on the rate of assessment to be made (if any be made) it will be considered now.

In New Jersey it is settled beyond controversy that creditors having at the time of giving credit notice that shares of stock were issued as full paid when in fact not paid for, or who are otherwise aware of the circumstances under which bonus stock was issued, may still look to all holders of such stock (except innocent holders thereof) for payment of debts due from the company to such creditors.

It was so held by the Court of Errors and Appeals in the case of *Easton, etc., Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84 (1905), after considering many cases in other jurisdictions in many of which states the liability of delinquent stockholders was not statutory. The court relied on the fact that liability in New Jersey was statutory. It was also intimated that independent of the statute creditors with notice of the irregularity might still be justified in regarding the stockholders' liability as an asset of the company for the purpose of satisfying creditors. There is much in this contention, and it may well be a proper basis for a decision on the point. But the New Jersey court did not rely on it entirely. This same rule was held in *Holcombe v. Trenton, etc., Co.* (1912) 80 N. J. Eq. 122, 82 Atl. 618, a later case in the Court of Chancery, which was affirmed without an opinion by the Court of Errors and Appeals, 82 N. J. Eq. 364, 91 Atl. 1069.

The same point was decided by the United States District Court in Connecticut in a case respecting a Connecticut corporation, the statute of Connecticut being "quite simi-

lar," as the court said, to the New Jersey statute, viz.: In *Rosoff v. Gilbert Transportation Co.* (D. C.) 221 Fed. 972 (1915):

"There is no suggestion [in the statute] that certain creditors can enforce this liability and that certain other creditors cannot. The statute clearly contemplates that all creditors are entitled to be paid, and that stockholders are bound to pay them if the stock held by them has not been paid * * * in full."

In *Gillet v. Chicago, etc., Co.*, 230 Ill. 373, 82 N. E. 891, which followed *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17, the same view was taken of the Illinois statute, similar to New Jersey and Delaware, which gave the right to creditors against unpaid stock.

[23, 24] Another question affects the rate of the assessment. Some of the stockholders who are liable to assessment are also creditors of the company. Have they a right to set off the amount with which they will be assessed against the debts due them from the company? This, too, is settled in New Jersey. They will be required to pay the assessment and share in the fund when realized. See *v. Heppenheimer*, supra; *Holcombe v. Trenton, etc., Co.*, supra; and other cases in New Jersey. So also stockholders who took stock with notice of the irregularities as to the issue thereof and who are also creditors of the company are not estopped from participating as creditors, after they have paid the assessment against their shares. *Easton, etc., Bank v. American Brick, etc., Co.*, supra.

[25] In July, 1913, the company made a call upon holders of preferred stock to pay the amounts due on the shares subscribed for. Does this, of itself, bar this court from making a call or assessment in this case in this proceeding? In the case of *Brown v. Allebach* (C. C.) 166 Fed. 488, 496, it was held that a receiver may collect amounts due on unpaid stock even though a call had been levied by the directors of the company while it was a going concern, and even though suits by the company to enforce the call were still pending. This view is manifestly a sound one.

[26] Should the assessment be made against all delinquent stockholders, whether solvent or insolvent, and whether residents of Delaware, or not?

There is ample authority, as well as good reason, for excluding the insolvent stockholders, and the reasons are obvious. *Rosoff v. Gilbert Transportation Co.* (D. C.) 221 Fed. 972. In this particular proceeding it is not an important matter, for there is no clear and satisfactory proof that any of those defaulting shareholders on the list submitted by the receivers are insolvent, except one J. William Henry, a subscriber to shares of preferred stock of par value of \$2,250, and who was proved to have been adjudicated a bankrupt since making the subscription. None of the stockholders of either class will be ex-

cluded from the assessment on account of financial inability to respond thereto, except J. William Henry.

[27] There is ample authority for the proposition that under a statute identical with the Delaware statute the whole assessment may be made against delinquent stockholders within the jurisdiction, with a right to those who pay to enforce contribution from other stockholders, and for this latter purpose to use the proceeding in which the assessment is made. See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Holcombe v. Trenton, etc., Co.*, 80 N. J. Eq. 122, 82 Atl. 618; *Wolcott v. Waldstein* (1916) 83 N. J. Eq. 63, 97 Atl. 951. It is said that the liability of stockholders to creditors is analogous to that of joint grantors, and therefore the above stated principle applies. The application of this principle to this case will be considered later.

[28] The defense of the statute of limitations is also raised so far as the liability of holders of preferred stock is concerned. It is claimed that on July 15, 1913, the holders of preferred stock were called on by vote of the directors to pay the balance of their subscriptions on or before September 15, 1913, and that the statute then began to run, and if it be a bar against the corporation it is also a bar against the receivers acting on behalf of the corporation's creditors. This defense is clearly one to be raised when suits are brought against the stockholders after the assessment and it seems to be so settled in such cases. Therefore no opinion is expressed on this point.

[29] Should the creditors of the company who have proved their claims be allowed in addition thereto interest as against the stockholders? As against the assets of an insolvent company when its affairs are being administered by a chancery receiver, interest is not allowed beyond the date of the appointment of the receiver, except on liens which bear interest. This is the practice in this court, as fixed by the rules of court. In a sense the contingent statutory liability of stockholders to corporation creditors is analogous to other assets of the company. But I am inclined to the view that the stockholders' liability has elements which justify charging them with a duty to contribute enough to pay interest to creditors. Interest is denied by the rules of court as an administrative measure, because if there is not enough of assets to pay all the principal the addition of interest does not increase the dividends. In case the assets should turn out to be sufficient to pay interest, as well as the principal of claims, there is good reason why creditors should have it.

Therefore, as against stockholders, creditors are entitled to have interest calculated on their claims. This is the prevailing practice in other jurisdictions, though no reason seems to have been given by the courts elsewhere for allowing it.

Without undertaking to calculate the exact

amount of interest on each claim to a fixed date, it is sufficient for the present purposes to estimate the aggregate of interest. If interest for five years be allowed, it will approximately be sufficient for all. Interest at six per cent. on \$466,739.42 for five years is about \$140,000.00. That sum is therefore to be added to the principal, and estimated expenses, and makes the grand total to be assessed \$706,739.42.

[30, 31] The general theory as to what should be determined by the court in a proceeding such as this is well settled. It is there determined that an assessment is necessary, which involves a judicial determination of the exhaustion of the assets of the company, the adjudication of the claims of the creditors and the aggregate of the amounts due to them. To this is added the costs of the receivership in collecting the assessment, including counsel fees and legal expenses in suits against stockholders, and compensation to the receivers. These latter items are necessarily estimated, and are liable to reduction according to the conduct of stockholders in resisting payment. As to all these matters, and perhaps others, stockholders are so far an integral part of the corporation that in the view of the law they are to that extent privy to proceedings by a receiver of an insolvent company on behalf of its creditors to enforce payment for stock not paid for, and cannot question the propriety of the assessment when made. *Cumlerland, etc., Co. v. Clinton*, 57 N. J. Eq. 627, 42 Atl. 585; *s. c.*, 64 N. J. Eq. 517, 54 Atl. 450; *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925; *Wolcott v. Waldstein* (1916) 83 N. J. Eq. 63, 97 Atl. 951. This is true whether the stockholders have or have not had notice of the proceeding (*Brown v. Allebach* [C. C.] 156 Fed. 697), though that is not important in this case.

This court having ascertained the amount necessary to be raised must also ascertain who the delinquent shareholders are, the number of shares held by them respectively, and the balance due from each up to the par value of the stock held by them. It is not quite clear as to the length to which the court should go in this latter respect, or as to the character of the individual defenses which a stockholder may set up when sued by the receivers for the assessment made against him. If the receivers show from the books of the company the above facts, they have made out a case which enables the court to fix the liability to be imposed on each share of stock, so that the receivers are entitled to test by suit the status of persons supposed to be stockholders and their liability for the particular amount assessed against them pursuant to the rate as fixed by the court. This is the view stated in *Cumberland, etc., Co. v. Clinton, etc., Co.*, 64 N. J. Eq. 517, 54 Atl. 450 (1903).

Having disposed of all the questions raised which relate to all of the creditors or to the

stockholders as a class or to classes thereof, it will be necessary to consider some special defenses which have been raised.

[32] Coleman du Pont, who was a subscriber to preferred stock and in whose name shares of common stock stand as the owner thereof, by his answer to the petition claims a credit on the preferred stock of \$101,850.00 paid thereon, and that the common stock in his name was not acquired from the company, but was assigned to him for a valuable consideration and upon representation by the company that the same was full paid and nonassessable. He also says that on July 15, 1913, a call for \$103,350.00, the balance of his subscription to preferred stock, was made by the company, and that any claim now made by the receivers for such balance is barred by the statute of limitations. There were other defenses set up in the answer, which are applicable to all holders of both kinds of stock, and these general defenses have already been disposed of.

It was also shown at the hearing that on his subscription in writing to the \$480,000.00 of preferred stock a notation made by him, the effect of which was to release him from an obligation to pay the amount subscribed for in case the money received from the subscriptions made by other persons amounted to \$125,000.00, and that as this event happened, he was under no further liability on his subscription. And also that by a subsequent resolution of the directors of the Arlington Hotel Company he was released from that obligation.

As has been stated above, the defense of the statute of limitations is not passed on in this proceeding. Notwithstanding the fact that some testimony, including some produced on behalf of Mr. du Pont, was heard on these several individual defenses, and however desirable it be to have the liability of this particular holder of a large number of shares of both kinds of stock determined before an assessment is made by this court, or pursuant to its authority, and to have disposed of all questions affecting such liability, still all of these defenses particularly asserted by and on behalf of Mr. du Pont come within the class of defenses which by the settled practice are not properly adjudicated in this proceeding, but are available as defenses to suits brought by the receivers in case an assessment is authorized. Furthermore, these personal defenses were not only not set up by his answer to the petition of the receivers, but were expressly reserved therein in general terms.

Therefore, and for these reasons, no opinion is expressed as to the particular defenses above mentioned. It is found that Coleman du Pont subscribed for \$480,000.00 of preferred stock, and on the books is the holder of \$971,000.00 of common stock; and that as admitted by the receivers, there is a credit on the subscription to preferred stock of \$75,000.00. Whether he paid, or was entitled

to any further credits thereon, or whether the other individual defenses mentioned were good, is not decided.

[33] William H. Fenn, in addition to some defenses open to all holders of common stock, sets out some special grounds of defense, which are personal to him and will not therefore be considered. Under the latter head is the representation in his answer that in order to qualify him as director a certificate for one hundred shares of common stock, marked as full paid was issued, exhibited to him, and an assignment thereof was endorsed thereon; that he had not and never had the certificate in his possession; and did not and does not know whether or not they were in fact full paid, except as it was so endorsed. This defense, or these defenses, are available to him when sued for the assessment when made, and are not here decided.

It may be well to here call attention to the view of the present Chancellor in another case, which indicates that Mr. Fenn did not relieve himself of liability in this present proceeding by assigning the shares of common stock which had been transferred to him to qualify him to be a director of the company.

Recently this court has announced the view that when one takes shares of stock of a corporation in order to qualify him to be a director of the company, he thereby holds himself out as being the owner of the stock in his own right, and cannot escape liability as the record owner of the stock for an assessment made thereon for the benefit of creditors of the company by showing that he never had a beneficial interest in the stock, but held it as the agent for another, to whom he had delivered the certificate for the shares of stock with a transfer thereof endorsed thereon. This was so decided in a proceeding by the receiver of Securities Company of North America, a dissolved corporation, to enforce for the benefit of creditors the liability of stockholders to pay in full for their shares of stock where the question arose respecting stock standing on the books of the company in the name of William M. Pyle, a director of the company. *Fell v. Securities Co. of North America*, Court of Chancery, New Castle County, 1917, 100 Atl. 788, not yet officially reported.

As Mr. Fenn is the record owner of the stock not paid for, the receivers have made out such a case as to justify the court in including his name as one of the stockholders liable to assessment, leaving his special defenses to be settled in the suit to be brought by the receivers.

Albert L. Stavelly does not set up any defense not already considered, and denies all allegations as to the common stock, and has paid in full for his subscription to preferred stock. His answer does not at this time require further particular consideration by this court.

Murray A. Cobb denies being a stockholder, though he served as director for a while and then resigned, or attempted to resign. But he appears of record to be a holder of ten shares of common stock not paid for, and his particular defense will not be passed on here, but will be available to him elsewhere, and probably the same principles applicable to Mr. Fenn's liability would apply to that of Mr. Cobb, both of whom took shares to qualify them as directors.

For the purposes of making this assessment, the following conclusions have been reached:

(1) That the company is insolvent; that its debts which are unpaid aggregate \$466,739.42; that the interest to which creditors will be entitled will probably aggregate \$140,000.00; that the costs and expenses of the receivership and of collecting the assessment, including compensation to the receivers and their legal counsel, may be estimated at \$100,000.00; and that the aggregate to be assessed upon and collected from the stockholders who are liable therefor is \$706,739.42.

(2) That those liable to assessment as subscribers to preferred stock, and the amounts on which they are liable to assessment aggregating \$479,210.00, are as follows (J. William Henry, the bankrupt, being omitted therefrom): [List of holders of preferred stock.]

(3) That those liable to assessment as holders of common stock, including those holding voting trust certificates, and the amounts to which they are liable to assessment, aggregating \$3,000,000.00, are as follows: [List of holders of common stock.]

Upon whom and in what proportions should the assessment be made? The amount to be raised being thus fixed, and the names of the delinquent stockholders and the amounts due from them severally having been thus settled, it remains to be decided as to who of them shall now be called on to bear the burden and the proportions in which it shall be borne. This is not an easy problem, and there seems to be no precedent to guide the court.

There are eight distinct groups into which the stockholders may be arranged, viz.:

(1) Subscribers to preferred stock who have paid in full for that stock and who also hold bonus common stock through the voting trust.

(2) Subscribers to preferred stock who have paid in part for that stock and who owe balances in varying proportions, and who also hold bonus common stock through the voting trust, or otherwise.

(3) Subscribers to preferred stock who have paid nothing, and who hold bonus common stock.

(4) Subscribers to preferred stock who have paid nothing and who do not hold common stock.

(5) Subscribers to preferred stock who

have paid in part only for that stock, and who do not hold common stock.

(6) Subscribers to preferred stock who paid in full and who hold common stock not by the voting trust.

(7) Holders of common stock only.

(8) Holders of common stock and holders of voting trust certificates, and who had paid nothing on either kind of stock. The only person in this class is Charles P. Taft, who holds \$1,000.00 of common stock and \$50,000.00 of voting trust certificates.

One simple method of assessment is this: The total to be raised being about \$706,000.00, and the aggregate of the liabilities of both preferred and common stockholders being about \$3,479,000.00 (J. William Henry the bankrupt holder of \$2,250.00 of preferred stock being omitted), an assessment of twenty per cent. on that aggregate liability will raise nearly \$700,000.00.

But some of the holders of preferred stock have paid in whole or in part for their shares, and the holders of common stock have paid nothing. Should there not be some preliminary equalization of payments exacted from the holders of common stock before the holders of preferred stock are called on? Other puzzling questions arise to vex one, in endeavoring to adjust equitably and proportionately the burden of the liability.

There is one very simple, direct and effective way, and that is to impose the whole burden on the resident stockholder. As hereinabove stated there is ample authority for so doing. So far as the records and proofs are concerned, there is but one stockholder shown to be a resident of Delaware and who has been identified and located, viz.: Coleman du Pont. He has filed an answer to the petition, subscribed for preferred stock; was a promoter of the company before its organization; was one of the first board of directors; was shown by the record to be cognizant of and an active participant in the management of its affairs throughout the early stages of its development; voted for the issue of common stock and the voting trust plan; took ten thousand shares of common stock knowing its history and purpose; and still holds nine thousand, seven hundred shares, which are subject to assessment, and as to his liability thereon to creditors there is no special individual defense set up by him. Furthermore, there is unpaid on his shares of common stock \$971,000.00, which is more than sufficient to pay all the creditors and expenses.

Furthermore, if he pays the creditors he will be given the right to use the present proceedings to enforce contribution from his fellow stockholders, and can do it as effectively as the receivers can. In this proceeding the liability of the other stockholders is determined, subject to their individual defenses, and this determination would be for his benefit in place of the receivers, to whose rights he would be subrogated by order of

this court. Furthermore, in addition he apparently owes \$205,000.00 unpaid on his subscriptions to preferred stock, which liability he denies. Furthermore, no question has been raised as to his financial ability to pay the demand.

[34] The advantage to the creditors would be great and are obvious, and this proceeding is solely for their benefit. If no other clearly equitable way to fix a rate applicable fairly to all of the various classes of stockholders, is found practicable, the receivers will be authorized to collect from Coleman du Pont the whole sum necessary to pay the debts and expenses, and when payment is made he will by a decree of this court be subrogated to the rights of the receivers and creditors against other stockholders whose liability is also fixed by the court.

This conclusion is reached with great reluctance, because it may be considered that the burden should be distributed among all delinquent stockholders ratably. But on the other hand the statute of Delaware imposes on each stockholder the obligation to pay the whole par value of his stock if that much is needed to pay creditors of the company in case the assets of the company are insufficient for the purpose, and by the method above stated the creditors will be given their remedy most quickly and effectively.

Inasmuch as the question upon whom and in what proportions the assessment should be made, was not discussed by counsel, the court will, if it be desirable, hear counsel on the point before a decree is entered.

Supplemental Opinion as to Form of Decree.

THE CHANCELLOR. After the filing of the opinion a hearing was had as to stockholders, or classes of stockholders upon whom the assessments should be laid primarily, the amount to be assessed, and the details of the substance and form of the decree.

[35] I am clear that there should be no distinction between the delinquent holders of common and preferred stock, but that they should be treated as one class. Also that all stockholders who had made payments on their stock in excess of their proportion of the amount due the creditors should be excluded, and that those stockholders who have made payments on account of their shares should be given credit therefor.

There are outstanding not paid for in full 5852 shares of preferred stock, and excluding the amount unpaid on the fifty shares of J. William Henry, the bankrupt, 5802 shares of preferred and 30,000 shares of common, a total of 35,802, with a par valuation of \$3,580,200.00. An assessment of twenty per cent. on the par would raise a sum about equal to the debts and expenses. Stockholders of the company who have paid in more than twenty per cent. of the par value of

their stock should in equity be excluded from assessment. There are two holders of preferred stock who are in that class, John F. Wilkins, a subscriber for two hundred and fifty shares, and John Auen, Jr., a subscriber of one thousand shares. Therefore they should equitably be excluded from the list of stockholders held liable to assessment, and the aggregate of the shares unpaid for being 4552 shares of preferred and 30,000 shares of common stock, a total of 34,552 shares.

If an assessment of \$20.52 be made upon each of 34,552, and those holders of preferred stock who have paid in part for their stock, and less than twenty per cent. thereof, be credited with the amounts so paid by them thereon, then a sum will be raised which is just a trifle more than the aggregate of the debts; but as some of the items making up the aggregate sum to be raised are estimated, there is no real inequality or unfairness in fixing that amount of the assessment at that figure.

There is authority for allowing to those stockholders who pay promptly the amounts for which they are liable a credit thereon to the extent of the payment (*Scovill v. Thayer*, 105 U. S. 143, 28 L. Ed. 968) and this is equitable.

A decree will be entered in accordance with this and the earlier opinion.

In accordance with the foregoing opinions the following decree was entered:

On this fourth day of August, A. D. 1917, the petition of James Frank Ball, Aulick Palmer and Peyton Gordon, receivers appointed by this court for the said Arlington Hotel Company, praying, among other things, that this court levy an assessment on the stockholders of the said company requiring them to severally pay such amount of their several and unpaid subscriptions to the capital stock of the said company as the court shall ascertain to be necessary to pay the debts of the said corporation with interest, and the expenses incident to the winding up of said corporation's affairs by said receivers, having been filed in this cause on the thirtieth day of October, A. D. 1916, and on said date the Chancellor having made an order directing that a rule of this court be issued directed to the stockholders of said company whose names appear on the list thereof attached to said petition to appear at a time in said order fixed, and show cause, if any they have, why the said assessment should not be made, and further directing that said rule and order with a copy of said petition, excluding the exhibits attached thereto, be served on those stockholders of said company who were residents of the state of Delaware and that the register in chancery give to all other stockholders of said company whose names appear on said list notice of said petition and of the rule and order by sending a copy thereof to each of said stockholders by registered letter addressed to his last known residence, or place of business, and mailed within six days from the date of said order;

And due proof having been made before the Chancellor that service and notice of said rule and order had been made and given in compliance with said order;

And answers to said petition having been filed by Murray A. Cobb, Z. D. Blackstone, Albert L. Stavely, William H. Fenn and T. Coleman du

Pont, whose names appear on said list as stockholders of said company, and no other stockholders of said company having appeared to said petition or rule, or filed any plea or answer thereto, or shown or averred any cause why the said assessment should not be made;

And the said petition and rule and the several answers thereto having come on to be heard by the Chancellor upon testimony presented and taken orally in open court before the Chancellor, and upon records and exhibits there produced, and the cause having been argued by the respective solicitors for said receivers and for said stockholders who had answered said petition, and the same having been duly considered and held under advisement until the date of this decree;

And it appearing to and being found by the Chancellor from the record, proceedings and evidence in said cause and upon said petition and answers thereto, that the proof so taken together with the record of said cause, constitute full and complete evidence and proof of all of the findings of fact and fully support for all the findings of law and for the orders of the court in this decree contained;

And further, that the said Arlington Hotel Company is a corporation of the state of Delaware, and has been duly adjudged by this court in this cause to be insolvent; and that the said James Frank Ball, Aulick Palmer and Peyton Gordon have been duly appointed by this court and qualified as receivers of said company;

And further, that after due notice given to all of the creditors and stockholders of said company and after exceptions taken to certain claims filed in said cause by creditors of said company had been adjudicated, and the amount due the said creditors on their respective claims fixed and determined by the Chancellor as being the debts due by said company, the dividends allowed and decreed upon claims of said creditors in the suits in which receivers were appointed in the District of Columbia having been deducted from said claims, and that the following are the claims of creditors of the said company filed in this cause which have been so allowed by the Chancellor as the debts due by said company in the amounts hereinafter stated, viz.: [Here was inserted a list of the creditors of the company and the amounts due them respectively, aggregating \$466,739.42.]

And further, that there are no funds or property of said corporation with which to pay the debts and claims, or any part thereof, except the moneys due to said corporation from the stockholders of the said corporation who have not paid in full for their shares of stock, and that an assessment or call should be made against said subscribers or holders of unpaid shares of stock of the said corporation to pay said debts and the expenses of the receivership;

And further, that the debts of said company which are unpaid as aforesaid aggregate the sum of four hundred and sixty-six thousand seven hundred and thirty-nine dollars and forty-two cents (\$466,739.42); that the interest to which creditors will be entitled will probably aggregate one hundred and forty thousand dollars (\$140,000.00); that the costs and expenses of the receivership and of collecting the assessment, including compensation for the receivers and their legal counsel, are estimated at one hundred thousand dollars (\$100,000.00); and that, therefore, the aggregate sum necessary to satisfy the debts of said corporation and to be assessed upon and collected from the stockholders who are liable therefor is seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42);

And further, that the said creditors are entitled to have their said claims and demands against said company paid by an assessment to be made upon the shares of preferred and common stock of said company, and upon the holders thereof, notwithstanding that the said cred-

itors, or some of them, had at the time of giving credit to said company notice of the circumstances under which the shares of common stock were issued by said company as full paid and nonassessable;

And further, that the following is a list of the subscribers to the preferred stock of said company, who have not paid in full therefor, showing the number of shares subscribed for by them respectively, the aggregate of the payments made by any of them respectively, and the amounts unpaid thereon respectively (the name of J. William Henry, a subscriber for fifty [50] shares, found to be a bankrupt, being omitted therefrom), and the aggregate of the amounts so stated as unpaid on said 5,802 shares of preferred stock being four hundred and seventy-nine thousand two hundred and ten dollars (\$479,210.00): [Here was inserted "Schedule A," showing the subscribers to preferred stock, number of shares, amount subscribed, amount paid and balance due.]

And further, that all of the authorized common stock of said company, aggregating three million dollars (\$3,000,000.00) had been issued without value given therefor, and that the amount remaining unpaid upon the common stock of said corporation is three million dollars (\$3,000,000.00), and that the persons liable to assessment as holders of such common stock, including those holding trust certificates for shares of said common stock, and the amounts, aggregating three million dollars (\$3,000,000.00), necessary to complete the amount of the par value of their shares and on which they are liable to assessment, are, respectively, as follows: [Here was inserted "Schedule B," showing the subscribers to common stock, number of shares, amount subscribed and amount due.]

And further, that an assessment of twenty per cent. (20%) upon all holders of shares of stock of said company, both preferred and common, not paid for in full, being 5,802 shares of preferred and 30,000 shares of common stock, aggregating 35,802 shares, would equal about the said sum of seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42), estimated to be necessary for the payment of the debts of said company, with interest and the expenses of the receivership; that two of said persons named in Schedule A have paid more than twenty per cent. of their subscriptions to said stock, viz.: John F. Wilkins, a subscriber for two hundred and fifty shares, and John Auen, Jr., a subscriber for one thousand shares; and that therefore the said John F. Wilkins and John Auen, Jr., should not at this time be required to make further payments on account of their respective subscriptions to said preferred stock; that after deducting the shares of the said John F. Wilkins and John Auen, Jr., aggregating twelve hundred and fifty, the aggregate of said shares held by the subscribers mentioned in Schedule A is four thousand five hundred and fifty-two (4,552), and the aggregate of the shares of common stock is thirty thousand (30,000) shares; and that the aggregate of both kinds of said stock liable for said assessment for payment of said debts and receivership expenses is thirty-four thousand five hundred and fifty-two (34,552) shares;

And further, that said assessment should be equalized as near as may be between those stockholders who have paid in part for their shares and to the extent thereof, and those who have paid nothing therefor; and for this purpose that an assessment of twenty dollars and fifty-two cents (\$20.52) should be made on each of said thirty-four thousand five hundred and fifty-two shares; and those persons named in Schedule A who have made payments on account of their shares be credited with the amounts so paid by them, as against the amount which would otherwise be assessed against them as above stated;

And further, that the following, Schedule C, is a list of the persons who as holders of shares of stock of said company, both preferred and common, are liable to said assessment; that the said schedule shows the number of shares held by them respectively, as shown by the books, records and papers of said company and by the testimony in this cause; and the amount due and payable from each of them by an assessment of twenty dollars and fifty-two cents (\$20.52) upon each share of stock held by them respectively, a deduction, or credit, having been given to such stockholders who have made payments on their stock of the amounts so paid by them respectively, as shown by the above mentioned Schedule A: [Here was inserted "Schedule C," showing the subscribers to preferred and common stock, number of shares of each, and amount of assessment.]

It is, therefore, adjudged, ordered and decreed by the court, as follows:

1. That the amount necessary to be raised to pay the principal of the claims of the creditors of the said Arlington Hotel Company found and allowed as aforesaid is four hundred and sixty-six thousand seven hundred and thirty-nine dollars and forty-two cents (\$466,739.42), and the estimated interest thereon to the date of payment is the sum of one hundred and forty thousand dollars (\$140,000.00), and the estimated costs and expenses of the receivership, including the collection of the assessments hereinafter levied for the payment of said claims, amount to the sum of one hundred thousand dollars (\$100,000.00), and the total amount necessary to satisfy the debts of the said corporation and said costs and expenses is the sum of seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42);

2. And further, that it is necessary to assess the said last mentioned sum upon the shares of stock of said company which have not been paid for in full, and upon the holders thereof, or upon the legal representatives of such of them as may be dead; that for said purpose the said sum is hereby assessed and levied upon said shares of stock and upon the holders thereof, or the legal representatives of such of them as may be dead; that for the said purpose an assessment of twenty dollars and fifty-two cents (\$20.52) is hereby levied on each of said shares of stock, preferred and common, except the shares of preferred stock held by John F. Wilkins and John Auen, Jr., as hereinabove stated; that the holders of shares of preferred stock who have made payments on account thereof be credited as against said assessment with the amounts so paid thereon respectively as shown by Schedule A.

3. And further, that the foregoing list, called Schedule C, contains the names of the holders of said shares, preferred and common, the number of shares held by them respectively, and the amounts so assessed against them as aforesaid, the holders of shares of preferred stock who have made payments on account thereof having been duly credited therewith as against said assessment;

4. And further, that the said persons mentioned in said Schedule C, or the legal representatives of such of them as may be dead, pay to said receivers the said sums so assessed as stated in said Schedule C, within the time to be fixed herein;

Provided, that with the consent of the receivers, or their solicitors, each and every stockholder liable under said assessment and levy who shall pay the amount assessed against him or them upon demand, or within the limit of time as hereinafter prescribed, shall be allowed a credit on the amount due as aforesaid of three per cent. (3%) upon his proportion of the amount so assessed and paid, which credit it is estimated would equal the proportionate share payable by each stockholder of the total

amount of the estimated costs and expenses of the receivership, and the collection of the assessment, including compensation for the receivers and their legal counsel, and also for accruing interest.

5. And further, that the said receivers be and they are hereby authorized and directed to send within ten (10) days from the date of this decree by registered postpaid letter, addressed to each of the holders of shares of stock of said company as shown in said Schedule C, or to their legal representatives, a copy of this decree, with a demand for the payment on or before the seventeenth day of September, A. D. 1917, of the amounts severally due from them as shown by said Schedule C.

6. And further, that in the event that any person or corporation liable as shareholders of the company, or the legal representative of any of them that may be dead, shall fail to pay the amount hereby assessed upon or against the share or shares of said stock, preferred or common, owned or held by him, or upon or on account of which he is liable, within the time hereinbefore specified, said receivers are hereby authorized and empowered to institute and prosecute such suit or suits, action or actions, or other proceedings against such person or persons, corporation or corporations, party or parties so liable, in any court having jurisdiction, whether in this state or elsewhere, as said receivers shall deem necessary or proper for the collection of the whole amount due from such persons or corporations, under the terms of this decree; and for the purpose of carrying on said suits, the receivers are hereby authorized and directed to employ such counsel in other jurisdictions and make such expenditures for costs in any of said suits as may reasonably be found to be necessary.

7. And further, that the title to said sums severally assessed as aforesaid against said shares of stock and against said stockholders, or their legal representatives, and the right to sue therefor, is in the said receivers of said company.

And it appearing to and being found by the court that T. Coleman du Pont is the only stockholder of said company resident in the state of Delaware,

It is further adjudged, ordered and decreed that in the event that at the end of the period of time hereinbefore specified, the whole or any part of the said sum of seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42), remains unpaid by reason of the failure of any person or corporation liable as shareholder of the Arlington Hotel Company to pay within said specified time the amount hereby assessed upon or against the share or shares of said stock, preferred or common, owned or held by him, or upon or on account of which he is liable, said receivers are hereby authorized, empowered and directed to give to the said T. Coleman du Pont written notice of that fact, and of the amount so remaining unpaid, and to demand and require the said T. Coleman du Pont to pay to said receivers in addition to the amount hereinbefore assessed against him on account of the shares held by him, the balance of the total sum of seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42), or so much thereof as then remains unpaid by reason of such failure on the part of said other stockholders, which said sum of seven hundred and six thousand seven hundred and thirty-nine dollars and forty-two cents (\$706,739.42), or so much thereof as shall then remain unpaid, the said T. Coleman du Pont is hereby ordered and decreed to pay to the said receivers; and in default thereof for the period of thirty (30) days, the said receivers shall proceed to collect the same from the said T. Coleman du Pont by suit, or otherwise, as they may deem proper.

And further, that the said T. Coleman du Pont, upon payment of the said sum so remaining unpaid, shall (except as to the amount assessed against him) be subrogated to the rights of the said receivers, to have and recover, by way of contribution, from the persons or corporations liable for or on account of said shares of preferred and common stock, the sums respectively assessed upon and due from each of them under the assessment hereinbefore made and levied; and shall also have the right to institute and prosecute at his own expense, in the name of said receivers, but to his own use, any suit, action or proceeding for the recovery or collection of said sums so assessed as aforesaid, including any suit, action or proceedings brought by said receivers for said purpose, and shall be entitled to have any order of this court necessary to effectuate such purpose; and all sums, if any, that may subsequent to such payment by said T. Coleman du Pont, be received by said receivers from any such person or corporation, for or on account of such liability, shall be held subject to the further order of the court, and for the use of said T. Coleman du Pont.

9. And it is further adjudged, ordered and decreed, that said receivers be and they are hereby directed to hold all amounts collected under the terms of this decree subject to the further order of the Chancellor herein.

[Signed] Chas. M. Curtis, Chancellor.

(11 Del. Ch. 258)

KINGSTON et al. v. HOME LIFE INS. CO. OF AMERICA et al.

(Court of Chancery of Delaware. April 19, 1917.)

1. CORPORATIONS ¶158 — STOCKHOLDERS — SUBSCRIPTION TO NEW SHARES.

The right of shareholders to subscribe for new shares issued by a corporation as an increase of its capital stock in preference to outsiders is well established, being known as a shareholder's pre-emptive right, although it may be difficult to determine whether the stock issue is an issue of new stock.

2. CORPORATIONS ¶66—STOCK—ISSUANCE OF SHARES.

New shares of corporate stock cannot be issued for an improper purpose, as to maintain control of a corporation.

3. CORPORATIONS ¶158—STOCK—CONTRACTS —VALIDITY.

A contract between a corporation and an outsider, giving the latter the exclusive right to take at par a large number of shares of corporate stock without regard to time, being valid as between the corporation and the outsider, cannot be attacked by those acquiring their stock subsequent to the execution of the contract, for it does not infringe on the pre-emptive right of such shareholders.

4. CORPORATIONS ¶158—STOCK—CONTRACTS —VALIDITY.

That those subsequently acquiring their stock did not know of the contract does not authorize them to attack it.

5. CORPORATIONS ¶72—STOCK—CONTRACTS —VALIDITY.

Where a contract between an insurance company and an outsider, authorizing him to take at par, without limitation as to time, certain corporate stock to be thereafter issued, was assigned to defendant, which made loans to enable the company to extend its business, and such loans were very beneficial, the contract cannot be overthrown, on the ground that it was oppressive, because the stock of the company sold above par.

6. PERPETUITIES ¶7(1) — CONTRACTS — INFRINGEMENT.

A contract between a private corporation and a third person, authorizing the third person to take, without limitation as to time, certain corporate stock thereafter to be issued, does not infringe the rule against perpetuities, which was intended to prevent undue restraint on the alienation of land, the source of all wealth, for the rule should not be extended to the stock of a private business corporation.

7. INSURANCE ¶36—INSURANCE COMPANIES —CONTRACTS—VALIDITY.

A contract whereby defendant was to furnish insurance company, engaged in writing industrial policies, with funds to secure new business, is not illegal or unfair as to the insurance company, which was a new corporation, and which needed such funds, as it could not legally use its capital stock for working capital, as a working surplus would be slowly built up, and as the contract provided that repayment should be made only out of the surplus of the company above a fixed amount, unless it should be dissolved, when payment should be made out of the capital stock; this being so, though the status of the loans was misrepresented on the books of the insurance company and defendant.

8. CORPORATIONS ¶152 — DIVIDENDS — PAYMENT.

Where it was estimated that the value of land purchased with the capital of an insurance company had enhanced, and it was shown that an officer, authorized to purchase land for a fixed amount, acquired it for less, such enhancement in the value of the land and the saving effected were not profits out of which dividends, that can only be paid out of surplus or net profits arising from the business, could be declared.

9. CORPORATIONS ¶351 — OFFICERS — DIVIDEND—LIABILITY.

The statutory liability of officers who improperly declare a dividend cannot be enforced in an action against the corporation and another company to annul contracts, enjoin payments of dividends, etc.; the officers not being parties.

10. INSURANCE ¶50 — CORPORATIONS — RECEIVERS—APPOINTMENT.

As the only purpose of a receivership for an insurance company would be a liquidation of the business, as a receiver could not carry it on indefinitely, a receiver will not be appointed because dividends may have been illegally declared, where liquidation was not desired, even though an injunction against declaration of future illegal dividends must be general.

11. INSURANCE ¶50 — CORPORATIONS — IMPAIRMENT OF CAPITAL.

As the insurance commissioner has extensive powers with respect to the conduct of an insurance company's business, particularly with respect to the impairment of capital, a receiver of an insurance company will not be appointed because the capital may be somewhat impaired, when the real property of the company is correctly valued; this being particularly true where there was testimony that, if liquidated, the net value of the stock of the company would exceed its par value.

12. INSURANCE ¶50 — CORPORATIONS — RECEIVERS—APPOINTMENT.

Where a contract by which the president of an insurance company, who personally assumed at its face value a worthless account, was to receive commissions on insurance written, was not oppressive or fraudulent, a receiver will not be appointed, though the president, in making his report to the insurance commissioner, misstated the facts as to payment of premiums to him.

Bill by Thomas Kingston and others, as shareholders, against the Home Life Insurance Company of America, a corporation, and another. Decree for defendants.

Bill by shareholders of an insurance company to annul contracts made by the company and to correct irregularities and unlawful acts of officers and directors. The cause was heard on bill, the joint answer of the two defendants and testimony and exhibits. The facts appear in the opinion of the Chancellor.

Caleb S. Layton, of Wilmington, and Thomas Raeburn White, of Philadelphia, Pa., for complainants. Charles F. Curley, of Wilmington, and John P. Connelly, of Philadelphia, Pa., for defendants.

THE CHANCELLOR. The six complainants, all stockholders of the Home Life Insurance Company of America, a Delaware corporation, have filed their bill against that company and the Home Protective Company, also a Delaware corporation, on behalf of themselves and of other stockholders. It appears that the officers of the two defendant companies are, and for more than nine years and during the transactions complained of, have been the same persons, and during the same period a majority of the directors of the Insurance Company were also directors of the Protective Company. Up to 1907 the Protective Company owned practically all the outstanding shares of the Insurance Company and therefore controlled it. Afterwards, and until the latter part of 1913, the Protective Company sold shares of the Insurance Company at prices about double the par value. The shares so sold were sold largely in connection with policies of insurance negotiated by agents of the Insurance Company, the persons insured being given a right to take such shares. Some at least of the shares so disposed of, and others afterwards acquired by the Protective Company, were issued pursuant to an option given by the Insurance Company and acquired by the Protective Company. This option had its origin in the action of the directors of the Insurance Company at a meeting on October 29, 1906, whereby it gave to Paul Bright the exclusive right to purchase one hundred thousand dollars worth of stock at par, which was then one hundred dollars per share and which was afterwards reduced to ten dollars per share. At this time one hundred thousand dollars of stock had been issued out of an authorized capital of two hundred and fifty thousand dollars. By an agreement dated April 15, 1907, the Protective Company purchased from Bright the entire good will and business of the Insurance Company and the entire outstanding stock, amounting to one hundred thousand dollars, at par ten dollars, for the total consideration of one hundred and fifty-five thousand dollars, and later Bright as-

signed to the Protective Company the option which he had to subscribe for stock of the Insurance Company. At a meeting of the stockholders of the Insurance Company held January 21, 1908, it was by motion duly carried agreed that the surplus earnings, if any, be paid to the Protective Company "for financing the Home Life Insurance Company of America," and authority was given to the directors to increase the authorized capital from two hundred and fifty thousand dollars to not exceeding one million dollars, contemplating, of course, that proper legal steps would be taken for the purpose. At a meeting of the stockholders of the Insurance Company held February 18, 1909, a resolution reciting the giving of the option to Bright, the assignment thereof to the Protective Company and the proposed increase of capital, and also reciting that the Protective Company had contributed or advanced to the Insurance Company moneys and securities to enable it to maintain its legal reserve and build up its business, and stating that the contributions or advances would continue as needed by the Insurance Company and be returned out of surplus earnings, and extending the option to include the entire capital stock, was adopted by the stockholders.

In explanation of the advances or contributions made by the Protective Company to the Insurance Company it was stated in the answer and shown that the moneys were needed to acquire new business either through soliciting agents or by reinsuring the risks of other insurance companies, and under the insurance laws the usual income of the company could not be used for such purpose. It was explained also that to grow rapidly it was necessary for a newly organized insurance company to make large expenditures in excess of the premiums collected by it in order to pay soliciting agents, and that after the business increased to large proportions the receipts will exceed such expenses. In other words, it costs a new company more to place insurance than is received from those insured. To enable the Home Life Insurance Company to so grow rapidly the Protective Company paid to the Insurance Company at various times sums of money.

Finally, at the annual meeting of the stockholders of the Insurance Company, held February 19, 1915, a resolution was adopted reciting the action of the meeting of January 21, 1908; and that about four hundred and seventy thousand dollars had been received from the Protective Company by the Insurance Company, of which about eighty-one thousand dollars had been re-paid; and authorizing the execution of obligations for the sums so contributed and advanced and those to be contributed and advanced, with interest at six per centum, the obligations to be made payable only out of surplus in excess of ten thousand dollars while the Insurance Company should continue in active business

and the obligations should not be considered a lien or debt against the Insurance Company, or be due or payable, except in the event of dissolution or retirement of the company.

Up to 1912 the Protective Company actually held a majority of all the stock of the Insurance Company, and after that time though it had not control as a majority stockholder, it had and still has power to secure control by exercising the option to take stock. The Protective Company now holds about six thousand shares of the Insurance Company out of about sixteen thousand outstanding. About eighty-five hundred shares remain unissued, and the Protective Company has the right to take at par these unissued shares to the exclusion of the other stockholders.

Between 1907 and the latter part of 1913 the Protective Company took under its option shares of the Insurance Company at par and sold them in connection with insurance policies at from two to three times the par value, and from 1913 to 1916 took none. But in June, 1916, after some of the stockholders of the company had expressed dissatisfaction with its course, and threatened to take legal proceedings, the Protective Company took at par thirty-seven hundred shares of the Insurance Company under the option. Up to a very recent date the officers and directors of the Insurance Company held very few of its shares, and were large holders of shares of the Protective Company, of which they were also officers and directors.

By the bill the complainants allege that the plan of financing the Insurance Company by the Protective Company was fraudulent both inherently and by the method of carrying it out. The plan briefly stated was and is (and as to this there is no dispute) that the Protective Company should furnish to the Insurance Company money to acquire new business for the latter, and in return therefor the Protective Company was given a perpetual and exclusive right to subscribe to the stock of the Insurance Company at par, the Insurance Company being liable to return all the money advanced, with interest, only out of surplus in excess of ten thousand dollars, or in case of liquidation out of the assets of the company.

It is alleged and shown that there were certain deceptions practiced by the officers of the two companies, who were the same persons, and particularly in the entries in the books of the Insurance Company and in its reports, official statements, which were misleading and evidence of a fraudulent purpose.

It is also alleged that dividends were paid otherwise than from earnings, and that the capital of the company had been impaired.

[1, 2] But independent of these and some other considerations, it should be first determined whether this agreement or option to purchase was valid, or invalid. If invalid, then what relief should be granted? For the

complainants it is urged that the stock option was in itself illegal and void, (1) because it violates the fundamental right of stockholders to share equally in the distribution of unissued stock, or to purchase the same upon equal terms and to maintain the same proportion of the control of the company as existed prior to such issue; and (2) because it is in violation of the rule against perpetuities.

Was the option contract invalid because it destroyed the pre-emptive right of stockholders to take the shares? The right of shareholders to subscribe for new shares issued by a corporation as an increase of its capital stock in preference to outsiders is well established, and is called a shareholder's pre-emptive right. 1 Machen on Corporations, § 603; 7 Ruling Case Law, 176; 1 Cook on Corporations (7th Ed.) §§ 70, 236, 614, 653. In some cases it has been held that the right does not exist as to the original authorized capital, but only as to an increase of authorized capital. 1 Machen on Corporations, § 618. But this is not clear, and it is difficult in particular cases to determine what can rightly be called a new issue of stock, as for instance, where the authorized capital stock was not increased by authority of law, and the new issue of shares were part of the capital stock as originally authorized, but issued after a substantially long period subsequent to the original issue of shares. New shares cannot be issued for an improper purpose, as for instance, to maintain control of the corporation. These principles are stated in 2 Cook on Corporations (7th Ed.) § 614.

[3] But these principles have no application to this case. In 1906 Paul Bright was given the exclusive right to take at par one hundred thousand dollars of shares of the company without limit of time. At that time the legally authorized capital stock of the company was and still is two hundred and fifty thousand dollars, and one hundred thousand dollars of it had then been issued and was then outstanding. Those who then held shares of stock of the company could probably have asserted their rights in opposition to this grant to Bright. Whether they can still do so need not now be considered, for none of them are complainants in this case. All of the complainants acquired their stock subsequent to the original and the later action of the company granting and confirming the option, and subsequent to the meeting of the stockholders thereof held in 1909, at which meeting the action of the board of directors in giving the original option and in extending it to any shares to be issued after the capital stock had been increased beyond two hundred and fifty thousand dollars was confirmed by the stockholders. None of the complainants, except Maginnis, are shown to have had knowledge of the option prior to acquiring their shares. Maginnis when he bought his shares knew of the

affairs of the company fully, and presumably knew of this option.

One who acquires shares of stock of a corporation after the corporation by action of its officers, directors and stockholders has given to a stranger an exclusive right to take and pay for at par all of the unissued shares of the company, cannot assert as against the company, or the holder of the option, the general pre-emptive right of shareholders of a corporation. No authority was cited or found for or against the above proposition, but it is clearly sound and based on fundamental considerations. As between the corporation and the holder of the option such a contract is valid, and can be held invalid only at the instance and for the benefit of a stockholder who asserts his right to take the stock, and whose right has been impaired by the giving of the option. If, however, before a particular person became a shareholder another person has acquired an option inconsistent with the pre-emptive right, then the latter is subservient to the former right. When the original contract was made between Bright and the company, it might have been invalid for lack of consideration; but when later the stockholders at the meeting in 1909 ratified it and extended its scope, there was then consideration based on the advances or other financial assistance given and continued to the company by the holder of the option.

Did the extension of the option so as to make it include shares to be thereafter issued by the company when the capital stock should be increased by law invalidate the agreement, or give the complainants a right to have it declared inoperative in so far as it limits their rights as stockholders? Probably not, for reasons hereinabove stated. But inasmuch as the limit of authorized capital stock has not yet been increased, the question is not now a vital one for the present solution.

[4, 5] It is immaterial that some of the complainants had no knowledge or notice of the existence of the option before acquiring their shares, for there was no representation by the company, or the holder of the option, respecting unissued shares upon which the complainants relied to their detriment or disadvantage. The right to take at par stock which was salable at more than par did not necessarily invalidate the option; that would depend on circumstances. It might be so inequitable, oppressive, or unjust as to shock the conscience of the court, or be fraudulent or without consideration. But it is not clear that this contract may be so characterized. While Bright held the option it may not have been advantageous to the Insurance Company. But after it had been acquired by the Protective Company and that company had made large advances of money to the Insurance Company to enlarge its business and increase its profits and stability, it was not and is not so glaringly inequitable

as to call for its annulment by this court, particularly if, as the complainants urged, the advances were contributions, made without expectation of repayment.

For these reasons, then, the complainants are not entitled to have the option contract set aside or affected in so far as it relates to the stock of the company as originally authorized, without deciding upon their rights with respect to shares in case the capital stock of the company be increased.

[6] Does the contract made by the Insurance Company with Bright, and subsequently assigned to the Protective Company, violate the rule against perpetuities? Is a contract by which one corporation gives an option to take and pay for at a fixed price all of the unissued shares of its capital stock invalid because it violates the rule against perpetuities? According to the authorities cited by the complainants, an unlimited option to purchase land is a contract in restraint of alienation of land and against public policy, and therefore void. *Barton v. Thaw*, 248 Pa. 348, 92 Atl. 312, Ann. Cas. 1916D, 570; *London, etc., Co. v. Gomm*, 20 Ch. Div. 562. In general the rule against remoteness in the time of vesting future interests applies to personalty as well as realty. *Lewis on Perpetuities*; *Gray on Perpetuities*, § 202. But almost all of the cases in which the rule has been applied to personalty the instrument by which the future right was created related to land, such as leaseholds or chattels real. In three Maryland cases cited the rule was applied to bequests of future interests in slaves. *Johnson v. Lish*, 4 Har. & J. (Md.) 441; *Matthews v. Daniel*, 3 N. C. 346; *Hutton v. Weems*, 12 Gill & J. (Md.) 83.

However, the real purpose of the rule was to prevent inalienability of land, i. e., to prevent its being tied up for an unreasonably long period whereby it was kept out of commerce. Public policy was the reason for the rule. This was peculiarly applicable to land and interests in land.

Has it any relation to contracts as to shares of stock of a private business corporation? There is no principle of public policy involved. It can make no difference to the general public, or to any one other than stockholders of that particular company. To tie up land, which is the source of all wealth, is quite a different thing from giving an unlimited option to buy all unissued shares of a corporation doing a private business. No case has been produced or found which so extends the rule respecting real estate and interests in real estate, however sound, wholesome and well established the rule be with respect to land, and I do not feel justified in extending it to the stock option, and, therefore, cannot hold the option contract entirely invalid for either of the reasons urged.

[7] Was the plan by which financial assistance was given to the Insurance Company by the Protective Company illegal or unfair to

the Insurance Company? It was clearly shown that free working cash capital was very important to the rapid development and success of the business of a life insurance company, and particularly where it is issuing policies called industrial insurance. An important element in such success is the size, or number, of policies issued. Where the company is a new one the cost of getting new business for a time exceeds the premiums received from holders of the policies. The capital stock of the company cannot under the laws of this State be used for such working capital, for it must be maintained intact. The working capital is secured by accumulating, or acquiring surplus funds for the purpose, and this surplus may be obtained by contributions thereto by stockholders as a part of their subscriptions to shares of stock, or from a group of stockholders. Of course, surplus earnings may be used for such working capital. An insurance company may make earnings from several sources, e. g. (1) by gains on mortality; (2) excess interest earnings; (3) margins on surrenders and lapses, each of which have a technical meaning, and may be calculated with reasonable certainty. These earnings must be reported to the Insurance Commissioner, and in a stock company issuing such policies as the Home Life Insurance Company of America belong to the shareholders, and may be used to acquire new business. But as stated above, these sources do not provide sufficient money to obtain a rapid growth, and additional money is necessary and is usually obtainable by contributions or advances.

The Protective Company was organized as a holding company and to supply such surplus to the Insurance Company and did make contributions or advances from time to time aggregating about four hundred and seventy thousand dollars, of which about eighty thousand dollars had been repaid. In return for this financial help the Protective Company had an exclusive right to take at par the unissued stock of the Insurance Company and the stockholders of the Insurance Company at the meeting in January, 1908, voted that all of its surplus be paid to the Protective Company for such "financing." Later the repayments were to be made only out of surplus in excess of ten thousand dollars, or in case of dissolution out of the assets of the Insurance Company as a debt.

In substance, then, the Insurance Company obtained from the Protective Company money with which to acquire new business under an agreement to repay the money only from its surplus in excess of ten thousand dollars, except in case of its dissolution, when the moneys furnished were to be treated as a debt due from the Insurance Company to the Protective Company. Was this unlawful or unfair?

In simple terms, the question is whether an insurance company may lawfully make a

contract by which it borrows money to be spent in acquiring new business and agree to repay the money only out of its surplus earnings, unless the company be dissolved, and then the money borrowed is to be treated as other debts of the company are treated?

More broadly stated the question is, whether it is wrong for an insurance company to borrow money to be spent to acquire new business? There is but one rational answer to that query. It being shown that such a use of money by an insurance company was evidence of good business management, was like sowing seed for a future sure harvest, and there being no evidence of inefficiency in the expenditure of the money, it is not wrong for this insurance company to borrow money for such purpose. If properly spent the money brings in a crop of good business, and until the new business comes in the value of the company is increased by the expenditure which will bring in the profitable new business. It certainly is not wrong to borrow money for such purpose, if the borrower is not obliged to repay it except from the profit he makes in the use of it. Such a borrower cannot be made insolvent because of the borrowing of the money, for he cannot be made to repay it unless he makes a profit from the use of it. The capital of the Insurance Company could not have been impaired by borrowing money for such purposes in such manner. As explained above, it could never be impaired if the debt is payable from surplus, which is net profit, or earnings. Neither would it be impaired if payable generally, because for every dollar so spent for new business the value of the business would be increased to that extent, so that the volume of new business obtained from the use of the money so borrowed would be an asset and so balance the liability arising from the loan of the money. This seems a fundamentally sound and common sense proposition. Furthermore, the soundness of the proposition was apparently shown by the calculations as to the present liquidating value of the business of the company based on prices usually paid on sales of such a business. See Schedule C of Defendants' Exhibit No. 23 and statement and testimony of Hugins in relation thereto.

Therefore, if the above principles are sound, and they seem to be so, the plan by which the Protective Company advanced or loaned money to the Insurance Company to be used for the acquisition of new business and to be repaid with interest, only from surplus, or according to the later arrangement, only from surplus acquired by the Insurance Company in excess of ten thousand dollars, and not to be treated as a lien or debt due by the Insurance Company, except in case of its dissolution, was not invalid, fraudulent, oppressive, unfair, unreasonable, unwise, or objectionable in any way, so far as the Insurance Company and its

stockholders were concerned. It would not have been objectionable if the money had been loaned to the Insurance Company by its president, or by its officers, or by its officers and directors, or by any of its stockholders. Nor would it be objectionable if made by another corporation the officers and directors of which are also the officers and directors of the Insurance Company, even if the lending company owned a majority of the shares of stock of the Insurance Company, for the contract itself being unobjectionable it is quite unimportant as to the source from which the money is borrowed. Indeed, it would be more likely to be beneficial to the Insurance Company, and so to its stockholders, if the money was advanced by persons having an interest in it as stockholder or officer, for obviously the probability of its being used most efficiently and profitably is increased thereby.

In this case, then, the complainants cannot base any relief on the fact that the Protective Company advanced money to the Insurance Company to be used to acquire new business under a plan by which the Insurance Company agreed to repay the loans only out of its surplus in excess of ten thousand dollars and under an agreement that the moneys should not be treated as a debt except in case the Insurance Company be dissolved. Nor would the result be held different because the Protective Company had been given by the Insurance Company the exclusive right to take and pay for its unissued shares of stock at par, and so had secured a permanent power to control the Insurance Company. Neither the plan by which the Insurance Company was assisted financially, nor the method of executing it, was unfair or illegal, except as to the misrepresentations and concealments to be considered later.

It is contended strongly for the complainants that the plan of the Protective Company for financing the Insurance Company must have been unfair and unlawful because so many of the dealings between the two companies were misrepresented and concealed in the books of the Insurance Company and in its reports to the Insurance Commissioners, the books of the Insurance Company being kept by or under the direction of the same person or persons who kept the books of the Protective Company. It was shown that until 1913 advances were charged on the books of the Protective Company to the profit and loss account, which means that they were not considered as assets, or as debts to be repaid to the Protective Company. The books of the Insurance Company show no liability whatever, contingent or otherwise, to repay the moneys advanced, although they are shown on the books of the Protective Company since 1913 as an asset. In the reports to the Insurance Commissioners the advances were not stated as liabilities, although the Insurance Company was called upon to state in

the report all its liabilities. There were actual misrepresentations in these reports as to the source from which the advances were received, they being called "bonus on stock." Also misrepresentations as to the expenditures of the moneys so advanced, payments of interest being entered as cost of business purchased, or agents' balances and otherwise.

These misrepresentations, concealments and irregularities of stating the dealings of the two corporations cannot be justified. If the plan of co-operation was considered fair and right, why conceal or misrepresent the transactions? The complainants insist that the purpose was fraud on the stockholders who were solicited to take shares. But this does not get very far if the plan be in fact innocent in its scope and purpose, and not unfair or unlawful. The deceptions, therefore do not give the complainants any right to relief, which is the only question before the court. Stockholders' rights are not affected by reason of the deceptions and this court need not act for the Insurance Commissioner, unless requested to do so. It is quite immaterial, though interesting, that until the litigation started the officers and directors of the Insurance Company held few of its shares, while the same people were large holders of shares of the Protective Company.

There can be no real doubt that there is now a binding obligation by the Insurance Company to repay to the Protective Company the advances from surplus in excess of ten thousand dollars. Even if prior to 1915 the moneys received from the Protective Company by the Insurance Company were contributions or gifts, and so not to be repaid, and were advances or loans to be repaid, still after the action of the stockholders at the meeting held that year there was no doubt but that they constituted a debt to be repaid in the manner agreed upon.

Has the investment of the stockholders been jeopardized by the illegal payment of dividends and by an impairment of the capital stock? Each of these charges is grave and involves serious consequences if sustained by the evidence.

[8] The prayer of the bill on the subject is for an injunction to prevent the officers of the Insurance Company from declaring or paying any dividend upon its stock except out of actual earnings. This may be granted without much consideration of the facts, because it would be but a declaration of the statute law of the State which permits dividends to be paid only out of surplus or net profits arising from the business of the company.

It is extremely difficult for anyone who has not had large experience in the practices and book-keeping theories of life insurance companies, or as an expert actuarial accountant, to decide what in a given case constitutes the surplus or net profits of the business of an insurance company. Some things seem clear even to me, and one is that

an estimated increase in the value of the building owned by the Insurance Company and occupied by its officers and employees, however accurately the increase be estimated, is not a net profit arising from the business of the company. If it is an investment of capital of the company its increased value when realized by a sale may perhaps be treated as a profit, but until realized it is surely unwise, inaccurate and wrong to so regard it and pay out money based on such an estimate, for it is only a guess, and if a correct one it may become incorrect later when the conditions which produced the estimated increase of value change.

Again, a profit of the business of fifteen thousand dollars is not made if an officer of the company authorized to buy for the company with its money real estate for sixty thousand dollars buys it for forty-five thousand dollars. The assets of the company are not increased, and the saving is not a profit of the business which can be paid out in money as dividends.

The defendants undertook to show by an actuarial insurance expert that all the dividends declared were earned, and for this purpose a schedule with complicated calculations made for the purpose was submitted to prove the fact. The data of Schedule B of Defendants' Exhibit No. 23 were taken from the books of the two companies, but the basis of a very important part of the calculation was arbitrarily selected by the expert, and as there would be differences of opinion as to this selection, the whole calculation had little probative value. Taking the fundamental fact as shown by the schedule and not disputed, the income was less than disbursements, and the attempt to explain the resultant deficit was not convincing.

[9, 10] Assuming, then, that dividends were paid otherwise than out of the surplus or net profits of the business of the Insurance Company, what power has this court to give relief in this case by reason thereof? The statutory liability of those officers who declare the dividend could not be enforced against them in this cause, for they are not parties to it. An injunction against future unlawful payments would, of course, be made in general terms. But that was hardly the purpose of the bill. The illegal payment of dividends would not of itself justify the appointment of a receiver. Such payments may be part of an unlawful plan, or be evidence of such gross incapacity, recklessness and fraud as to justify this court in taking the control and management of the company from its officers and directors for some useful purpose. But in this case the only purpose of a receivership would be a winding up and liquidation, for a receivership to carry on indefinitely the business of the company would be an intolerable suggestion, as was found by the court in *Carson v. Alleghany Window Glass Co.* (C. C.) 189 Fed. 791, 799.

If the complainants desire to pursue this branch of the case further by amendments to the prayers of the bill, it will probably be necessary to refer this branch of the case to an insurance expert as Master to consider the evidence and report thereon whether dividends have been declared otherwise than from the surplus or profits of the business of the Insurance Company. An opportunity will be given to counsel to be heard on this point before entering a decree.

[11] Has there been an impairment of the capital of the Insurance Company? As evidence of the impairment of capital it is urged by the complainants that the value of the real estate in Philadelphia owned by the Insurance Company, and which is stated in its reports to be one hundred and eighty-three thousand dollars, is much exaggerated and should not be in excess of one hundred thousand dollars; that on December 31, 1915, the surplus as shown by the last report of the company made to the Insurance Commissioner was about twenty thousand dollars; that if the real estate was overvalued more than twenty thousand dollars, the capital was impaired; and that if the advances by the Protective Company to the Insurance Company, aggregating about three hundred and sixty thousand dollars, constitute a debt, then the capital of the Insurance Company is entirely wiped out.

From the testimony it is quite clear that the contention of the complainants on this point is correct. The value of the real estate was much too high as reported in the statements of the Insurance Company. Difficult as it is to estimate values even of real estate, it is surely unwise to value this property at one hundred and eighty-three thousand dollars, and it is certainly worth at least twenty thousand dollars less than that sum and nearer one hundred thousand dollars than one hundred and eighty-three thousand dollars. The extent of the impairment of capital is not important here. But it does not follow that this court should for that reason now wind up the affairs of the company by a receivership. The statutes of the State give to the Insurance Commissioner large powers and impose upon him important duties respecting the conduct of business of insurance companies doing business here. The question of the impairment of capital is peculiarly for his consideration, as also would it be his duty to decide what the consequences thereof would be, and this court should not act so as to interfere with his official disposition of the facts—certainly not in advance of his acting or refusing to act. There is, however, no intention of disclaiming the jurisdiction of this court by declining at this time to exercise it.

It is a notable fact, apparently established by the testimony of the actuarial expert, that the liquidating value of the business of the Insurance Company is sufficient to repay the

Protective Company all their advances and still make the net value of each share of the Insurance Company from about twenty-two dollars to twenty-four dollars per share, the par value being ten dollars. See Schedule C of Defendant's Exhibit No. 23. There are other signs that the connection of the two companies has been beneficial rather than detrimental. This may not of itself be an answer to all the charges made in the bill, but may fairly influence judicial discretion as to remedies.

[12] Should the Walsh contract be annulled? It was claimed by the complainants that Basil S. Walsh, the president of the company, obtained from the company in 1905 a contract concerning commissions which was unfair to the company, and that in the report to the Insurance Commissioner this was concealed. It is true that when called upon to state in the report whether any of the officers of the company were paid commissions, Walsh under oath answered no. His explanation is that the contract had so far been unprofitable and for that reason he thought he was answering correctly. But this is not a satisfactory explanation. He assumed as worth its face value a certain worthless account owing to the Insurance Company, and by reason thereof the company was able to make a better showing in its reports to the Insurance Commissioner. In consideration of the assumption of the worthless account Walsh receives a very large part of the premiums on commissions. It does not appear that the company is any better off by reason of the contract, and on the other hand it does not seem so grossly unfair to the company as to justify action by this court to annul it, if the court has a right to do so. Mr. Walsh has in his testimony offered to surrender his contract if it is considered unfair. But his deceptive statement in the report is apparently the worst feature of the matter. By the testimony he did not vote on the motion when the board of directors decided to accept his proposition, and there appears to be no breach of the trust arising from his official position in his dealings with the company. Certainly the making of the contract does not justify the appointment of a receiver of the company for any purpose, and there is no special prayer for relief as to the contract.

On the whole, then, notwithstanding the deceptions, concealments and misstatements in the book-keeping and reports to the Insurance Commissioner, and though dividends may have been declared other than from surplus or net profits of the business of the company, and even though the capital of the company may in a sense have been impaired, still neither one nor all of these misdeeds, indefensible and as reprehensible as they are, justify this court in taking action against the company, such as is sought, or

any other. Some of the bills are righted by exposure, others may be righted by the Insurance Commissioner, and all of them together do not warrant a court in taking the administration of the affairs of the company from the hands of its officers.

Having determined that the stock option was not invalid, and that the arrangement by which the Protective Company advanced money to the Insurance Company was not illegal or unfair, there is no relief which this court can grant to the complainants, except an injunction against declaring dividends except out of surplus or net profits.

It should be commented that the books and papers of both defendant companies have been voluntarily laid open to full inspection by the complainants.

Unless, therefore, the complainants be given some relief based on the payment of dividends, the dismissal of the bill would follow.

Inasmuch as the concealments and deceptions in the reports made by the Insurance Company were probably largely responsible for litigation, a part at least of the costs should be put on the two defendants, for the identity of their managers imposes on each of them a responsibility for the situation.

(6 Boyce, 554)

WILLIAMS v. BELTZ et al.

(Superior Court of Delaware. New Castle.
June 4, 1917.)

1. CORPORATIONS §116—SALE OF STOCK—WHAT LAW GOVERNS.

An action to recover damages for alleged fraudulent misrepresentations by defendant with respect to sale of stock in a mining company, where the sale and the circumstances of the sale occurred in Pennsylvania, was governed by the law of that state in so far as applicable to the facts in the case.

2. CORPORATIONS §116 — SALE OF STOCK—FRAUDULENT REPRESENTATIONS—VALUE OF MINING STOCK.

A representation by defendant, on the sale of stock in a mining company, that its liabilities then amounted to \$1,600, and a failure to disclose the existence of defendant's contract with the company, capitalized at \$25,000, whereby he was to receive \$36,000 out of the company's net profits in payment of money previously spent by him in its development, was a misrepresentation of a fact affecting the value of its stock.

On Motion for New Trial and Arrest of Judgment.

3. CORPORATIONS §121(7)—SALE OF STOCK—MEASURE OF DAMAGES.

The measure of damages for a false representation of a material fact affecting the value of mining stock is the difference between the real value of the stock at the time of the purchase and what the purchaser was induced to pay by reason of the misrepresentation.

Action of deceit, begun by foreign attachment, by Henry L. Williams against John Beltz and Francis E. McGillick. Directed

verdict for defendants. Motion for new trial and in arrest of judgment denied.

Argued before RICE and HEISEL, JJ.

Daniel O. Hastings, of Wilmington, and James Balph, of Pittsburg, Pa., for plaintiff. Edward G. Bradford, Jr., of Wilmington, and Thomas Watson, of Pittsburg, Pa., for defendants.

The plaintiff seeks to recover damages from the defendants, for alleged fraudulent misrepresentation by the defendants with respect to the sale of stock in a mining company to the plaintiff.

The plaintiff claims that John Beltz, one of the defendants, owned the mining interests in, and was engaged in the development of, a lead mine in Galena, Illinois; that Beltz was in need of money for developing the mine and made arrangements with one Garrison, in Pittsburg, Pennsylvania, to secure for him the necessary money. The plaintiff in October, 1912, through Garrison, became interested, with the idea of investing money in the venture. The plaintiff went to Galena with Beltz to inspect the mine; while on the trip he made inquiries of Beltz about the liabilities of the mining company, which had been organized, and he was at the time informed by Beltz that the company's liabilities amounted to about \$1,600. The plaintiff in April, 1913, invested \$1,000 in the company, for which he received 20 shares of the company's stock. The capital stock of the company amounted to \$10,000. It was increased to \$25,000 in September following, and at that time the plaintiff invested an additional \$1,000, and \$1,000 more in November, for which he received 40 more shares of stock in the company. A little in excess of \$24,000 worth of the stock was sold and the plaintiff owned approximately one-eighth of the stock of the company. In the latter part of November, 1913, the plaintiff first learned of the existence of a contract between Beltz, who was a director in the company, and certain other directors and stockholders under the terms of which Beltz was to receive 50 per cent. of the net profits of the company until the sum of \$36,000, which he had previously expended in the development of the mine, had been paid to him. Beltz in November, 1914, brought suit in the Pennsylvania courts against Samuel Garrison, F. E. McGillick (one of the defendants herein), George H. Futch, J. E. McGinnis, and William I. N. Lofland for the enforcement of the contract. The Pennsylvania courts held the contract to be binding and enforceable against the company, and Beltz was paid the \$36,000, which was to be paid to him, under the terms of the contract, out of the net profits of the company. The plaintiff further claims that by reason of the payment of the \$36,000 to Beltz the shares of stock held by the plaintiff in the company have greatly decreased in value.

The defendants deny that they were guilty

of any fraudulent misrepresentation whatever with respect to the sale of stock to the plaintiff and contend that the issues in the present case were determined in the former suit in the Pennsylvania courts, in which suit Henry L. Williams the plaintiff in the present action upon his own petition was made one of the defendants. The defendants further contend that the plaintiff did not suffer damages for the reason that the company paid dividends to Williams to the extent of 365 per cent. on his investment.

The plaintiff at the trial introduced evidence to show the alleged fraudulent misrepresentation, and the circumstances surrounding it; the amount of capital stock issued by the company and the proportionate share owned by Williams; the terms of the contract and the decree of the courts of Pennsylvania with respect to it and the payment by the company of the \$36,000 to Beltz under the terms of the contract.

RICE, J., after stating the facts as above, delivered the opinion of the court.

[1] The seventeenth prayer of the defendants is in the following language:

"That under all the evidence in this case it is the duty of the court to direct the jury to find a verdict for the defendants."

As a preliminary statement, we will say that it is admitted by counsel for the plaintiff and defendants that, as the alleged fraudulent concealment of the liabilities of the company, the sale of the stock and the circumstances surrounding the same, took place in the state of Pennsylvania, the law of that state in so far as the same may be applicable to the facts in this case, should control this court in the consideration and determination of the questions of law here raised.

With respect to the defendant Francis E. McGillick, we now say that there is no evidence in the case to support the plaintiff's allegation of fraud against McGillick, and therefore it is our duty to direct the jury to find a verdict for the defendant McGillick.

Counsel for the defendants contend that the court should direct the jury to find a verdict for the defendant John Beltz, for the reason that the rule of the Pennsylvania courts with respect to damages in an action of deceit for fraud, in the sale of stock in corporations, is the difference between what the plaintiff paid for the stock and its actual value at the time it was purchased and that there is no evidence in this case to show that at the time of the purchase the value of the stock was any less by reason of the alleged misrepresentation than the plaintiff paid for it. In support of this contention he cites the recent case of *Curtis v. Buzard*, 254 Pa. 61, 98 Atl. 777. The plaintiff on the other hand argues that the court should not give binding instructions in favor of the defendant Beltz, for the reasons assigned by the defendant, and contends that in this case the plaintiff is entitled to such damages as

were the natural and necessary result of the false misrepresentation, the measure being the amount the plaintiff would have received of the \$36,000, which the company paid to John Beltz, the defendant, on that part of plaintiff's stock purchased before the alleged fraud was discovered.

In support of his contention, counsel for the plaintiff cited the following cases, many of the cases being Pennsylvania ones: *Smith on the Law of Fraud*, § 289; 20 Cyc. pp. 136, 140; *Sutherland on Damages*, § 1171; *Pennock v. Tilford*, 17 Pa. 456; *Thompson v. Burgey*, 36 Pa. 403; *Stetson v. Croskey*, 52 Pa. 230; *Seigworth v. Leffel*, 76 Pa. 476; *Rice v. Olin*, 79 Pa. 391; *Guffey v. Clever*, 146 Pa. 548, 23 Atl. 161; *High v. Berret*, 148 Pa. 261, 23 Atl. 1004; *Lukens v. Aiken*, 174 Pa. 152, 34 Atl. 575; *Weaver v. Cone*, 174 Pa. 104, 34 Atl. 551; *Drenning & Long v. Wesley*, 189 Pa. 160, 42 Atl. 13; *West Homestead v. Erbeck*, 239 Pa. 192, 86 Atl. 773; *Curtis v. Buzard*, 254 Pa. 61, 98 Atl. 777; *Medbury v. Watson*, 6 Metc. (Mass.) 248, 39 Am. Dec. 726; *Morse v. Hutchins*, 102 Mass. 439; *Thomson v. Pentecost*, 210 Mass. 223, 96 N. E. 835; *Whitney v. Allaire*, 1 N. Y. 305; *Benedict v. Trust Co.*, 91 App. Div. 103-107, 86 N. Y. Supp. 370; *Murray v. Jennings*, 42 Conn. 9, 19 Am. Rep. 527; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Chapman v. Bible*, 171 Mich. 663, 137 N. W. 533, 43 L. R. A. (N. S.) 373; *Kendrick v. Ryus*, 225 Mo. 150, 123 S. W. 937, 135 Am. St. Rep. 585; *Drake v. Holbrook* (Ky.) 66 S. W. 512.

It appears from an examination of these cases that the courts of Pennsylvania, as well as many other courts, recognize the rule of damages in actions of deceit for fraudulent misrepresentations affecting the value of the property whether real or personal, to be the difference between the price paid and what the value would have been if it had been as represented.

[2] Before considering the question whether either rule, and, if so, which one, should obtain in this case, it is necessary for us to first determine whether the alleged fraudulent misrepresentation on the part of the defendant was one affecting the value of the stock purchased, or whether it was of such a nature that it would not affect the value of the stock purchased. If it was of the class which would affect the value of the stock purchased, then one of the rules of damages recognized by the Supreme Court of Pennsylvania should obtain; if it should prove to be of the other class, then neither rule would apply and in the absence of Pennsylvania decisions, it would be necessary for us under such circumstances to ascertain the true measure of damages.

The misrepresentation alleged was the failure of the defendant Beltz, when the plain-

tiff inquired about the liabilities of the company, to disclose to the plaintiff the existence of a contract Beltz had with the company whereby he, Beltz, was to receive from the company the sum of \$36,000, to be paid out of the net profits of the company. While those interested in the company, and those who later became interested, undoubtedly had great expectations of profits, it is admitted by all that for more than a year there were no profits. At the time the plaintiff made his first investment the authorized stock of the company amounted to \$10,000. The amount of stock was increased from time to time until it reached the sum of \$25,000, and as the increases of stock were made, the plaintiff purchased additional stock until he had purchased \$3,000 worth of stock before he knew of the existence of the outstanding contract of the company with Beltz.

The existence of a contract for the payment of \$36,000 out of the net profits of a company with authorized stock to the amount of \$10,000, or even \$25,000, is surely a matter for a person contemplating the purchase of stock in the company, to consider before investing in the company notwithstanding the profits were of a purely speculative character. It is such a matter as would probably make the stock worth less than if the contract had not existed. We therefore are of the opinion that the alleged misrepresentation was of a fact affecting the value of stock of the company.

The plaintiff has not introduced evidence to show that the value of the stock was at the time of purchase or at any time thereafter affected by reason of the alleged misrepresentation. However he does claim that he would not have invested in the stock of the company if he had had knowledge of the contract Beltz had with the company. While this may be true, yet the fact remains that the alleged misrepresentation was one in our opinion, within the class of those affecting the value of the stock, therefore he is bound by the decision of the Pennsylvania courts with respect to the measure of damages in such cases.

As in our opinion the alleged misrepresentation comes within the class of cases affecting the value of the property purchased, we will now consider whether the plaintiff suffered pecuniary loss or damage under the rules enforced in the Pennsylvania courts, with respect to the measure of damages in such cases.

In the case of *Curtis v. Buzard*, *supra*, the court below in considering the measure of damages in actions of deceit for fraud in the sale of stock used the following language:

"We are still of the opinion that the true rule as to the measure of damages in an action of deceit for fraud in the sale of stock is * * * the difference between what the plaintiff was induced to pay for the stock and its actual value at the time of the purchase."

This decision was affirmed by the Supreme Court of Pennsylvania.

If this is the rule of the measure of damages in such cases in the courts of Pennsylvania, and we should adopt the rule here, it would be decisive in this case and it would be our duty to instruct the jury to find a verdict for the defendant.

However, without passing upon the question as to the applicability of this rule in the present case, we will pass to a consideration of whether the other rule of the measure of damages in actions of deceit for fraudulent misrepresentations, recognized by the Pennsylvania court, in connection with the facts of this case and determine whether under that measure of damages the plaintiff here is entitled to damages.

The measure of damages in such cases under this rule is the difference between the purchase price of the property and its value if it had been as represented.

This brings us to the question of what under the evidence in this case would have been the value of the stock if it had been as represented. The evidence is: That the plaintiff up to the time he learned of the existence of the contract of Beltz, had purchased 60 shares of stock at its par value of \$50 per share. That some time thereafter Beltz brought suit against the company to collect the \$36,000 due him, out of the profits of the company under the terms of his contract, and secured judgment. This judgment was paid by the company. The payment of this sum of money to Beltz might well have made the stock of less value at the time, and if the value of the stock had been decreased by reason of Beltz being paid the \$36,000, then under the measure of damages in the rule under consideration, the plaintiff would have been entitled to damages to the extent of any depreciation in value by reason thereof, if there has been a fraudulent misrepresentation as charged. But there is no evidence before us to show by reason of the payment of the money by the company to Beltz, that the stock of the company was depreciated in value, at that or any other time.

Thus whether we apply to the facts of this case the rule of Supreme Court of Pennsylvania with respect to the measure of damages in action of deceit in the sale of stock or the other rule recognized by that court with respect to actions of deceit for fraud in the sale of other property, the plaintiff is not entitled to damages in this case for the reason that there is no evidence to show that he suffered pecuniary loss by reason of the alleged fraudulent misrepresentation.

For the reasons assigned we are of the opinion that it is our duty to instruct the jury to find a verdict for the defendants, and we so instruct them.

Verdict for defendants.

Thereupon the plaintiff made a motion for a new trial and arrest of judgment.

RICE, J., delivering the opinion of the court: In support of the motion for a new trial, counsel for the plaintiff made an oral argument and briefs in support of their contentions were filed respectively by counsel for plaintiff and defendant.

At the trial the court gave binding instructions to the jury to find in favor of the defendant, for the reason that it had not been proved that the plaintiff had suffered pecuniary loss as a natural and probable result of the defendant's alleged misrepresentation. And the court held at the time, whether the measure of damages which should obtain in this case, was the difference between what the plaintiff was induced to pay for his stock and its actual value at the time of purchase, or was the difference between what he was induced to pay and what the stock would have been worth if it had been as represented, the evidence did not show that the plaintiff had suffered pecuniary damages.

[3] After a further consideration of the facts of the case, the court are of the opinion that we probably were in error in some of the reasons given by us in holding that under the second measure of damages the plaintiff had not suffered pecuniary loss. However, we are now of the opinion that the true and reasonable measure of damages in the present case is that laid down by the Supreme Court of Pennsylvania in the two cases of *High v. Berrett*, 148 Pa. 263, 23 Atl. 1004, and *Curtis v. Buzard*, 254 Pa. 61, 98 Atl. 777, to be the difference between the real value of the stock at the time of purchase and what he was induced to pay by reason of the false misrepresentation. This appears to be the measure of damages recognized by the Supreme Court of the United States in the case of *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, and also by the English courts in the case of *Peek v. Derry*, 37 Law Reps., Chancery Division, 541.

The motion for a new trial is denied.

(11 Del. Ch. 355)

SCULLY et al. v. AUTOMOBILE FINANCE CO. et al.

(Court of Chancery of Delaware. Sept. 22, 1917.)

1. CORPORATIONS §99(2)—SALE OF STOCK—INSUFFICIENT CONSIDERATION.

An issue of common stock, which alone had voting power, by a corporation to an associated corporation composed of the organizers of the first company, in consideration of a transfer of a valueless business idea, not salable or transferable, violated the Constitution and statutes, such transaction being an actual fraud, and no pretended exercise of business judgment by directors could validate it.

2. CORPORATIONS \Rightarrow 189(5) — **ACTION BY STOCKHOLDERS—CANCELLATION OF STOCK.**

Preferred stockholders, acting for themselves and other stockholders, and not for creditors, may bring suit to cancel shares of common stock illegally issued in consideration of a valueless business idea, such action not being prohibited by Constitution or statutes, although in the case of a proceeding against delinquent stockholders by or for creditors in case of insolvency, an action at law is appropriate.

3. CORPORATIONS \Rightarrow 99(1)—**STOCK ISSUED AS FULLY PAID—CONSTITUTION AND STATUTES.**

Constitutional and statutory prohibitions respecting issue of stock, except for property, do not prohibit the issue of stock as partly paid for; such provisions meaning that stock cannot be issued as fully paid, so as to relieve the holder from liability, until the transaction has been paid for in money or other property.

4. CORPORATIONS \Rightarrow 189(13) — **ACTION BY STOCKHOLDER—CANCELLATION OF STOCK—RELIEF.**

In a preferred stockholders' suit to cancel shares of common stock issued for a valueless consideration, terms to protect and enforce all stockholders' and creditors' rights may be imposed in granting relief.

5. CORPORATIONS \Rightarrow 189(5) — **ACTION BY STOCKHOLDER—CANCELLATION OF STOCK—TIME OF ACQUIRING STOCK.**

Preferred stockholders could not be denied relief in suit to cancel common stock issued for a valueless consideration, because they acquired their stock subsequent to the unlawful issue; they being then ignorant of its unlawful character, and there being nothing to show their consent, nor conduct cutting them off from such remedy.

6. CORPORATIONS \Rightarrow 189(5) — **PREFERRED STOCKHOLDERS' RIGHTS—ISSUE OF COMMON STOCK—LEGALITY.**

Preferred stockholders have a right to question the legality of the issue of common stock, particularly where the control of the company is in the holders of common stock, who alone possess voting powers.

Bill by Charles Y. Scully and others against the Automobile Finance Company and another. Demurrers to bill overruled.

H. H. Ward, of Wilmington, for complainants. Martin E. Smith, of Wilmington, and George J. Edwards, of Philadelphia, Pa., for defendants.

THE CHANCELLOR. A demurrer has been filed by each of the two defendants to the bill. By the bill it appears that a group of men organized two corporations under the laws of Delaware, corporation A, with an authorized capital of \$400,000, one-half preferred stock with no right to vote and one-half common stock with voting power, and corporation B, with \$5,000 capital. Corporation A was organized chiefly to loan money to persons desiring to purchase automobiles, title to the cars to be taken as security for advances. The purpose was that B should be and was a holding company and A the active company. By an arrangement between the two companies A sold and transferred to B all its \$200,000 of common stock for a theory of carrying on the business of A, which idea had been used by other corpo-

rations and which had no commercial value, or indeed any appreciable value. Afterwards a contract was made by A with two of the group whereby the group undertook the sale of the preferred stock of A and were to give one share of common stock as bonus for each two shares of preferred stock sold.

The complainants each purchased shares of preferred stock of A and became owners of common stock, and are directors of company A and are not owners of stock of B. At the time of acquiring the stock they were ignorant of the transactions between the two corporations. After finding out the facts in general, the complainants, believing that the arrangement was fraudulent and illegal, appealed to the officers and directors of A to take steps to undo the wrong, and obtaining no help filed a bill against both corporations, asking, among other things, that the transfer of the shares of common stock of A to B be adjudged illegal and that they be returned to the company for cancellation.

In brief, company A sold and transferred to company B all of its common stock, which alone had voting power, for something which obviously had no value, and which was not salable or transferable, viz. a business idea which others had used and which any one could use freely, and stockholders of A who acquired their shares subsequent to the transfer being unsuccessful in moving the officers of the company to act, have taken steps to have the transfer annulled because illegal under the laws of Delaware, and done for a fraudulent purpose.

For the defendants it is urged that there was no fraud, and that the stock was lawfully held; that at most the holders of the stock were liable to pay therefor under the provisions of the General Incorporation Act, and so there was an adequate remedy at law; also that the complainants and company A were estopped to deny the legality of the organization of the company, or to seek a return of the stock; also that the complainants had no standing because they had acquired stock subsequent to the transaction, and in fact acquired some of it from company B.

[1] Beyond question there was no consideration for the shares issued to the Finance Company. The business idea was not salable or transferable, and had no commercial value, and was not property in any sense. No pretended exercise of business judgment by the directors of the selling company could give any value to that which in fact was not property or rights in and to property, or validate a transaction based on there being value in that which was the subject of the dealings. The transaction violated the Constitution and statutes of the state. In some of the other states the statutes declare void shares of stock issued under such circumstances. Such a transaction is actual fraud and the effect

is the same. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666; *Tooker v. National, etc., Co.*, 80 N. J. Eq. 305, 84 Atl. 10 (1912).

[2] The defendants say that the only remedy is to enforce payment for the shares as authorized by the statute, and that the court cannot annul this issuance thereof or compel a return thereof. If a proceeding against delinquent stockholders is for or by creditors of the company in case of insolvency an action at law is appropriate. But when it is not for creditors, but by stockholders acting for themselves and other stockholders to enforce a right of the corporation which the officers of the company will not enforce, then it may turn out that cancellation of the illegally issued shares is the appropriate remedy.

The case of *Yetter v. Delaware, etc., Co.*, 206 Pa. 485, 56 Atl. 57, cited by the defendants to show that stockholders of a corporation cannot maintain a bill such as this one, does not so hold; but on the contrary the court expressly declined to pass on that question. The right was denied because the Pennsylvania statute gave to the Attorney General the remedy to enforce a provision of the Pennsylvania Constitution and statute substantially like the Constitution and statute of Delaware. There is nothing in the Constitution or statutes of Delaware, or in the decisions of the courts of Delaware, or elsewhere, which speaking generally excludes stockholders from obtaining proper relief for the corporation, themselves and other stockholders where the prohibition of the Constitution and statutes have been violated by the issue of shares of stock for no value. On the contrary that right of the stockholders was found in *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666. On a re-examination of the general question I am convinced that the principle there stated is sound. *Brahm v. M. O. Gehl Co. et al.*, 132 Wis. 674, 112 N. W. 1097; *Cuba, etc., Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133.

[3] It is further urged by the defendants that inasmuch as the prohibitions of the Constitution and statute respecting the issue of stock except for property are in the past tense no stock can be issued until fully paid for and that the provisions of the statute respecting the liability of holders of shares not paid for (sections 20, 21 and 22) are in conflict therewith. These sections simply provide that shareholders are liable to the full extent of the par value of the shares, and that either the corporation or its creditors can enforce the liability. All that the Constitution means is that stock cannot be issued as fully paid so as to relieve the holder thereof from such liability until it has been paid for in money or other form of property. There is no prohibition against the issue of stock as partly paid for. The Constitution is violated if shares wholly or in part unpaid for are issued as fully paid for.

In administering the affairs of the Arling-

ton Hotel Company, an insolvent corporation, this court found that the Constitution had been violated and for the benefit of creditors of that company ordered the receivers of the corporation to enforce that liability. In *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666, this same court had recognized that same liability at the instance of a stockholder, though the only relief there granted on the preliminary application was the appointment of a receiver of the company in order to conserve the property and business pending the litigation.

There is no conflict between the two decisions of this court. In each the prohibition of the Constitution was enforced to suit the facts of each case, in one favoring the granting to stockholders appropriate relief as to stock issued without any value given therefor, and in the other requiring holders of stock who had not paid therefor to do so for the benefit of creditors of the company, which was then insolvent.

In the case of *Tooker v. National Sugar Refining Co.*, 80 N. J. Eq. 305, 84 Atl. 10, a decision by Vice Chancellor Stevens in 1912, and which does not appear to have been reversed, the court found that there had been a conscious overvaluation by the directors of property taken in payment for shares of stock, which was actual fraud and rendered the stock void because the statute as to what can be taken as payment for shares was thereby violated. Where creditors were concerned the shares were still liable to assessment. Being bound by decisions of the Court of Appeals of New Jersey, the Vice Chancellor felt he could not cancel the stock because the statutes of New Jersey provided a method for retiring stock, and not being sure of the propriety or justice of the other relief asked for and discussed in the opinion, the court said that it would in the decree give the holders of the unlawfully issued stock a right to vote to retire the stock in accordance with the statute. *Howard v. National Telephone Co. et al.* (C. C.) 182 Fed. 215.

[4] In the case at bar it is proper to apply the principle approved of in *Ellis v. Penn Beef Co.*, for the bill is properly brought by and for stockholders to effect a cancellation of shares issued for a business idea which was not property and was not brought by or for creditors of the company to enforce payment for the shares in order to protect creditors, there being no allegation in the bill respecting them. If it should later appear that they need protection or relief the decree could so provide. Indeed, terms to protect and enforce all rights may be imposed in granting relief to the complainants and other stockholders if they are finally found entitled to relief. Even if the validity of the organization of the company is affected by holding the issue of shares of common stock invalid, some way will be found to meet that situation. The exact form of the relief to be granted is not here material on the ques-

tion of jurisdiction and power raised by the demurrer.

[5] Are the complainants to be denied relief because they acquired their stock subsequent to the unlawful issue of stock, being then ignorant of the unlawful character thereof?

In *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666, this court held otherwise under the peculiar facts of that case. The court in *Pollitz v. Gould*, 202 N. Y. 11, 94 N. E. 1088, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912D, 1098, after stating the contrariety of decisions in other states, and considering the question as a new one in New York, sustained that right to a stockholder in the absence of special circumstances, such as the consent of the prior holder of the stock or something connected with the acquisition of stock by the complaining stockholder as would render it inequitable for him to seek relief. The court reasoned that the right to avoid an unlawful issue was in the company, and when the officers of the company refused to take action, the right was in the stockholders acting for the company and this right of action passed with the transfer of stock.

There is nothing to show that the complainants in the case at bar have as holders of shares of preferred stock consented, or because of any conduct personal to them cut themselves off from the remedy of stockholders in general.

[6] Inasmuch as there does not now appear to be ground for denying to these particular complainants the right of objection which in general such stockholders have, they should not at this time be denied a right to maintain their bill. Furthermore, the complainants as holders of preferred stock have a right to question the legality of the issue of common stock. *Howard v. National Telephone Co.*, supra. Particularly is this true in this case where the control of the company is in the holders of common stock, to which alone voting powers are given.

It is not profitable at this time to consider the effect of sustaining the bill on the legality of the organization of the company and its corporate existence, which was discussed in one of the briefs for the defendants.

On the allegations of the bill the complainants are entitled to some relief, and the demurrers will, therefore, be overruled.

Let an order be entered accordingly.

(258 Pa. 78)

MALEY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. EXECUTORS AND ADMINISTRATORS §9 — ORPHANS' COURT—JURISDICTION.

Act June 24, 1885 (P. L. 155), providing for the granting of letters of administration by the orphans' court on the estates of per-

sons presumed to be dead, does not indicate an intention on the part of the Legislature to confer on such court exclusive jurisdiction of the determination of the fact of death by reason of absence, for that question frequently arises in collateral proceedings where the object is not to distribute the estate of the absentee.

2. JUDGMENT §688—PERSONS CONCLUDED—ABSENTEE PRESUMED DEAD.

Where a railroad employé who made deposits in a savings fund named his three children as beneficiaries, or, in case they were not living, directed that the fund should be paid to his legal representatives, and two of the three children departed and were not heard from for over seven years, a judgment directing the railroad company to pay the fund to the employé's executrix, the other beneficiary having assigned her interest to the executrix, protects the company, for the rights of the absentees could be preserved in proceedings for the distribution of the decedent's estate.

3. DEATH §2(1) — PRESUMPTIONS — "ABSENCE."

A presumption of death is raised by the absence of a person from his domicile unheard from for seven years, "absence" in such connection meaning that the person is not at the place of his domicile, and that his actual residence is unknown, but removal is not sufficient, and disappearance from his domicile and from the knowledge of those with whom he would naturally communicate is necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Absence.]

4. DEATH §2(1)—PRESUMPTION—ABSENCE.

Where an absentee's possible destination was known when he left, reasonable search should be made at the place where he was last known to live before a presumption of death can arise by reason of seven years' absence unheard from.

5. DEATH §4—EVIDENCE—FINDING.

In an action by the executrix of a railroad employé to recover deposits made in an employé's savings fund by the decedent, where it appeared that one of the three beneficiaries had assigned her interest to the executrix, evidence held to warrant a finding that the other two beneficiaries who had been absent unheard from for over seven years had died.

Appeal from Court of Common Pleas, Bradford County.

Action by Margaret Maley, executrix of the last will and testament of Martin Maley, deceased, against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES- TREZAT, POTTER, FRAZER, and WAL- LING, JJ.

Benjamin Kuykendall, of Towanda, and Guy H. Davies, of Harrisburg, for appellant. T. S. Hickok and James W. Burke, both of Canton, for appellee.

FRAZER, J. Martin Maley died in 1913, leaving a will in which, after giving certain specific legacies, he left his residuary estate to his wife, plaintiff in this proceeding, and appointed her executrix. Deceased had been an employé of the Pennsylvania Railroad Company, the defendant, and had, since 1893, made deposits in the employé's saving fund of the company, and, at the time of his

death, there was standing to his credit in that fund the sum of \$1,774.25, the subject-matter of this litigation. In his application for membership deceased provided that, in event of his death, the amount due him should be paid to his three children, Jerry, Daniel, and Mary, or, in case they were not living, to his legal representatives. The regulations governing payment of the saving fund provided that:

"Upon the presentation to the superintendent of the fund of satisfactory proof of the death of a depositor, the money belonging to him shall be paid only to the beneficiary designated, in accordance with these regulations, to receive the same; or, if the beneficiary so designated shall not be then living, said fund shall be paid either to the heirs or legal representatives of the deceased depositor, as the board, or superintendent, may determine."

Daniel and Jerry Maley left home shortly after the father became a depositor to this fund, and have not since been heard from. After the death of Martin Maley, Mary assigned her interest in the fund to her mother, the executrix, who then brought this action to recover the entire fund as the personal representative of decedent, basing her claim to the shares of Jerry and Daniel on the presumption of their death, arising from absence unheard of for a period of 21 and 18 years, respectively, at the time of bringing this action. The court below left to the jury the question whether the absent sons were dead, and a verdict for plaintiff was rendered on which the court, after discharging rules for a new trial and judgment non obstante veredicto, entered judgment, and defendant appealed.

[1] The second assignment of error questions the jurisdiction of the court of common pleas to adjudicate the fact of the death of the two sons. Defendant contends that exclusive jurisdiction of this question is vested in the orphans' court, and that an application should first have been made to that court by plaintiff for letters of administration on the estates of the absentees, in accordance with the provision of the act of June 24, 1885 (P. L. 155). Previous to the passage of this act the practice of the register of wills had been to grant letters of administration on the estates of persons presumed to be dead because of seven years' absence, on the production of sufficient evidence before him. In the case of *Devlin v. Commonwealth*, to Use, 101 Pa. 273, 47 Am. Rep. 710, this court held the grant of letters of administration by the register in such case to be absolutely void if afterwards the absent person was found to be alive. The act of June 24, 1885 (P. L. 155), followed, apparently for the purpose of establishing a uniform practice conclusive upon all parties. The act begins by providing that:

"Whenever, hereafter, letters of administration, on the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicile within this commonwealth, shall be applied for, it shall

be the duty of the register of wills, to whom the application shall be made, to certify the same forthwith to the orphans' court of the county."

Other sections designated the procedure to be taken by the orphans' court, the publication of notice, the evidence which may be offered at the hearing, the giving of a refunding bond for the recovery of property distributed, with power in the court to revoke the letters upon it being made to appear that the supposed decedent is in fact alive, also providing that all acts done by the administrator to the time of revocation of the letters shall remain as valid as if the letters were unrevoked, subject to the right of recovery of the property from the distributees. This act provides a complete system for distribution of estates of supposed decedents, with a view to protect and safeguard the rights of all parties concerned. We find nothing in the act, however, indicating an intention on the part of the Legislature to confer upon the orphans' court exclusive jurisdiction of the determination of the fact of death by reason of absence. This question may, and frequently does, arise in collateral proceedings where the object is not to distribute the estate of the absentee, and where the court has complete jurisdiction of the subject-matter, as in the present case. In such cases no necessity exists for taking out letters of administration on the estates of the absentees, and no adequate reason appears for holding that a court of competent jurisdiction should delay matters pending before it for the purpose of awaiting an application for appointment of an administrator by the orphans' court, merely to determine whether or not certain facts warrant a presumption of death of the absentee, who may in fact have no estate to administer, at least so far as the pending proceeding in the common pleas is concerned. True there is nothing in the act of 1885 to indicate a prerequisite to taking jurisdiction by the orphans' court is ownership of property by the supposed decedent within the state of Pennsylvania, or elsewhere. The conditions, so far as the provisions of the act are concerned, are that the application for letters shall be made by the proper person, and evidence produced sufficient to satisfy the court that the presumption of death has arisen. The act, however, contains no indication of an attempt upon the part of the Legislature to confer on the orphans' court exclusive jurisdiction and to take from the common pleas jurisdiction to determine all questions of fact arising in a proceeding pending before that court, and over which its jurisdiction is undoubted, and jurisdiction of the subject-matter carries with it jurisdiction to decide every incidental question necessarily involved. *Wilhelm's Appeal*, 79 Pa. 120, 141. The court is not asked to administer the estate of a person presumed to be dead, nor would this be the direct or indirect effect of judgment

rendered in the proceeding. Under a verdict for defendant the fund in question must remain in its hands until claimed by the absent owners, or until an administration of their estate is duly made by proceedings brought under the act of 1885.

The courts have frequently, since the passage of the act of 1885, assumed jurisdiction to pass on the question of presumption of death without the formality of applying for letters of administration pursuant to that act. For instance, in *Re Petition of Mutual Benefit Co. of Penna. for Dissolution*, *Schoneman's Appeal*, 174 Pa. 1, 34 Atl. 283, 52 Am. St. Rep. 814, the common pleas decided the question in a proceeding to distribute the estate of a mutual benefit association. In *Francis v. Francis & Beale*, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668, proof of death of an absentee was received in the common pleas in an issue *devisavit vel non* on the will of another person, the court not deeming it necessary to await a determination of the death of the absentee under the provisions of the act of 1885. In *Baker v. Fidelity Title & Trust Co.*, 55 Pa. Super. Ct. 15, the question was raised in a bill in equity for partition and an account of rents. In that case the court said (page 21):

"The act of June 24, 1885, relates to the granting of letters of administration on the estate of persons presumed to be dead by reason of long absence from their former domicile. It provides a mode of administration of such property as would come into the hands of an administrator, but the proceeding now under consideration is not for the collection or conservation or administration of Baker's estate; it is a proceeding to partition his estate, and that which the appellee is demanding is her property, and never was a part of the estate of Baker. It came into being after he died. When the presumption of death arose, the rights of his widow took effect, and as no appeal is taken from the decree in partition by the widow or the heir, it does not appear that the interests of the appellant are in any wise prejudiced. The contention that it may hereafter be discovered that Frank Baker is alive is one which might be made with propriety after an accounting when the money is to be paid over, but until that time the accountant incurs no risk and is not subjected to any prejudice. The action is not against the estate of the missing husband, but against the heir at law for the settlement of a property right, and is in its general features a proceeding in rem as to which the jurisdiction of the court is unquestioned."

A verdict and judgment for plaintiff does not amount to a distribution of the estate of the absentees, for the reason that, when the fact of their death, before that of deceased testator, is established, the fund does not pass to plaintiff through them, but passes directly to the personal representative of deceased under the agreement for disposition of the benefit fund, and also as part of the estate of the deceased father. The presumption of death from absence is as effective as direct proof of the fact of death, the rule being that property such person would have inherited does not vest in him, but passes directly to others entitled

thereto. *Esterly's Appeal*, 109 Pa. 222. In that case it was held, where a son was, by reason of absence, presumed to be dead, the share of his father's estate he would have inherited went directly to the grandchildren, and not through the son, and, therefore, creditors of the latter were without right to participate in a distribution of the estate. In the opinion the court says (page 231):

"If it now appeared, by positive and direct proof, that Joseph H. Gery had, in fact, died on the day he disappeared, it certainly cannot be doubted that we would distribute this fund, so held in trust and awaiting adjudication, to those upon whom the estate devolved; and as the presumption of death after the lapse of seven years is as effective as direct proof of the fact, we cannot see how any doubt can exist as to the parties entitled here."

Under this authority, the shares of the sons passed directly to the executrix who represents the estate of decedent, and through her to those entitled. Consequently this action is in no sense one against the estates of the missing sons, requiring the raising of administration thereon, and the court below properly sustained its jurisdiction to determine the questions raised.

[2] Defendant cannot be injured by a judgment in favor of the plaintiff for the amount in its hands. It admits the amount is due, and merely desires to be protected in making payment to the proper person. This protection is fully given by the judgment of the court in the present proceeding. In *Devlin v. Commonwealth, to Use*, 101 Pa. 273, this court held a voluntary payment to the administrator, appointed on the estate of a person on the strength of the presumption of death before the act of 1885, was not a defense to a subsequent action by the supposed decedent, but said (page 278 of 101 Pa., 47 Am. Rep. 710):

"Had John F. Devlin been compelled, by a court of competent jurisdiction, to have paid to the administrator the money in controversy, his case would have been very different."

In *Miller et al. v. Beates et al.*, 3 Serg. & R. 490, 8 Am. Dec. 658, it was said in answer to a similar contention (page 494):

"As to the injury which might arise to John G. Schlosser, by this presumption, in case he should be alive, I think it ought not be regarded. He would have his action against those to whom the money will be paid; and although he might lose by their insolvency, yet that would not be a greater evil than would arise from the establishment of a principle that the life of a man ought to be presumed, under circumstances which usually attend death, merely because positive proof of death could not be obtained. I am bound to mention, in justice to the defendants, in this cause, that they have no wish to reap any benefit from the detention of the money in question. Their object is safety; they are willing to pay to the persons who are authorized by law to receive; and, considering the circumstances of the case, I think they were prudent in withholding the money, till the plaintiffs established their right by legal adjudication."

The question as to the amount and sufficiency of the security that should be required to be entered by the distributees en-

titled to the fund is not before us, and may properly be considered when the account of the administratrix comes before the court for distribution.

[3-5] The remaining question is whether the evidence is sufficient to warrant the jury in finding the fact of death of the two sons. Jerry Maley left home in 1894 when under 20 years of age. Daniel Maley left in 1897, when about the same age. They lived at home with their father in the small village of Grover, containing about 150 inhabitants. The fact of their leaving was, without doubt, generally known in the community, especially as their father had been a resident there for many years, and the family was well known. After the departure of the sons the father continued to reside in Grover until his death in 1913. During the period of 20 years which elapsed since the departure of the eldest son no word was received from either of them, or reason shown for their going away, or their possible destination, except the testimony of a witness, who employed Jerry, to the effect that the latter indicated an intention of "going West." The father at one time stated to a witness that if Jerry were alive he thought he was on the sea. Defendant contends that something more than the mere fact of the boys not returning home or writing their father was necessary to give rise to the presumption of death, and that an effort to locate the absentees must appear. Just what form such inquiry should take, in view of the facts of this case, we are unable to comprehend. There was nothing to indicate to the father the possible destination of his sons; had such fact been known to him reasonable search should be required to be made at the place where the boys were last known to live. As matters stood, however, the last-known residence was the home of their father, and the proof of their absence unheard of from that place for a long period of years was without contradiction. In fact their presence, or even news of them, in a small community would soon become a matter of common knowledge; consequently the making of specific search or inquiry would be a needless proceeding. The presumption of death from several years' absence is founded on the English Statute of 19 Car. II, c. 6 (3 Eng. Stat. 313), which provides:

"That any person or persons, for whose lives estates are granted, absent themselves for seven years together, and no evident proof be made of their being living, in any action commenced by the lessors or reversioners for recovery of the premises shall be counted as dead."

In *Miller et al. v. Beates et al.*, supra, the supposed decedent went abroad, and when last heard from was in France, and contemplated taking passage to America. Unsuccessful inquiry was made in France concerning him. The court said (page 493 of 8 Serg. & R., 8 Am. Dec. 658):

"Although a person who has gone from Philadelphia to France may be presumed to be living, although he be not heard of for several years, because such things commonly happen; yet when many years have elapsed without hearing from him, and no circumstance is shown by which this may be reasonably accounted for, it is so contrary to general experience that he should be living that the jury may, and ought to, presume his death. For, in such cases, what is to be done? The jury must find the fact one way or the other. They are not to give a verdict by caprice, but upon principle. Therefore, when a man's being alive is inconsistent with the other fact proved in the cause, according to general experience, it ought to be presumed that he is not alive. I find it laid down in 2 Peake's Law of Evid. 356, that where one has not been heard of for many years, this is prima facie evidence to presume his death without issue, until the contrary be proved. This appears to me to be quite reasonable. 'Many years' is an indefinite expression. I am not for fixing, at present, any precise period, after which a presumption of death arises. But I think myself safe in saying that, in the present instance, considering that 14 years and 9 months had elapsed between John G. Schlosser's being last heard of and the commencement of this action; that when last heard of, he was at a place between which and the city of Philadelphia there was a free communication, and it was then his intent to return * * * to Philadelphia; his being now in life, would be contrary to the usual course of things; that the jury might, and ought to, presume his death, and if the case were to come to another trial, the court would so direct them."

It was also further said (page 495 of 8 Serg. & R., 8 Am. St. Rep. 658):

"If he has not been heard of for many years, this in every case is prima facie evidence, sufficient to presume his death without issue, until the contrary is proved."

The question as to the evidence required to raise the presumption of death was again discussed in *Innis et al. v. Campbell*, 1 Rawle, 373, 375, as follows:

"A person, proved to have been alive at a particular time is presumed to be so still; and the onus of proof is on him who alleges the contrary. But in addition to lapse of time, proof that he has not been heard of for 7 years is sufficient to rebut the presumption of life; and, was it shown that Mrs. Wallace had not been heard of for that period, there would clearly be sufficient to warrant a presumption of her death. 2 Stark, Ev. 458. But the question is whether the lapse of 24 years, without proof of inquiry, or other circumstance, be not of itself, sufficient to warrant such a presumption; and, although I know of no authority in point, I am of opinion that it is."

In the case of *Francis v. Francis & Beale*, 180 Pa. 644, 646, 37 Atl. 120, 57 Am. St. Rep. 668, the supposed deceased had gone with others to settle in Patagonia, and was a member of that colony when last heard from. The contention was that a presumption of his death existed, as no word had been received from him for a period of over 7 years. The trial judge affirmed a point that "the presumption of death arising from the absence of the person for 7 years unheard from stands as competent and satisfactory proof until it is successfully rebutted by competent evidence to the contrary," with the qualification that if a party left his home "without saying where he was go-

ing, or if he had left his home on a business trip or a pleasure trip, and nothing had been heard of him for a period of 7 years, then the presumption would arise that he was dead. But if he went away for the purpose of establishing a permanent home somewhere else, and he was known to be alive there, then the presumption would not arise until he would be absent from that home and unheard of there." The jury found the absentee was alive, and this court affirmed the judgment, saying the instruction to the jury was correct, and that:

"A presumption of death is raised by the absence of a person from his domicile unheard of for 7 years. Absence in this connection means that a person is not at the place of his domicile and that his actual residence is unknown. It is for this reason that his existence is doubtful, and that after 7 years of such absence his death is presumed. But removal alone is not enough. The further fact that he has disappeared from his domicile and from the knowledge of those with whom he would naturally communicate, so that his whereabouts have been unknown for 7 years or upwards, is necessary in order to raise the presumption."

Had the sons in this case announced their destination upon departing, or had knowledge of their destination been subsequently acquired, from which it appeared the two boys left home with the intention of establishing their permanent residence at another place, absence from such place unheard of for a period of 7 years would become necessary to raise the presumption of death. But under the circumstances of their departure, and in view of their failure to communicate with their father, with whom they would naturally be expected to impart information, to prove their destination was unknown, and that they had not been heard from for the period of time which had elapsed, was sufficient to raise a presumption of death, and must stand as proof until rebutted by evidence to the contrary.

The judgment is affirmed.

(257 Pa. 589)

CHEW et al. v. CITY OF PHILADELPHIA
et al.

(Supreme Court of Pennsylvania. April 30, 1917.)

1. MUNICIPAL CORPORATIONS §1000(1) —
PUBLIC IMPROVEMENTS — INJUNCTION —
LACHES.

A city will not be enjoined from carrying out a contract for extensive municipal improvements on the ground that the contract increased the municipality's indebtedness beyond its borrowing capacity, where the bill was not filed until part of the money had been actually raised, and a loan of the balance had been arranged, and where a large part of it had been actually expended.

2. MUNICIPAL CORPORATIONS §1000(1) —
TAXPAYERS' BILL—LACHES.

The rule of laches applies to either a taxpayers' or to property owners' bill to enjoin a municipality from carrying out a contract involving a public improvement about to be constructed without legal authority.

3. INJUNCTION §37—PUBLIC IMPROVEMENTS —
JURISDICTION.

The chancery powers of the courts of the county of Philadelphia to enjoin the erection or use of public works is materially modified by Act April 8, 1846 (P. L. 272), prohibiting the exercise of such power until the questions of title and damages are finally decided by a common-law court.

4. RAILROADS §99(7)—ABOLITION OF GRADE
CROSSINGS—NECESSITY AND EXTENT OF TAK-
ING.

Where a city and several railroads, acting under Act March 17, 1869 (P. L. 12), and Act June 9, 1874 (P. L. 282), entered into a contract for the appropriation of land for yards to relocate the railroads, to elevate their tracks so as to abolish grade crossings and to unite the railroad tracks and provide sites for municipal piers and docks and other extensive improvements to meet present and future needs, a court will not interfere with the judgment of the contracting parties as to the necessity and extent of taking property, without strong and conclusive evidence that the taking was arbitrary, and not for legitimate railroad purposes.

Appeal from Court of Common Pleas, Philadelphia County.

Bill for injunction by Mary J. B. Chew and others against the City of Philadelphia and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAILING, JJ.

Francis B. Bracken and Samuel B. Scott, both of Philadelphia, for appellants. John P. Connolly, City Sol., Joseph G. Magee and Ernest Lowengrund, Asst. City Sols., and Gill & Linn, Graham & Glifflin, Francis I. Gowen, and John G. Johnson, all of Philadelphia, for appellees.

MOSCHZISKER, J. The bill in this case was filed by seven individuals and one corporation, as property owners and taxpayers for themselves and such others as might become parties thereto. Before hearing the Greenwich Terminal Company, a corporation, having acquired the real estate of all the original complainants, asked and received permission to intervene as an additional plaintiff, "for the protection of its interests in the premises," being certain tracts of land in the southern section of the city of Philadelphia, condemned for freightyard purposes, as hereinafter more particularly set forth. The other parties remained upon the record, however, as taxpayers; the last-named corporation not having asked to intervene in that capacity. Suit was commenced May 22, 1916. Plaintiffs did not press for a preliminary injunction, and the case came to trial September 26, 1916. On November 6, 1916, the chancellor filed his findings of fact and conclusions of law, with a decree nisi. December 14, 1916, exceptions thereto were disposed of and the bill dismissed upon, inter alia, the ground of laches. Plaintiffs have appealed.

To indicate the material contentions insisted upon by the appellants, it is necessary to note only the following averments and prayers of their bill: Briefly stated, the plaintiffs allege that, in pursuance of an ordinance of the city council, dated February 14, 1914, a contract authorized therein was executed on March 23, 1914, between the city of Philadelphia and the several railroad companies named with it as codefendants; that this contract is illegal and void: First, because the city is therein obligated to expend approximately \$10,000,000, which at the date of the ordinance, constituted an increase in the municipal debt beyond the then legal borrowing capacity; and, next, because no sufficient prior appropriation was made to meet the obligations thereby incurred; finally, that the lands which the railroads intend to take for freightyards, in carrying out the plans contemplated by the ordinance, are greatly in excess of their needs "both at present and for many years to come," such lands embracing properties of the complainants, which the latter desire to retain for industrial uses. They pray: (1) That the ordinance and contract be declared void; (2) that the city and the railroads be enjoined from spending any money or otherwise proceeding thereunder; (3) that the railroads be especially restrained from "taking any lands under condemnation proceedings, in pursuance of said illegal ordinance or contract."

On this appeal the plaintiffs state the following questions involved: (1) Did the contract and ordinance under consideration impose such a liability upon the city as to increase its debt within the meaning of the Constitution? (2) "Was an appropriation by councils to cover the liability of the city under the contract essential to its validity?" (3) "When a railroad company proposes to condemn land under its power of eminent domain, is the owner precluded from having a judicial inquiry whether or not the taking is arbitrary, or for legitimate railroad purposes?" (4) Should the plaintiffs' bill have been "dismissed on the ground of laches"?

As said by the learned court below:

"The project for the improvement of the southern section of Philadelphia involved in this litigation is the most considerable single development in the city's history."

And its purposes are well set forth in the following excerpt from a paragraph of the city's answer, which was in no wise impeded at trial:

"The abolition of railroad crossings at grade in that section has engaged the attention of the municipal authorities and the public for many years. * * * Wide publicity was given to the plans, and, through the newspaper press and otherwise, the attention of the entire community was invited thereto. The method thought best adapted to the advancement and upbuilding of that locality, as finally evolved, was embodied in this ordinance. * * * It has in view three principal objects: First, the abolition of the grade crossings which have held back the

growth of the lower portion of the city ever since they have existed, * * * to be accomplished by elevating most of the railroad trackage traversing that section, and incorporating into one system * * * south of the traveled territory all the remaining tracks, so eliminating existing grade crossings to the number of 53, together with 73 other grade crossings which would result from the opening of streets under the plan, being a total of 126 such surface crossings, or substantially all of them; * * * second, location of well-situated sites for great municipal piers and docks, to be built at such points as to enable their use to enhance the city's commercial and port resources, * * * to be effected by taking over from the Pennsylvania Railroad Company and its associates a part of their properties, * * * and from the Baltimore and Ohio Railroad Company and its associates their pier [locating it], * * * placing the piers of the railroad companies at the southeastern extremity of the city, and providing adequate storage, yardage, and shifting area in lieu of that taken by the city; * * * third, the unifying and improving of the belt line railroad in the southwestern and southern part of the city, and its operation in conjunction with the tracks of the various railroad companies in that locality, * * * together with provision for the joint use upon equitable terms not only of the belt line tracks, but also of those of the other railroads, by any additional railroads which may in the future seek entrance into the city."

These plans, as incorporated in the ordinance and contract now before us, were duly submitted to the Pennsylvania State Utilities Commission and approved by that body, before the present proceedings were commenced.

[1, 2] As to the first question involved, the injunction was not applied for until the expiration of two years and three months from the date of the ordinance. At that time \$2,000,000 had been actually raised, appropriated, and a large part of it spent by the city; and a loan for the balance of the estimated cost to the municipality of all the improvements outlined in the ordinance, amounting to \$8,940,120, had been authorized by councils and approved by the people at a special election. Thus it may be seen that the funds required by the city had been either actually appropriated or specially dedicated to the purposes of the contract and ordinance before the municipality's right to borrow the money was questioned in this action. Moreover, the legality of these loans has never been attacked either directly or indirectly in any other proceeding; that is to say, while the plaintiffs dallied, the city proceeded to raise the necessary funds, and a substantial part of the money had actually been spent, in accordance with the terms of the ordinance, before the present proceeding was instituted.

The city controller gave testimony tending to show that at the date of the ordinance the municipality had a margin of legal credit, or borrowing capacity, beyond the estimated cost to it of the improvements in question; but the chancellor refused certain other testimony offered by plaintiffs to prove that the controller had not taken into account some items of charge which, if allowed to

figure, would reduce this margin to such an extent as to preclude the floating of loans sufficient for the purposes of the present ordinance and contract. It is not necessary, and we shall not go into the question of the propriety of the chancellor's finding to the effect that the municipal credit was more than adequate to cover the full amount of the estimate, or of the correctness of his ruling in refusing the testimony offered to supplement the evidence given by the controller; for, after delaying their complaint till all the money had been either actually or in effect raised by the city, the plaintiffs cannot be heard to say that the contract and ordinance under consideration was invalid because of an alleged insufficient borrowing capacity. To permit such belated, collateral attacks upon the validity of duly authorized municipal loans would prove highly prejudicial to the public interests.

Under the circumstances at bar, the second question stated for our consideration by the appellants, as to the necessity of prior appropriations by councils sufficient to meet the full amount of the estimated cost of the contract to the city, is no more controlling of the present case than the one mentioned above. As already indicated, the agreement between the municipality and the railroads is very comprehensive in character, and thereunder, perhaps, the former may in the end be found to have assumed obligations to a total of \$10,940,120, according to the estimate of the proper city authorities (*Schuldice v. Pittsburgh*, 251 Pa. 28, 33, 95 Atl. 938); only \$1,000,000 of this amount being appropriated in the ordinance now under attack. The ordinance in question is carefully drawn to avoid legal pitfalls, particularly the prohibition of the third section of the act of June 11, 1879 (P. L. 130), relied upon by appellants, which calls for previous appropriations whenever municipal contracts requiring the expenditure of money are made. The plaintiffs contend that the present case falls within this act; while the defendants claim otherwise. The court below decided, however, that the agreement did not impose an immediate obligation upon the city to the extent of the total estimated expenditures which the latter eventually might make thereunder, but that, according to its terms, the obligations of the municipality, beyond the \$1,000,000 presently appropriated, would arise only from time to time, as other appropriations were actually made to carry on the work and perfect the purchases referred to in the ordinance.

After outlining in great detail the work to be done, the properties to be acquired, and the proportionate cost thereof to be borne by the city and railroads respectively, the ordinance provides that the entire improvement shall be completed within five years, but that, in event of delay by "the city in making sufficient appropriations," this time limit shall be extended. It also provides:

That the work "shall be divided into sections; * * * that one or more sections shall be executed at a time, as and when appropriations therefor shall be made by the city;" that the railroads "shall not be required to undertake and contribute to the cost of any section of the work unless the city shall have first appropriated a sum sufficient to meet its share of the estimated cost of such section"; finally, that "the acquisition of property and the work of construction * * * authorized in this ordinance shall be carried on, from time to time, as councils shall provide the necessary funds, and the railroad companies shall provide their proportion of the cost whenever they shall be notified to do so by ordinance of councils: * * * Provided, that every contract for public improvements authorized by this ordinance shall contain a clause that it is subject to the provisions of the act of June 1, 1885 (P. L. 37), and the liability of the city thereunder shall be limited by the amounts which shall have been or may be from time to time appropriated for the same."

Much may be said both for and against the view of the court below, that this ordinance represents a mere program of improvements laid out and agreed to between the municipality and the railroads, to be executed in convenient blocks, or sections, when and as appropriations may at its option be made by the former to cover the city's proportion of the cost of the particular section about to be undertaken, and that obligations in the nature of indebtedness would arise thereunder only from time to time, when and as the city thus committed itself to a particular section of the improvement by making an appropriation to cover its proportion of the cost thereof; but, owing to the laches of the complainants, we do not feel called upon to determine this point. Here the plaintiffs waited for more than two years before filing their bill, and in the meantime vast sums of money had been raised and spent under the ordinance; so that to stop the undertaking at this time would work a great public evil. It may be noted that the present appeal was not made a supersedeas, and hence the improvement has now been in course of completion for about three years.

The original plaintiffs sued as taxpayers, as well as property owners; but, as previously stated, they subsequently disposed of their property holdings to the intervening plaintiff, and now appear simply as taxpayers. Counsel for the appellants well says, "The bill might, perhaps, have been objected to on the ground of multifariousness;" since it endeavors to have determined at one and the same time the separate rights of taxpayers and property owners. While we shall not stop to discuss the matter, yet, in passing, we note it is apparent that the bill was filed to protect the particular, individual property rights of the plaintiffs, rather than their general rights as taxpayers. The rule of laches applies, however, from whichever point the proceedings may be viewed, whether as a taxpayers' or property owners' bill; and, when the facts call for its application, the rule may control even in a case where

there is involved a public improvement constructed without lawful authority (which we do not hold to be the fact in the present case). *Becker v. Lebanon & Myerstown St. Ry. Co.*, 188 Pa. 484, 493, 496, 41 Atl. 612; *Keeling v. Pittsburgh, Va. & Charleston Ry. Co.*, 205 Pa. 31, 34, 54 Atl. 485; *Condron v. Penna. R. R. Co.*, 233 Pa. 197, 82 Atl. 64.

[3] Moreover, the power to issue injunctions in cases such as the one before us is much restricted by the act of April 8, 1846 (P. L. 272), entitled, "An act relating to the chancery powers of courts in the city and county of Philadelphia," which provides:

"That no courts within the city and county of Philadelphia shall exercise the powers of a court of chancery, in granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an act of the Legislature, until the questions of title and damages shall be submitted, and finally decided by a common-law court."

This act was discussed, sustained, and applied in *Wolbert v. Philadelphia*, 49 Pa. 439 (property owner's bill), *Wheeler v. Philadelphia*, 77 Pa. 338, 344, and *Wheeler v. Rice*, 83 Pa. 232, Id., 4 Brewst. 129 (taxpayers' bills). Also see opinion by Sharswood, J., in *Flanagan v. Philadelphia*, 8 Phila. 110, 111, and by Paxson, J., in *Philadelphia & Reading R. R. Co. v. Philadelphia*, 8 Phila. 284.

[4] We have already sufficiently disposed of the last of the four questions stated by the appellants for our consideration, and the only one remaining is the third, which involves the right of the defendant railroads to condemn certain lands for freightyard purposes. The agreement incorporated in the ordinance provides that two of the railroads are to surrender and the city is to purchase the former's present yards, when the latter makes appropriations sufficient for that purpose, these properties to be used for and in connection with new and much-needed public docks and piers to be constructed and maintained by the city. It also provides that lands for yard facilities equal to those abandoned by these railroads shall be taken up by them in a designated section on the line of the improvement, the cost thereof to be borne equally by the city and the corporations in question, but any additional real estate needed for yard purposes to be paid for solely by the latter. The map prepared by the city and introduced in evidence by plaintiffs shows two large tracts of land, one marked "Space required for Pennsylvania Railroad terminal yard," and the other, immediately south thereof, designated "Space required for Baltimore & Ohio Railroad terminal yard." These are the tracts owned by the plaintiffs. It is plain from this last-mentioned piece of evidence, and other proofs in the case, that the railroads and the city agreed between themselves that the condemnation of this land for railroad yards was a necessary and essential part of the general improvement contemplated by the ordinance.

While, in their statement of the third "question involved," the appellants set forth a broad, general subject for our consideration, yet, when the record covering this branch of the case is looked at critically, as it must be in a matter of such grave public importance, it will be seen that the real points thereby presented are: (1) Under the circumstances at bar, do the railroads possess a legal right to condemn any of the lands here in controversy? (2) If so, then can they lawfully take therefrom an acreage greater than required for their present needs? The prayer of the bill is:

"That said defendant railroads, and each of them, be restrained * * * from taking any lands under condemnation proceedings, in pursuance of said illegal ordinance or contract."

When the case came to trial, however, the plaintiffs seem to have assumed the position that the corporations which were required to surrender their present freightyards might lawfully condemn other lands to take the place of those given up, but only such as are necessary for their "actual needs"; further, that it was the province and duty of the chancellor to determine whether the railroads were about to "take and condemn [for freightyard purposes] any of the plaintiff's said lands arbitrarily and without regard to their [the railroads'] actual needs." The court below held that, the city and railroad authorities having acted in the matter, it would not overrule their judgment.

At trial there was no real effort to go into the question of the future freightyard requirements of any of the defendant companies. A witness was placed upon the stand by plaintiffs, and the following tender of evidence was made:

"If it please the court, the * * * railroad company, as is conceded in this proceeding, proposes to condemn for railroad purposes some 200 and odd acres of land indicated on this map [being the map previously referred to in this opinion]. I offer to prove by this witness the extent of its [the railroad's] business now being carried on, * * * as a step in the proof that the taking of this approximate mile of river front in lieu of the front to be abandoned, * * * is an arbitrary taking, and in no wise necessary for railroad purposes in connection with the present plan of abolishing grades in South Philadelphia or otherwise."

The overruling of this offer forms the basis of the principal assignment of error in support of the "question involved" now under consideration.

It will be noticed that the offer just quoted was to show the business "now being carried on," and, although this was stated to be "a step in the proof," yet there was no other proposal, either then or afterwards, to show that the lands about to be appropriated were not essential to meet the future requirements of the railroads. It is well established that, in cases of this character, "a liberal consideration for future as well as existing necessities" is the test. *Pittsburgh Junction R. R. Co.'s Appeal*, 122 Pa. 511, 530, 6 Atl.

564, 9 Am. St. Rep. 128; Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Peet, 152 Pa. 488, 494, 25 Atl. 612, 19 L. R. A. 467. Moreover, this contract was expressly entered into under and by virtue of authority granted by the act of June 9, 1874 (P. L. 282), which provides that the proper municipal authorities are empowered to make contracts with railroad companies whose lines run within the limits of their cities, "whereby the said companies may relocate, change or elevate their railroads within said limits * * * in such manner as in the judgment of such authorities * * * may be best adapted to secure the safety of lives and property, and promote the interests of said city," and "for that purpose the city authorities shall have power to do all such acts as may be necessary and proper to effectually carry out such contracts." This act has been liberally construed whenever before the courts. Western Penna. R. R. Co.'s Appeal, 90 Pa. 155, 162-163; Bryner v. Youghiogheny Bridge Co., 190 Pa. 617, 627, 42 Atl. 1100. Also see the opinion of that eminent jurist the late Judge Hare in Duncan v. Penna. R. R. Co., 7 Wkly. Notes Cas. 551, 554. And in conjunction with the act of March 17, 1869 (P. L. 12), conferring the right of eminent domain upon railroads "to straighten, widen, deepen, enlarge and otherwise improve" their lines (Wilson v. Pittsburgh & Lake Erie R. R. Co., 222 Pa. 541, 544-545, 72 Atl. 235), the legislation in question not only affords support to the contract here in controversy, but confers such broad powers upon municipal and railroad authorities that it would take strong and conclusive evidence to justify a court's interference, to any degree, with their combined judgment, exercised thereunder, when dealing with the matter of yard or other facilities required to meet present and future needs created by a general scheme for railroad relocation, elevation, and improvement of the magnitude of the one at bar. The record under review shows no evidence, either produced, offered, or suggested to warrant such interference in this case.

When the subject in hand was under discussion at trial, the learned chancellor well remarked that, so far as the city of Philadelphia and the railroads are concerned, "this is an improvement for the next century, or two centuries to come"; and, since the appellants assert their lands to be the only ones in the locality in question available and suitable for freightyard purposes, if this assertion be true, and the general scheme of relocation is to prove a permanent success, it may readily be seen how necessary it was for the city and railroads to look far into the future, in planning for and providing yard facilities.

Plaintiffs, of course, have a full and ample remedy at law to recover damages suffered by them as property owners; but, on the

assignments now before us, we are not convinced either of reversible trial error or that the court below would have been warranted in granting any part of the relief prayed for in the bill.

The decree is affirmed at the cost of appellants.

(288 Pa. 18)

McKENNA v. VERNON.

(Supreme Court of Pennsylvania. May 7, 1917.)

CONTRACTS §290 — BUILDING CONTRACT — CONDITIONS AS TO PAYMENT.

Where the provision in a building contract that payments should be made only on certificate of the architect had been repeatedly disregarded, and the architect was satisfied with the work, deviations having been made at his direction, a verdict for the contractor for a balance due was warranted, the owner having almost daily supervised the work, and made no complaint as to the deviations, and hence the court properly refused to enter judgment for defendant notwithstanding the verdict.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Bernard J. McKenna, trading as John McKenna & Son, against William J. Vernon. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES- TREZAT, STEWART, FRAZER, and WAL- LING, JJ.

Stanley W. Root, of Philadelphia, for appellant. Harry S. Mesirov and James J. Breen, both of Philadelphia, for appellee.

STEWART, J. This was an action to recover a balance alleged to be due on a building contract. By written agreement under date of January 20, 1914, the plaintiff undertook the erection and completion of a moving picture theater at 1528-28 Cumberland street in the city of Philadelphia, agreeably to certain plans and specifications which accompanied and were made part of the agreement, he to receive therefor, in full compensation, the sum of \$7,750, to be paid by the owner to the contractor wholly upon certificates of the architect as follows: Eighty per cent. of the work set in place as the work proceeds, the first payment within 30 days after the completion of the work; all payments to be due when certificates of the same shall have been issued by the architect; the building to be completed by April 20, 1914, and the work to be done under the direction of the architect. A supplemental agreement was entered into by the parties March 24, 1914, which provided for an enlargement of the theater building, for which the contractor was to receive an additional \$1,000. The main provisions of this agreement were similar to those contained in the earlier. By the later agreement the work was to be completed on or before the 11th of May, 1914. From time

to time, as the work progressed, the owner made several payments on account, amounting in all to \$6,000. Suit was brought, August 28, 1914, to recover the balance of \$2,750, with interest from June 30, 1914. Defense was made on several grounds: Failure of contractor to erect and complete the building in accordance with the plans and specifications, the substituting of inferior and cheaper materials, and inferior workmanship throughout, entailing, for the supply and correction of the same, if attempted, a large expenditure. Further, defendant claimed that the building was not completed within the time allowed by the contract, and demanded as a set-off a penalty of \$283.35. The trial resulted in a verdict for the plaintiff for \$2,500. At the conclusion of the evidence, the defendant asked for a compulsory nonsuit, which was refused.

The several assignments of error, in one form and another, relate directly or indirectly to this one feature of the case, and are all based on the theory that, in the absence of a certificate from the architect of the final completion of the building in accordance with plans and specifications, no right of action existed. Not only is there no express provision to this effect in the contract, but the contract itself shows that no distinction is there made between final payment and the payments on account of the 80 per cent. of work in place. All payments were to be made only on certificate of the architect, and yet with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for. With such constant and repeated disregard on the part of the owner to exact compliance with this provision in the contract, it is too late now for him to insist that failure on the part of the plaintiff to secure such certificate before suit defeats his right of action. Furthermore, on the trial, the architect, called as a witness, testified that the plaintiff had performed substantial compliance with all the requirements of the contract, that he had not given the certificate to this effect only because it had not been asked for, and that whatever variations there were from the specifications were authorized and directed by him. The provision in the contract for written certificates from the architect is for the benefit and protection of the owner. If he waived it repeatedly, as he did here, during the progress of the work, he cannot complain if he be held to have waived it when he seeks to defend against a final payment for work shown to have been honestly and substantially performed, especially when almost daily he has had the work under his own observation, without remonstrance or complaint at any time with respect to either the work done or materials employed. This being the situation, the court was entirely right in refusing the nonsuit.

For like reason, there was no error in refusing to give binding instructions for the defendant. If the court was right in these rulings, the other assignments of error necessarily fall.

The judgment is affirmed.

(258 Pa. 11)

In re MANIATAKIS' ESTATE.

(Supreme Court of Pennsylvania. April 30, 1917.)

1. LIMITATION OF ACTIONS \S 150(1)—RUNNING OF STATUTE—ACKNOWLEDGMENT.

A clear, distinct, and unequivocal acknowledgment of a debt as an existing obligation, such as is consistent with a promise to pay, is sufficient to toll the statute of limitations; but there must be no uncertainty, either in the acknowledgment or in the identification of the debt, and a mere expression of willingness or desire to pay is insufficient.

2. LIMITATION OF ACTIONS \S 157(1)—TOLLING OF STATUTE—PAYMENT.

Payment on account of a debt will stop the running of limitations.

3. LIMITATION OF ACTIONS \S 157(1)—PAYMENT—TENDER.

A tender of payment on account of a debt, though not accepted by the creditor, is a sufficient acknowledgment by the debtor to toll the statute of limitations; hence, where decedent, within the period of limitation, on the creditor's demand, tendered a small payment, which was refused, such tender stopped the running of limitations.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Andros Maniatakis, deceased. From a decree awarding the entire fund in the hands of the executor to George P. Calogera, on account of a claim against a partnership of which deceased had been a member, James Pappas and others appeal. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

Saul Schein, of Pittsburgh, for appellants. W. D. N. Rogers and O. S. Richardson, both of Pittsburgh, for appellee.

FRAZER, J. This appeal is by legatees under the will of Andros Maniatakis from the decree of the orphans' court, awarding the entire fund in the hands of the executor to George P. Calogera, on account of a claim of the latter against a partnership of which deceased had been a member. There was no dispute as to the amount of the claim, \$5,411.27, or at least that the amount was sufficient to cover the entire balance for distribution, and the only question involved is whether there was sufficient evidence of acknowledgment of the debt and promise to pay to toll the statute of limitations.

In 1908, and previous thereto, decedent was a partner with one Carooglanis in the retail grocery business in Pittsburgh, and claimant a wholesale grocer in New York,

from whom the partnership purchased merchandise. An account remained unpaid which amounted to the claim presented, and further credit was refused. In November, 1909, claimant visited Pittsburgh to either collect or secure payment of the indebtedness. The firm, however, being unable to pay at the time, by agreement of the parties the account was placed for collection in the hands of John Andrews, a mutual friend. In an interview with the partners in December, 1909, Andrews informed them of having received orders from Calogera to close their store, but preferred not to do so, whereupon payment of part of the claim "after Christmas" was promised. No payment was made, though frequent assurances were given, and later the firm property was seized and sold by the landlord under a distress for rent. All demands by Andrews for payment were met with substantially the same response—that the debtors were willing to pay, but were without funds to do so. In the summer of 1911, deceased, having acquired a half interest in another business, informed Andrews he owed for the purchase of his interest, and as soon as that indebtedness was paid he would make payments on the Calogera account, "maybe half share, or maybe the full amount." Later deceased disposed of this interest in the business referred to, but made no payment to Andrews. The last interview took place three weeks before decedent was removed to the hospital, which was shortly before his death. The date of this interview does not clearly appear, but, according to the testimony of Andrews, it was not earlier than 1912. Another witness fixed the time as in 1914. The account was audited in September, 1916; consequently the exact date is immaterial, since the conversation was had at least within the statutory period. Andrews testified that at this interview decedent tendered him \$50 in part payment of the indebtedness, which amount he refused to accept on account of a debt of over \$5,000, saying, "Keep it to buy stamps." His version of the conversation was given as follows, on cross-examination:

"He offered me \$50, and I said, 'Andy, think for me, you got what you got the last time;' and so he offered me \$50, and as soon as he got the money [from the man who bought his interest] to give me some more, and I said, 'You keep it.' I was ripping mad. I don't want to lose my temper. I said, 'You better buy stamps; I don't think Calogera needs that.' * * * I said, 'After you owe \$5,000, you give me \$50 to send it.' Q. He denied that? A. No; he said, 'As soon as I get the money I send it.'"

This testimony was corroborated by two witnesses. One testified to the offer of \$50 and the refusal of Andrews to receive that amount, for the reason the payment was too small, considering the amount of the account. He admitted, however, not having actually seen the money. The other witness testified to having seen decedent take—

"out of his pocket two \$20 bills and one \$10 bill and give to Andrews, and he says, 'Why did

you give me that money, mercy—for five thousand dollars, you try to give me fifty dollars.' Q. What else did he say? A. Then I left him there, because I had to go to work. I don't know what they done afterwards. What I hear is that 'You take this \$50, and later on I give you some more.' * * * Q. And you saw that there were two \$20 bills and one \$10 bill? A. He take a roll of money out of his pocket, and I saw he was trying to give him two \$20 and one \$10."

[1, 2] A clear, distinct, and unequivocal acknowledgment of a debt as an existing obligation, such as is consistent with a promise to pay, is sufficient to toll the statute. *Palmer v. Gillespie*, 95 Pa. 340, 40 Am. Rep. 657; *Wells v. Wilson*, 140 Pa. 645, 21 Atl. 445. There must, however, be no uncertainty, either in the acknowledgment or in the identification of the debt (*Landis v. Roth*, 109 Pa. 621, 1 Atl. 49, 58 Am. Rep. 747); and the acknowledgment must be plainly referable to the very debt upon which the action is based (*Burr v. Burr*, 26 Pa. 284; *Clark v. Maguire*, 35 Pa. 259), and also must be consistent with a promise to pay on demand and not accompanied by other expressions indicating a mere willingness to pay at a future time (*Keener v. Zartman*, 144 Pa. 179, 22 Atl. 889). A mere declaration of an intention to discharge an obligation is not the equivalent of a promise to pay, but is more in the nature of a desire to do so, from which there is no implication of a promise.

"To be consistent with a promise to pay the debt, the acknowledgment must be such as indicates an intention to pay the debt existing at the time of the acknowledgment. The time of payment need not be immediate, but the intention to pay must be present. Hence any language inconsistent with this present intention must be inconsistent with a new promise. * * * An acknowledgment is less in force than a promise, and hence the necessity of scrutinizing closely the extent of meaning the language of the acknowledgment has." *Senseman et al. v. Hershman & Houser*, 82 Pa. 83, 85.

In *Miller v. Baschore*, 83 Pa. 356, 24 Am. Rep. 187, a letter from the debtor to the creditor, acknowledging the existence of the debt, but not stating the amount and concluding with a promise after other persons to whom the debtor owed money were paid, as follows:

"I will pay you all I owe you, and if I can do anything for you before that time I will do so; you need not trouble yourself about me that I will not pay you, for I expect to pay all I owe"

—was held to be insufficient to toll the statute for the reason, as stated:

"There is nothing specific or definite, for it is not stated what note is referred to, neither is the amount of the balance indicated; * * * the defendant promises to pay a balance of a note, but neither note nor balance is stated; he promises to pay what he owes, but whether that is much or little we are not informed; there is, in fact, neither the required certainty nor perspicuity in the evidence produced to break down the defense."

In the present case the various promises made by deceased to pay when able seem in-

sufficient to remove the bar of the statute under the rules of law established by the cases above referred to. There is no doubt, however, as to the identification of the debt itself. There was but one account between the parties, and the amount had been determined upon, and was not any time denied or disputed in their various conversations. To establish an acknowledgment of the debt or promise to pay, claimant relies upon what took place at the last interview between Andrews and deceased, and offers as a substitute for payment, or part payment, the tender of \$50, on account of the debt, the amount of which was specifically referred to by the parties in the interview. A payment on account of the debt is sufficient recognition of the indebtedness to toll the statute.

"There can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it, and, according to all the authorities, that is all that is required to take a case out of the statute of limitations. But then it must plainly appear, and not be a matter of conjecture merely, that the payment was made on account of the very debt which is in dispute." *Barclay's Appeal*, 64 Pa. 69.

In *Tyers v. Kuhn*, 52 Pa. Super. Ct. 24, 28, the above language was quoted, and that court held a payment of \$50, accompanied by a letter in which defendant said:

"I do not know of my own knowledge what I owe you, but I have no doubt you have it correct. * * * I'll send you some from time to time as I can until it is paid"

—was sufficient to toll the statute, where a statement of the balance had been previously sent by defendant to plaintiff, and there was evidence of no other debt to which the payment could be applied.

[3] In our case the tender of payment on account was not in fact accepted by the creditor, and the question arises whether such tender is equivalent to payment, in so far as evidence of acknowledgment of the existence of the debt is concerned. Ordinarily a tender of money does not operate as a satisfaction of the debt, or a part of it, as the case may be, and does not bar an action thereon. 88 Cyc. 162. But to the extent of a recognition or acknowledgment of the existence of an indebtedness it is unconditional, and where there is a tender of a part of the debt only, accompanied by a distinct acknowledgment of the existence of the remainder, we see no reason in principle for holding its effect as admission must depend upon whether or not the amount tendered was actually accepted by the creditor.

As a rule the refusal of a tender is founded on different grounds from those on which the partial payment was declined in this case, and, consequently, gives rise to the question as to whether the tender was sufficient, and should have been accepted by the party to whom made. The refusal of an offer of payment on account for the reason appearing

here is unusual, and such refusal, for the reason stated can have no effect on the legal question involved in the transaction. As an acknowledgment of the debt the tender must be given the same effect as if payment had been accepted by the creditor.

Counsel for appellants relies upon *Huff v. Richardson*, 19 Pa. 388, as authority for their contention that an unaccepted tender is not sufficient acknowledgment of the debt to toll the statute. In that case the decision was based on an insufficient acknowledgment of the amount of the balance due, in that the promise to pay the balance was without basis from which the amount of the debt was ascertainable. True the court stated (page 390):

"Equally vague and unsatisfactory was the evidence of acknowledgment derived from the defendant's offering the plaintiff a horse on account, which did not suit the plaintiff. Part payment of a debt is acknowledgment; but the offer of a horse, not accepted, is not."

This language does not necessarily indicate that an offer to pay a debt in part, whether in cash or in property, is not a sufficient acknowledgment of the indebtedness. It merely signifies that an offer of property, not accepted, is not a valid tender, and is consistent with the general rule of law that payment on a contract cannot be made other than in money, unless the creditor consents thereto or acquiesces therein. 80 Cyc. 1187. In the case cited, instead of there being a consent to the tender of payment, the creditor expressly dissented, stating, "The horse did not suit him." It is, therefore, not authority for the proposition that a legal tender of cash on account of a recognized claim is insufficient, under any circumstances, to show such acknowledgment of the existence of the debt as will toll the statute.

The judgment is affirmed.

(258 Pa. 57)

BURGESS AND TOWN COUNCIL OF CHAMBERSBURG BOROUGH v. CHAMBERSBURG & G. ELECTRIC RY. CO.
(Supreme Court of Pennsylvania. May 7, 1917.)

1. STREET RAILROADS §38—DUTY OF STREET RAILROAD COMPANY—CARE OF STREETS.

A street railway company is under the common-law duty to keep the portions of a street occupied by its right of way in good condition and repair.

2. STREET RAILROADS §38 — REPAIR OF STREETS—DUTY OF REPLACEMENT.

While a street railway, under its common-law duty to repair portions of street occupied by its right of way, need not tear up a sound pavement of antiquated style and replace it with a different and better one, yet if necessity for repair arises after an improved pavement has been laid in the remainder of the street by the city, the city may require the company to replace the antiquated pavement with a new and improved one.

3. STREET RAILROADS §24(10)—FRANCHISE—CONSTRUCTION.

A municipal ordinance granting a city railway the right to maintain tracks in a public street, being a grant of a special privilege in

derogation of the right of the public to the full and unobstructed use of the street, must be construed against the grantee and in favor of the public, and no privileges or exemptions will be deemed to have passed, unless given in clear and explicit terms.

4. SPECIFIC PERFORMANCE ⇐74—CONTRACTS—ENFORCEMENT.

A court of equity may decree specific performance of a contract between a street railway company and a municipality, whereby the company was to keep a portion of the streets occupied by its right of way in proper repair.

5. SPECIFIC PERFORMANCE ⇐74—PAVING STREETS—PERFORMANCE OF CONTRACT.

An ordinance granting the defendant street railway company the right to use the streets as a right of way provided that it should be required at the time of the construction of the railway to pave the streets between its tracks and for a distance of 24 inches outside of each rail with material or pavement similar to that now in use or which may in the future be used or adopted by the municipality, and keep and maintain the same in good condition, so that driving on, off, or across the tracks should be safe. At the time of construction of the road the municipality's streets were macadamized, and defendant macadamized the streets between its tracks. Thereafter the municipality ordered repaving of certain streets with vitrified brick, and defendant thereupon paved its portion of such streets with the same material. Subsequently the municipality ordered the paving of other streets with vitrified brick, and notified defendant to pave its portion. Defendant refused, on account of its financial condition. *Held* that, as the streets were in need of construction and repair, specific performance of the contract was properly directed.

Appeal from Court of Common Pleas, Franklin County.

Suit by the Burgess and Town Council of the Borough of Chambersburg against the Chambersburg & Gettysburg Electric Railway Company. From a decree directing specific performance of a contract, the defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Walter K. Sharpe, O. C. Bowers, and Irvin C. Elder, all of Chambersburg, for appellant. Charles Walter, Borough Sol., and Arthur W. Gillan, both of Chambersburg, for appellee.

FRAZER, J. Defendant appeals from a decree of the court of common pleas, directing specific performance of a contract by it to pave certain streets in the borough of Chambersburg, between and adjoining its tracks, with material similar to that used by the borough in paving the remainder of the highway. The validity of the decree depends upon the construction of section 3 of an ordinance of the municipality, adopted June 23, 1902, granting to defendant the right to construct and operate a street railway upon a number of the streets of the borough, subject to the conditions and restrictions therein mentioned. The section referred to provides, *inter alia*, that:

"The said company shall be required, at the time of construction of said railway, between

its tracks and for a distance of twenty-four inches outside of each rail, to pave with material or pavements similar to that now in use, or which may in the future be used or adopted by said borough, and keep and maintain the same in good condition, so that driving on, off or across said track or tracks shall be safe and not inconvenient, and be constructed so as not to impede travel."

Section 17 of the ordinance provides that:

In case of violation of any of its provisions by the street railway company "the borough reserves the right to terminate and cease all rights and privileges granted."

The facts are not in dispute. They were found by the court below, and were not excepted to. At the time defendant constructed its road, the streets of the borough were macadamized; and defendant accordingly macadamized the space between and along its tracks, and maintained that part in substantially the same condition as the borough maintained the remaining portion of the street. In 1913 an ordinance was adopted providing for the repaving, with vitrified brick, of certain streets of the borough, including several on which defendant's tracks were laid, whereupon defendant proceeded to repave its portion of each street with the same material, in accordance with plaintiff's construction of section 3 of the ordinance of 1902. In 1916 a second ordinance was adopted, providing for the paving of other streets with vitrified brick, which streets the court finds were "in need of reconstruction and repair." Defendant, however, on receiving notice to pave its portion of the highways to be improved, addressed a letter to the borough council, stating its inability to comply with the provisions of the ordinance, owing to "the present financial condition" of the company. The borough thereupon instituted the present proceeding in equity, asking that defendant be required to pave between and along its tracks, in accordance with the provisions of the ordinance granting it the right to use the streets of the municipality. Defendant contends that, having paved its part of the street with the kind of material then used by the borough at the time its tracks were laid, and having maintained such paving in good condition, its whole duty in the matter was performed, and no further obligation rests upon it to repave with a different material.

[1, 2] Aside from the question of contractual obligation, defendant was under a common-law duty to keep the portions of the street occupied by its right of way in good condition and repair. *Reading v. United Traction Co.*, 202 Pa. 571, 52 Atl. 106; *Reading v. United Traction Co.*, 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380. In the former case it is held the railway company's duty to repair involves something more than the mere preservation of the condition in which the street was found when first occupied by it. In that case the court below, in an opin-

ion adopted by this court, in quoting from *Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co. of Philadelphia*, 169 Pa. 269, 33 Atl. 126, said (202 Pa. 574, 52 Atl. 106):

"The duty to repair, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind. The company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."

And further, referring to *Elliott on Roads and Streets*, pp. 594, 595:

"The doctrine is laid down as the one deducible from the authorities, that a railway company, in respect to the condition of its right of way upon the streets of a city, is bound to repair but not to improve, but that the duty of making repairs requires them to be made in such manner and with such materials as will correspond with the general condition of the street at the time the repairs are needed; so that, whilst the company is not compellable to tear up a sound pavement of antiquated style and replace it with a different and better one, yet if a necessity for repairing the pavement within the right of way arises after an improved pavement has been laid in the remainder of the street by the city, the latter may require the company reasonably to confirm [conform] with such improved pavement. And it is pertinently observed [202 Pa. at p. 574, 52 Atl. 106]: 'If it be true that the company is not bound under the continuing duty to make repairs to correspond with the improved or changed condition of the street, then the practical result would be that it would be entirely released from its duty, since it is quite clear that repairs of any other character would be without value or service to the public.'"

The common-law duty on the part of street railways is referred to because of its bearing on the intention of the parties in their dealings with each other in the present case. The argument of defendant that it is bound to keep in repair only macadam pavement, regardless of the character of the remainder of the street, practically amounts to a contention that the company's liability is limited to an extent less than its common-law duty, and that no higher obligation than that claimed is imposed upon it by the ordinance in question. The word "future," as used in the ordinance, is unlimited as to time, unless the natural meaning of the word is restricted by other provisions of the ordinance. Although the words "at the time of construction of said railway" may tend to indicate a limitation of the word "future," yet to so confine its meaning practically disregards the clause concerning the similarity of pavement "which may in the future be used or adopted." The words requiring paving "at the time of construction" of the railway are not rendered nugatory by giving the word "future" its natural meaning, as they may readily be construed as a wise precaution to prevent the company from delaying its part of the work, so important to the public, for an unreasonable time beyond the period allowed for construction of the road, and thus render "driving on, off or across said tracks" inconvenient and unsafe. The ordinance required the entire work to be complete and in operation within eight months from date of

defendant's acceptance of its provisions in writing, which was to be made within ten days from its passage. It is not reasonable to suppose a provision requiring the company to pave with material similar to that which may in the future be used or accepted by the borough was inserted merely for the purpose of covering possible changes in the short time elapsing between the date of the passage of the ordinance and the actual construction of the work.

As a further indication of the intent of the borough in granting the franchise, section 15 of the ordinance provides that:

"Nothing contained in this ordinance shall be taken or construed to limit or restrict the borough of Chambersburg in making and enforcing in the future any additional regulations, respecting the construction, maintenance or operation of the said company's railway within the limits of the said borough, and the said borough reserves the right to require, by ordinance or resolution of its council, the adoption and enforcement of such regulations, at any time hereafter, and removing and replacing of the rails, tracks, ties, poles, cables, wires or other appliances, at any time located or erected by the said company, within the said borough, whenever, within the judgment of said council, the public interests shall require it."

[3-5] The ordinance in question is a grant of a special privilege affecting the general public interests, and in derogation of the right of the public to the full and unobstructed use of the streets. Its provisions must therefore be construed strictly against the grantee and liberally in favor of the public, and no privileges or exemptions will be deemed to have passed unless given in clear and explicit terms. 19 Cyc. 1459; 28 Cyc. 883. Tested by these principles, the conclusion reached by the court below is correct. The ordinance contemplated the use or adoption of a different method of paving, consistent with the growth of the municipality, and the need incident to increased traffic in the future generally, and did not limit that term to the period fixed for completing the work.

This construction of the contract is further supported by the acts of the parties. Under the earlier ordinance, defendant, pursuant to notice from the borough repaved the portion of the street within its control and supervision. With the contract and this construction of its provisions before them, the ordinance of 1916 was passed, and, upon defendant receiving notice to repave under the later ordinance, it declined to comply with the request solely on the ground of its "present financial condition." While defendant at this time offers an excuse for not having desired to enter into a controversy with the borough at the time the earlier ordinance was adopted, the weight to be given such reason was properly for the consideration of the court below. We see no valid reason for changing the conclusion reached in the court below.

The jurisdiction of the court to specifically enforce a contract of this kind, in lieu of leaving the borough to its remedy by doing

the work and suing at law for the cost, is amply supported by the case of Patton Township v. Monongahela St. Ry. Co., 226 Pa. 372, 75 Atl. 589.

The decree of the lower court is affirmed.

(253 Pa. 45)

PENNSYLVANIA CENTRAL BREWING CO. v. ANTHRACITE BEER CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION.

Where defendant's conduct is calculated to pass off his goods as those of another, he is guilty of actionable unfair competition, and his freedom from fraudulent intent is no defense.

2. TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION.

A dealer, coming into a field already occupied by a rival of established reputation, must do nothing which will unnecessarily create or increase confusion between his goods and those of his rival.

3. TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION — WHAT CONSTITUTES.

Regardless of trade-mark, a manufacturer has no right to so dress his goods as to deceive purchasers or dealers into the belief that they are the goods of another.

4. TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION—INJUNCTION.

Plaintiff, whose brewing business had been established for 40 years, distinctively marked its beer containers by a red band at one end and a blue band at the other, while chimes and a ring adjoining on each end were also painted in colors like the band. Defendant, who had been engaged in the manufacture and sale of beer in a small way for 15 years, and had previously marked its barrels with yellow bands, repainted its containers in all respects practically like the containers of plaintiff, so that the casual observer would mistake the one for the other. As a result, plaintiff was caused inconvenience and delay in collecting its kegs, and plaintiff's customers, who could not read English, were unable to distinguish plaintiff's containers from those of defendant. *Held* that, though defendant disclaimed any fraudulent intent in repainting its barrels like plaintiff's, and alleged that it did so because its customers objected to yellow, and it had a quantity of red paint in stock, defendant was properly enjoined from continuing to paint its containers in such a manner as to deceive plaintiff's trade.

Appeal from Court of Common Pleas, Lackawanna County.

Suit by the Pennsylvania Central Brewing Company against the Anthracite Beer Company. From a decree awarding an injunction, defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

R. W. Archbald, John B. Jordan, and David J. Reedy, all of Scranton, for appellant. M. J. Martin and H. A. Knapp, both of Scranton, for appellee.

WALLING, J. The bill was filed to restrain alleged unfair trade competition. The E. Robinson's Sons Brewery, for the manu-

facture of lager beer, was established at Scranton in 1870, and has continued in the business to this time. In 1897 it became, and since has been, a branch of the plaintiff corporation. Its product has always been sold in containers, to wit, barrels and kegs, of the customary sizes, which for over 40 years have been distinctively marked by a red band painted around each container between the first and second hoops at one end and a blue band similarly painted at the other. The chimes and a ring adjoining on each end were also painted in colors like the bands. For many years the Robinson brewery has done and is doing an increasing business in Lackawanna county, where its beer is regarded as of a superior quality and is largely known among dealers and consumers by the marking on the barrels and kegs as above mentioned. There are many other breweries in the county, each of which has its containers marked by bands, rings, etc., painted thereon, but as a rule not so as to conflict with the markings used by any other brewery. In all cases the name of the owner is branded on the heads of the barrels and kegs.

The Anthracite Beer Company, defendant, is also located in the same county, where it has been engaged in the manufacture and sale of beer in a comparatively small way for over 15 years. Prior to the summer of 1916 its containers were marked by painted bands, etc., in which yellow was a prominent color; but then its barrels and kegs were repainted, in color, form, and manner, in all respects practically like those of the plaintiff, so that the casual observer would mistake the one for the other. As both parties were doing business in the same locality and, in many instances, with the same retail dealers, it at once resulted in confusion from which plaintiff suffered inconvenience and damage. While the beer of each was largely sold on credit, it was sometimes sold for cash, when the similarity of markings would naturally cause plaintiff damage because of its larger business and the greater reputation of its product. It caused inconvenience to retail dealers, who handled both, because of the liability to tap the wrong keg in the dimly lighted cellars. It caused trouble and delay to plaintiff in the collection of its empty kegs in such cellars and elsewhere. It caused dissatisfaction to consumers, especially those unable to read English, and who recognized plaintiff's product by the markings on the kegs. Prior to the defendant's change of markings in 1916, no beer kegs in that county had been marked like plaintiff's, except the Bartels Company, doing an inconsiderable business, had used the red and blue bands, but without the end markings. Defendant's officers, while persisting in such imitation and insisting on the right to continue the same, disclaimed any

fraudulent intent and gave as reasons for adopting colors, etc., similar to those of plaintiff, that they had the red paint in stock, that blue was a more staple color than yellow, and that there was some sentimental prejudice among certain customers against the last named color; also that their red and blue were of a shade different from plaintiff's. The reasons, however, are not convincing. The court below found the facts in favor of plaintiff, and enjoined defendant from such imitation, from which we have this appeal.

[1-4] In our opinion the principle here involved is one of unfair trade competition. As the result of 40 years' business plaintiff's product was so well known and highly regarded as to be in general demand, and recognized in part by the distinctively marked containers. In the minds of many customers, the peculiarly marked kegs of red and blue naturally suggested the Robinson beer, and the use of kegs so marked by defendant, whose product was comparatively unknown, naturally worked to its advantage and to plaintiff's loss. It is not a case of a trade-mark, technically so called, but of unfair competition, in which defendant, by imitating plaintiff's containers, secures to some extent the benefit of the high standing of plaintiff's product. The similarity of the containers is such as to naturally cause some customers to buy the Anthracite beer under the belief that they were getting the Robinson beer; and also to enable retailers, who handle both, to substitute the one for the other. True, the evidence shows that as a general rule the kegs are kept in the retailer's cellar, where they are not seen by the customer at the time of his purchase; nevertheless it affords some opportunity for deception. The imitation here would seem to be likely to deceive the ordinary customer, and, if so, it should be enjoined. *Heinz v. Lutz*, 146 Pa. 592, 23 Atl. 314; *Juan F. Portuondo Cigar Manufacturing Co. v. Vicente Portuondo Cigar Manufacturing Co.*, 222 Pa. 116, 70 Atl. 968. It need not be a literal copy. "The test is whether the label or mark is calculated to deceive the public, and lead them to suppose they are purchasing an article manufactured by a person other than the one offering it for sale." *Scranton Stove Works v. Clark et al.*, 255 Pa. 23, 99 Atl. 170. See, also, *Pratt's Appeal*, 117 Pa. 401, 11 Atl. 878, 2 Am. St. Rep. 676. "And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public, so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition." 38 Cyc. 756. If the effect be to injure plaintiff, the fact that defendant had no fraudulent intent is no defense. *Suburban Press v. Philadelphia Suburban Publishing Co.*, 227 Pa. 148, 75 Atl.

1037; *Amer. Clay Mfg. Co. v. Amer. Clay Mfg. Co. of N. J.*, 198 Pa. 189, 47 Atl. 936; *E. T. Fraim Lock Co. v. Shimer*, 43 Pa. Super. Ct. 221. "A dealer, coming into a field already occupied by a rival of established reputation, must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival." 38 Cyc. 794. Irrespective of the question of trade-mark, a manufacturer has no right to inclose his product in packages so like those of a rival manufacturer as to deceive a purchaser, or to enable a dealer to do so. See *Holeproof Hosiery Co. v. Wallach Brothers* (C. C.) 167 Fed. 373; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Anheuser-Busch Brewing Ass'n v. Clarke* (C. C.) 26 Fed. 410.

In view of the authorities above referred to, and many more of like import, we are clearly satisfied that this case was rightly decided by the court below. It was not necessary for defendant to imitate plaintiff's containers; and the fact that the Bartles Company, which did a nominal business in the territory, had red and blue bands on its kegs, was no justification for defendant. The painting on plaintiff's containers, when considered in its entirety, constituted such a distinctive marking as defendant had no right to imitate.

The assignments of error are overruled, and the decree is affirmed, at the cost of appellant.

(258 Pa. 93)

WEINSCHENK v. PHILADELPHIA HOME-MADE BREAD CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. MASTER AND SERVANT §278(12)—ACTION FOR INJURY—UNGUARDED ELEVATOR—SUFFICIENCY OF EVIDENCE.

In an action for damages for the death of plaintiff's husband, killed by fall down an elevator shaft in the bakery where he was employed, brought on the ground of an unsafe condition of the premises at the time of the accident, evidence held to sustain a verdict for plaintiff.

2. MASTER AND SERVANT §288(2)—PERSONAL INJURY—ASSUMPTION OF RISK.

If the employer was negligent in permitting an unsafe condition of the premises, it could not be said as a matter of law that the employé assumed the risks thereof, where the condition was constantly subject to change, and where the danger, though always present, was not always imminent.

3. MASTER AND SERVANT §270(3)—ACTION FOR INJURY—EVIDENCE—ORDINANCE.

In such case, the admission of an ordinance regulating or relating to the maintenance of freight elevators, offered, not to take away any defense, but merely to prove negligence, was not error, where the trial court instructed that proof of the violation of such ordinance was not proof of the negligence charged, and that it should be considered merely as evidence tending to show defendant's negligence.

4. MASTER AND SERVANT §258(11)—ACTION FOR INJURY—NEGLIGENCE—PLEADING AND PROOF.

In such case, where the negligence relied upon was not the maintenance of an improper and unsafe instrument, but the unsafe condition of the premises at the time of the accident, it was not necessary for plaintiff to plead or prove that the elevator was more dangerous than those of the kind generally used.

5. DEATH §99(4)—EXCESSIVE DAMAGES.

A verdict of \$5,616 for the death of a bakery employé, 45 years of age and in good health, and who left a widow and six children, was not excessive.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Sophie K. Weinschenk against the Philadelphia Home-Made Bread Company to recover damages for the death of her husband. Verdict for plaintiff for \$5,616, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

William H. Peace, of Philadelphia, for appellant. Ruby R. Vale and J. Edgar Wilkinson, both of Philadelphia, for appellee.

MOSCHZISKER, J. The plaintiff's husband died as a result of injuries received while engaged in the service of the defendant company; the wife sued, alleging negligence, and recovered a verdict upon which judgment was entered. The defendant has appealed.

[1] Frank P. Weinschenk was employed as a dough mixer in defendant's bread bakery, where he had worked for about eight years prior to January 22, 1912, the date of the accident which caused his death; his duties were performed at night, and the fatality occurred between 4:30 and 5 a. m.; the room wherein he labored is a large apartment on the second floor of his employer's establishment, about 80 feet long and 45 feet wide; a freight elevator, which ran from the first to the third story, was located in the northwest corner of this room; on the floor in question, the elevator shaft was solidly inclosed on three sides, and it could be entered only when approaching from the east; on the latter side were two gates, one a solid wooden structure, extending from floor to ceiling, operated on rollers, which, when pushed aside by hand, exposed a slat gate, or guard, about five feet high, that moved vertically by pulleys and weights, and which, at the time of the accident, also had to be operated by hand; on the third floor a like guard worked automatically, so that, when the elevator either ascended or descended, this gate became locked in place, effectually barring an entrance into the shaft; originally the gate on the second floor was operated in the same manner, but it had become out of order to such an extent that it could be

worked only by hand; it remained in this defective condition for at least one year prior to January 22, 1912, and possibly longer, although, "a couple of months before the accident," the president of the defendant company had been notified by an employé that, if the defect were not remedied, somebody would probably fall down the shaft; "right after the accident" this gate was found up, and "the floor close to the elevator" was then seen to be "smeary" and "slippery"; there was also other testimony to the effect that this floor was often in a "very slippery" condition, "especially around the elevator"; the plaintiff's husband was obliged to use the elevator from time to time, in the course of his usual employment; he worked at a dough-mixing machine, located on the north side of this second-floor room, about 40 feet east of the shaft, with a post between him and it; the room was illuminated by gaslights, with "ordinary plain little burners," one being on this post, but on the side farthest from the shaft; two other lights were in front and one in the rear of the mixing machine; the testimony seems to indicate additional gas burners on the second floor, but, so far as we can understand the situation, these were located on the south side of the shaft, and ordinarily were not used; there was no artificial light in the shaft itself, and, while the plaintiff probably had sufficient light to observe the location of this inclosure, yet the strong indications are that, at nighttime, under the surrounding conditions, a person on the second floor would have difficulty in seeing whether or not the car, which was just an ordinary platform without sides, was actually in place; the elevator had no special attendant, and was operated from time to time by any one who had occasion to use it; on the evening prior to his injury, plaintiff's husband, who was then a man in good health, about 45 years of age, left home in a "happy and jolly" state of mind; he went to his customary place of employment, and was there last seen just before the accident; 15 minutes later he was found in an unconscious condition, lying on the elevator platform, which was then at the level of the first floor; his skull was crushed, and he was otherwise badly injured; beside him was a can of milk and a box of yeast, the latter of which he may have been carrying; he was taken to a hospital, and two days thereafter died as a result of his injuries; so far as the evidence shows, the last person to use the elevator prior to the accident was one Jacobs, the defendant's engineer.

The man just referred to testified for the defendant that he saw Weinschenk fall down the elevator shaft under circumstances which, if believed, convicted the latter of clear contributory negligence; but Thomas McCormick, a witness called on behalf of

plaintiff, in rebuttal, testified that Jacobs, from the spot where he was standing, could not have seen Weinschenk fall, and the court below left the question of the credibility of these witnesses to the jury, saying as to Jacobs, "If you believe him, * * * your verdict should be for the defendant." After this, however, the trial judge pointedly referred to the value of cross-examination, and strongly intimated that he entertained a grave doubt concerning the veracity of the witness in question, ending his instructions by the statement:

"I do not pass any opinion as to the truth or falsity of his testimony; it is for you, and you only. I speak of these matters that I may help you, if I can, to reach a righteous and proper verdict."

We must assume, from the verdict rendered, that the jury did not give credence to the testimony depended upon by defendant, but accepted the theory of the plaintiff that the accident happened as a result of the combined negligence of the former and its engineer, Jacobs. True, according to this theory, there was no eyewitness to the accident; but that situation is present in many cases where verdicts for the plaintiff have been affirmed, among others Philadelphia & Reading R. R. Co. v. Huber et al., 128 Pa. 63, 18 Atl. 334, 5 L. R. A. 439; Henderson v. Continental Refining Co., 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668; Millum v. Lehigh & Wilkes-Barre Coal Co., 225 Pa. 214, 73 Atl. 1106; Tucker v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 227 Pa. 66, 75 Atl. 991; McManamon v. Hanover Twp., 232 Pa. 439, 81 Atl. 440; Madden v. Lehigh Valley R. R. Co., 236 Pa. 104, 84 Atl. 672; Dannals v. Sylvania Twp., 255 Pa. 156, 99 Atl. 475.

If Jacobs left the gates on the second floor open, when he moved the elevator from that level, just prior to Weinschenk's fall, then we have a case of the former's carelessness combined with the negligence of defendant in maintaining a dangerous and unsafe condition at the point of the accident; and such a combination would not defeat plaintiff's right of recovery. *Siever v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 252 Pa. 1, 97 Atl. 116; *Kaiser v. Flaccus*, 138 Pa. 332, 22 Atl. 88; *Wallace v. Henderson*, 211 Pa. 142, 146, 60 Atl. 574; *Deserant v. Cerillos Coal R. R. Co.*, 178 U. S. 409, 420, 20 Sup. Ct. 987, 44 L. Ed. 1127.

[2] Moreover, if defendant was negligent in maintaining the condition just referred to, since the situation thus created was constantly subject to change, and the dangers, while ever present, were not always imminent, it could not be said as a matter of law that plaintiff's husband assumed the risks thereof. *Valjago v. Carnegie Steel Co.*, 226 Pa. 514, 519, 75 Atl. 728.

Beach v. Hyman, 254 Pa. 131, 98 Atl. 962, is largely depended upon by appellant. As that case was tried, it appears that the surrounding conditions presented no special ele-

ments of danger; further, that the elevator shaft there in question was equipped with what, so far as the evidence showed, were proper gates; and in point of fact there were no contentions to the contrary. Under these circumstances we held that, since no knowledge or notice had been brought home to the defendants that the particular gate which caused the accident had, in fact, been carelessly suffered to remain open, negligence upon the part of the latter was not shown. In the present instance, however, there was evidence from which the jury could find that due care in the maintenance of the elevator gate had not been observed by the defendant, and that, under the surrounding conditions, such negligence was a concurring cause of the accident; thus the two cases are distinguished.

[3] The defendant contends that the court below erred when it admitted in evidence a certain ordinance of councils regulating the construction and maintenance of freight elevators in the city of Philadelphia. So far as the record shows, while the ordinance was allowed in evidence, yet a copy was not physically handed to the jury for use in their deliberations. The attention of the jury was called simply to certain parts of the ordinance, namely, those providing that "every freight elevator shall have its hatchway surrounded by vertical inclosures and gates," and that "all gates must be self-closing, also fitted with a device to prevent them being raised until the platform is at the floor landing." When these excerpts were read in court, counsel for plaintiff particularly stated:

"I desire it noted of record that I am not asking for the admission of this ordinance to take away from the defendant any right of defense at all, but simply as bearing on the question of negligence; and when I say any defense, I mean specifically the defense of assumption of risk."

Furthermore, in charging the jury, the trial judge stated:

"Proof of the violation of an ordinance regulating or relating to conduct alleged to have been negligent is not in itself proof of the negligence charged. The ordinance and its violation are matters of evidence to be considered with all other evidence in the case; but this rule is limited to cases in which the ordinance relates to the alleged negligent act under consideration. * * * Ordinances and their violation are admissible, not as substantive and sufficient proof of the negligence of the defendant, but as evidence of municipal expression of opinion on matters as to which the municipal authorities have acted, * * * and are to be taken into consideration with all the other facts in the case."

The defendant argues that, since the ordinance under consideration was not specially pleaded, it should not have been accepted in evidence at all. If plaintiff were depending upon a violation of the ordinance as the substance of her case, there would be force in this position; but she does not so depend. The violation of defendant's duty to observe due care in relation to the elevator gates would give rise to an action for negligence on

common-law principles, without regard to the terms of the ordinance, and the present suit was instituted and tried upon this theory; but the ordinance points out what the municipality conceives to be due care in that respect; hence its relevancy. As previously stated, when the trial judge submitted this ordinance to the jury, he took care to say that it was evidence only of an expression of municipal opinion appropriate to the facts in the case as presented by the plaintiff. The latter produced evidence to prove the facts hereinbefore indicated, and the question of their existence or nonexistence was submitted to the jury; on these facts, she contended that, under surrounding conditions, it was negligence for defendant to maintain and permit the operation of this freight elevator with a defective gate, particularly when no attendant was in charge of the car. Since the inner or guard gate of the elevator, on the second floor, had carelessly been permitted to become out of order, to such an extent that it was in effect nonautomatic, it may be seen that the ordinance relates, in a measure at least, to the alleged negligent acts under investigation, suggesting a municipal view upon the subject in hand coinciding with that contended for by the plaintiff; and to this extent it was relevant. In other words, the municipal view, for what it was worth, was proper for the jury's consideration. In negligence cases, jurors are constantly called upon to exercise their general knowledge of the affairs and conditions of life with which they, in common with others in the community, come in more or less constant contact, and thus to determine whether or not carelessness directly contributing to the accident under investigation has been proved. This is all that the jurors were asked to do in the present instance; and the ordinance was introduced simply as an expression of municipal opinion to aid them in their deliberations. In this we see no error. *Lederman et ux. v. Penna. R. Co.*, 165 Pa. 118, 121, 125, 126, 30 Atl. 725, 44 Am. St. Rep. 644; *Ubelmann v. American Ice Co.*, 209 Pa. 398, 400, 58 Atl. 849.

[4] The case at bar was not tried upon the theory of the maintenance of an improper and unsafe implement, but rather of an unsafe and dangerous condition of affairs at the place of the accident; hence it was not necessary to plead or prove that the elevator in question was, in fact, more dangerous than those of the kind in general use.

[5] Finally, the relevant issues were submitted to the jury without error prejudicial to the defendant; and, considering the age and earning capacity of plaintiff's decedent, the verdict of \$5,616 is not an excessive one for this mother and six children. The former verdict rendered in their favor was \$500 more; in all probability, it was set aside to permit a second jury to pass upon the credi-

bility of defendant's witness Jacobs, and the present verdict shows that his testimony was rejected a second time. The case is a close one in several respects; but, on its peculiar facts, we are not convinced it could properly have been taken from the jury, or that the proof was insufficient to support the verdict.

The assignments of error are all overruled, and the judgment is affirmed.

(288 Pa. 130)

COMMONWEALTH ex rel. SLATTERY, Dist. Atty., v. CITY OF WILKES-BARRE et al.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. STATUTES §§184, 206 — CONSTRUCTION — GIVING EFFECT TO STATUTE.

Where there is an apparent conflict between different parts of the statute, the general legislative purpose must be considered, and, if the language permits, the statute must be so construed as to give effect to every part thereof.

2. STATUTES §§189 — CONSTRUCTION.

Literal construction of the language of part of an act cannot prevail, if another construction is fairly deducible, which will better effect the manifest legislative intention, as, if it can be reasonably avoided, a statute should not be construed to defeat the legislative purpose.

3. MUNICIPAL CORPORATIONS §§108 — ORDINANCE—PROTEST—FORM—STATUTE.

A petition of electors of a city of the third class, filed within 10 days and signed by voters equal in number to more than 20 per cent. of the entire number of votes cast for all candidates for mayor at the last preceding general election, protesting against the passage of an ordinance and requesting its reconsideration and repeal, or its submission to a vote of the electors in the form required by the referendum article of Act June 27, 1913 (P. L. 568) art. 20, was sufficient, and was not required to be prepared and signed in accordance with the initiative article of such act (article 19), as that applies only to proceedings for the initiation of legislation.

Appeal from Court of Common Pleas, Luzerne County.

Petition for peremptory mandamus by the Commonwealth, on relation of Frank P. Slattery, District Attorney of Luzerne County, against John V. Kosek, Mayor, and R. Nelson Bennett and others, Councilmen, of the City of Wilkes-Barre. From a judgment dismissing the petition, the relator appeals. Reversed, and writ ordered to issue.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-LING, JJ.

W. I. Hibbs, of Pittston, for appellant. John T. Lanehan and C. F. McHugh, both of Wilkes-Barre, for appellees.

MESTREZAT, J. This is an appeal by the relator from a judgment refusing to grant a writ of mandamus. On October 3, 1916, the city council of Wilkes-Barre, a city of the third class, passed finally an ordinance awarding to the Wilkes-Barre Company a contract for lighting certain streets and public buildings of the city for the term of five years. Within 10 days, a petition of qualified elec-

tors of the city, signed by voters equal in number to more than 20 per cent. of the entire number of votes cast for all candidates for mayor, at the last preceding general municipal election at which a mayor was elected, was presented to and filed with the city council protesting against the passage of the ordinance and requesting its reconsideration and repeal by the council, and, upon failure of the council to repeal the ordinance, that the same be submitted to a vote of the people of the city, as provided in articles 19 and 20 of the act of June 27, 1913 (P. L. 568). The council neglected and refused to reconsider the ordinance or to submit the same to a vote of the electors of the city. Thereupon, the district attorney of Luzerne county petitioned the court below for a mandamus upon the mayor and city councilmen of the city of Wilkes-Barre commanding them to reconsider the ordinance, and to cause the same, if not repealed, to be submitted to the electors of the city, as provided by the act of 1913. The mandamus was refused on the ground, as stated in the opinion of the court, that the petition was not preceded by a written request of 100 electors, prepared by the city clerk, and signed in his office on oath before him, as provided by article 19 of the act of 1913. In a concurring opinion, one of the judges of the court joined in refusing the mandamus for the reason that article 20 "is so inconsistent and ambiguous that it ought to be declared inoperative."

The act of June 27, 1913 (P. L. 568), provides for the incorporation, regulation, and government of cities of the third class. Article 19 provides a method for inaugurating city legislation outside the council, and article 20 prescribes a method for submitting an ordinance to a vote of the electorate before it becomes effective. Article 19 provides that any proposed ordinance may be submitted to the council by a petition signed by the electors of any city of the third class; and, "upon the written request of one hundred qualified electors, directed to the city clerk," he shall prepare such petition within 10 days, and meanwhile notice shall be given by advertisement that the petition will be ready for signing at the expiration of the 10 days. Ten days more shall be allowed for signatures. The signing shall be done in the city clerk's office only, and the petition shall be retained there at all times during the period of 10 days. Each signer shall add to his signature his place of residence, and shall make oath before the city clerk that he is a qualified elector of the city and resides at the address given. At the end of the "ten days aforesaid," and within 10 days thereafter, the clerk shall examine the petition and ascertain whether it is signed by voters equal to 20 per centum of all votes cast for all candidates for mayor at the last preceding election, and shall attach to the petition his certificate showing the result of said exami-

nation. If the petition shall be certified to contain 20 per centum of the votes cast, as aforesaid, the clerk shall submit the same to the council without delay. Article 20 provides that:

"No ordinance passed by the council [with certain exceptions] shall go into effect before ten days from the time of its final passage; and if, during the said ten days, * * * a petition signed by electors of the city equal in number to at least twenty per centum of the entire votes of all candidates for mayor at the last preceding * * * election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation; and it shall be the duty of the council to reconsider such ordinance; and, if the same is not entirely repealed, the council shall submit the ordinance, as is provided by subsection (b) of section one of article nineteen of this act, to the vote of the electors of the city, * * * and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. Said petition shall be prepared, signed and perfected in all respects, in accordance with the provisions of said section one of article nineteen, and be examined and certified to by the clerk in all respects as therein provided."

The position of the learned court below and of the appellees is that the petition of protest required by article 20 must "be prepared, signed and perfected in all respects in accordance with the provisions of article nineteen." It is claimed that such is the plain requirement of article 20, and that a compliance therewith is a prerequisite to a demand for a referendum. It is conceded that the petition of protest presented to the council was not prepared, signed, and certified as required by article 19, and therefore it is contended that the council properly refused to act upon it. The relator maintains that the court misinterpreted article 20 of the act in question, and that the petition of protest is not required to be signed and certified in conformity with the provisions of article 19, and that such signing and certification apply only to the petition required to be filed on the refusal of the council to repeal the ordinance. It is further claimed that to apply the requirements of the initiative petition of article 19 to the petition of protest in the referendum article would make that part of the last-named article inoperative and render it impossible of performance.

[1,2] In considering certain articles, including 19 and 20, of the act of 1913, in *Commonwealth ex rel. Heintz v. Marks*, 248 Pa. 518, 522, 94 Atl. 191, 192, it was said:

"The act in question, like many other attempts to legislate upon advanced lines, gives evidence of having been drawn hastily and without any serious effort to co-ordinate its various parts; but, under such circumstances, it is the office of the judiciary to apply the established rules of law and construction, and, when possible, to reconcile the various legislative provisions, so that all may stand together and yet each operate within its own field."

In cases where there is an apparent conflict between different parts of a statute,

the general purpose of the Legislature must be considered, and, if the language will permit, such construction must be applied as will give effect to every part of the law. A statute will not be construed so as to defeat the object of the Legislature, if it can reasonably be avoided. Literal construction of the language of a part of an act of assembly cannot prevail, if another interpretation is fairly deducible which will better effect the manifest purpose of the general legislative intent. The purpose and intention of the whole statute, as derived therefrom, will control the interpretation of its several parts, so that the whole may be made effective. It is presumed, as well on the ground of good faith as on the ground that the Legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried out. 2 Lewis' Sutherland, Stat. Con. (2d Ed.) § 490. "It is the duty of the court," says Agnew, C. J., in *Mauch Chunk v. McGee*, 81 Pa. 433, 437, "to reconcile the different parts of a law, if it can be reasonably done, rather than to declare any part void, and thus frustrate the legislative action."

[3] If the petition of protest required by the referendum article of the act must be "prepared, signed and perfected" in accordance with the initiative article, the clause of the article requiring the filing of the petition is incapable of performance, and is therefore nullified. This is apparent from the provisions of the two articles in question. The referendum article suspends operation of the ordinance for 10 days, "and if, during the said ten days, * * * a petition signed by" not less than twenty per cent. of the "electors of the city * * * protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation." This protest must, therefore, be presented to the council within 10 days from the final passage of the ordinance, or thereafter it is operative and is a law of the city. The proceedings to initiate legislation under article 19, as will be observed, require a written request of 100 electors to be presented to the city clerk to prepare the petition. He has then 10 days to prepare the petition, and meanwhile to advertise notice that the petition will be ready for signing at the expiration of such 10 days. Ten days more are allowed for signing which shall be done in the city clerk's office. At the expiration of this period for signatures, "and within 10 days thereafter," the clerk shall examine the petition, and if the requisite number of voters have not signed it, 10 days more shall be granted to amend, and if sufficient signatures have then been obtained he shall present the petition to the council. It is palpably manifest that a petition could not thus be prepared, signed by at least 20 per cent. of the electors, and presented to the council in 10 days from the passage

of an ordinance, as required by article 20 of the statute. Aside from other requisites of such a petition, which requires at least 30 days for its completion, the clerk, as will be observed, has 10 days to prepare the petition and to give notice by advertisement where and when it may be signed, and thereafter the electors have 10 days for attaching their signatures. The time for instituting the referendum proceedings by filing a petition and thereby continuing the suspension of the operation of the ordinance will expire, and the ordinance become operative, before the petition can be signed and presented to the council.

The settled rules of statutory construction, as already pointed out, will not permit such a result if it can reasonably be avoided. We will not presume that the Legislature, by the language of the enactment, intended in bad faith to nullify the referendum article, and thereby defeat its express purpose. There is no ambiguity or uncertainty of purpose in the referendum article. It plainly declares that no ordinance shall go into effect before 10 days after its final passage, and if the requisite protest is presented to the council within that time, the operation of the ordinance is suspended, and, if not entirely repealed, it must be submitted to a vote of the electors of the city. The two dominant thoughts in these provisions of the article are the suspension of the operation of the ordinance and its submission to the popular vote. The first is to be carried out by presenting a protest to the council. This may end all further proceedings on the ordinance. The council is required to reconsider the ordinance, and, if it is entirely repealed, the legislation is ended. If, however, such action be not taken by the council, the second step becomes necessary, and the electorate must determine by their votes whether the ordinance shall become a law of the city. The submission is to be made "as is provided by subsection (b) of section one of article nineteen of this act," which provides, *inter alia*:

"Forthwith, after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the council shall call a special election unless the general municipal election is fixed within ninety days thereafter."

It was evidently intended that this submission should be made on petition, prepared and signed in accordance with the provisions of article nineteen. The petition of protest was regarded as a preliminary proceeding and as having served its purpose by bringing the objections of the electorate to the notice of the council. No elaborate procedure, such as is provided by article 19, was deemed by the Legislature necessary in simply entering the protest which, if effective, made unnecessary an election, and the consequent care and expense required by the machinery of that article in ascertaining the duly qualified electors of the city. The objection that, unless

the protest is prepared and signed as required by the initiative article, it cannot be known if the requisite number of signatures has been obtained is not well taken. If that becomes a question of importance in any case, it must be determined by the courts in the usual way. The burden is upon those entering the protest against the ordinance to show that they have complied with the requirements of the statute as to the number of signers, as well as in other respects, and, failing to do so, the protest falls, and the ordinance becomes operative and is a law of the city.

Our construction of the referendum article makes it intelligible and enforceable, and hence carries out the intention of the Legislature in the enactment of the statute.

The judgment refusing the mandamus is reversed, and the writ is ordered to be awarded as prayed for.

(258 Pa. 126)

In re VERHOVAY AID ASS'N'S CHARTER.
(Supreme Court of Pennsylvania. May 7, 1917.)

APPEAL AND ERROR \S 1010(1)—QUESTION OF FACT—AMENDMENT OF CHARTER.

An appeal from the lower court's refusal to allow an amendment of the charter of a beneficial association incorporated under Act April 6, 1893 (P. L. 10), so as to change its principal office from a town in the county where it was created to a city in another county, will be dismissed, where the lower court found that there was no clear proof of the desire of its members to amend the charter.

Appeal from Court of Common Pleas, Luzerne County.

Petition to amend the charter of the Verhovay Aid Association, a fraternal and beneficial association. From a decree refusing the petition, petitioners appeal. Appeal dismissed.

From the record it appeared that, at a convention of the Verhovay Aid Association, the majority of the 202 delegates voted in favor of the change in the location of the association's principal place of business. There was no evidence as to whether the delegates at such convention voted upon the authority and with the knowledge of the branches and members, or merely upon their individual judgment. The membership of the association was approximately 16,000. Further facts appear by the opinion of the Supreme Court.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WAL-LING, JJ.

John H. Bigelow, of Hazleton, Harry Doerr, of Johnstown, and John R. Sharpless, of Hazleton, for appellants. M. A. Kilker, of Girardville, and John J. Kelley, of Hazleton, for appellee.

PER CURIAM. The appellant was incorporated by the court below on September 3,

1901, under Act April 6, 1893 (P. L. 10). That act provides that its charter must set forth where its principal office is to be located, and Hazleton, Luzerne county, was named in the charter as the location of that office. This appeal is from the refusal of the court below to allow an amendment to the charter, changing the place of appellant's principal office from Hazleton to Pittsburgh, Allegheny county.

The petition to amend was denied for the reason that there had not been clear proof of the desire for the amendment on the part of the membership of the association. We have not been convinced that this was error, even if the court had authority to allow the amendment. It declined to pass upon that question, and we shall therefore not now consider it.

Appeal dismissed, at appellant's costs.

(258 Pa. 127)

COMMONWEALTH ex rel. McADOO
BRANCH, NO. 11, VERHOVAY AID
ASS'N, v. VERHOVAY AID ASS'N.

(Supreme Court of Pennsylvania. May 7, 1917.)

MANDAMUS \S 136—SUBJECT—ACTS OF OFFICERS OF BENEFICIAL SOCIETY.

Mandamus was properly awarded, on relation of members, to compel officers of a beneficial society, who has changed its principal place of business to another county from that in which they were authorized by their charter to maintain it, without having complied with society's constitution and by-laws, to compel them to maintain a principal office in town in which it was originally located until legally authorized to remove it.

Appeal from Court of Common Pleas, Luzerne County.

Petition for mandamus by the Commonwealth, on relation of McAdoo Branch, No. 11, Verhovay Aid Association, against the Verhovay Aid Association, a beneficial society, to compel it to maintain a principal place of business in the city in which it was directed to be maintained by the by-laws. Judgment for relator, and defendant appeals. Affirmed.

The facts appear from the following opinion by Fuller, J., in the common pleas:

The plaintiffs are members of the defendant, a secret fraternal and beneficial society, incorporated by this court under Act April 6, 1893 (P. L. 10), and complain that the principal office of the defendant has been unlawfully moved from the city of Hazleton, designated in the charter, to the city of Pittsburgh; wherefore they pray the court "to issue a writ of mandamus to the said Verhovay Aid Association and to the officers, defendants above named, commanding the defendants to locate the principal office of the said association in the said city of Hazleton, and to keep and maintain the same therein." The case, after being put at issue by petition and answer, was by agreement submitted to the court without a jury under Act April 22, 1874 (P. L. 100).

From the pleadings and evidence, we find the following facts:

(1) The Verhovay Aid Association, defendant

corporation, of whom the individual defendants are the chief officers, as named in the caption, was incorporated by this court September 8, 1901, under Act April 6, 1893 (P. L. 10), for the purpose of "the organization of a beneficial relief society or association which will pay the members sick and funeral benefits from funds collected by assessment on the membership of the society, and for more fully carrying out this purpose it is the intention to create subordinate or branch societies, wherever it may be to their interest to do so." In the charter it is provided "that the place where its principal office is to be located is the city of Hazleton, county of Luzerne, state of Pennsylvania."

(2) The plaintiff, McAdoo Branch No. 11, is a subordinate or branch society of the Verhovay Aid Association, and the individual plaintiffs are members thereof with standing to make this complaint.

(3) By a proceeding in this court, filed June 10, 1913, to No. 134, October term, 1913, it was sought to amend the charter by changing the location of the principal office from the city of Hazleton in this county to the city of Pittsburgh; but by decision of this court, filed August 14, 1913, the application was refused, on the ground that the proceedings had not been preceded by certain preliminary requirements of the constitution and by-laws of the association.

(4) A second proceeding was subsequently filed to No. 2428, October term, 1914, but was later withdrawn without submission to the court.

(5) From the date of incorporation until the latter part of September, 1914, the principal office was kept and maintained in the city of Hazleton as designated in the charter, but in the latter part of September, 1914, it was removed for all practical intents and purposes in the transaction of the corporate business, to the city of Pittsburgh, where it has been since maintained and is now maintained, although as a matter of form, without substance, it continued to hold possession of a room, which it designates an office, in the city of Hazleton. No proof has been adduced that this removal was preceded by compliance with the requirements of the constitution and by-laws, which in the application to the court were held essential as already stated, *supra* (3).

No requests have been submitted on either side. From the facts we state, without hesitation or citation, in a matter which seems entirely free from doubt, the following conclusions of law:

(1) The plaintiffs have standing to demand conformity with the provision of the charter relative to the location of the principal office and to insist that it shall remain at Hazleton until legally removed to some other place.

(2) They are therefore entitled to have a peremptory mandamus as prayed, issuable on special motion, 20 days after signing of this judgment, subject to further hearing and argument on exceptions, if any be filed.

The lower court granted the writ of mandamus as prayed for. Defendant appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

John R. Sharpless and John H. Bigelow, both of Hazleton, and Harry Doerr, of Johnstown, for appellant. John J. Kelley, of Hazleton, and M. A. Kilker, of Girardville, for appellee.

PER CURIAM. This judgment is affirmed on the facts found and legal conclusions reached by the learned court below.

(288 Pa. 115)

L'HOMMEDIEU v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. CARRIERS — 337 — PERSONAL INJURY — ASSUMPTION OF RISK.

A passenger, leaving his seat while the train is still in motion before reaching his station, and standing in the vestibule with his fingers on the jamb of the car door, assumed the risk of injury to his fingers when the door was shut by a trainman, not shown to have seen his danger or to have acted wantonly.

2. CARRIERS — 302(3) — PERSONAL INJURY — NEGLIGENCE.

In such case the trainman, acting within the proper line of his duty, was under no obligation to see that the passenger's fingers were on the jamb of the door, or to foresee any reasonable probability that they would be there.

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Arthur R. L'Hommedieu against the Delaware, Lackawanna & Western Railroad Company to recover damages for personal injuries. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

The facts appear in the following opinion of the court in banc:

The plaintiff, a passenger in a day coach on defendant's vestibuled train approaching Scranton, when the station was called and the car door into the vestibule was opened by the trainman, left his seat and went forward into the vestibule, preparatory to alighting. There he took a position facing the unopened vestibule door, through which he expected to go. In order to steady himself in that position, he placed his right hand against the jamb of the car door, with his fingers in the space between the door and the jamb. Before the station was reached, the trainman who stood in the vestibule in front of the plaintiff reached into the car and pulled shut the open door upon the plaintiff's fingers, inflicting the injury for which the action was brought. The reason for thus shutting the door was not disclosed on the trial, as the defendant offered no evidence.

[1, 2] There is no proof that the trainman actually saw the position of the plaintiff's fingers, nor is there any contention that he acted wantonly, as he must have done if he had seen; but the claim is advanced, as the foundation of liability, that he ought to have seen, and in the exercise of due care for the safety of the passenger should not have closed the door without warning or other precaution.

We cannot sustain this view. There is no evidence that the trainman was not acting within the proper line of his duty, and presumptively he was so acting when he shut the door. He was under no obligation to see where the plaintiff's fingers happened to be, nor to foresee any reasonable probability of their being placed in such a precarious position. The plaintiff, by leaving his seat and standing in the vestibule, assumed the risk of what happened, even if he were not guilty of contributory negligence in so doing.

We need not go so far as to decide that he was guilty of contributory negligence, nor will we decide that he was not guilty thereof, and thus run the risk of creating, with slight ground for distinction, an exception to the salutary rule of authority that a passenger on a railroad train should not leave his seat for the purpose of alighting until the train comes to a stop.

We pass over the question of contributory negligence altogether, and we hold that the nonsuit was properly allowed for lack of proof establishing negligence on the part of defendant's employé.

The lower court entered a compulsory nonsuit, which it subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

Frank A. McGuigan and Harris B. Hamlin,
both of Wilkes-Barre, for appellant. Benja-
min R. Jones, of Wilkes-Barre, and J. H.
Oliver, of Scranton, for appellee.

PER CURIAM. It clearly appears, from
the concise opinion of the court below refus-
ing to take off the nonsuit, that no negligence
of defendant was shown, and on that opin-
ion the judgment is affirmed.

(258 Pa. 117)

In re MINERS' BANK OF WILKES-BARRE.
Appeal of HANCOCK.

(Supreme Court of Pennsylvania. May 7, 1917.)

Trusts — 59(2), 140(1) — CONSTRUCTION — LIFE
ESTATE — DISTRIBUTION.

Where a husband and wife, owning royalties
under coal leases, conveyed them to a trustee
to pay the husband a certain sum annually for
life and to pay one-quarter of the balance of
the income to the wife during his lifetime, and
after his death to pay her what she would be
entitled to receive under the intestate laws, and
to pay the balance in equal shares to his three
children, the deed of trust limited her estate in
the royalties to a life estate, and the trust was
revoked by her death after that of her husband,
and the fund was payable to the three children
in equal shares.

Appeal from Court of Common Pleas, Lu-
zerne County.

Case stated in the matter of the Miners'
Bank of Wilkes-Barre, successor to the Min-
ers' Savings Bank of Wilkes-Barre, trustee
for William James Hancock, Louise B. Han-
cock, and Anna M. Hancock Smith, to de-
termine the rights of the parties under a
declaration of trust. From a decree of the
common pleas, Luzerne county, Louise B.
Hancock appeals. Affirmed.

The facts appear by the opinion of the
lower court, per Woodward, J.:

The Miners' Bank of Wilkes-Barre succeeded
the Miners' Savings Bank as trustee in a deed
of trust from William Hancock and wife, dated
November 19, 1904, providing for the distribu-
tion of coal royalties arising under three sepa-
rate leases in said assignment set forth. As the
rights of the parties depend upon this assign-
ment, we will here set it out in full:

"Know all men by these presents, that we,
William Hancock and Isabella B. Hancock, his
wife, parties named in the following mentioned
coal leases, viz.: First. That certain coal lease
between Jonathan Hancock, William Hancock et
al, with the Lehigh Valley Coal Company, dated
the 1st day of January, A. D. 1891, and re-
corded in the recorder's office in and for the
county of Luzerne, Pennsylvania, in Deed Book
No. 300, page 314, etc. Second. That certain

coal lease between David Perkins, William Han-
cock et al., and the Mt. Lookout Coal Company
dated the 21st day of February, A. D. 1889, and
recorded in the aforesaid Luzerne county, in
Deed Book No. 315, page 22. Third. That cer-
tain coal lease between William Hancock and
wife and the Mt. Lookout Coal Company, dated
the 27th day of February, 1893, and recorded
in the aforesaid recorder's office, in Deed Book
No. 314, page 505, for and in consideration of
the sum of one dollar, to us in hand paid at and
before the sealing and delivery hereof, the re-
ceipt whereof is hereby acknowledged, do by
these presents assign, transfer and set over unto
the Miners' Savings Bank of Wilkes-Barre, Pa.,
trustee, its successors and assigns, all our right,
title and interest in and to the aforesaid three
coal leases, and in and to the messuages, tene-
ments and tracts of land therein mentioned and
described, as well as all the coal royalties or
rents therein secured to be paid, as well those
now due as those hereafter to fall due thereon.
To have and to hold the same in trust, neverthe-
less, for the following uses and purposes, viz.:
To receive and receipt for all moneys due or
hereafter due under the above-mentioned coal
leases, or any of them, and after deducting a
reasonable sum for the costs and expenses of
this trust, to distribute and pay over the same
as follows: First, to pay to William Hancock,
one of the above-mentioned assignors, three hun-
dred dollars per year in quarterly installments
of seventy-five dollars each, as the royalties are
paid in; second, to pay one-fourth of the bal-
ance thereof to Isabella B. Hancock, one of the
assignors hereof, during the life of the above
named William Hancock, and after his death, to
pay to the said Isabella B. Hancock, such
amount as she would be entitled to receive un-
der the intestate laws of the commonwealth of
Pennsylvania, as widow of the said William
Hancock; third, to pay the balance in equal
shares to William James Hancock, Louise B.
Hancock, and Anna M. Hancock Smith, their
heirs and assigns—all to be payable likewise
quarterly as the same may be received by the
said trustee. And upon the further trust, to
enforce payment of all royalties due or to fall
due under the said leases, by due process of
law or otherwise as in the said leases provided,
and to enforce performance of the covenants of
the said leases as fully as the said William Han-
cock might or could do were he still the owner
thereof, and the title still remained in him.
This assignment is to be irrevocable during the
life of the above named William Hancock and
Isabella B. Hancock and the life of the sur-
vivor of them.

"In witness whereof, we, the above-named
William Hancock and Isabella B. Hancock, his
wife, have hereunto set our hands and seals this
nineteenth day of November, A. D. one thousand
nine hundred and four (1904).

"William Hancock. [Seal.]

"Isabella B. Hancock. [Seal.]

"Merritt Sax.

"Anna M. Hancock Smith.

"Witness as to the signature of Isabella B. Han-
cock:

"G. F. Townend."

The trustee distributed the coal rentals and
royalties under this assignment down to the
death of Isabella B. Hancock, the surviving as-
signor on the 9th day of October, 1914, accord-
ing to the terms of the assignment; that is,
\$300 a year to William H. Hancock, and one-
fourth of the balance to Isabella B. Hancock
during his life, and after his death on the 8th
day of February, 1906, one-third to Isabella and
the balance in equal shares to their three chil-
dren, Anna, William, and Louise. After the
death of Isabella B. Hancock, the trustee contin-
ued to distribute the royalties paid under the

leases two-ninths to Anna M. Hancock Smith, two-ninths to William James Hancock, and two-ninths to Louise B. Hancock, retaining in its hands one-third of the aggregate royalties formerly paid to Isabella during her life, which is the balance shown by the account in the case stated, the proper distribution of which is the question now before the court. Isabella B. Hancock, at her death on the 9th day of October, 1914, left a will dated January 31, 1908, in which after giving specific bequests of \$100 to each of her children, William and Anna, she gave the residue of her estate to her daughter Louise, subject to certain trusts.

The questions for the court as set forth in the case stated are as follows:

A. What estate was given Isabella B. Hancock?

(a) Life estate only, or

(b) One-third of the royalties absolutely, and therefore to whom shall the trustee pay the balance on hand?

(c) Is there a difference between the interests under the Lehigh Valley Coal Company lease and the other leases?

B. Is the trust a continuing one, or does it terminate with the death of Isabella B. Hancock?

I. If the court shall be of the opinion that Isabella B. Hancock took only a life estate in all the royalties, then distribution shall be made to the three children in equal shares.

II. If the court shall be of the opinion that Isabella B. Hancock took one-third of the royalties absolutely, then distribution of said fund shall be made to the executor and executrix under her will for distribution to the beneficiaries therein named.

III. If the court shall be of the opinion that Isabella B. Hancock took only a life estate in the royalties arising under the Lehigh Valley Coal Company lease and one-third absolutely in the Mt. Lookout Coal Company leases, then distribution to be made in the proportions above set forth between the parties entitled thereto.

The court is of the opinion:

A. That Isabella B. Hancock's estate was limited to a life estate only by the assignment, and that there is no difference in this respect between her interest under the Lehigh Valley Coal Company lease and the other leases.

B. The trust was revoked by the death of Isabella B. Hancock. It follows from this opinion that distribution shall be made to the children in equal shares, and this without any distinction between the leases.

The assignment from William Hancock and Isabella B. Hancock, his wife, to the Miners' Savings Bank of Wilkes-Barre, Pa., trustee, its successors and assigns, was of all their right, title, and interest in and to the three coal leases, and in and to the tracts of land therein described, as well as all the coal royalties or rents therein secured to be paid, as well those now due as those hereafter to fall due thereunder. By this assignment William and Isabella B. Hancock divested themselves of all their interest in these leases, so that when she made her will on January 31, 1908, Isabella had no interest in the leases or the land described therein, or the royalties thereunder, that she could dispose of by will.

The intention of the parties as expressed in their language seems free from doubt. It was to secure the estate to their three children in equal shares, subject to certain life payments, which they reserved to themselves. It was to give up their former rights in the leases and the coal, and substitute therefor other rights specified in the assignment, to wit, on the part of William, to substitute for his interest, which was entire and absolute, a yearly cash payment of \$300 a year; on the part of his wife, to substitute for her interest, whether dower or

such as the intestate laws gave her in her husband's personal estate, a cash payment of one-fourth the royalty during his life after his \$300 was deducted, and one-third after his death. The trustee was to pay money, and when they directed the trustee, after the death of William, "to pay to the said Isabella B. Hancock such amount as she would be entitled to receive under the intestate laws of the commonwealth of Pennsylvania as widow of the said William Hancock," they meant "such amount" of money. It was a rather clumsy method of measuring the amount of money to be paid, to wit, one-third. They did not mean that the trustee was to convey a one-third or other interest in the estate to the widow. This was the interpretation of the language put upon it by the widow, for she accepted the one-third of the royalty in cash and made no demand for a conveyance of an interest in the leases or the coal.

The assignors divested themselves of their former estates during the term of the trust, and neither had anything to dispose of during that term. If Isabella had died first, William would have continued to receive \$300 a year, nor could he have conveyed any interest by deed or will. William derived his estate by descent from his father. If his interest in the coal after it was leased was real estate, his wife had a dower interest, which could only be released by her own act, but which she released when she executed the assignment. If his interest was personalty, he could convey it without any act on her part, and did convey it when he executed the assignment. The conveyance was absolute during the term of the trust, which was coterminous with the life of the survivor. On her death, the trust ended, and the estate passed to the three children in equal shares.

The lower court decreed that the balance in the hands of the trustee be equally distributed among the three children of the creators of the trust. Louise B. Hancock appealed.

Argued before BROWN, C. J., and MES- TREZAT, POTTER, FRAZER, and WAL- LING, JJ.

Edmund E. Jones and William C. Price, both of Wilkes-Barre, for appellant. J. Q. Creveling, of Wilkes-Barre, for appellee.

PER CURIAM. The decree in this case is affirmed, at appellant's costs on the opinion of the learned court below, in pursu- ance of which it was entered.

(258 Pa. 38)

IN RE MURPHY'S ESTATE.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. ATTORNEY AND CLIENT \S 154—FEES—DE- DUCTIO FROM FUNDS.

An attorney, who has money in his hands which he has recovered for his client, may deduct his fees from the amount, and payment of the balance is all that can be legally demanded.

2. JURY \S 12(1)—RIGHT TO JURY TRIAL.

Where there is a dispute over the terms of an agreement as to fees to be paid, the client contending that the attorney's deduction of fees is too large, the question is one of fact, and the attorney does not lose the right to jury trial because he is an officer of the court.

3. ATTORNEY AND CLIENT \S 126(2) — PRO- CEEDINGS—RULE.

Petitioner, alleging that she had received a check for \$4,500 from the executor of her hus-

band's estate in payment of part of her share thereof, and had indorsed it to respondent, an attorney, who deposited it to his account and paid petitioner \$2,500, retaining the balance as compensation for his services, filed a petition in the orphans' court for a rule to show cause why respondent should not pay over to her the sum of \$2,000, less his reasonable fees for services rendered, claiming that the agreed fee did not amount to \$2,000. *Held*, that the orphans' court has no jurisdiction to require an attorney to pay his client funds which have come into his hands, where it appears that the attorney has paid over part of such fund and retained the balance as compensation, and there is no allegation of fraud or misconduct on the part of the attorney; and hence, the question being one of fact, the petition was properly dismissed, the respondent being entitled to jury trial.

Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of Bernard J. Murphy, deceased. Petition by Ella Murphy for rule to show cause why George F. O'Brien, an attorney at law, should not pay over to petitioner certain funds in his hands. From a decree discharging the rule to show cause, petitioner appeals. Dismissed.

The facts appear in the following petition of Ella Murphy:

To the Honorable M. F. Sando, President Judge of the Orphans' Court of Lackawanna County:

The petition of Mrs. Ella Murphy respectfully represents: That George F. O'Brien is a duly qualified attorney practicing chiefly in the courts of Luzerne county, state of Pennsylvania, but is a registered member of the bar of Lackawanna county and of the bar of the orphans' court of the said county; that your petitioner is the widow of Bernard J. Murphy, late of the city of Carbondale, county of Lackawanna, and state of Pennsylvania, who died testate and whose will was duly probated in the register's office in said county, and whose estate is being adjudicated in your honorable court; that shortly after the death of the said Bernard J. Murphy, your petitioner employed the said George F. O'Brien as her attorney to represent her in a proceeding relating to the administration and distribution of the estate of her late husband; that it was agreed then and there between the said George F. O'Brien and your petitioner that his fee or compensation for all work that should be done for and on her behalf, relating to the protection of her interests in the said estate and the securing of her share therefrom, should not exceed the sum of \$500; that your petitioner was not the administrator or executor of the said estate, and that, therefore, the said George F. O'Brien had nothing to do with conserving the affairs of the estate, gathering in its assets, or distribution to the creditors, except to guard the interests of your petitioner; that under the advice of the said George F. O'Brien your petitioner elected to take against the will of the decedent, and that the proper proceedings were taken by the said George F. O'Brien to secure the interests of your petitioner in that behalf, and that his action in this regard was practically all that was done by the said George F. O'Brien for or on behalf of your petitioner; that such proceedings are simple, perfunctory, and not complicated; that the proceedings were so proceeded with; that your petitioner was awarded out of the said estate the sum of \$4,500; that this sum of money was paid to her by a check drawn by the executor in the office of Joseph O'Brien, of the Lackawanna bar, in the Mears Building, city of Scranton, said check being payable to her order and being handed to her by the said

Joseph O'Brien in the presence of her then attorney, George F. O'Brien; that at the suggestion of her said attorney, George F. O'Brien, your petitioner and the said George F. O'Brien proceeded to the Hotel Casey, in said city of Scranton, where your petitioner was induced by her said attorney, George F. O'Brien, to indorse the said check over to him, the said George F. O'Brien; that thereupon the said George F. O'Brien, having secured possession of the said check, retained the same and delivered to your petitioner his own personal check in the sum of \$2,500, and departed, retaining the check for \$4,500; that this was done against the protests of your petitioner; that the said George F. O'Brien subsequently deposited the said check of \$4,500, and has received the money thereon; that he has thereby retained out of the sum of \$4,500, secured from your petitioner, the sum of \$2,000; that demand has been made upon him to pay over to your petitioner the said money, after the deduction of a reasonable fee, but the said George F. O'Brien has neglected and refused to pay over the said sum of money to your petitioner or any part thereof.

Wherefore your petitioner prays that a rule be granted upon the said George F. O'Brien to show cause why he should not pay over to your petitioner the said sum of \$2,000, or such part thereof as remains after the deduction of such reasonable fee for his services as to your honor may seem proper.

Answer of George F. O'Brien:

To the Honorable M. F. Sando, President Judge of the Orphans' Court of Lackawanna County:

George F. O'Brien, answering the petition in above-entitled case, avers: That your respondent is a qualified attorney, a member of the bar of Luzerne county, and of the Supreme Court of Pennsylvania. That Bernard J. Murphy, late of the city of Carbondale, died on April 21, 1914, testate, leaving to survive him a widow and no issue. That by the terms of the will of the said Bernard J. Murphy, deceased (which will is probated in the office of the register of wills of Lackawanna county, to No. 52 of 1914), the said Ella Murphy, petitioner, was left but a small annuity. That shortly after the death of the said Bernard J. Murphy the petitioner sent for your respondent and retained him to represent her in the settlement of the said estate. That on the advice of your respondent the petitioner, Ella Murphy, elected to take against the will of her deceased husband, Bernard J. Murphy, and through the efforts of your respondent she was awarded by your honorable court, on March 15, 1915, the sum of \$5,300, and in addition thereto one-half the balance of the estate of said decedent, which in all, will amount to more than \$20,000. That your respondent, who has continued to represent the petitioner since his original employment, specifically denies that it was at any time agreed between him and the petitioner that his fee or compensation for all work that should be done for her on her behalf relating to the protection of her interest in the said estate, and the securing of her share therefrom should not exceed the sum of \$500, and avers that the petitioner agreed to pay your respondent for his services the sum of \$2,000, and in addition thereto his actual expenses incurred by reason of his employment, the said sum of \$2,000 to be paid by the petitioner out of the first moneys to be received by her from the said estate. That in pursuance of said agreement the petitioner, Ella Murphy, on the 18th day of December, 1915, did knowingly and willingly pay to your respondent the said sum of \$2,000, and is still indebted to your respondent for expenses incurred by him in the course of his employment, and for legal services on matters not connected with the said estate, amounting to \$500. That the petitioner made no complaint in reference to the fee paid by her to said

respondent for many weeks after the payment thereof, or until the middle of February, 1916, when your respondent was notified by counsel for the petitioner in these proceedings that she was dissatisfied with the amount paid by her to your respondent.

Wherefore your respondent prays that the petition in this case, unjustly brought, shall be dismissed, at the costs of the said petitioner.

Motion to discharge rule:

Now, to wit, August 28, 1916, comes George F. O'Brien, the respondent in the rule granted in the above-stated case, and by his attorneys, Charles B. Lenahan and David J. Reedy, moves to dismiss the rule granted on him, and assigns therefor the following reasons: (1) The court has no jurisdiction of the person of George F. O'Brien, for the reason that he is not a member of the orphans' court of this county. (2) The court has no jurisdiction of the subject-matter in controversy.

Wherefore the respondent prays that the rule be dismissed.

Other facts appear in the opinion of the Supreme Court. The court discharged the rule. Petitioner appealed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

H. W. Mumford and E. A. De Laney, both of Scranton, for appellant. Charles B. Lenahan, of Wilkes-Barre, David J. Reedy, of Scranton, and John T. Lenahan, of Wilkes-Barre, for appellee.

BROWN, C. J. Appellant's petition in the court below was for a rule on the appellee, a member of the bar, to show cause why he should not be ordered to pay over to her \$2,000, moneys which she alleged were in his hands, but belonged to her, less such sum as the court might adjudge proper for professional services rendered. The averments upon which the appellant relied in asking for the rule appear in her petition for it, to be found in the reporter's notes. An answer was filed to the rule to show cause, and this was followed by a replication. Before any testimony was taken, appellee moved to dismiss the petition, for the reason that the court had no jurisdiction of his person or of the matter in controversy. From the order sustaining that motion there is this appeal.

If from the pleadings it had appeared to the court below that the appellee had misbehaved himself in his office as an attorney practicing before it, or that the money which he retained was under its jurisdiction, it clearly could have punished the offending practitioner, or required him to turn over the moneys in his hands to the estate to which they belonged; but no such situation was presented, and the court correctly held that it was without jurisdiction to grant relief to the appellant, if she was entitled to any.

[1-3] The transaction of which the appellant complains was between her and the appellee alone. After the award of \$4,500 to

her out of the estate of her deceased husband had been paid to her by a check drawn to her order by the executor, and delivered to her, that sum no longer formed any part of the estate of the deceased, and the orphans' court ceased to have jurisdiction over it. After receiving the check she indorsed it over to the appellee, her attorney, and there is no averment that he procured it from her by fraud or mistake. He deposited it to his own credit in bank, and gave her his check for \$2,500, retaining the balance for his services under a distinct averment in his answer that his retention of the \$2,000 was in pursuance of an express contract between him and the appellant that he should be paid that sum for his professional services, and, in addition thereto, his actual expenses incurred in acting for the appellee. She, on the other hand, avers that the agreement between them was that the compensation for his services was not to exceed \$500. The controversy between her and him is in no manner connected with the administration of Murphy's estate, over which the court below had jurisdiction. The simple question, to be settled in a proper forum, is the amount to be paid by one living person to another for services rendered. That question can be settled only in the common pleas. The terms of the contract are in dispute, and what they really were is a fact to be settled in the common pleas, and nowhere else. There it must be determined whether the contract upon which the appellee relies was entered into by the appellant, and is a conscionable one, under all the facts in the case, or the appellant is to pay no more than she avers was the contract with the appellee for his services.

The case is an ordinary one, growing out of a contract between living persons, and neither over its disputed terms nor the parties to it has the orphans' court any jurisdiction. "An attorney, who has money in his hands which he has recovered for his client, may deduct his fees from the amount, and payment of the balance is all that can be lawfully demanded." *Balsbaugh v. Frazer*, 19 Pa. 95. If there be a dispute as to the terms of an agreement as to the fees to be paid, the question becomes one of fact, and "a man does not lose his right to trial by jury because he is an attorney at law." *In re Rule on R. P. Kennedy*, 120 Pa. 497, 503, 14 Atl. 397, 398 (6 Am. St. Rep. 724).

Appeal dismissed, at appellant's costs.

(258 Pa. 196)

CULLEN v. STOUGH.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. LIBEL AND SLANDER §123(2)—QUESTION FOR JURY—ACTIONABLE WORDS.

In an action for slander, the question whether the words as pleaded in plaintiff's statement are actionable is for the court.

2. LIBEL AND SLANDER §100(1)—PLEADING—STATEMENT OF CLAIM—LIMITATION.

In an action for slander, where the statement of claim did not aver that plaintiff was a public officer, or that the words were spoken of him with reference to his official position, the court, in determining the legal import of the words, would confine their application to the plaintiff as a private citizen, and at the trial he could not enlarge their sense to make them refer to him as a public officer, without an amendment for that purpose.

3. PLEADING §18—SUFFICIENCY—STATUTE.

Under Procedure Act May 25, 1887 (P. L. 271), plaintiff in his statement must set forth his cause of action with accuracy and precision.

4. LIBEL AND SLANDER §100(1)—STATEMENT OF CLAIM—EVIDENCE—AMENDMENT.

Plaintiff, in an action for slander, cannot extend his cause of action by testimony not relevant under the pleadings without an amendment.

5. LIBEL AND SLANDER §7(2)—ACTIONABLE WORDS—WORDS IMPUTING CRIME.

Words not imputing a crime punishable by indictment are not actionable, though the words need not impute an infamous crime.

6. LIBEL AND SLANDER §86(3)—STATEMENT OF CLAIM—PROVINCE OF COURT.

In an action for slander, it is not the province of the court to search out and group together from the different parts of the declaration the facts and circumstances and adjudge whether a definite crime may be fairly deduced, but the pleader must clearly aver the crime intended to be imputed to him.

7. LIBEL AND SLANDER §86(2)—STATEMENT OF CLAIM—INNUENDO.

In an action for slander, a statement of claim, alleging defendant's language in a general way, should contain an innuendo disclosing a charge of some indictable offense.

8. LIBEL AND SLANDER §123(1) — ACTIONABLE WORDS—INDICTABLE CHARGE.

When words charging a crime are qualified or explained at the time of speaking so as to negative an indictable charge, the court may properly award a nonsuit.

9. LIBEL AND SLANDER §10(1)—ACTIONABLE WORDS—IMPUTATION OF CRIME.

The statement of an evangelist at a public religious meeting that if it were not for plaintiff and others having great political influence, there would not be a house of prostitution open in the city or a saloon opened after midnight or on Sunday did not charge plaintiff, not alleging himself to be a public officer, with any indictable offense, so that a compulsory nonsuit was properly ordered.

Appeal from Court of Common Pleas, Luzerne County.

Trespass for slander by William J. Cullen against Henry W. Stough. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The following is the opinion of the lower court sur plaintiff's motion to take off the nonsuit:

This is an action of trespass in which the plaintiff sought to recover damages for alleged slanderous words spoken of him by the defendant, an evangelist, at a public religious meeting in Hazleton. The words complained of are as follows:

"Harry Jacobs is the man who runs your city. Do you know him? He runs the Arnold and Pilsen Heim Breweries. He is general manager, and he is one of the bosses that runs Jim Harvey and things down at city hall. He runs the

whole bunch down there. Harvey does not know it, but there may be some exceptions. This gang holds the situation and I tell you so to-night." "Big Bill Cullen, he is another boss. He is called the commissioner of public safety, whatever that means. He tells saloonmen when it is safe to run."

"I will tell you another, one more of the bosses who run this city. Little John Fierro. Fear-o, Fear-o, they fear him, no they don't. Fierro, that's it. He is the Twelfth ward boss, the man who runs two saloons, and who brings things through for license through booze and beer, though not through water like the other Fear-o's."

"The fourth is Max Friedlander, the wholesale liquor dealer. I want to lay it down that if it were not for Fierro, Cullen, Jacobs, and Friedlander there would not be a house of prostitution open in this city to-night. If it were not for them, there would not be a saloon open after midnight. If it were not for them, not a saloon would dare to open on Sunday. There would not be a slot machine or a gambling den or a poker game in Hazleton by to-morrow night, if it were not for these four."

"I lay the moral condition of Hazleton and the vicious things here at the foot of these four. Let them take up the gauntlet; I have thrown it down. I charge them with being responsible for the conditions here, and I say they are the real mayor and chief and council and all other issues in so far as politics are concerned in Hazleton."

"You must break the strangle hold they have upon this city's throat if you officials can enforce the laws. I tell you what this city and old West Hazleton need to-night is cleaning and a quickening of conscience on the part of the citizens to get things so that you can have a clean city. I believe Jim Harvey does not know that he is being made a monkey of by these men, but I tell you that if you do not get together behind him and Turnbach, three months after Stough has gone, a monkey will be made out of Harvey again. You must stand back of him and help him to enforce the laws, or the three months' period will show that what I say will happen shall have come to pass."

"You must aid them or you will never break away the hold of the gang on the throats of the citizens of Hazleton. I tell you preachers the cue, and you can start in right where I left off. I'll give you some more to-morrow night."

That the defendant uttered those words, or equivalent language, at the place mentioned was shown upon trial, and was not denied.

[1] When the plaintiff rested we granted a nonsuit for the reason that the words, as pleaded in plaintiff's statement, were not actionable. That it is the duty of the court to decide such question is settled. *Mess v. Johnson*, 185 Pa. 12, 39 Atl. 562.

[2] The plaintiff's right to recover must be ascertained, in the first place, from his statement of his cause of action. There is therein no averment that he occupied any official position, nor, in consequence, that the words complained of were spoken of him in relation thereto. While the affidavit to hold to bail, made by the plaintiff, set forth that he was the superintendent of the department of public safety of the city of Hazleton, such averment was omitted from his statement of his cause of action. It follows that in determining the legal import of the words constituting the cause of action, their sense must be confined to their application to the plaintiff as a private citizen. The plaintiff could not, upon the trial, enlarge the significance of the words so as to make them refer to him as a public officer; that is, without an amendment for that purpose, which was not asked.

[3] Ever since the Procedure Act of May 25, 1887 (P. L. 271), it is held that the plaintiff

must, in his statement, set forth his cause of action with accuracy and precision: *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *McCready v. Gans*, 242 Pa. 364, 89 Atl. 459. And the proofs must correspond. *Stewart v. De Noon*, 220 Pa. 154, 69 Atl. 587; *Perry v. Penna. R. R. Co.*, 41 Pa. Super. Ct. 591 (on page 609).

[4] And, further, when by the introduction of testimony, not relevant under the pleadings, the plaintiff seeks to extend his cause of action, such testimony will not be effective, in the absence of an amendment. *Wilkinson Mfg. Co. v. Welde*, 196 Pa. 508, 46 Atl. 852.

[5] What significance then had the words declared upon applied to the plaintiff as a private citizen? We thought, as expressed by us orally, when the nonsuit was entered that they imputed no crime punishable by indictment, without which in slander, differing from libel, they cannot be held actionable; and as the authorities are clear upon this point we have had no change of mind. *Gosling v. Morgan*, 32 Pa. 273; *Meas v. Johnson*, 185 Pa. 12, 39 Atl. 562. Other cases, showing how strictly the rule is applied, are *Lukehart v. Byerly*, 53 Pa. 418; *Harvey v. Boles*, 1 Pen. & W. 12; *Findlay v. Bear*, 8 Serg. & R. 571; *Stees v. Kemble*, 27 Pa. 112; *Evans v. Tibbins*, 2 Grant (Pa.) 451; *Stitzell v. Reynolds*, 67 Pa. 54, 5 Am. Rep. 396. The only qualification that has been made of this rule in this state is that the words uttered need not impute an infamous crime. *Davis v. Carey*, 141 Pa. 314, 21 Atl. 633.

[6] The plaintiff's statement contains no allegation that the words spoken of him by the defendant imputed any crime. The only expression approaching it is the following detached sentence: "That by virtue of said utterances he (plaintiff) is liable to prosecution for the violation of the penal and criminal laws of the state of Pennsylvania, upon the charges made by the said Henry W. Stough." It was not alleged that any offense punishable by indictment was, by the defendant, charged against the plaintiff. Nor was a specific crime mentioned. It was held, in *Hoar v. Ward*, 47 Vt. 657, that it is not the province of the court to search and sift and group together from the different parts of the declaration the facts and circumstances and adjudge whether a definite crime may be fairly deduced, but that it is the duty of the pleader to aver clearly the crime intended to be imputed to the plaintiff.

[7, 8] The plaintiff's statement did not contain, as it should to afford a recovery, considering the generality of the defendant's language, an innuendo disclosing a charge of some indictable offense. *Lukehart v. Byerly*, 53 Pa. 418. It was held, in *Colbert v. Caldwell*, 3 Grant Cas. (Pa.) 181, that when words charging a crime are qualified or explained at the time of speaking, so as to negative an indictable charge, which the court may perceive, and in view of which the judge would be bound to charge the jury were not actionable, he may properly award a nonsuit. See, also, *Pittsburgh, Allegheny & Manchester Pass. Ry. Co. v. McCurdy*, 114 Pa. 554, 8 Atl. 230, 60 Am. Rep. 363. The words uttered by the defendant, taken together, negative rather than affirm the idea that the plaintiff himself conducted any of the places, or committed any of the acts named.

[9] Applying the foregoing principles to the plaintiff's case, we think it is evident the nonsuit was properly entered. He had not pleaded that the words uttered by defendant were spoken of him as a public officer; nor had he specified any crime imputed to him. The most that can be said, accurately, of the meaning of the alleged slanderous words is that the plaintiff, as a private citizen credited with political influence, countenanced the existence of houses of prostitu-

tion and the other evils mentioned, instead of exerting that influence for their suppression. By no sound reasoning can it be inferred, as claimed by plaintiff's counsel when the motion for nonsuit was being argued, that the defendant charged the plaintiff with fornication. Nor is any other criminal offense more clearly ascribed. Concede that upon every citizen there is imposed the moral obligation of exercising his influence for good, in his community, it does not result that his failure so to do makes him liable to indictment.

It seems clear to us that the words alleged against the defendant as slanderous were not actionable, and that consequently our disposition of the case was right.

The rule to strike off the nonsuit is discharged.

The court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

John H. Bigelow, of Hazleton, Abram Salsburg, and F. A. McGulgan, both of Wilkes-Barre, and John J. Kelley, of Hazleton, for appellant. Paul J. Sherwood, of Wilkes-Barre, George H. Harris, of Hazleton, and R. W. Archbald, of Scranton, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the learned judge below, specially presiding, discharging the rule to strike off the nonsuit.

(258 Pa. 211)

SAUPP et al. v. STREIT et al.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. JUDGMENT \S 342(1)—STRIKING OFF JUDGMENT—TIME.

If a judgment is irregularly or illegally entered, there is no time limit restricting the court's power to strike it off, provided it is not entered adversely after a hearing or a trial.

2. JUDGMENT \S 361—VACATION—GROUNDS.

On a bill in equity against the widow and executrix of a deceased partner and against her individually and against two other defendants for money owing the partnership, wherein the attorneys agreed that judgment should be entered against the defendants for a certain sum, a judgment against the widow individually would be stricken off where she had no actual knowledge that she was to be individually liable and where there was nothing to show that she was liable for her husband's debts.

Appeal from Court of Common Pleas, Blair County.

Bill in equity by Frank D. Saupp, Jr., executor of the estate of Francis D. Saupp, Sr., deceased, and Matilda J. Saupp against Carolyn Streitt, intermarried with Oliver Rothert, executrix of the estate of George F. Streitt, deceased, and others. From a decree striking off the judgment against Carolyn Streitt Rothert, plaintiffs appeal. Appeal dismissed.

The following is the opinion of Baldrige, P. J., in the court of common pleas:

On or about the 20th day of June, 1890, George F. Streit and Francis D. Saupp, Sr., entered into an oral agreement of copartnership, whereby they were to buy, sell, and deal in real estate. This copartnership continued until the 9th day of July, 1905, when George F. Streit, one of the partners, died.

On the 27th day of March, 1908, a bill in equity was filed in this county, to No. 645, October term, 1908, wherein Frank D. Saupp, Jr., executor of Francis D. Saupp, Sr., deceased, and Matilda J. Saupp were plaintiffs, and Carolyne Streit, intermarried with Oliver Rothert, executrix of the estate of George F. Streit, deceased, Carolyne Streit Rothert, widow of the late George F. Streit, deceased, and the Central Trust Company, trustee, were defendants.

In the ninth paragraph of the bill the plaintiffs aver the copartnership, the death of George F. Streit, and that thereafter the partnership was dissolved. The eleventh paragraph avers that in the conduct of the copartnership George F. Streit received various amounts of money for the use and benefit of the partnership, and never rendered an account thereof. It is further averred in the sixth paragraph that on the 4th day of August, 1905, Francis D. Saupp, Sr., and Carolyne Streit, widow of George F. Streit, entered into an agreement with the Central Trust Company, of Altoona, whereunder the trust company was to act as trustee for Francis D. Saupp, Sr., and for the estate of George F. Streit, deceased, in selling and conveying certain property owned by Saupp and Streit estate.

The plaintiffs prayed for an accounting of all the partnership dealings and transactions during the life of George F. Streit, and for a full and true account of the partnership by the Central Trust Company, and for a dissolution of the partnership.

The record does not disclose any objection raised to the misjoinder of parties by including Carolyne Streit Rothert as widow of the deceased partner, nor does the bill aver that the widow of George F. Streit was a member of the copartnership, nor that she was indebted thereto, nor that she in any wise assumed the payment of any indebtedness that might have been due from George F. Streit to the partnership.

An answer was filed by the defendants, and on March 1, 1909, the parties through their attorneys fixed the indebtedness of Francis D. Saupp, Sr., and George F. Streit to the copartnership, and on March 5, 1909, filed the following stipulation, to wit: "Now, by agreement of counsel the sole question submitted herein for determination by your honorable court is, whether or not the estate of the late George F. Streit is liable to the copartnership of Streit & Saupp for the payment of interest in the amount of \$17,826.38, as claimed by the plaintiffs." Thereafter, to wit, on April 28, 1909, the court filed the following decree: "It is further adjudged and decreed that the interest be surcharged against the defendant on the sum of \$22,854.33 from the 9th day of July, 1905, at the rate of 6 per cent. to the date of this decree, being the sum of \$5,222.14, for which amount judgment is directed to be entered, unless exceptions are filed thereto within fifteen days."

Exceptions were filed, and the court modified its decree respecting the amount of interest. Accordingly the following decree of court was entered of record: "And now, to wit, this 25th day of September, A. D. 1911, on motion of J. Banks Kurtz, counsel for plaintiff, the prothonotary, for the purpose of carrying out the provisions of the stipulation of counsel for plaintiffs and defendants herein filed, is authorized and directed to enter judgment in favor of the late partnership of Francis D. Saupp, Sr., and George F. Streit, and against the plaintiffs in the sum of \$11,734.93, with interest thereon

from August 1, 1905, and against the defendants in the sum of \$36,407.58, with interest thereon from August 1, 1905, which amounts represent the indebtedness of the estates of the late Francis D. Saupp, Sr., and George F. Streit to the copartnership, as fixed and determined by their respective counsel in the stipulation filed, as aforesaid, and was in excess of the amount filed in the court's decree under date of May 17, 1910, filed in these proceedings."

The attorneys for plaintiffs and defendants in writing consenting to the entering of the foregoing decree, judgment was thereupon entered to No. 364, June term, 1911, in favor of the late copartnership in the sum of \$36,405.58, with interest from August 1, 1905, and "against the defendants," including Carolyne Streit Rothert in her individual capacity. A sci. fa. was issued to revive this judgment to No. 41, March term, 1915, which was duly served upon Carolyne Streit Rothert, whereupon she came into court, alleging that she had no knowledge of any effort to make her individually liable for the payment of the judgment above recited, and that the averments in the bill, and the prayer for relief did not justify a judgment being entered against her, and therefore prayed that the judgment be opened up, and also that it be stricken from the record in so far as it affects her, contending that the judgment is irregular on its face and was improvidently entered in so far as she Carolyne Streit Rothert is concerned.

[1] The plaintiffs contended that the objecting defendant has no standing in this proceeding, that her remedy, if she has one, is by a bill of review. It has been frequently ruled in this state that if a judgment was irregularly or illegally issued, there is no time limit restricting the power of the court to strike off such a judgment, providing the judgment is not entered adversely after hearing or a trial. *Johnson v. Royal Insurance Co. of Liverpool*, 218 Pa. 423, 67 Atl. 749; *Long v. Lemoyne Borough*, 222 Pa. 311, 318, 71 Atl. 211, 212 (21 L. R. A. [N. S.] 474). The court in this latter case says: "As a general rule, a judgment regular on its face, will not be stricken off, but when it is entered wholly without authority, it may be stricken off, for it is no judgment at all so far as it affects the rights of the defendants. *Bryn Mawr National Bank v. James*, 152 Pa. 364 [25 Atl. 823]. This judgment was entered without authority, and the court below found that the entry of it had never been ratified." In the case at bar the judgment was entered not adversely, but by agreement.

[2] There is not the slightest intimation from any source that Carolyne Streit Rothert was a member of the firm when the indebtedness arose, nor is there any averment in the bill that the plaintiff sought to hold her liable. The parties themselves stipulated that the sole question for determination by the court was to what extent the estate of George F. Streit was liable to the copartnership of Streit & Saupp. If the purpose was to make Carolyne Streit Rothert in her individual capacity pay the debts of the copartnership of Streit & Saupp, it was incumbent upon the plaintiff to sufficiently allege and prove her liability, as it is a well-recognized fundamental principle in equity procedure and pleading that every fact essential to entitle the plaintiff to the relief he seeks must be averred in the bill, and the decree must be in conformity with the averments and proof. *Luther v. Luther*, 216 Pa. 1, 64 Atl. 868; *Spangler Brewing Co. v. McHenry*, 242 Pa. 522, 89 Atl. 685. Not only the bill and the relief sought fail to point out Carolyne Streit Rothert's liability, but the parties themselves after the decree of the court had been entered apparently recognized that the liability was confined to the George F. Streit estate, for on September 12, 1912, the executor of Francis D. Saupp, Sr., in presenting a petition for the appointment of

a receiver sets forth "that counsel for the respective parties in this suit by stipulation filed on the 1st day of March, 1909, agreed that on August 5, 1905, Francis D. Saupp, Sr., was indebted to the partnership of Streit & Saupp in the sum of \$11,734.93, and on said date George F. Streit was indebted to the said partnership in the sum of \$36,407.58, and that judgments have been entered of record for said amounts against said parties." Even at that date there is no intimation but that the indebtedness was that of the George F. Streit estate only, no hint that Carolyne Streit Rothert was expected to pay any part of it.

We are at loss to know how a judgment unsupported by any adequate averment, in fact no averment at all, could have been entered except on the theory that because Carolyne Streit Rothert was erroneously joined as a party defendant that that of itself made her liable. Judgment was to be entered as stipulated "against the defendants." What defendants? Would the Central Trust Company, a trustee appointed long after the indebtedness was incurred, but a defendant, be also held liable with Carolyne Streit Rothert? Such an intention is inconceivable. Yet if she as a defendant must help pay this judgment, so would the Central Trust Company have to contribute its share.

As Carolyne Streit Rothert bore no relationship to the firm, and no liability has been shown either by averment, proof, or stipulation, the judgment in so far as it affects her is illegal and invalid and stricken from the record.

It is apparent that under the pleadings in the case a decree against "the defendants" was not warranted, and was irregular and illegal. The estate of George F. Streit is liable for and should pay this indebtedness, as it was he who incurred it, not Carolyne Streit Rothert individually.

The court struck off the judgment against Carolyne Streit Rothert, individually. Plaintiffs appealed.

Argued before BROWN, C. J., and MES-TREZAT, POTTER, STEWART, and WALLING, JJ.

R. A. Henderson, of Altoona, James E. Hindman, of Pittsburgh, and J. Banks Kurtz, of Altoona, for appellants. O. H. Hewit, of Hollidaysburg, and W. Frank Vaughn, of Altoona, for appellees.

PER CURIAM. This appeal is dismissed, at appellants' costs, on the opinion of the court striking off the judgment against Carolyne Streit Rothert individually.

(258 Pa. 194)

FORTE v. G. B. MARKLE CO.

(Supreme Court of Pennsylvania. May 14, 1917.)

MASTER AND SERVANT §236(19)—EVIDENCE—NONSUIT.

In an action by the servant of a mining company for injury, when struck by a car suddenly descending a slope, while his back was turned towards it, while unloading a car, where there was no evidence as to the cause of the accident, or to justify a finding that the starting of the car was due to defendant's negligence, a compulsory nonsuit was properly ordered.

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Alfonso Forte against the G. B. Markle Company to recover damages for

personal injuries. From an order refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-TREZAT, POTTER, FRAZER, and WALLING, JJ.

F. P. Slaterry, of Wilkes-Barre, N. M. Curcio, of Hazleton, and Andrew Hourigan, of Wilkes-Barre, for appellant. John H. Bigelow and C. W. Kline, both of Hazleton, and Joseph A. Mulheren, of Wilkes-Barre, for appellee.

PER CURIAM. The appellant was an employé of the appellee, and, while unloading a car filled with rock and dirt, another car came down the incline on which he was working and struck him; his back having been towards the descending car. For the injuries sustained this action was brought, in which, after plaintiff had closed his case, a compulsory nonsuit was entered.

Nothing in the testimony could have justified a finding by the jury that the starting of the colliding car down the incline was due to any negligence of the defendant. If the question of its negligence had been submitted to the jury, there would have been, as the court properly held, an invitation to them to guess as to the cause of the accident, and to infer negligence against the employer from the mere fact of its happening. For this reason the case was not for them. *Snodgrass v. Carnegie Steel Co.*, 173 Pa. 228, 33 Atl. 1104; *Wojciechowski v. Sugar Refining Company*, 177 Pa. 57, 35 Atl. 596; *Alexander v. Water Company*, 201 Pa. 252, 50 Atl. 991; *Sandt v. North Wales Co.*, 214 Pa. 215, 63 Atl. 596.

Judgment affirmed.

(258 Pa. 85)

HOGSETT et al. v. THOMPSON et al.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. EQUITY §1—COURTS—JURISDICTION.

Pennsylvania courts do not possess general chancery powers, but exercise only such as have been conferred upon them by statute.

2. INJUNCTION §43—JURISDICTION—COLLECTION OF MONEY.

Though Act June 16, 1836 (P. L. 784), gives courts of common pleas equity jurisdiction for the prevention or restraint of the commission of acts contrary to law and prejudicial to the community or the rights of individuals, the collection of debts cannot be enjoined save where the creditor is clearly and undeniably proceeding, against right and justice, to use the processes of the law to the injury of another.

3. RECEIVERS §21—APPOINTMENT—INDIVIDUALS.

While the supervision and control of partnerships and corporations are recognized subjects of equity jurisdiction, the administration of affairs of an individual sui juris and compos mentis is not, and the fact that he is unable to meet his obligations does not alone warrant the appointment of a receiver for his property, or the issuance of an injunction restraining

creditors from attempting to collect their claims by legal process.

4. CREDITORS' SUIT ⇨4—NATURE OF REMEDY—EXECUTION.

A creditor's bill is always in aid of execution, and will not lie when there is an adequate remedy at law, its purpose being to satisfy a debt out of the equitable estate of the debtor which is not liable to execution at law, or out of some property beyond reach of ordinary process.

5. RECEIVERS ⇨9—APPOINTMENT.

Unsecured creditors of an individual filed a bill in equity, alleging that the defendant debtor had assets consisting of unimproved coal lands of enormous value which were the subject of incumbrances amounting to \$15,000,000; that he was indebted to unsecured creditors in the sum of \$7,000,000; that he was unable to meet the indebtedness; that suits had been filed and execution threatened which would destroy his equities in the various properties which were the only assets out of which unsecured creditors could be paid, but that if the assets were administered under the direction of a court of equity, sufficient might be realized to pay all debts. The bill prayed for appointment of receivers and for an injunction to restrain all creditors from proceeding at law against the debtor's assets. The defendant admitted the facts alleged in the bill and receivers were appointed, and creditors allowed to reduce their claims to judgment, but enjoined from issuing execution against the defendant debtor's property. A judgment creditor petitioned for leave to intervene and for leave to pursue the usual legal remedies for collection of her judgment. *Held*, that as simple contract creditors who have no judgment against or lien upon the property of an individual, or any equitable interest in his assets, have no standing to pray for appointment of a receiver, especially where such acts might prejudice the rights of lien creditors, the court of common pleas was without authority to appoint receivers for the property of the defendant debtor, and a judgment creditor, petitioning for leave, was entitled to proceed at law for the collection of her judgment.

Appeal from Court of Common Pleas, Fayette County.

Bill by Fuller Hogsett and another against Josiah V. Thompson, in which Elizabeth Kremer, administratrix of Albert C. Kremer, petitioned to intervene. From a decree appointing receivers and awarding an injunction, petitioner appeals. Reversed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Charles A. Tuit and H. S. Dumbauld, both of Uniontown, for appellant. John M. Freeman, of Pittsburgh, Louis Marshall, of New York City, H. F. Stambaugh, of Pittsburgh, Sturgis & Morrow, of Uniontown, and Samuel Untermyer, of New York City, for appellees.

POTTER, J. On January 19, 1915, Fuller Hogsett and David L. Durr filed a bill in equity against Josiah V. Thompson, in the court of common pleas of Fayette county, praying for the appointment of a receiver for the property of Mr. Thompson. It was alleged in the bill that the defendant had assets consisting largely of unimproved coal lands, of the value of \$70,000,000, which were pledged and mortgaged to the amount

of \$15,000,000, and that he was further indebted to unsecured creditors in the sum of \$7,000,000; that the defendant was unable to meet his indebtedness as it became due, and that suits were entered, and executions threatened, which would sweep away his equities in the various properties, which were the only assets out of which the unsecured creditors could be paid, and that, by reason of enormous prior incumbrances, executions would be of no avail. It was alleged that, if the assets could be preserved from sacrifice, and sold under the direction of a court of equity, sufficient might be realized to pay all of defendant's debts. When the bill was filed, defendant filed an answer, admitting the facts to be as averred. After hearing, the court appointed receivers and issued an injunction, restraining all creditors from entering suits, issuing executions, or interfering in any way with the property in the hands of the receivers. Afterwards the court modified its decree, so as to permit creditors, who so desired, to enter suit and prosecute the same to judgment. On February 29, 1916, Elizabeth Kremer, administratrix, recovered a judgment against defendant for \$3,698.98, and filed her petition to intervene, and asked for permission to pursue the usual legal remedies for collecting her judgment. On August 1, 1916, the court made an order refusing permission to intervene, and refusing to modify the original decree. Exceptions were filed, which were overruled, and the decree of August 1, 1916, was confirmed and made absolute. Petitioner has appealed, and the fundamental question raised by the assignments of error is whether the court below had jurisdiction to appoint receivers for the property of Mr. Thompson, an individual, and to restrain his creditors from proceeding to collect their lawful claims.

[1, 2] That the courts of Pennsylvania do not possess general chancery powers, but exercise only such as have been conferred upon them by statute, has repeatedly been pointed out. *Davis v. Gerhard*, 5 Whart. 466; *Gilder v. Merwin et al.*, 6 Whart. 522; *Dohnert's Appeal*, 64 Pa. 311; *Bridesburg Mfg. Co.'s Appeal*, 106 Pa. 275; *Pitcairn v. Pitcairn*, 201 Pa. 368, 50 Atl. 963.

The equity jurisdiction of the courts of common pleas is conferred and defined by Act June 16, 1836 (P. L. 789), § 13, and a few later acts. In these acts the courts are given no express power or control over the property of individuals who are *sui juris* and *compos mentis*, except under circumstances which do not exist in the present case. The court below concedes this, saying:

"The petitioner here contends that there is no specific statutory authority in Pennsylvania for the appointment of receivers for the estates of individuals. That is true."

The court, however, regarded its action as warranted by the clause of the act of 1836, giving equity jurisdiction for "the pre-

vention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals." But, as was said by Sergeant, J., in *Gilder v. Merwin et al.*, 6 Whart. 522, 541:

"It cannot be seriously contended that the issuing execution on a judgment confessed in a court of law is an act contrary to law. Injunctions on equitable grounds are grantable by this court only where they are incidental to the relief prayed for, and where that relief is within our jurisdiction by the acts of assembly."

And in *Winch's App.*, 61 Pa. 424, 426, Mr. Justice Agnew, considering the same clause, said:

"The jurisdiction given to a court of equity for the prevention or restraint of the commission of acts contrary to law and prejudicial to the rights of individuals was never intended to be used to obstruct the collection of debts. It is only where the creditor is clearly and undeniably proceeding, against right and justice, to use the process of the law to the injury of another, that equity intervenes to stay his hand. To adopt another rule would lead to a constant use of the powers of equity to hinder and delay the collection of honest claims, and to prevent the creditor from reaching the marrow of a fraud."

In *Pairpoint Mfg. Co. et al. v. Philadelphia Optical & Watch Co. et al.*, 161 Pa. 17, 22, 28 Atl. 1003, 1004, Mr. Justice Fell said:

"The confession of judgment to the appellant being lawful, the only remaining reason presented by the petition for interfering with the writ of execution is that a sale can be more advantageously conducted in the interests of all the creditors by the receivers. This is not a sufficient reason. The appellant is pursuing the regular and orderly course for the collection of a judgment lawfully obtained for a debt admittedly due. This is its right. The interest of other creditors may be affected thereby, but, until it is shown that their rights are violated, no one has a standing to challenge the appellant's right to use the means provided by law for the enforcement of its claim."

Even in the case of a corporation a receiver will not be appointed where the only effect would be to hinder and delay the collection of valid claims, and the courts are without authority to make such an appointment. *Bell et al. v. Wood & Co., to Use of Camden Iron Works*, 181 Pa. 175, 181, 37 Atl. 201.

The action of appellant in seeking to enforce her claim in the manner provided by law is certainly neither "contrary to law," nor "prejudicial to the interests of the community," nor does it infringe on "the rights of individuals."

[3-5] As a bill merely for an injunction to restrain legal process in the collection of a debt, the present bill cannot be sustained. An inspection of the bill shows that it was filed for the express purpose of securing the appointment of a receiver for the assets of an individual, and to provide for the management and disposal of those assets. For such a purpose, the plaintiffs in the original bill have no standing in an equity court of Pennsylvania. The supervision and control of partnerships, and of corporations, are rec-

ognized heads of equity jurisdiction, but the administration of the affairs of an individual, *sui juris*, and *compos mentis*, is not.

The fact that an individual is not able to meet his obligations is not in itself sufficient to warrant the appointment of a receiver for his property, or the issuing of an injunction to restrain his creditors from attempting to collect their claims. Other equitable cause for relief must be shown to justify the interference of a chancellor. The plaintiffs in their bill asserted no right which required the aid of equity. There was no dispute between them and Mr. Thompson, and no issue was presented which a court of equity had jurisdiction to determine. The relief which they sought was not by means of a decree determining any matter in dispute between Mr. Thompson and themselves, but their object was to prevent other persons, not parties to the bill, from taking lawful action. The appointment of a receiver is only incidental to other equitable causes of relief within the statutory grant of jurisdiction. It is a provisional remedy, and is not the ultimate end of a suit. It is the exercise of a power in aid of a proceeding in equity. In the present case no suit was pending between the parties in the court below when the application for the appointment of a receiver was made. In *High on Receivers* (4th Ed.) § 17, it is said:

"Ordinarily, unless perhaps, in the case of infants or lunatics, a suit must be actually pending, to justify a court of equity in appointing a receiver."

These plaintiffs were simple contract creditors, who had no judgments or liens upon the property, or any equitable interest in any of the assets of the defendant. The general rule applicable in such case is stated in *High on Receivers* (4th Ed.) § 406, as follows:

"Having already shown that the aid of a receiver is extended only in behalf of creditors who have fully exhausted their remedy at law, it follows necessarily that the jurisdiction will not be exercised in favor of mere general creditors, whose rights rest only in contract and are not yet reduced to judgment, and who have acquired no lien upon the property of the debtor. Courts of equity will not permit any interference with the right of a debtor to control his own property, at the suit of creditors who have acquired no lien thereon, and whatever embarrassment the creditor may experience, by reason of the slow procedure of the courts of law, must be remedied by legislative and not by judicial authority. And while there are a few instances where the courts have maintained a contrary doctrine, the great weight of authority supports the rule, that, in the absence of statutory provisions to the contrary, a general contract creditor, before judgment, is not entitled either to an injunction or a receiver against his debtor, upon whose property he has acquired no lien."

There is no ground for the suggestion that this bill is in the nature of a creditors' bill. It was not filed to enforce payment of any judgment or in aid of an execution against the defendant. On the contrary, its purpose was to prevent the seizure of any of his property under execution, and to prevent

his creditors from pursuing their lawful remedies for an indefinite time. A creditors' bill is always in aid of an execution, and it will not lie where there is an adequate remedy at law. Its purpose is to secure satisfaction of a debt out of some equitable estate of the debtor which is not liable to execution at law, or out of some property beyond the reach of ordinary process. In the present case there is no allegation of concealment or fraudulent disposal of any of the assets of the defendant. The bill is in no sense of the term a creditors' bill, and the authorities relating to creditors' suits of that nature have no application here.

In the argument of counsel for appellees, it is suggested that the jurisdiction for which they here contend was upheld by this court in *Galey v. Guffey*, 248 Pa. 523, 94 Atl. 233. In that case, the court of common pleas of Allegheny county, upon a bill filed by an unsecured creditor of J. M. Guffey, containing averments to the same effect as those in the present bill, and an answer admitting the facts and consenting to the relief prayed for, appointed a receiver for the property and assets of defendant and enjoined his creditors from selling, transferring, disposing of, or interfering in any way with such property or preventing or obstructing the receiver in the performance of his duty. A mortgagee of one of defendant's properties petitioned the court for leave to proceed on his mortgage, which was in default. The court refused to grant such leave, and the petitioner appealed. We reversed on the express ground that the mortgagee was entitled, under the terms of the mortgage, to sue it out and take the mortgaged premises in execution, and that, to deny him this right, would be to impair the obligation of the contract, which was beyond the power of the court.

The question of the jurisdiction of the court below to entertain the bill and appoint the receiver does not appear to have been raised in that case, and it certainly was not passed upon by this court. Mr. Justice Stewart said (248 Pa. 527, 94 Atl. 239):

"We have before us the single question whether the order of the court enjoining the creditors of J. M. Guffey from proceeding by law to enforce collection of the debts due them, so long as the estate is in the hands and under the control of the receiver appointed by the court, operates in law to stay the hands of these appellants. In other words, the question raised is: Is it within the power of the court to restrain these particular creditors—and we are here concerned with no other—because of the appointment of the receiver of the estate, from adopting and applying such legal remedies as are allowed them by the terms of their contract, and at such time as that contract by its terms permits?"

And it was held that the court had no such power. The broad question of the power of the court to appoint a receiver for the estate of an individual was neither considered nor decided in that case.

If the defendant here is solvent, as is alleged, a court of equity has no power to place his property beyond the reach of his creditors, or to enjoin them from resorting to the remedies which the law has given to them for the protection of their claims. If he is insolvent the law also provides appropriate means for the distribution of his estate for the benefit of his creditors. It follows that the court below erred in appointing receivers for the property of defendant, and in restraining his creditors from prosecuting suits at law or in equity against the defendant.

The order and decree of the court below are reversed, and the bill filed for the appointment of receivers is dismissed for want of jurisdiction to entertain it, and all proceedings thereunder are vacated and set aside; but it is ordered that the receivers who were improperly appointed forthwith file their account; the costs below and on this appeal to be paid by the plaintiffs in the original bill.

(258 Pa. 97)

HOGSETT et al. v. THOMPSON.

(Supreme Court of Pennsylvania. May 7, 1917.)

Appeal from Court of Common Pleas, Fayette County.

Bill by Fuller Hogsett and another against Josiah V. Thompson, in which William J. Kyle intervened as defendant. From a decree awarding an injunction and appointing receiver, the intervenor appeals. Reversed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHISKEER, FRAZER, and WALLING, JJ.

Samuel McClay and W. A. Seifert, both of Pittsburgh, Kyle & Reinhart, of Waynesburg, and Reed, Smith, Shaw & Beal, of Pittsburgh, for appellant. John M. Freeman, of Pittsburgh, Louis Marshall, of New York City, H. F. Stambaugh, of Pittsburgh, Sturgis & Morrow, of Uniontown, and Samuel Untermyer, of New York City, for appellees.

POTTER, J. This appeal was argued with that at No. 1, January Term, 1917, 101 Atl. 941, as the fundamental questions involved are the same. The opinion which has been filed in that case is conclusive here, and the same decree will be entered. The first and second assignments of error are sustained. The order and decree of the court below are reversed, and the bill filed for the appointment of receivers is dismissed for want of jurisdiction to entertain it, and all proceedings thereunder are vacated and set aside; but it is ordered that the receivers who were improperly appointed forthwith file their account; the costs below and on this appeal to be paid by the plaintiffs in the original bill.

(253 Pa. 139)

BROOKVILLE TITLE & TRUST CO. v. BEAVER TRUST CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. JUDGMENT \S 106(1) — RULE OF COURT — DEATH OF PARTY.

The lower court would not enter a judgment against a deceased defendant for want of a suffi-

cient affidavit of defense where under its rules the defendant, had he lived, might at any time before argument have filed a supplemental affidavit.

2. EXECUTORS AND ADMINISTRATORS ¶443(2)
— ACTIONS — AFFIDAVIT OF DEFENSE — PERSONAL REPRESENTATIVE.

In a suit on a contract made by decedent, his personal representative is not required to file an affidavit of defense as to matters arising before the decedent's death.

3. JUDGMENT ¶135 — OPENING JUDGMENT — AFFIDAVIT OF DEFENSE.

In an action against the indorser of a note, a rule was taken for judgment for want of a sufficient affidavit, and, the defendant dying before the rule was called for argument, his administrator was substituted as defendant, and the rule for judgment was made absolute; the rule of the lower court as to motions for judgment for want of sufficient affidavits of defense then providing that at any time before application for judgment defendant might file a supplemental affidavit. *Held*, that the lower court did not err in opening the judgment, though the setting aside of the judgment would have been a more appropriate remedy.

Appeal from Court of Common Pleas, Beaver County.

Suit by the Brookville Title & Trust Company against John Spencer, in which after his death, his administrator, Beaver Trust Company was substituted as party defendant. From a judgment making absolute defendant's rule to open the judgment, plaintiff appeals. Appeal dismissed.

Argued before MESTREZAT, POTTER, STEWART, MOSCHISKER, and FRAZER, JJ.

W. S. Moore, of Beaver, and W. N. Conrad, of Brookville, for appellant. Lawrence M. Sebring, of Beaver, for appellee.

MOSCHISKER, J. John Spencer indorsed a promissory note given to the plaintiff company. Suit was brought thereon January 25, 1915. An affidavit of defense was filed February 10, 1915. A rule for judgment for want of a sufficient affidavit of defense was entered March 8, 1915. Spencer died on March 16, 1915, before this rule was called for argument. Thereafter the Beaver Trust Company was appointed and duly qualified as administrator of his estate; on June 14, 1915, a suggestion of death was filed in the present case, and Spencer's administrator was substituted as defendant. July 6, 1915, the rule for judgment was placed upon the argument list, and on November 17, 1915, it was made absolute. November 18, 1915, judgment was entered. November 22, 1915, defendant petitioned the court to set aside the judgment on the ground that it was unwarranted in law, and the petitioner asked also that the judgment be opened. December 31, 1915, the lat-

ter prayer was granted. Plaintiff has appealed.

[1] In an opinion filed with the order appealed from, the learned president judge of the court below states that, while not convinced of the sufficiency of the affidavit of defense, yet he had concluded that the death of Spencer abated the rule for judgment, and hence the court was without authority to enter it. The rule of the court below, regulating motions for judgment for want of sufficient affidavits of defense, particularly provides that they may be set for argument by either party, and that "at any time before it the application for judgment is regularly called for argument * * * defendant may file a supplemental affidavit." Under this rule of court, Spencer might have supplemented his affidavit at any time up to July 6, 1915, had he then been living; and, ex necessitate, his prior death abated the rule for judgment against him for want of a sufficient defense. In other words, the court could not enter a judgment against a dead man, in a case like the present, when, under its own rules, had the latter lived, he might have added to his defense.

[2] It is well established in this state that, in a suit on a contract made by a decedent, his personal representative is not required to file an affidavit of defense as to matters which arose before the demise of the former. In *Seymour et al. v. Hubert*, 83 Pa. 346, 348, citing *Leibert v. Hocker*, 1 Miles, 263, this point is discussed. We there say that the rule just stated is "indispensable to protect interests that would be otherwise defenseless, and to afford security to creditors, distributees and heirs"; and we add: "A dead man's estate would be in utter peril, if a creditor could convert his demand into a judgment upon no proof other than the statement of his claim filed at the commencement of his suit." It is to be noted that *Leibert v. Hocker*, cited in the case just reviewed, was an action against the executors of an indorser of a promissory note, and that it was there held an affidavit of defense was not required. See, also, *Johnson v. Smith*, 153 Pa. 568, 571, 28 Atl. 144; *Mutual Life Ins. Co. of N. Y. v. Tenan*, 188 Pa. 239, 241, 41 Atl. 539; *Perkins v. Humes*, 200 Pa. 235, 240, 49 Atl. 934; *Heilfrich v. Greenberg*, 206 Pa. 516, 518, 58 Atl. 45.

[3] Under the circumstances at bar, we are not convinced of error in the order appealed from. It may be that granting the prayer of the petition to set aside the judgment would have been a more appropriate remedy, but, since the practice followed is not complained of, a discussion of that point becomes unnecessary.

The appeal is dismissed.

(258 Pa. 176)

**In re WEST MAHANOEY TOWNSHIP'S
CONTESTED ELECTION.**

Appeal of McCoy et al.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. ELECTIONS \S 298(3) — OPENING BALLOT BOX—FRAUD.

A petition in an election contest for the opening of a ballot box was properly refused, where petitioner failed to show fraud, irregularity, illegal voting, or illegal counting of votes.

2. ELECTIONS \S 227(1) — VALIDITY—IRREGULARITIES.

Mere irregularities in conducting an election will not avoid it, even though the election officers may be subject to punishment for misconduct, as the rights of voters are not to be prejudiced by the errors or wrongful acts of such officers.

3. ELECTIONS \S 229 — VALIDITY — FRAUDULENT VOTES.

The mere casting of fraudulent votes is not a sufficient ground for throwing out returns from an election district, the remedy in such case being to strike out the fraudulent votes if possible.

4. ELECTIONS \S 229—RETURNS—PRECINCT.

Where no election is legally held in an election precinct, the returns therefrom may be thrown out.

5. ELECTIONS \S 229 — CONTEST — THROWING OUT VOTES.

Where the ballots, tally return sheets and supplies in an election precinct were tampered with, the records were illegally kept, and voters were threatened before the election and on election day, and prevented from voting, and were intimidated, and where personal attacks were made under the direction of the election officers, the votes polled in such precinct were properly stricken out in an election contest.

Appeal from Court of Quarter Sessions, Schuylkill County.

Petitions by citizens of the Township of West Mahanoy, County of Schuylkill, to contest the election of Thomas McCoy and Frank J. Donahue to the offices of school directors in such township. From an order declaring their election void, contestees separately appeal. Appeals dismissed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, MOSCHZISKER, and FRAZER, JJ.

C. E. Berger, of Pottsville, and M. M. Burke and P. H. Burke, both of Shenandoah, for appellants. M. J. Ryan, of Philadelphia, for appellees.

BROWN, C. J. At an election held November 2, 1915, two school directors were to be elected in the West Mahanoy township school district, Schuylkill county. There are four election precincts in the township—Lost Creek, William Penn, Brownsville, and Raven Run. Thomas McCoy and Frank J. Donahue, the appellants, were candidates for school directors on the Democratic ticket, and John D. Edmunds and John Cosgrove, the appellees, were candidates for the same office on the Republican ticket. McCoy and Donahue were returned as elected, but, with-

in the period fixed by the statute for contesting an election, qualified electors of West Mahanoy township instituted a proceeding to contest the election of the appellants, on the ground of fraud and gross irregularities in connection with the election in the Lost Creek precinct. This proceeding was discontinued shortly afterwards by counsel for the petitioners. Subsequently, on the petition of the electors of the township, the discontinuance was stricken off by the court, and the petition for the contest was reinstated. After a full hearing and the taking of a mass of testimony, the court decreed that the election in the Lost Creek precinct was null and void, and its entire returns were thrown out. With the returns from that precinct not counted, those from the other three showed Edmunds and Cosgrove to be elected. From the decree so holding, McCoy and Donahue have appealed.

The action of the court below in striking off the discontinuance of the proceeding instituted to contest the election of the appellants, and in reinstating the petition of the contestants after the expiration of the statutory period within which a contest must be instituted, has not been assigned as error, and we do not therefore pass upon the authority of the court to reinstate the proceeding.

[1] This appeal brings up a most voluminous record, and there are 92 assignments of error, but the sole question for determination is whether the court erred in throwing out the returns from Lost Creek. Before passing upon this question it is proper that we say no error was committed in refusing to open the ballot box from the William Penn precinct upon the petition of the respondents. They failed to show fraud, irregularity, illegal voting, or counting of votes in that precinct, which called for the opening of the box, and the ninetieth assignment of error is overruled.

[2-4] For mere irregularities in conducting an election it is not to be held void, even though the election officers may be subject to punishment for misconduct. This is so because the rights of voters are not to be prejudiced by the errors or wrongful acts of the officers of the election, unless it appears that a fair election and honest count were prevented. *Krickbaum's Contested Election*, 221 Pa. 521, 70 Atl. 852. Nor is the mere casting of fraudulent votes sufficient to throw out the return from an election district. "The remedy in such case is to purge the polls by striking out the fraudulent votes, if possible." *Melvin's Case*, 68 Pa. 333. But where no election is legally held in an election precinct, the returns from it may be thrown out.

[5] In the case now under consideration the conditions that existed at the election at Lost Creek were as disgraceful as they are inconceivable, and are thus properly summarized by the learned court below, after a

review of the testimony and the facts to be found from it:

"The ballots, tally, return sheets, and supplies generally, were tampered with; records were irregularly and illegally kept; voters were threatened before the election and on election day; were prevented from voting; were intimidated; coerced and not allowed to vote as they wished; blackjacks and pistols were used, and personal attacks made on legal voters, overseers, and watchers while in the performance of their duty. All of this was done by, or under the direction of, the election officers, aided by their 'buffer' and his assistant."

It clearly appeared from the testimony that these ruffians intimidated the overseers, and for this reason the court below was expressly authorized to throw out "all votes polled in the precinct." Act January 30, 1874 (P. L. 33), § 4.

Each appeal is dismissed on the following correct conclusions reached by the court below:

"The whole election was illegally and fraudulently conducted. The number of voters prevented from voting by intimidation, threats, and violence, and the number of voters coerced by interference in the booths, could not be known, and the correctness or legality of the vote cast and returned could not be ascertained. There was practically no election or opportunity for the voters at this poll to express and have recorded their wish or choice by their ballot, and there is no possible way to ascertain the correct, or approximately correct, result out of this seething mass of corruption, blackguardism, and brute force."

Appeals dismissed at costs of appellants.

(258 Pa. 1)

COMMONWEALTH ex rel. ZERNHOLT et al.
v. BRENNAN et al.

(Supreme Court of Pennsylvania. April 30, 1917.)

1. CONSTITUTIONAL LAW §24 — CONSTRUCTION—PRE-EXISTING LAWS.

As the constitutional amendments of 1909 (see 5 Purdon's Dig. Supp. [13th Ed.] p. 5197, par. 8), together with a schedule adopted for carrying their provisions into effect, contemplated that general elections should be held in even-numbered years, and municipal elections in odd-numbered years, and extended the terms of officers fixed at odd-numbered years to an even number, all acts of the Legislature theretofore in force, whether general or special, were altered.

2. ELECTIONS §30—STATUTE—REPEAL.

Act June 19, 1911 (P. L. 1047), and Act May 20, 1913 (P. L. 268), enacted to enforce the constitutional amendments of 1909 relating to municipal elections and terms of officers, repealed all legislative acts relating to boroughs, whether general or special, inconsistent therewith; the first act declaring that it should apply to every borough in the state.

3. MUNICIPAL CORPORATIONS §124(1) — STATUTES—APPLICABILITY.

General Borough Act May 14, 1915 (P. L. 312), relating to boroughs and election of municipal officers, does not apply to boroughs which have not adopted its provisions.

4. STATUTES §169—REPEAL—REVIVAL.

A borough incorporated by Sp. Acts April 6, 1850 (P. L. 363), and Sp. Act April 12, 1867 (P. L. 1181), did not adopt General Borough Act May 14, 1915 (P. L. 312), which, after re-

pealing the acts of 1911 and 1913 declares in chapter 1, art. 1, § 3, that the repeal of an act or part thereof shall not revive any acts or parts thereof theretofore repealed or superseded. The two acts repealed had repealed all prior acts applicable to boroughs, whether general or special. *Held* that the repeal of the acts of 1911 and 1913 did not revive the earlier special acts, and hence defendants, who held offices of councilmen under an election had under the acts of 1911 and 1913, could not be ousted from office on the theory that the election was void, and that relators were, under the special acts incorporating the borough, entitled to hold office until their successors were elected.

Appeal from Court of Common Pleas, Schuylkill County.

Quo warranto by the Commonwealth, on the relation of Henry Zernholt and another, against Michael M. Brennan and others. From an order sustaining a demurrer and dismissing the writ, relators appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

Arthur L. Shay and Joseph J. Brown, both of Pottsville, for appellants. C. E. Berger, of Pottsville, for appellees.

FRAZER, J. Relators have appealed from the decree of the court of common pleas of Schuylkill county, sustaining a demurrer and quashing the writ of quo warranto brought to oust defendants from office as members of council of the borough of St. Clair. The borough was incorporated by special act of April 6, 1850 (P. L. 363), and its supplement of April 12, 1867 (P. L. 1181), under which the council was composed of nine members, three from each of the three wards into which the borough was divided. Their term of office was three years, and so arranged that one member was elected by each ward annually. The act also provided that members should continue to hold office until their successors were duly appointed, and that vacancies be filled by the remaining members until the next election.

In 1909 Thomas Lawless was elected from the south ward of the borough, to serve three years from the first Monday of March of that year. By the provisions of Act June 19, 1911, § 5 (P. L. 1047), his term was extended to the first Monday of January, 1914. In 1910 Henry Zernholt, one of the relators, was elected from the same ward to serve a three-year term, which period, by virtue of the provisions of the act of 1911, was extended to the first Monday of January, 1914. In 1911 John Quigley was elected for a term of four years, in accordance with the constitutional amendment of 1909 and the act of June 19, 1911, fixing the term of office of borough councilmen at four years. The term for which Quigley was elected ended accordingly on the first Monday of January, 1916. He resigned in March, 1913, and Walter Smith, the other relator, was appointed to fill

the vacancy. It thus happened that at the municipal election of November, 1913, three members of council were to be elected for the term beginning the first Monday of January, 1914; one to fill the unexpired term of Quigley, and the two others without designation of term, which was, however, to be determined by lot, in accordance with the provisions of the act of May 20, 1913 (P. L. 268), amending the act of 1911. The official ballot failed to designate the candidates for the unexpired term of Quigley, left vacant by reason of his resignation, and the court held the election illegal and void, and ousted from office the three persons chosen at that election. Following the entering of this decree, Lawless, Zernholt, and Smith resumed their seats as members, and continued to act until the first Monday of January, 1916. At the municipal election held in November, 1915, the official ballot notified electors to vote for one person for a term of four years, and two for a term of two years to fill the unexpired terms of two persons elected in 1913, and who had drawn four-year terms at the organization of council on the first Monday of January, 1914, but whose election had been declared void. The election of 1915 resulted in the choice of respondents to fill the three vacancies; Brennan for the four-year term, and Schuster and Hughes for two years each. These candidates qualified, and entered upon the duties of their office, and acted therein without objection until April, 1916, when these proceedings were begun to oust them from office on the ground that the ballot was defective, for the reason it contained no designation of a three-year term as required by the incorporating act of 1850.

[1-4] At the hearing counsel for relators conceded the effect of the constitutional amendment to be an extension of the term of members of council to four years in all boroughs, contending, however, that since the acts of 1911 and 1913 were both repealed by the general act of May 14, 1915 (P. L. 312), and as the borough of St. Clair has not accepted the benefits of the act of 1915, or of the earlier general borough act of April 3, 1851 (P. L. 320), the provisions of the original charter of the borough were again in force, and that the voters of each ward must be limited to the election of one member of council each year; and, even if lawful to elect more than one member, the offices to be filled were not vacancies, but full four-year terms succeeding the hold-over terms of relators, and, consequently, the designation of two of the offices as two-year terms, to fill the unexpired terms of those whose election in 1913 had been declared void, rendered the ballot invalid.

The constitutional amendments of 1909, together with the schedule adopted for carrying their provisions into effect, contemplated general elections being held in even-numbered years, and municipal elections in odd-numbered years, and extended the terms of of-

fice fixed by any act of assembly at an odd number of years, so as to make the period of service an even number of years, and further provided that changes in the duration of official terms made by the Legislature should thereafter provide for an even number of years' service. These amendments must be considered as altering the provisions of all acts of the Legislature theretofore in force, whether general or special. The acts of 1911 and 1913 were passed to further carry into effect, or put in operation, the constitutional provisions above referred to; the former containing the specific provision that it should apply to every borough in the commonwealth, whether governed by general or special acts of assembly. The general borough act of May 14, 1915 (P. L. 312), contains a codification of the laws relating to boroughs, including the election of municipal officers. The borough of St. Clair, not having accepted the provisions of this act, that legislation cannot be considered in disposing of the present case.

Although the general act repeals the acts of 1911 and 1913, chapter 1, art. 1, § 3, provides that the repeal of an act of assembly, or part thereof, shall not revive any acts, or part thereof, theretofore repealed or superseded, nor affect the corporate existence of any borough heretofore incorporated, and that any person holding office under an act of assembly repealed by the act of 1915 shall continue to hold such office until the expiration of the term for which he was elected, subject to the conditions attached previous to the passage of the act of 1915. If we should now hold that the repeal of the acts of 1911 and 1913 reinstated the provisions of the special acts of assembly, under which the borough of St. Clair was incorporated, the uniform plan or system of holding elections contemplated by the constitutional amendments will be destroyed. Elections in such cases would be held at different times, and the terms of office of members of council necessarily vary, depending upon the particular provisions of local statutes. Such conclusion is inconsistent with the constitutional amendments, and statutes passed pursuant thereto, providing for the holding of general elections in even-numbered years, and municipal elections in odd-numbered years, and fixing the term of office at an even number of years. Counsel for plaintiff admits the constitutional amendment extended three-year terms to four years, and that a municipal election can now be held only every two years. If this be conceded, the same reasoning would support the conclusion that other inconsistent provisions of the local acts were also modified, and that the borough of St. Clair has now the right to elect more than one member of council in any of its wards at the same election.

Other questions are sought to be raised on this record, especially the legality of the ballot of 1915; but they are not properly before the court, and do not call for decision. The

suggestion for the writ is limited to the question above decided. It is true that, in the notes of the hearing in the court below, printed in the appendix to appellant's paper book without certificate by a stenographer or by the judge who heard the case, counsel for appellant states that the informations were drawn by other counsel, and "there will have to be amendments made" to cover other questions raised, but so far as appears no amendments were filed. They do not appear in the appendix, and no mention is made of them in the "abstract of the record showing the exact questions presented for the decision of the court, and how disposed of," and the question is not considered by the court below.

The above disposition of the case covers all questions properly raised by the record and necessary for decision, and furnishes a sufficient guide for the borough in the future. It may not be amiss to suggest that an acceptance of the act of 1915 by the borough would definitely fix all charter rights and tend to prevent recurring litigation after each election.

The judgment is affirmed.

(268 Pa. 7)

COMMONWEALTH ex rel. KELLER v. SCHERR et al.

(Supreme Court of Pennsylvania. April 30, 1917.)

MUNICIPAL CORPORATIONS §124(4) — OFFICERS—STATUTES—REPEAL.

Though General Borough Act May 14, 1915 (P. L. 312), repealed Act June 19, 1911 (P. L. 1047), and Act May 20, 1913 (P. L. 268), relating to elections of municipal officers the special acts creating the borough did not become effective, so that the election of members for council must be for four years, and the election of more than one candidate in the same year would be illegal.

Appeal from Court of Common Pleas, Schuylkill County.

Quo warranto by the Commonwealth, on the relation of Nicholas Keller, against George P. Scherr and another. From a judgment sustaining a demurrer and quashing the writ, relator appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

Arthur L. Shay and Joseph J. Brown, both of Pottsville, for appellant. C. E. Berger, of Pottsville, for appellees.

FRAZER, J. This appeal is from a decree of the court below, quashing the writ of quo warranto brought to determine the title of respondents to the office of members of council in the borough of St. Clair, and raises questions we have discussed in the preceding case of Commonwealth ex rel. v. Brennan et al., 101 Atl. 947.

At the municipal election in November, 1911, Keller, the relator, was elected a mem-

ber of council from the north ward of the borough for a period of four years. At the election in November, 1913, two persons were elected from that ward without designation of terms, and upon the organization of council, Thorn, one of the candidates, was chosen to serve for four years, and Davis, the other, for two years, in accordance with the provisions of the act of May 20, 1913 (P. L. 268), amending the act of June 19, 1911 (P. L. 1047). At the election in November, 1915, the official ballot designated two members were to be elected in that ward for a term of four years, one as successor of the relator, whose term would expire January 1, 1916. Respondents were duly elected, and these proceedings were instituted by relator, alleging that since the general borough act of May 14, 1915 (P. L. 312), repealed the acts of 1911 and 1913, the special acts of assembly creating the borough were again in force, and under them the election of members of council must be for a term of four years, and that an election of more than one candidate in the same year is illegal. These questions were both answered against the contention of relator in the opinion in the preceding case of Commonwealth v. Brennan.

The judgment is affirmed.

(268 Pa. 9)

COMMONWEALTH ex rel. WHITEHOUSE, Dist. Atty., v. REESE et al.

(Supreme Court of Pennsylvania. April 30, 1917.)

Appeal from Court of Common Pleas, Schuylkill County.

Quo warranto by the Commonwealth, on relation of C. A. Whitehouse, District Attorney, against William A. Reese and others, to oust them from office as members of the council of the borough of St. Clair. Demurrer to suggestion for the writ sustained, and writ quashed, and relator appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

Arthur L. Shay and Joseph J. Brown, both of Pottsville, for appellant. C. E. Berger, of Pottsville, for appellees.

FRAZER, J. The facts and circumstances involved in this appeal are similar to those in Commonwealth ex rel. v. Brennan et al., 101 Atl. 947, and arose out of a dispute concerning the municipal election of 1915 in the middle ward of the borough of St. Clair. At the general election held November 4, 1913, there were three members of council to be elected from that ward, one to fill the unexpired term of two years of Frank Post, temporarily filled by council and which ended in 1915, and two to succeed John Dodds and Frank Betz, whose terms expired in 1914; the election to be without designation of terms, which were to be determined according to the provisions of the act of June 19, 1911 (P. L. 1047). The official ballot at the election of 1913 failed to designate the candidates for the unexpired term; consequently the election was afterwards declared void, and those elected ousted from office. Following this action of the court, Betz resumed the duties of his office, and Fox

and Kantner were appointed by council to fill the remaining two vacancies.

At the municipal election in November, 1915, successors to these three persons were to be elected. The official ballot informed electors to vote for one person for a four-year term, and two for two years to fill the unexpired terms of William H. Holmes and William A. Reese, who had drawn four-year terms at the organization of council on the first Monday of January, 1914, and pursuant to the election of 1913, subsequently by the court declared void. These quo warranto proceedings followed at the instance of the District attorney, alleging the election of respondents to be invalid for the reason the acts of June 19, 1911, and May 20, 1913 (P. L. 268), were repealed by the general borough act of May 14, 1915 (P. L. 312), and that elections for members of council in the borough of St. Clair are regulated entirely by the special acts creating the municipality and according to which such officials must be elected for a three-year term, and but one each year. These questions were both decided against the contention of relators in *Commonwealth ex rel. v. Brennan et al.*, supra.

We deem unnecessary the consideration of questions relating to the form of the ballot at the election of 1915, since no complaint of defects is made in the information; the allegation being confined to the contention that, since the repeal of the acts of 1911 and 1913, not more than one member of council should be elected in any one year under the act incorporating the borough, which statute it is argued is again in force, and such election must be for a three-year term. The paper book of appellant in this appeal contains nothing but the information and answer, the latter in effect a demurrer, and only the averments therein set forth are before us. Counsel argues that an amendment to the information was made in the court below, but not even a suggestion of it appears in the record of this appeal.

The judgment is affirmed.

(258 Pa. 106)

In re BERGDOLL'S ESTATE.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. TRUSTS \S 191(2) — POWER OF SALE — WILLS.

Under a will devising the residue of an estate to trustees after disposing of one-third of the realty and directing them to pay one-half of the income of two-thirds of the realty to a son and the remaining one-half to three granddaughters for their lives, and providing that on the conversion of any realty into money, one-third of the proceeds should be paid to the son absolutely, and authorizing the trustees to sell and convert all or part of the realty at such times and in such parcels as they might deem best, such authority to sell was equivalent to a positive direction to sell, because of the necessity of a sale to carry out the scheme of the will.

2. CONVERSION \S 15(4) — CONSTRUCTION OF WILL.

Under such will, and after the son's death after the testator leaving a widow and children, one-third of the proceeds of the sale of the son's share of the real estate went to his widow absolutely.

Appeal from Orphans' Court, Philadelphia County.

In the matter of an accounting in the estate of Louis Bergdoll, Sr., deceased. From an order dismissing his exceptions to adjudi-

cation Louis Bergdoll, Jr., appeals. Affirmed.

The facts appear in the following opinion by Dallett, P. J., in the orphans' court, sur exceptions to adjudication:

This testator gave the residue of his estate to his executors as trustees, directing them, after the disposition of all of his personal and one-third of his real estate as he had indicated, "to collect, recover and receive the rents, issues and profits thereof and to pay one-half part of the rents, issues and profits of said two-thirds of the real estate to my said son Louis Bergdoll, Junior, and the remaining one-half part thereof to pay to my three granddaughters, Elizabeth, Catharine, and Louisa Schoening, equally, for and during the terms of their natural lives respectively. Upon the conversion of any of my real estate into money as hereinafter mentioned, I direct the proceeds thereof shall be disposed of as follows, to wit: One-third part thereof shall be held and retained by said trustees, in trust for my daughter, Louisa Alter, and her children under the trusts hereinbefore declared and expressed for their use one other third part thereof shall be paid to my son, Louis Bergdoll, Junior, absolutely, and the remaining one-third part thereof shall be held and retained by said trustees upon the same trusts as above directed for the use and benefit of my three granddaughters, Elizabeth, Catharine and Louisa Schoening"—and added: "The said trustees and the survivors and survivor of them are hereby authorized to sell and convert all or part of my real estate into money at such time or times and in such parcels as they in their discretion may deem best for the advantage of my estate, and whenever the said trustees shall make public or private sale of any portion of my real estate they are hereby authorized and empowered to make, execute and deliver to the purchaser or purchasers thereof in fee simple good and sufficient conveyances for the same free and clear of all trusts and of the legacies and annuities herein given and discharged from all liability on the part of such purchaser or purchasers to see to the application of the purchase moneys."

The testator died on August 10, 1894. His son, Louis Bergdoll, Jr., died September 9, 1896, intestate, and leaving to survive him his widow, Emma C. Bergdoll, and five children, all of whom are living and of full age. This is the fifth accounting, and includes the proceeds derived from sales of real estate made subsequent to the death of Louis Bergdoll, Jr.

[1] The exceptions relate to the auditing judge's award of one-third of the share of the proceeds to which Louis Bergdoll, Jr., would be entitled were he living, to his widow, and two-thirds to his five children, the exceptant, a son, contending that the fund realized from the sales should be treated as real estate and one-third thereof awarded to Emma C. Bergdoll, Louis Bergdoll, Jr.'s widow for life only. We believe the auditing judge's award the proper one. It will be noted that the testator's only gift to Louis Bergdoll, Jr., after a gift of the rents, issues, and profits derived from residuary real estate, is of the proceeds derived from sales thereof, and as well that the discretion given the trustees as to sales relates only to the parcels in which real estate is to be sold and to the time at which the sales are to be made. To effect gifts of proceeds, sales must at some time be made. The inevitable conclusion is that while the trustees are merely authorized by the will to sell, that authorization, because of the necessity to sell to carry out the scheme of the will, is equivalent to a positive direction to sell.

In *Fahnestock v. Fahnestock et al.*, 152 Pa. 56, 25 Atl. 313, 34 Am. St. Rep. 623, where

due effect could not be given material provisions of the will without treating a mere power of sale as a direction to sell and so operating as an equitable conversion. Mr. Justice McCollum, for the Supreme Court, said (page 61 of 152 Pa., page 315 of 25 Atl., 34 Am. St. Rep. 623): "If a testator authorizes his executors to sell his real estate and to execute and deliver to the purchasers deeds in fee simple, of the same, as in this case, and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell, and operate as an equitable conversion. If in addition to this clear intention of the testator it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell."

In *Severns' Estate* (No. 1) 211 Pa. 65, 67, 60 Atl. 492, 493, where it was held that an intention to convert would be implied although a sale was merely authorized if a sale was necessary to carry out the provisions of the will, Mr. Justice Mestrezat, for the Supreme Court, said: "There is no difficulty in ascertaining the intention of the testatrix from the provisions of Mrs. Severns' will. She does not devise her real estate, but empowers her executrix to sell without any alternative disposition of it. It is not given as real estate to the persons named in the will, nor to any other person for any purpose whatever, but, in the language of the instrument, 'the proceeds of the sale of the said premises I direct my said executrix to divide among my said three daughters share and share alike.' We, therefore, have in the will an authority given to the executrix to sell and a direction to divide the proceeds of the sale in equal shares among the three legatees. In order to carry out the provisions of the will and make that distribution of the proceeds of the property, a sale of the real estate becomes imperative and is an absolute necessity. This, as appears from the authorities cited above, meets the requirements of our cases and operates as an equitable conversion. The fact that the time when, and the terms upon which, the sale should be made are discretionary with the executrix does not give the latter authority to prevent a sale, nor to postpone it indefinitely. The discretion reposed in the executrix is a reasonable and not an arbitrary one, and must be exercised to carry out the plain intention of the testatrix that the property shall be converted into personalty and the proceeds distributed equally among the three sisters."

And in *Bahn's Estate*, 57 Pa. Super. Ct. 457, Judge Porter, for the Superior Court, said (page 461): "This will contains, it is true, no express direction to sell the land; it does, however, authorize the executor to make a sale and convey 'as good a title of my real estate sold as I could were I living'; the time of such sale to be subject to the joint discretion of Henry Bahn and the executor. 'And when so sold, that the proceeds of said sale be equally divided share and share alike between my husband, Henry Bahn, and my daughter, Elsie Minerva Bahn.' This is a positive direction to divide the proceeds of and not the real estate itself between the two persons named, and there is an absolute necessity to sell to accomplish the purpose of the testator. Taking all the provisions of the will together, they disclose a clear intention upon the part of the testator that the land should be sold and the proceeds divided, and the conclusion is irresistible that a conversion is effectually accomplished by the will, though there was not to be an immediate sale. *McClure's Appeal*, 72 Pa. 414; *Roland v. Miller*, 100

Pa. 47; *Philadelphia's Appeal*, 112 Pa. 470 [4 Atl. 4]; *Severns' Estate* (No. 1) 211 Pa. 65, 60 Atl. 492; *McClarren's Estate*, 238 Pa. 220 [85 Atl. 1119]."

[2] In all, these the facts appear very like those in this estate, and in *Knoppel's Estate*, 25 Pa. Dist. R. 116, where the testator merely authorized his executor to sell real estate and gave the proceeds to his children, nominatim, Judge Lamorelle, for this court, said (page 117): "The mere reading of the will shows that the authorization to sell was tantamount to a direction, for the nine children were, in terms, given the proceeds and not the real estate itself; therefore a sale was essential to effect the distribution contemplated by testator."

We are satisfied that this testator's will worked an equitable conversion of his real estate into personal property as of the date of his death, and that, such being the case, proceeds derived from sales pass as personal property and not as real estate. The award to the son's widow, therefore (his estate having been settled and all debts paid), of one-third of the share to which her husband would have been entitled was correct.

It should perhaps be added that in reaching this conclusion we have not overlooked, although we have not thought it necessary to discuss, the apparently conflicting views expressed in opinions heretofore filed in this state and relating to the distribution of rents (*Metzger's Estate*, 222 Pa. 276, 71 Atl. 96; *Id.*, 242 Pa. 69, 83 Atl. 915) or of the proceeds derived from sales of other real estate.

The court dismissed the exceptions. Louis J. Bergdoll appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

William H. Balle, of Philadelphia, for appellant. R. Stuart Smith, A. Allen Woodruff, and Nicholas H. Larzelere, all of Philadelphia, for appellee.

PER CURIAM. The decrees in this case is affirmed, at appellant's costs, on the opinion of the learned court below dismissing the exceptions to the adjudication.

(258 Pa. 143)

HANDEL & HAYDEN BUILDING & LOAN ASS'N v. ELLEFORD et al.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. JUDGMENT ~~6~~865 — LIEN — "TERRE-TENANT"—STATUTE.

Under Act April 4, 1798 (3 Smith's Laws, pp. 331, 332) §§ 2, 3, relating to the lien of judgments upon realty and their revival, and providing that writs of scire facias to revive shall be served on the terre-tenant or person occupying the realty bound by the judgment, the "terre-tenant" is one whose title is subsequent to the incumbrance; one other than the debtor, who becomes seised or possessed of the debtor's lands subject to the lien thereof; and in a more general sense one who is seised or actually possessed of lands as the owner thereof, so that one deriving his title 11 weeks prior to the date of the original judgment was not a terre-tenant, and a default judgment of revival entered against him was properly stricken from the record.

[Ed. Note.—For other definitions, see Words and Phrases, Terre-Tenant.]

2. JUDGMENT §675(1)—SCIRE FACIAS—TERRE-TENANT—ADVERSE POSSESSION.

On a scire facias to revive a judgment upon a bond accompanying a mortgage, one summoned as defendant's terre-tenant, who in fact did not acquire the real estate in controversy while subject to the lien of the original judgment, was not precluded from setting up an adverse title in a subsequent action of ejectment.

3. FRAUDULENT CONVEYANCES §230—REMEDY—JUDICIAL SALE.

Where a sale is made to delay, hinder, and defraud creditors, the proper way to test the validity of the transaction is by a judicial sale at the suit of a judgment creditor.

4. FRAUDULENT CONVEYANCES §237(2) — REMEDIES OF CREDITOR—EQUITY.

Where a judgment debtor makes a fraudulent transfer of property which otherwise would be subject to the lien of the judgment, and the creditor for some valid reason cannot then lawfully proceed to immediate execution and sale, or has no adequate remedy at law, he can sue in equity.

5. JUDGMENT §252(1) — SCIRE FACIAS—ORDER—RESPONSIVENESS.

On scire facias to revive a judgment against two defendants upon a mortgage bond against them, and against their terre-tenant, where the terre-tenant sought to strike off the default judgment against him, an order striking off the judgment against him only was responsive to the relief asked.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Handel & Hayden Building & Loan Association against William J. Elleford, Eleise H. Elleford, his wife, and Charles C. Wells, terre-tenant. From a judgment making absolute a rule to strike off a judgment against the terre-tenant, plaintiff appeals. Appeal dismissed.

Argued before BROWN, O. J., and MESTREZAT, POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Joseph H. Sundhelm and I. Lasker Greenberg, both of Philadelphia, for appellant. W. Horace Hepburn, Jr., of Philadelphia, for appellees.

MOSCHZISKER, J. William J. Elleford and Eleise H., his wife, executed to the plaintiff corporation a mortgage in the usual building association form, secured upon real estate in the city of Philadelphia. Mrs. Elleford owned another piece of real estate, not covered by the mortgage, which, on October 15, 1914, the two defendants conveyed to Charles C. Wells. On December 31, 1914, a judgment by confession was entered in favor of the plaintiff against these defendants, upon the bond accompanying this mortgage. December 8, 1915, plaintiff filed of record a suggestion that the above-mentioned conveyance by Elleford and wife was made without consideration, and with the intent to "hinder, delay, and defraud the creditors of Eleise H. Elleford, particularly the plaintiff in this case." December 9, 1915, a sc. fa. to revive the judgment issued against the two defendants and Charles C. Wells, the latter being named as terre-tenant of the

property conveyed to him by the former; and January 8, 1916, judgment was entered generally against all three, for want of an affidavit of defense. April 4, 1916, Mr. Wells obtained the allowance of a rule to show cause why the judgment against him should not be stricken from the record; and, on May 5, 1916, this rule was made absolute. The plaintiff has appealed.

[1] Sections 2 and 3 of the act of April 4, 1798 (3 Smith's Laws, p. 331; 2 Purd. Dig. [13th Ed.] 2042-2044), covering the subject of the lien of judgments upon real estate and their revival, provide, *inter alia*, that writs of scire facias to revive "shall be served on the terre-tenants or persons occupying the real estate bound by the judgment." There is some conflict in the earlier decisions of this court concerning the meaning of the term "terre-tenant," as used in this act; but it is not necessary to review our cases chronologically. It is sufficient to cite the last one touching the point under consideration, which conclusively settles it in favor of the appellee. In *Hulett et al. v. Mut. Life Ins. Co. of N. Y.*, 114 Pa. 142, 146, 6 Atl. 554, 555, we said:

"A terre-tenant, in a general sense, is one who is seised or actually possessed of lands as the owner thereof. In a scire facias sur mortgage or judgment, a terre-tenant is, in a more restricted sense, one, other than the debtor, who becomes seised or possessed of the debtor's lands, subject to the lien thereof. Those only are terre-tenants, therefore, in a technical sense, whose title is subsequent to the incumbrance."

Here, whatever title Mr. Wells may have to the real estate sought to be covered by the proceedings to revive, came to him before and not "subsequent to the incumbrance"; hence he is not a terre-tenant, within the meaning of the act depended upon by the plaintiff, and should not have been named as such.

Under some of our cases, where one is *prima facie* a terre-tenant, in that he took title to the real estate in question subsequent to the judgment sought to be revived, a plaintiff has a right to name him as such, even though the lien of the judgment may have expired; and, when so named, the terre-tenant may defend under a plea that the judgment is not and never was a lien upon his land. *Hulett v. Mut. Life Ins. Co.*, supra; *Hanhauser v. Penna. & New England R. R. Co.* (No. 2) 222 Pa. 244, 71 Atl. 4, 247; *Colwell v. Easley*, 83 Pa. 31. In a case like the present, where the record depended upon by the plaintiff clearly shows that the person named as terre-tenant derived his title 11 weeks prior to the date of the original judgment, the fact that he is not a terre-tenant within the meaning of the act of 1798, as construed in our latest rulings, is so apparent that, upon application, a judgment of revival entered against him by default may properly be stricken from the record.

If the summary relief granted in this case were not allowed, there would be nothing to hinder a judgment creditor in the position of the present plaintiff from filing of record suggestions of fraudulent conveyances covering all real estate disposed of by his mortgagor subsequent to the date of his mortgage lien, and thus, in numerous instances unjustly, but none the less effectually, prevent the marketing of such properties for indefinite periods of time. While there are some dicta in certain of our cases which, no doubt, suggested to plaintiff the possible validity of such a procedure, yet we have been pointed to no ruling authority therefor, and we know of none.

[2] In a proceeding to revive, such as the one now before us, a person summoned as terre-tenant, who in point of fact did not acquire the real estate in controversy while it was subject to the lien of the original judgment, is not precluded from setting up an adverse title in a subsequent action of ejectment (*Mitchell v. Hamilton*, 8 Pa. 486; *Dengler v. Kiehner*, 13 Pa. 38, 53 Am. Dec. 441; *Drum v. Kelly*, 34 Pa. 415; *Colwell v. Easley*, supra; *Gibbs v. Tiffany*, 4 Pa. Super. Ct. 29); and the present plaintiff does not contend to the contrary, but only that it should be allowed to retain whatever prima facie rights it may possess under the judgment against the alleged terre-tenant.

[3, 4] There is an ample remedy to protect whatever rights the plaintiff may have in the premises; for as well stated in the opinion of the learned court below:

"Where a sale is made to delay, hinder, and defraud creditors, the proper manner to test the validity of the transaction is not by suggestion and scire facias, as has been attempted in this case, but by a judicial sale at the suit of the judgment creditor." *Stewart v. Coder*, 11 Pa. 90, 94; *Kemmler, Ex'r, v. McGovern et ux.*, 238 Pa. 460, 86 Atl. 304.

A judicial sale of all or any real estate alleged to be subject to a judgment, followed by ejectment, is the usual course pursued in cases like the one at bar. Where, however, a judgment debtor has made a fraudulent transfer of property which otherwise would be subject to the lien of the judgment, and the creditor, for some valid reason, cannot for the time being lawfully proceed to immediate execution and sale, or for any other cause the latter has no full and adequate remedy at law, then the doors of equity are opened to him. *Fowler's Appeal*, 87 Pa. 449; *Hyde v. Baker*, 212 Pa. 224, 61 Atl. 823, 108 Am. St. Rep. 865.

[5] The plaintiff contends that the order appealed from is not responsive to the relief asked, for the reason that the judgment is a general one, comprehending the two original defendants, as well as the terre-tenant, and the prayer is simply to strike it off, without limitation; but, when the whole petition is read, it is perfectly apparent the

only relief desired was that the judgment in question should be stricken off as to the alleged terre-tenant and petitioner, Charles C. Wells. The order of the court below was properly restricted accordingly.

The assignments of error are overruled, and the appeal is dismissed.

(258 Pa. 209)

BOOKWALTER et ux. v. BOROUGH OF MT. UNION.

(Supreme Court of Pennsylvania. May 14, 1917.)

MUNICIPAL CORPORATIONS — §805(2)—DEFECTIVE SIDEWALK — CONTRIBUTORY NEGLIGENCE.

Plaintiff in an action against a municipality to recover for injuries from a fall over a pile of broken brick on a sidewalk, who had passed over the sidewalk twice before on the same day and had seen the broken brick, and who, when injured in broad daylight, did not look to see whether it was still there, was not in the exercise of due care, and could not recover.

Appeal from Court of Common Pleas, Huntingdon County.

Trespass by J. G. Bookwalter and Ida Bookwalter, his wife, against the Borough of Mt. Union, to recover damages for personal injuries. From an order refusing to take off a compulsory nonsuit, plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, and WALLING, JJ.

Samuel I. Spyker, of Huntingdon, for appellants. Charles B. Hower, of Mt. Union, for appellee.

PER CURIAM. In broad daylight, on a May morning, Ida Bookwalter fell on a sidewalk in the borough of Mt. Union, and this action was brought to recover compensation for the injuries she sustained. Her fall was caused by stepping on spalls or broken brick, and the negligence with which she charged the municipality was its failure to remove the brick or stone from the sidewalk.

The borough may have been negligent in this respect; but the contributory negligence of the plaintiff was clear, and it was the duty of the court below to sustain the defendant's motion for a nonsuit. Just before she fell she was crossing the entrance to an alley and approaching a curb on the sidewalk alongside of the entrance. The curb projected 10 inches above the sidewalk, on the north side of it, the direction in which the plaintiff was walking. She testified that she had passed over the sidewalk twice before on the same day and had seen the spalls on it. That she failed to exercise the proper degree of care at the time she fell conclusively appears from her own admission. Her testimony as to this is as follows:

"Q. If you had looked over the curb, you would have seen the spalls that were there,

couldn't you. It was broad daylight? A. Yes. Q. When you came to that curb, you didn't look over to see them? A. No, sir. * * * Q. The reason you didn't see the spalls on the opposite side of the curb, when you stepped over, was because you didn't look to see them; is that true? A. Yes, sir."

Judgment affirmed.

(258 Pa. 202)

REILLY v. CITY OF WILKES-BARRE.

(Supreme Court of Pennsylvania. May 14, 1917.)

MUNICIPAL CORPORATIONS — 352 — CONSTRUCTION OF CONTRACT — LIABILITY.

Under a contract to furnish labor and materials in laying sewer pipes according to the plans and specifications and the contractor's proposal attached to the contract, requiring the bidder to state the cost of each item and carry out the total cost of the work according to the proposal, and also providing that all the work and materials to be paid for should be measured by the engineer, and whereby the city agreed to pay for the completed work in accordance with the plans the sum of \$48,980.59, the proposal was a part of the contract, and the city was not liable for the amount stated, but only for the aggregate actual measurements at the prices specified.

Appeal from Court of Common Pleas, Luzerne County.

Assumpsit on a contract by C. M. Reilly against City of Wilkes-Barre. From a judgment on a verdict for plaintiff, he appeals. Affirmed.

The following is the opinion of Fuller, P. J., in the court of common pleas:

The action was brought to recover a balance claimed on contract for building a sewer. By that contract, dated October 25, 1912, plaintiff agreed to furnish all labor and materials to excavate and back-fill trenches and to lay sewer pipes therein, on certain streets in the city of Wilkes-Barre according to plans and specifications and plaintiff's proposal on file on the city office, and attached to the contract; and the defendant agreed to pay for completing said work in accordance with plans and specifications \$48,980.59 in the manner provided by the specifications. Thus the proposal and specifications became a part of the contract and must be considered in construing its terms.

In the proposal the plaintiff offered "to excavate and back-fill sewer trenches and to furnish sand and cement and lay pipe in trenches in accordance with plans and specifications of the same for the following prices, and in greater or smaller quantities, viz. * * *". Then follows some 17 items specifying different lengths and depths of trenches, cubic yards of different material such as hardpan, rock, shale, and slate, length and diameter of pipes, number of man-holes, etc., with unit prices per lineal foot, cubic yard, and manhole, all carried out, footed up, and added together, amounting to the said sum of \$48,980.59.

This proposal was on a standard printed blank used by the city, and contained the following: "Bidders will fill in the cost per foot or yard of each item as indicated on the above blank, carry out the total cost of such items, and add the bid showing total cost of work according to their proposal"—as was done in this case. It was also provided: "All work and materials to be paid for shall be measured by the engineer and his assistants according to the plans, specifications, and the lines given on the ground."

It was also provided that in rock work certain considerations should determine whether the estimate should be for rock, shale, or slate; "these estimates and the decision and judgment upon which they are based to be final and conclusive." It was also provided that at the end of each month during the progress of the work the engineer shall make an estimate of the total amount of work during that month and the valuation thereof at the prices stipulated and recorded in the contract, which estimate shall be a warrant for payment of 90 per cent., the other 10 per cent. to remain unpaid until completion, and then to be payable within 90 days from completion and acceptance.

The plaintiff received payments on monthly estimates of the engineer from time to time, 23 in all, forming a connected series, with balances carried forward from one to the other, based upon actual measurements and upon prices specified in the proposal, amounting all together to \$34,046.04.

Ten per cent. was retained out of each monthly estimate as agreed, and upon completion and acceptance of the work by the city, December 9, 1914, the final estimate was \$4,971.59, which the city offered and still offers to pay.

There were some minor questions in the case which are not in controversy at this time, and need not be mentioned or considered.

The plaintiff in substance claimed that on his construction of the contract he was entitled to the flat sum of \$48,980.59, regardless of measurements, with credit of \$34,046.04, leaving a balance of \$14,934.55, subject to some further credit connected with the minor questions just mentioned. The defendant, on the other hand, claimed that on its construction of the contract the limitation of liability was actual measurements and specified prices, that is \$39,017.63, less payments \$34,046.04, leaving \$4,971.59, as set forth in the final estimate above mentioned, with some addition thereto connected with the minor questions aforesaid. Thus the controversy involves a construction of the contract as between \$48,980.59, claimed by the plaintiff, and the unit basis claimed by the defendant. In our charge to the jury we adopted and we still hold to the latter.

The defendant offered evidence of a contemporaneous similar contract, in which the plaintiff himself adopted and acted upon the defendant's construction, but we rejected the evidence on the assumption, which we still make, that the contract taken as a whole was free from ambiguity.

Plainly, we think, the contract was to do the work for \$48,980.59 if the measurements amounted to so much at the specified unit prices. The measurements stated in the proposal were estimated as closely as they could be in advance. If they fell short, the cost would be correspondingly less; if they went above, the cost would be correspondingly more. No other construction would be fair to either party. No other construction accords with the language of the different provisions heretofore quoted, accompanied by the specification of prices. Why specify prices or measurements "in greater or smaller quantities" if a flat payment of the total amount is contemplated?

Without further discussion, which the case no doubt deserves, but which we have not the time to bestow, we concur with the trial judge that the contract clearly contemplates payment, not of a flat \$48,980.59, but for aggregate actual measurements on prices specified.

Verdict for plaintiff for \$6,411.41 and judgment thereon. Plaintiff appealed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

John McGahren and R. B. Alexander, both of Wilkes-Barre, for appellant. Evan C. Jones and Charles F. McHugh, both of Wilkes-Barre, for appellee.

PER CURIAM. The proposal of the plaintiff to the defendant to do the work for which he bid and the specifications upon which it was based became parts of the contract upon which he brought this action. The proposal was to do the work and furnish materials at an estimated price for certain items, which prices were to be paid for "greater or smaller quantities." The contract was correctly construed by the court below as imposing "liability upon the city, not for the flat sum of \$48,980.59, as claimed by the plaintiff, but for such less or larger sum as would result from applying the specified unit rate prices to the actual measurements of work done, as claimed by the defendant."

Judgment affirmed.

(258 Pa. 206)

BOROUGH OF HOLLIDAYSBURG v. SNYDER.

(Supreme Court of Pennsylvania. May 14, 1917.)

INDEMNITY §14 — ACTION OVER AGAINST TORT-FEASOR—CONCLUSIVENESS OF ADJUDICATION.

In a municipality's action to recover from a property owner the amount of a judgment it had been compelled to pay in an action for injury resulting from the dangerous condition of his sidewalk, where the evidence was conflicting as to his notice of the action against the municipality, the record of such action, showing that he was present and testified therein, was admissible.

Appeal from Court of Common Pleas, Blair County.

Assumpsit by the Borough of Hollidaysburg against Plymouth W. Snyder, executor of Anna C. Bell, deceased, to recover the amount of a judgment which plaintiff was compelled to pay for injuries caused by the dangerous condition of a sidewalk. Verdict for plaintiff for \$2,072.31, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and WAL-
LING, JJ.

John M. Snyder, of Philadelphia, J. Lee Plummer, of Hollidaysburg, and William L. Snyder, of Shamokin, for appellant. Marion D. Patterson, of Hollidaysburg, and Thomas H. Greevy, of Altoona, for appellee.

PER CURIAM. This action was brought by the borough of Hollidaysburg to recover from the estate of Anna C. Bell, deceased, the amount of a judgment it was compelled to pay in a suit brought against it by Teresa Green, for injuries sustained in falling on an icy pavement in front of a property owned by Miss Bell. The record of that suit was

admitted in evidence in this action, and the main complaint of the appellant—and the only one to be noticed—is of its admission, because, he alleges, he had not received notice from the borough of the former proceeding against it. Whether he had received such notice, and was thus given the opportunity to ask to intervene as a defendant, was submitted to the jury as a question of fact, and their finding that he had had due notice of the proceeding against the borough was supported by the evidence. The borough solicitor testified that, when the case against the borough was fixed on the trial list, he went to the appellant and said to him:

"It is highly important for you to take some interest in this case, for, in the event of the borough being held responsible, it may be possible that you will in turn be made liable."

In addition to this, the appellant was actually present at the trial of the case and testified in it as a witness. Nothing is discoverable in the assignments of error calling for a retrial of the case, and the judgment is affirmed.

(258 Pa. 113)

MURRAY et al. v. RANDALL et al.

Appeal of MATISER.

(Supreme Court of Pennsylvania. May 7, 1917.)

JUDGMENT §382—MOTION TO STRIKE.

Where one of the two defendants in ejectment filed a disclaimer before trial, and the jury were sworn as between the plaintiff and the other defendant, but rendered a verdict against both defendants, a motion to strike off the judgment entered thereon was properly refused, where the disclaiming defendant did not complain.

Appeal from Court of Common Pleas, Luzerne County.

Ejectment by John C. Murray and another against A. Blanche Randall (now A. Blanche Matiser) and John Morrett, to recover land in Luzerne county in which defendant Morrett disclaimed. Judgment for plaintiff against both defendants, and from an order discharging rule to show cause why judgment should not be stricken off, defendant A. Blanche Matiser appeals. Appeal dismissed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

B. R. Jones, of Wilkes-Barre, R. B. Smith, of Philadelphia, and E. G. Butler, of Wilkes-Barre, for appellant. Richard B. Sheridan, Michael F. McDonald, and John T. Lenahan, all of Wilkes-Barre, for appellees.

PER CURIAM. In this ejectment one of the two defendants, John Morrett, filed a disclaimer before the case was called for trial. Notwithstanding this, a verdict was rendered against both defendants, and judgment thereon was duly entered. A. Blanche Matiser, the other defendant, appealed from

that judgment to this court, but subsequently suffered a non pros. Shortly afterwards she presented her petition to the court below, asking that the judgment be stricken off, for the reason that the verdict had been improperly rendered against herself and Morrett, in view of the latter's disclaimer before the trial. This petition was dismissed for the good reason that Morrett himself was not complaining of the judgment against him, and the entry of it in no manner impaired or invalidated the judgment against the appellant.

Appeal dismissed, at her costs.

(258 Pa. 206)

FULTON COUNTY BANK v. SWOPE et al.
(Supreme Court of Pennsylvania. May 14, 1917.)

JUDGMENT \Leftrightarrow 68(2) — **OPENING JUDGMENT — GROUNDS.**

A judgment on a note, given in renewal of another note upon which defendants claimed they were not liable, will not be opened, where it appeared that, when the renewal note was given, they had full knowledge of all facts connected with the execution of the original note.

Appeal from Court of Common Pleas, Huntingdon County.

Action by the Fulton County Bank against M. F. Swope and others. From an order refusing to open a judgment for plaintiff, defendants appeal. Appeal dismissed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and WAL-
LING, JJ.

James S. Woods, of Huntingdon, for appellants. Walter K. Sharpe, of Chambersburg, H. H. Waite, of Huntingdon, and Irvin C. Elder, of Chambersburg, for appellee.

PER CURIAM. The judgment which the appellants would have opened was entered on a note given in renewal of another judgment note executed by them. They ask that the judgment be opened, because they aver they were not liable on the original note, for reasons which need not be considered; for, even if they were mistaken as a matter of law as to the character of the first note, they gave the second with full knowledge of all the facts connected with the execution of the first. For this reason, the action of the court below is sustained. *Garrett v. Gonter*, 42 Pa. 143; *Building & Loan Association v. Walton*, 181 Pa. 201, 37 Atl. 261.

Appeal dismissed, at appellants' costs.

(258 Pa. 188)

HACK v. SHOVLIN.

(Supreme Court of Pennsylvania. May 14, 1917.)

CONTRACTS \Leftrightarrow 323(3) — **ACTION — QUESTION FOR JURY — ABANDONMENT.**

In an action for labor and materials furnished under building contract, held, on the evidence, that whether the contractor had forfeited his

right to recover by refusing to accept the architect's estimates under the contract, and by notifying defendant that he would not proceed until paid what was found to be due him upon a re-estimate, was a question for the jury.

Appeal from Court of Common Pleas, Luzerne County.

Assumpsit on a building contract by John Hack against John F. Shovlin. From a judgment on a verdict for plaintiff, defendant appeals. Affirmed.

Garman, J., filed the following opinion in the common pleas sur defendant's motion for a new trial:

Plaintiff and defendant were parties to a building contract dated November 10, 1913, wherein the plaintiff agreed to do the work and furnish the materials for the sum of \$6,907, and defendant agreed to pay said sum, the manner of payment set forth in the contract as follows: "On the 1st day of every month the architect shall make a monthly estimate of the value of the work done on the building, on which day the amount of said estimate, less 10 per cent., shall be paid contractor; when the final estimate is made and building accepted the 10 per cent. reductions theretofore made shall be added to and made part of the final payment. And it is hereby expressly covenanted, understood and agreed by the said party of the first part that 10 per cent. of the amount of each payment is to be retained by the party of the second part until the said building is completed and finished, and finally accepted by the party of the second part."

On the 1st of December, 1913, the architect made an estimate addressed to Mr. Shovlin in the following form: "This is to certify that the first payment of \$360 is due to John Hack, contractor on your building, Park avenue, Wilkes-Barre, Pa. John J. Feeney, Architect. John Hack, Contractor." This paper was accepted by both parties as an estimate, and defendant paid to plaintiff the sum of \$360. On the 1st of January, 1914, the architect presented a paper, addressed to Mr. Shovlin, reading as follows: "This is to certify that the second payment of one thousand dollars is due to Mr. John Hack, contractor on your building, Park avenue, Wilkes-Barre, Pa. John J. Feeney, Architect. Amount of contract, \$6,907; previously paid, \$360; this certificate, \$1,000; balance, \$5,547." To this paper plaintiff objected, on the ground that it was not a proper estimate, and demanded a re-estimate.

On the 7th of January, 1914, the architect sent in another paper as follows: "Wilkes-Barre, January 7, 1914. Mr. John Shovlin—Dear Sir: I have re-estimated the amount of work and materials fixed in on your building, Park avenue, as done by your contractor, John Hack, for the month of December, 1913, as follows: Entire excavation, 766 yards at .60, \$459.60; 68 yards of concrete, at \$6.00, \$408.00; brick wall in cellar, at \$15 per thousand, \$82.00; 9,790 feet hemlock, at \$45.00 per thousand, \$440.55; 10 cellar window frames, at \$1.50, \$15.00; total \$1,405.15. John J. Feeney, Architect." This paper was delivered to Mr. Shovlin, who declined to pay Hack according to its findings, but offered Hack a check for \$1,000, as per certificate of January 1, 1914.

Now, if the case rested right here, who would doubt that Shovlin should have paid Hack \$1,264.63, the amount of the estimate, less 10 per cent. But on the 5th of January, 1914, Hack sent to Shovlin a letter as follows: "I have been advised by my attorney to notify you that John J. Feeney, archt. for your building, Park ave., city, is to re-estimate the amount of work

and material furnished on said building to January 1, 1914, in a fair and honest manner. I also demand a copy of his estimate to date. I will allow you for readjustment until January 6, 1914, at 4:30 p. m. If not settled satisfactory by said time and date, I shall quit work on your building and hold you responsible for all delays." As indicated in this letter, Hack quit work on the 6th of January, 1914, at 4:30 p. m.

On the 8th of January, 1914, Shovlin and Feeney sent to Hack the following letter: "You are hereby notified that, because of your having quit working on the John F. Shovlin building on Park avenue, city of Wilkes-Barre, Pa., which you contracted to build for him, and having neglected to supply a sufficiency of materials and workmen, whereby, in our opinion the completion of the said building at the time specified will be prevented, and having failed and refused to follow the drawings and specifications, it is our intention to enter and take possession of the premises and bldg. in three (3) days after service of this notice on you and provide materials and workmen to complete and finish said bldg. as provided in the specifications and contract. For any loss sustained by John F. Shovlin, resulting from your refusal or failure to perform the contract you will be held responsible." This letter was followed by one dated January 26, 1914, to Shovlin from Hack's attorneys, demanding the sum of \$2,361, the amount claimed by Hack to be due to him for materials furnished and work and labor done to January 1, 1914.

Now at this point a review of the circumstances will disclose these facts: (1) Hack demanded of Shovlin a new and honest estimate, threatened to quit work, and did quit work on the 6th of January, 1914. (2) Shovlin on January 7, 1914, received an estimate showing the items of work and material furnished by Hack and the sum of \$1,405.15 due him. (3) Shovlin and Feeney, both knowing of the contents of the re-estimate on January 8, 1914, demanded, without tender of full payment, that Hack proceed within three days or forfeit his contract. After the 8th of January, Hack did no more work, and Shovlin made a contract with another person to complete the work, and in the trial claimed from Hack the sum of \$7,439 for failure to complete his contract and for expenses incurred in correcting Hack's bad work.

As to the estimate, we instructed the jury that, if the architect had stood by his estimate known in the case as of January 1st, both Hack and Shovlin would have been bound by it; but when the architect made a re-estimate, showing the incorrectness of the first paper, Shovlin was bound by it, and therefore would not be entitled to set off against Hack any expense, except such as was necessary to correct bad work done by Hack; that Hack might recover such sum as the jury should find to be the actual value of the materials furnished and work done up to January 7, 1914, less such amount as the jury would deduct for payments made to Hack and for bad work or defective work attributable to him. And on consideration of these instructions we are unable to see any error. As a fact there was no estimate worth considering until that of January 7th. The contract specified that Hack was entitled to a monthly estimate of the value of the work done on the building and to pay for the value, less 10 per cent. When, therefore, Shovlin learned on the 7th of January that there was due on the 1st of January a sum of excess of the first estimate, he was bound to tender Hack the sum due, less 10 per cent.

But Shovlin claimed that, as threatened by the letter of January 5th, Hack quit the work and abandoned his undertaking. This Hack denied, and averred that he quit the work only pending the dispute about the estimate. As to these contentions we said to the jury: "If you

find that Hack absolutely quit on the 5th of January, before this estimate of the 7th came into the hands of Mr. Shovlin, then I think he is not entitled to recover." Also: "You will be permitted to take this letter of Mr. Hack, and your material question will be: Was that letter an absolute declaration of forfeiture of the contract on the part of Mr. Hack? If so, this being an entire contract, I would instruct you that Mr. Hack could not recover. But if it was only a notice that he would cease work pending the determination of the estimate, then we would say to you that, after Mr. Shovlin got the estimate on the 7th of January, it is our opinion that he would be liable for its amount, and having himself forfeited the contract afterward by the letter of the 8th of January, he could not recover for anything that he afterward spent in the erection of the building, and could only recover in the way of set-off the amount that he may have had to spend for work that was not properly done while the contractor was in possession."

If our theory be correct, that the estimate of January 7th was binding upon Shovlin and Hack, then it follows that Shovlin was bound to tender Hack payment as shown by the estimate, less 10 per cent.; if the jury found that Hack suspended work only during and pending the making of an "honest estimate," then he would be entitled to full pay for work done up to the time that Shovlin took possession of the premises. We believe this view of the case the just one, and that our charge to the jury properly left to them the determination of disputed facts.

Defendant's first exception is to our answer to his third point, which point was as follows: "(3) The architect did make an estimate of the value of the work done on the building during the month of December, 1913, by the plaintiff, and the defendant tendered to him a check in payment of the amount of said estimate which was refused." To which we answered: "I will not affirm that point, but will say to you that there is evidence to justify your so finding. Even if there be no contradiction, the facts are for the jury." Our answer simply left to the jury whether the certificate of January 1st was an estimate.

The second exception is to our answer to his fourth point which point is: "(4) Even if said estimate were made in bad faith and for a dishonest purpose (and there is no evidence that it was), such action on the part of the architect could not affect the rights of the defendant under the contract unless he were a party to it." And the answer thereto was: "That point is affirmed. We have already told you, however, that when the second estimate was tendered to Mr. Shovlin, and he retained it without complying with it, if he had any liability, it was then revived, and he would have been liable for the amount of the said estimate." In this we see no error. In view of the affirmation of the point, it was proper to refer to previous instructions applicable to "action on the part of the architect" relating to his estimates.

We do not deem it necessary to discuss the other exceptions taken, because we do not think they are well taken, and therefore the rule for new trial is discharged.

Verdict for plaintiff for \$2,478.95, and judgment thereon. Defendant appealed. Errors assigned were instructions to the jury and in refusing to direct a verdict for defendant.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

M. J. Mulhall, of Pittston, and A. C. Campbell, of Wilkes-Barre, for appellant. J. Q. Creveling and G. B. Kleeman, both of Wilkes-Barre, for appellee.

PER CURIAM. The learned trial judge instructed the jury to find as a fact whether the written notice of the appellee to the appellant of January 5, 1914, was an absolute abandonment of the contract by the former, or merely that he would not prosecute the work until, upon a re-estimate for December, he was paid what was due him. The finding of the jury was that he had not absolutely abandoned the contract, and, as the appellee did not tender payment to him of the amount due on the re-estimate of January 7th, he was entitled to recover.

This was the correct view of the court below in discharging the rule for a new trial, and the judgment is affirmed.

(258 Pa. 124)

FORD v. LEHIGH & WILKES-BARRE COAL CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

MASTER AND SERVANT §278(10)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a mining company to recover for the death of plaintiff's son, killed by a car while attempting to ring a bell used to signal the engineer in charge of cars, alleging negligence in not providing a safety hole in which to signal, evidence held to sustain a verdict for plaintiff.

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Mary Ann Ford against the Lehigh & Wilkes-Barre Coal Company to recover damages for the death of her son. From a judgment on a verdict for plaintiff, defendant appeals. Affirmed.

From the record it appeared that Stanley Ford, the plaintiff's son, was employed at the Hollenbach No. 2 colliery or slope of the defendant in Luzerne county on April 18, 1914. Ford's duty was in part to signal to the engineer the manner in which the trip was to be hoisted or lowered. This signal was given from an electric push button, hanging from a wire and situated about three or four feet from the rail, and between the slope and a lift or branch. The lifts are openings that run off from the slope and vary in dimensions. The place where Ford was killed was several hundred feet from the bottom of the slope. Two cars were being lowered from the top of the slope by means of a rope. In some manner the lower car became separated from the car attached to the rope and ran down the slope, jumping the track a few feet above the point where Ford was attempting to ring the bell to signal the engineer to slack up on the trip, striking him, and causing his death. Verdict for the plaintiff for \$2,319, and judgment thereon. Defendant appealed.

Argued before BROWN, C. J., and MES-
TREZAT. POTTER, FRAZER, and WAL-
LING, JJ.

Evan C. Jones, Gilbert S. McClintock, Arthur Hillman, and Andrew H. McClintock, all of Wilkes-Barre, for appellant. Paul Bedford and Frank A. McGuigan, both of Wilkes-Barre, for appellee.

PER CURIAM. It appears from the testimony in this case that in other mines, and in other parts of appellant's mine, the signal to hoist or lower cars was located in a safety hole. If the deceased had been in such a hole when he was attempting to ring the bell to signal the engineer, he could not have been struck by the car, which ran down the slope and jumped the track. Whether the defendant's failure to provide a safety hole, where the deceased was working, was negligence, was properly regarded by the learned trial judge as a question of fact for the jury.

It was the only question in the case, and judgment on the verdict is affirmed.

(258 Pa. 180)

FRITZ v. ELK TANNING CO.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. EVIDENCE §528(1)—OPINION EVIDENCE—CAUSE OF ILLNESS.

The deliberate opinions of physicians as to the cause of an illness are competent.

2. MASTER AND SERVANT §285(5) — SAFE PLACE TO WORK—QUESTION FOR JURY.

In an action by the employé of a leather tanning company to recover for injuries to his health, alleged to have resulted from inhaling poisonous fumes against which he was not protected, held, on the evidence, that whether the poisonous fumes arose from a vat and were inhaled by him, and whether his sickness resulted therefrom, were questions of fact.

3. MASTER AND SERVANT §284(1)—ACTION FOR INJURY—QUESTION FOR JURY.

In such action, where plaintiff's case was supported by positive and circumstantial evidence and by expert opinion, there was a question for jury, notwithstanding the strength of opposing proofs.

4. NEW TRIAL §72—GROUNDS — VERDICT AGAINST WEIGHT OF EVIDENCE.

Where a verdict is against the weight of the evidence, the remedy is a new trial.

5. MASTER AND SERVANT §107(7) — SAFE PLACE TO WORK—POISONOUS FUMES—STATUTE.

Act May 2, 1905 (P. L. 352) § 11, is mandatory and requires a leather tanning company to know the character of the fumes and gases arising in its bleachrooms, and, if they are poisonous, to provide for their elimination; and where there was no attempt to comply therewith, and no claim that it could not have been complied with, and the poisonous fumes injured a workman, without negligence on his own part, he was entitled to recover.

6. MASTER AND SERVANT §239(4)—ACTION FOR INJURY—CONTRIBUTORY NEGLIGENCE.

In such case, the fact that the employé, under the assurances of the superintendent that the fumes were not injurious, continued at his work, did not as a matter of law charge him with contributory negligence.

Appeal from Court of Common Pleas, Sullivan County.

Trespass by Norman A. Fritz against the Elk Tanning Company to recover damages for the loss of plaintiff's health, alleged to have resulted from defendant's negligence. Verdict for plaintiff for \$5,000, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WALL-
ING, JJ.

John G. Johnson, of Philadelphia, E. J. Mullen, of La Porte, and W. E. Rice, of Warren, for appellant. Charles M. Culver, of Towanda, F. W. Meylert, of La Porte, and J. H. Thayer, of Dushore, for appellee.

WALLING, J. Defendant was operating a tannery at Jamison City, in Sullivan county, where plaintiff was employed from October, 1911, to February, 1913. A long narrow room, called the bleachroom, occupied one side of the tannery, wherein was a tier of five vats; each being $4\frac{1}{2}$ feet in diameter and 6 feet deep. These vats contained liquids into which the hides were dipped by machinery in the process of bleaching. One vat contained water warmed to the temperature of 126° Fahrenheit, into which each morning plaintiff poured from a crock 110 pounds of sulphuric acid, sometimes called "oil of vitriol." This caused a hissing sound, and a substance resembling steam or fog to rise from the vat, covering the operator and the immediate surroundings. After pouring in the acid, it was the duty of the operator to stir the contents of the vat with a long stick, called a "plunger." About 15 times daily, it was the operator's duty to replenish the vat with 11 pounds of the acid; when to some extent the result above described would occur, as it also would when the hides were dipped therein. Plaintiff worked from 10 to 13 hours a day, and his duty as operator in this room required him to be near the vats a large part of the time. The room was about 12 feet high, and constructed with windows at the sides and ventilators at the top, but without an exhaust fan. In warm weather the windows and ventilators were open, but in cold weather defendant kept them closed—in fact, caused the ventilators to be boarded up and battened tightly. There were two large openings between this and the main room; but, as the latter was also kept closed in winter, that fact did not greatly assist in changing the air in the bleachroom.

When plaintiff began this work, he was robust, 26 years of age, and weighed 195 pounds; when he quit he was a physical wreck, and for 16 months thereafter walked upon crutches, and much of that time was confined to the house, and has not since been able to do any work. At the time of the trial in 1916 he could walk with the assistance of a cane, and weighed 140 pounds, and seemed to be permanently disabled. Plaintiff brought this suit on the allegation that he had not

been afforded a reasonably safe place in which to work, by reason of which he had become the victim of sulphuric acid poisoning, and thereby lost his health. About 6 weeks before plaintiff quit such employment, he complained to the superintendent of the tannery of ill health, described his symptoms, and said in effect that he thought the fumes from the vats were causing his trouble, and requested that he be given work elsewhere. The superintendent assured him that there were no injurious fumes in the bleachroom, that he must be suffering from rheumatism, and directed him to return to his work. Plaintiff's symptoms then were, *inter alia*, drowsiness and pain in an eye, arm, and leg. Other ailments developed later, including serious sores upon the leg, and eye affliction, known as iritis, valvular heart trouble, and multiple neuritis, from all of which he was suffering when the case was tried in the court below.

[1] It is plaintiff's contention that, when sulphuric acid is added to water of the temperature above mentioned, it becomes to some extent decomposed, and gives off a substance known as sulphur trioxide ($S O_2$), which in this case arose from the vat with the hot fog and was inhaled by the plaintiff, and on account of the moisture and lower temperature small particles of sulphuric acid were reformed and gradually poisoned his system. It is conceded that such acid is a corrosive poison, but defendant strenuously denies that it did or could arise from the vat under such circumstances. Dr. Albertson, who attended plaintiff from the beginning of his sickness, expresses the opinion that it was a case of sulphuric acid poisoning, from inhaling the fumes at the tannery. Dr. Fish, a prominent physician who has given special attention to chemistry, and who carefully examined and considered plaintiff's case, expresses the same opinion, and says he can come to no other conclusion. Dr. Biddle says it is the result of poison introduced into plaintiff's system. Plaintiff and three other witnesses testify that the fumes arising from the vat smelled like sulphuric acid; and the experts agree that, if such odor was in the air, it proved the presence of the acid. Mr. Newhart, who did the same work, in the same room, near the same time, was taken ill with like symptoms and had to quit the work. He and plaintiff speak of the irritation and burning sensation in the nose and throat, and the tendency to hack or cough, produced by the fumes from the vat. Dr. Fish says the mixing of the sulphuric acid with the water at such a temperature would produce sulphur trioxide, which, coming in contact with the moisture in the nose and throat, would reform into small particles of sulphuric acid, and cites an eminent chemical authority in support of his conclusion. The deliberate opinions of physicians as to the cause of illness are competent. *Flaherty v. Scranton Gas & Water*

Co., 30 Pa. Super. Ct. 446; *Brown v. Chester Traction Co.*, 230 Pa. 498, 79 Atl. 713.

[2] There is no question but what plaintiff's condition could result from sulphuric acid poisoning; and there is the circumstance that he lost his health while working in the bleachroom without any other apparent cause. On the other hand, strong evidence was offered by the defendant, including that of eminent experts, to the effect that sulphuric acid had such a strong affinity for water that sulphur trioxide could not be formed under the circumstances and rise with the fumes, and that the most delicate tests failed to disclose its presence, or any trace thereof, and that so mixing the sulphuric acid with the water would not cause poisonous fumes to arise. A number of physicians called by defendant, who had made a personal examination of plaintiff and of the circumstances under which he had worked at the tannery, expressed the opinion that his sickness had not resulted from such poisoning. Some were inclined to attribute the origin of plaintiff's illness to rheumatism, especially as that would seem to account for the heart and eye trouble. However, there is no claim that he was suffering from rheumatism when the case was tried, and no satisfactory evidence that he was ever actually afflicted with it. Defendant also offered evidence to the effect that the work in this bleachroom was done in the manner usual and customary in tanneries throughout the state and elsewhere, and that such a case of sulphuric acid poisoning as alleged here was never known or heard of before, and that fact does not seem to be contested, unless it might be in the case of Mr. Newhart above referred to. However, some people seem to be more susceptible to such poison than others; and plaintiff's theory is that this is a case of chronic poisoning from long-continued exposure to such fumes. We have not attempted to refer to the evidence of all of the witnesses, nor to all the evidence of any witness, but only enough to show that the controlling questions, as to whether poisonous fumes arose from the vats and were inhaled by plaintiff, and, if so, whether his sickness was the result thereof, were questions of fact.

[3, 4] Where seemingly credible evidence tends directly to establish the facts upon which defendant's liability depends, a verdict based thereon is not the result of guesswork, although such evidence is strongly con-

tradicted by that submitted for the defense. And where, as here, a plaintiff's case is supported by positive and circumstantial evidence, and also by expert opinion, it must be submitted to the jury, notwithstanding the strength of the opposing proofs. In such case the remedy, if the verdict be against the weight of the evidence, is a new trial, which was not here sought. The fact that no case like this has come within the knowledge or information of any witness called, while strongly persuasive, is not conclusive against the plaintiff.

[5] As the case was submitted, the verdict implies a finding by the jury, not only that the fumes were poisonous, but that such fact was or should have been known by the defendant, which was the common-law rule; but under section 11 of the act of May 2, 1905 (P. L. 352), it was defendant's duty to know the character of the fumes and gases arising in its bleachroom, and, if poisonous, to provide for their elimination by exhaust fans or other sufficient devices. As no attempt was made to comply with the statute, and no claim that it could not have been done, if the fumes were poisonous, and plaintiff was injured thereby, without negligence on his part, he was entitled to recover as the provisions of the statute are mandatory. *Jones v. American Caramel Co.*, 225 Pa. 614, 74 Atl. 613; *Lanahan v. Arasapha Mfg. Co.*, 240 Pa. 292, 87 Atl. 286; *Kelliher v. Brown & Co.*, 242 Pa. 499, 89 Atl. 589. And see *Krutiles v. Bulls Head Coal Co.*, 249 Pa. 162, 94 Atl. 459, L. R. A. 1915F, 1082.

[6] The fact that plaintiff, under the assurance of the superintendent, continued at his work, did not as matter of law charge him with contributory negligence. *Wagner v. H. W. Jayne Chemical Co.*, 147 Pa. 475, 23 Atl. 772, 30 Am. St. Rep. 745. The court below concludes an exhaustive review of the law and the facts by saying:

"Bearing in mind the previous healthy condition of the plaintiff, the development of his symptoms during the winter, when not only the ventilators over the vats but also the windows were closed, the nature of the bleach, with its accompaniment of steam or vapor, the affirmative testimony as to the production and escape of sulphur trioxide, its poisonous character, and the effect thereof upon the plaintiff, and the somewhat similar experience of Newhart, we cannot reach the conclusion that we should have withdrawn the case from the jury. That there was weighty contradiction does not alter this view."

The judgment is affirmed.

(32 Conn. 168)

SOUTH NORWALK TRUST CO. v. ST. JOHN et al.

(Supreme Court of Errors of Connecticut. Oct. 4, 1917.)

1. WILLS §384—PROBATE—APPEALS—SCOPE OF REVIEW.

On appeal to the superior court from an order and decree of the probate court admitting a will to probate, the special statutory issue as to whether the will was a valid will was the sole issue.

2. WILLS §665—CONDITIONS AGAINST CONTESTS—BREACH.

Where children of a testator appealed from an order admitting the will to probate, thereby raising the special statutory issue as to whether the will was valid, they violated a provision of the will that any beneficiary of the will contesting its probate or operation, or seeking to set it aside or annul it, should forfeit the interest given such beneficiary by the will, though they attempted to conceal their purpose to contest the will by stipulating that the only questions to be determined were whether a provision in the will was void under the law against perpetuities and whether a gift of income without limitation passed an absolute estate.

3. WILLS §665—CONDITIONS AGAINST CONTESTS—BREACH.

An action by a legatee to determine the true construction of a will or of any of its parts is not a breach of the ordinary provision for forfeiture in case of a contest, as the object of such an action is not to make void the will or any of its parts, but to ascertain its true legal meaning.

4. WILLS §651—CONDITIONS AGAINST CONTESTS—VALIDITY.

Under a provision in a will for a forfeiture of the rights of any beneficiary contesting the will, a beneficiary does not forfeit his rights by bringing a contest for which there is a reasonable ground, as the law is vitally interested in having property transmitted by will under the conditions it prescribes, and none others, and if those interested are forced to remain silent the court will be unable to ascertain the truth, and those who would profit by a will procured by undue influence or made by one lacking testamentary capacity would thereby be aided in their wrongful designs.

5. WILLS §668—CONDITIONS AGAINST CONTESTS—WAIVER OF FORFEITURE.

Under a will providing for forfeiture in case of a contest, where all the children and beneficiaries united in a contest, they could not waive the forfeiture on the ground that they were the only persons who could claim a forfeiture, as the condition of forfeiture was not for the benefit of the other beneficiaries, but to carry out the wishes of the testator.

6. WILLS §865(1) — FORFEITURES — INTENT.

In such case, all of the children having forfeited all of their rights under the will, the property of the testator was intestate estate.

Case Reserved from Superior Court, Fairfield County; Howard J. Curtis, Judge.

Suit by the South Norwalk Trust Company, executor and trustee, against Mary D. St. John and others, to determine the validity and construction of the will of Oscar St. John, deceased. Reserved upon an agreed finding of facts for the advice of the Supreme Court of Errors. Superior court advised in accordance with the opinion.

Oscar St. John, late of Norwalk, died September 4, 1912, possessed of both real and personal estate. He left a will which was duly probated, in which the plaintiff was named as executor and trustee. The estate has been settled. The plaintiff qualified as trustee, and there remains in his hands as such trustee certain real and personal property. The testator left a widow, the said Mary D. St. John, who died February 1, 1917, subsequent to this action, and eight children, his only heirs at law, who are now living. Several of these children have minor children, who with said eight children are made parties. Mrs. St. John's death has been suggested upon the record, and the administrator of her estate has entered an appearance.

The probate court admitted to probate the will of Mr. St. John, and all of the eight children appealed from this order and decree. On that appeal no evidence was submitted to the superior court. The parties to the appeal stipulated that the only questions to be determined were whether or not the whole or any part of section 7 of the will was void under the law against perpetuities, and whether the gift therein of the income to the children of the testator, without limitation, passed an absolute estate in the property in question to such children.

The will of Mr. St. John gave to his wife all the personal property and effects in his homestead, and provided that she should have the use and enjoyment of the homestead free of rent and all other charges until it should be sold. It directed the executor to sell this real estate as soon as such sale could be advantageously made. The proceeds of this sale as designated in paragraph second, and of certain personal property specifically designated in paragraphs fourth and fifth, and all the rest, residue, and remainder of the testator's estate, was then given to the plaintiff in trust. By the terms of the trust, defined in the seventh paragraph, the trustee was directed to pay to his wife during her life, in full of all dower and rights she might have in the testator's estate, certain sums of money in quarterly payments. This direction was supplemented by the following:

"And after the decease of my said wife, to pay the net income from my trust estate equally to my children [names given] annually, and to their heirs forever, free from the control of the husband of any of my said children; and if any of my said children should die without leaving lawful issue then and in such event I direct that the share of such child so dying in and to the income from my said trust estate shall be distributed among and paid to my surviving children and their heirs in equal proportions; the heirs of any child so dying to take the share which their parent would have been entitled to receive if living."

The eighth paragraph was as follows:

"To the end that there may be no wasting of my estate by litigation pertaining thereto, I hereby declare, and it is my will, that any pro-

vision made herein in favor of my wife and of any of my children, shall, as to my said wife or as to such children, be null and void in the event of any one of them presenting any claim against my estate, or in any way contesting the probate or operation of this my will, or in any way seeking to set aside or annulling this my said will; and in such event, the provision for the payment of income to my said wife, or for the payment of income to such child, as the case may be, by this paragraph of my said will made null and void, shall be held by my said trustee for the benefit of the remaining beneficiaries under this will, and increase their several shares in like proportion as to income as is herein provided."

Judgment was rendered in the superior court, affirming the action of the probate court and refusing to pass upon the questions of construction. The questions upon which advice is desired are the following:

"(a) Whether any legal effect can be given to any part of the fourth, fifth, and seventh paragraphs of said will, and, if so, what; and whether or not all or any part of said sections are or are not void; and whether any portion of the purposes contemplated by said sections can be made legally operative?

"(b) Whether the trusts made or which it was contemplated or attempted to be made or to make in said sections are valid, legal, and operative, and capable of being carried out in any legal manner, and, if so, how; and whether the trust estates created thereby, or which it was attempted to create, are now valid and subsisting estates; and whether the provisions for accumulation therein contained are legal and valid provisions, and, if not, whether the other provisions of said sections are thereby rendered inoperative and void?

"(c) Whether the provisions of said sections suspend the power of alienation for more than two lives, either actually or by possibility; and whether, if said power of alienation be suspended for more than two lives, the trusts which the testator sought to create are thereby rendered inoperative and void?

"(d) Whether the trusts, which it was sought to create by said sections, are or are not void for uncertainty, indefiniteness, and a failure of the object of the testator's bounty?

"(e) Whether or not the defendants, or any of them, and, if so, who, have violated the eighth paragraph of said will by contesting the probate or operation of said will, or have sought to set aside or annul said will, and, if so, whether or not the provisions in said will in favor of such defendants are null and void; and whether or not such defendants have forfeited their right, title, interest, and claim in and to said estate by violating said paragraph 8, and, if so, to whom the estate of said deceased, and the income therefrom, should be paid?"

Joseph R. Taylor, of South Norwalk, for plaintiff. John H. Light and Freeman Light, both of South Norwalk, for defendant Bertha E. St. John and another. Thomas O. Coughlin, of Bridgeport, for defendant Clifford M. St. John and others. William F. Tammany, of South Norwalk, for defendant Oscar B. St. John.

WHEELER, J. (after stating the facts as above). One of the questions submitted for our advice is whether or not the children of the testator have forfeited their claim to the estate by having violated paragraph eighth, and, if so, to whom the estate and the income should be paid. If the eighth paragraph be valid and literally interpreted, and

the children have violated it, they have forfeited their claim to any part of this estate. The consideration of this question should precede all other questions, for, if the children have forfeited their claim to this estate, so far as they are concerned, consideration of other questions under the will is academic.

[1] The appeal from the court of probate took up to the superior court the special statutory issue, whether the will was a valid will. That was the sole issue of the appeal. *St. Leger's Appeal*, 34 Conn. 434, 447, 91 Am. Dec. 735. The parties subsequently, in a very apparent attempt to avoid the consequences of having contested the will, stipulated that the only question to be determined upon the appeal was as to the construction of paragraph 7. Counsel for the trust company in his brief persists in assuming the existence of this wholly artificial position, but the counsel for the children frankly admit the real situation in their brief when they say:

"The widow and all of the children joined in an appeal from the order and decree of the court of probate for the district of Norwalk admitting the will to probate, on the ground that the testator was of unsound mind when the will was made and executed, but they afterward came to feel such a dread of the consequences which would follow from legally establishing the mental incapacity of the testator that they instructed counsel not to pursue that feature of the case, and, instead, to have the court determine the legality of the trust created by the will."

Two things are to be noted about this statement: (1) It is an inaccuracy to state that the widow joined in this appeal. (2) Counsel seek to bring the case within one of the exceptions which some jurisdictions sustain, to the general rule supporting forfeiture clauses of the character of that in this will, by assuming that there exists *probabilis causa litigandi*.

[2] The appeal was an attack upon the validity of the will, and the subsequent effort of the children to conceal this purpose must fail. The children by their appeal engaged in an act which the testator attempted to penalize by prescribing a forfeiture of the interest given them by his will. Substantially all authorities agree that a testator may in some cases impose upon a legatee a condition forfeiting his legacy if he contest the validity of the will. Counsel for the children concede this, for they say in their brief:

"While the validity of such condition is generally recognized, the exceptions to its operation have intrenched upon its effectiveness."

In England the action to secure a legacy could be had in the ecclesiastical courts, where the rule of the civil law prevailed, in which a fiction had been adopted that, unless there was a gift over of such a legacy, no forfeiture would be decreed. The English court of equity accepted this rule, and enforced it as to legacies of personal property, but not as to devises of land. It was early pointed out by American text-writers and jurists that there was no substantial ground

for any distinction in this respect between real and personal estate, and that the exception was purely an artificial one, and unsupported by any adequate reason. Some few of the American courts have adopted the English view, although in some instances recognizing that the exception is not based on any satisfactory reason. *Fifield v. Van Wyck*, 94 Va. 563, 27 S. E. 446, 64 Am. St. Rep. 745; *Friend's Estate*, 209 Pa. 442, 446, 58 Atl. 853, 68 L. R. A. 447; *Matter of Arrowsmith*, 162 App. Div. 623, 628, 147 N. Y. Supp. 1016. The great majority of the American courts have repudiated this exception. *Bradford v. Bradford*, 19 Ohio St. 546, 547, 2 Am. Rep. 419; *Moran v. Moran*, 144 Iowa, 451, 462, 123 N. W. 202, 30 L. R. A. (N. S.) 898; *Thompson v. Gaut*, 14 Lea (Tenn.) 310, 315; *Estate of Hite*, 155 Cal. 436, 445, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *Donegan v. Wade*, 70 Ala. 501; *Holt v. Holt*, 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43; *Massie v. Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219; *Smithsonian Inst. v. Meech*, 169 U. S. 398, 413, 18 Sup. Ct. 396, 42 L. Ed. 796.

Most of these authorities support a condition of forfeiture without recognizing any exception. Their underlying principle is that, since the testator may attach any condition to his gift which is not violative of law or public policy, the legatee must either take the gift with its conditions, or reject it. The disposition of these authorities has been to sustain forfeiture clauses as a method of preventing will contests which so often breed family antagonisms, and expose family secrets better left untold, and result in a waste of estates through expensive and long drawn out litigation.

The children suggest the possible approval of this exception, based on the failure to provide for a gift over, but the trustee omits reference to it. The trustee relies upon the appeal having been one to secure the construction of the will, rather than one to contest its validity. And both trustee and children unite in urging upon us as an exception to the rule of forfeiture the exception that, if reasonable cause exist for the contest, a forfeiture will not be decreed. And they further urge that a forfeiture has been waived by them through their acquiescence in the execution of the will.

[3] One of the claimed exceptions to the general rule of forfeiture is not an exception. If the action of a legatee is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning. *Black v. Herring*, 79 Md. 152, 28 Atl. 1063; *Schouler on Wills* (5th Ed.) § 605. The appeal taken from the decree of the probate court did not, as we have before pointed out, raise the question of the construction of this will.

[4] The exception that a contest for which there is a reasonable ground will not work a forfeiture stands upon better ground. It is quite likely true that the authorities to greater number refuse to accept this exception, but we think it has behind it the better reason. It rests upon a sound public policy. The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and none others.

Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court. And those only who have an interest in the will will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth, and the devolution of property will be had in a manner against both statutory and common law. Courts exist to ascertain the truth and to apply it to a given situation, and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy. If, on contest, the will should have been held invalid, the literal interpretation of the forfeiture provision has suppressed the truth and impeded the true course of justice. If the will should be held valid, no harm has been done through the contest, except the delay and the attendant expense.

Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such. The contest will not defeat the valid will, but it may, as it ought, the invalid will. The effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made on probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs.

The practical difficulties following this exception are more apparent than real. Contests will be made only in causes where they are justified. Doubtful cases will not invite a forfeiture. There will be no more burden put upon the court in finding the fact of probable cause than in finding similar facts in other classes of cases. *Schouler on Wills*

(5th Ed.) § 605, states his view upon this subject thus:

"To exclude all contest of the probate on reasonable ground that the testator was insane or unduly influenced when he made it is to intrench fraud and coercion more securely; and public policy should not concede that a legatee, no matter what ground of litigation existed, must forfeit his legacy if the will is finally admitted." *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *Friend's Estate*, 209 Pa. 444, 58 Atl. 853, 68 L. R. A. 447; *Jackson v. Westerfield*, 61 How. Prac. (N. Y.) 399; *In re Kathan's Will*, 141 N. Y. Supp. 705, 710; *Smithsonian Inst. v. Meech*, 169 U. S. 413, 18 Sup. Ct. 396, 42 L. Ed. 793; *Cooke v. Turner*, 14 Simons, 493; *Morris v. Burroughs*, 1 Atk. 404.

The facts of record are silent as to whether this contest was begun in good faith, and whether there was probable cause and reasonable justification. The stipulated facts do not bring the case within this exception.

[5] These beneficiaries say that they are the only persons who could claim a forfeiture, and as they are all in court, requesting a division of the property in pursuance of the provisions of the will, they must be held to have waived the right to claim a forfeiture, and to have acquiesced in the execution of the will as a valid will. The court has before it a will providing for a forfeiture, and facts showing the existence of the forfeiture. Under those conditions, the court could not permit the testator's expressed will to be rendered nugatory by the consent of his beneficiaries. Its duty is to see that the testator's intention is consummated. The clause of forfeiture is one beneficiaries cannot waive. They may waive a known right of their own. They cannot waive a right which was exclusively the testator's, and one which he made a condition of his bounty and a guide to the devolution of his estate.

Let us suppose that only one of six beneficiaries had forfeited his right to a bequest. Could all the other beneficiaries waive the forfeiture? Could an executor or a trustee refuse to present the facts of waiver before the court? And is not his duty to insist upon the forfeiture, and thus to carry out the will of the testator? We find no authority which supports the claim of waiver of this forfeiture, except *Williams v. Williams*, 15 Lea (Tenn.) 438, 454. Authority upon the point is limited, but against this view. Agreements by beneficiaries cannot validate a void trust. *Schouler on Wills* (5th Ed.) § 1072; *Dresser v. Travis*, 39 Misc. Rep. 358, 79 N. Y. Supp. 929.

It is a well-recognized rule of law that contracts between devisees and legatees are not enforceable, when made with the apparent purpose of thwarting the testator's desires. *Mercler v. Mercler*, 50 Ga. 546, 15 Am. Rep. 694; *Cuthbert v. Chawnet et al.*, 136 N. Y. 326, 332, 32 N. E. 1088, 18 L. R. A. 745. This condition of forfeiture is not made for the benefit of the other beneficiaries, but to

carry out the wishes of the testator. It is totally apart from a condition subsequent for the benefit of a third party, as where a will bequeathed land to a testator's heirs on condition that they pay for certain improvements to the heirs of S. The latter could waive the payment, for it was for their benefit. Such a waiver does not defeat the testator's will. *Hill v. Gianelli*, 221 Ill. 286, 77 N. E. 458, 112 Am. St. Rep. 182.

[6] The superior court is advised that said eight children, by contesting the probate of the will of Oscar St. John, have forfeited all rights under his will, and that the property in plaintiff's hands is intestate estate. No costs in this court will be taxed in favor of any of the parties. The other Judges concurred.

(181 Md. 204)

**EVANS MARBLE CO. OF BALTIMORE,
CITY v. ABRAMS et al. (No. 19.)**

(Court of Appeals of Maryland. June 28, 1917.
Motion for Reargument Overruled
Oct. 3, 1917.)

1. JUDICIAL SALES — 39 — INADEQUACY OF PRICE — EFFECT.

Sales by trustees made under decrees of equity will not be invalidated on account of inadequacy of price, unless it is so gross and inordinate as to indicate misconduct or fraud on the part of the trustee, or some mistake or unfairness for which the purchaser is responsible.

2. JUDICIAL SALES — 31(2) — INTENDMENTS.

Every intentment will be made to support a judicial sale, but ratification will be denied, where injustice will result, by reason of the carelessness or omission of an officer, to a person not in default.

3. JUDICIAL SALES — 35 — VACATION — GROUNDS.

Judicial sales will not be set aside for causes which the parties in interest might with reasonable degree of diligence have obviated.

4. MORTGAGES — 526(2) — SALES — INADEQUACY OF PRICE.

On objection to the ratification of a foreclosure sale, evidence held to show that the inadequacy of price was not so gross as to indicate fraud, etc., on the part of the trustee.

5. MORTGAGES — 526(2) — SALES — ADVERTISEMENT.

Where property to be sold on foreclosure was advertised as valuable leaseholds, and the numbers of the premises were given, and the improvements described so that a reader could ascertain that the two leaseholds were to be sold together and where they were located, the advertisement, which gave the descriptions of the leaseholds and the rents to which they were subject, was not so insufficient as to warrant vacation of the trustee's report of sale, for prospective purchasers could ascertain what property was to be disposed of, and defects in the advertisement did not cause the inadequacy of price, which was not so great as to show fraud, etc.

Appeal from Circuit Court No. 2 of Baltimore City; Carroll T. Bond, Judge.

Suit by the Evans Marble Company of Baltimore City against George W. Abrams and another. From a decree sustaining exceptions to ratification of trustee's report of

sale and setting aside the sale, complainant appeals. Decree reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Wm. Edgar Byrd and John L. G. Lee, both of Baltimore, for appellant. Read A. McCaffrey, of Baltimore, for appellees.

CONSTABLE, J. This appeal is from a decree sustaining exceptions filed to the ratification of a trustee's report of sale and setting aside of said sale. George W. Abrams and Alexander J. Abrams, Jr., gave to the appellant in 1894 a mortgage on leasehold properties in the city of Baltimore to secure the payment of \$998.37. Default having been made in the payment of the mortgage debt, the appellant filed his petition to foreclose said mortgage. The usual decree to sell the property was passed, and a trustee appointed for that purpose. The appellant also filed in said proceedings a claim under a second mortgage from the same parties to it. The trustee offered the property described in the mortgage at public sale on the premises, and sold the same, in its entirety, to Patrick J. Cushen for the sum of \$1,125. The surviving mortgagor filed exceptions to the ratification of the sale upon several grounds, all of which, except two, have been abandoned and need not be adverted to. The two reasons relied upon by the appellee for an affirmance of the decree passed are, first, that the property was sold for a greatly inadequate price; second, because of the injudicious, improper, and insufficient advertising of said sale.

[1-3] The law of this state is firmly settled, in a long line of decisions, that, in sales made by trustees under decrees in equity, mere inadequacy of price, standing by itself, is not sufficient to invalidate a sale, unless it be so gross and inordinate as to indicate want of reasonable judgment and discretion, or misconduct or fraud in the trustees, or some mistake or unfairness for which the purchaser is responsible. Every intendment will be made to support such sales, but where it is seen an injustice will be done, through the ratification of a sale, a person not in default, by reason of the carelessness or omission of its own officer, the court will interfere to prevent it. Sales will not be set aside for causes that the parties in interest might, with a reasonable degree of diligence, have obviated. *Johnson v. Dorsey*, 7 Gill, 269; *Kauffman v. Walker*, 9 Md. 229; *Bank v. Lanahan*, 45 Md. 397; *Loeber v. Eckes*, 55 Md. 1; *Stewart v. Devries*, 81 Md. 528, 32 Atl. 285; *Thomas v. Fewster*, 95 Md. 446, 52 Atl. 750.

[4] The mortgage covered two contiguous leasehold tracts of ground containing, approximately, 6,500 square feet and 7,200 square feet respectively; and, from the testimony

taken, it appears that witnesses for each side admitted that the tracts would sell to better advantage as a whole than if offered separately, because of the extremely irregular shape of one of the tracts, so we are not concerned with the question as to the manner of offering the property for sale. The witnesses produced by both sides were mainly of the real estate expert class, and, from a close reading of their testimony, we are unable to hold that the price realized was a grossly inadequate one, though to some extent it was inadequate. The prices placed by them upon both tracts as a whole ranged from \$1,400 to \$5,000. The witness Wright was the one who put the highest valuation on the property and used this language in doing so:

"I would think \$4,500 or \$5,000 would be a right moderate estimate of these two leasehold properties. I think they would be sold or offered for sale at a great deal less price than that."

It was also in evidence that the properties were assessed for the year 1917, in fee, for \$8,700, but that on the previous assessment, made in 1913, the assessment in fee was \$4,558.

[5] Having determined that, in our opinion, there was no gross, but a mere, inadequacy of price, we will now consider what effect the form of the advertisement played in the inadequacy. *Johnson v. Dorsey*, supra. The main advertisement was inserted in the *Baltimore Daily Record* and appeared for the time limited by the decree. Shorter advertisements were inserted in the *Baltimore Sun* and the *Baltimore American*. These two latter advertisements gave notice of a trustee's sale of the valuable leasehold property, No. 431 East Oliver street, to be held on the premises, on Monday, August 14, 1916, at 4 o'clock p. m.; then followed a description of the improvements on the property, and referred prospective purchasers to the *Daily Record* for the terms and full description. The advertisement in the *Daily Record* was under the heading of "Trustee's Sale of Valuable Leasehold Property, No. 431 East Oliver St.," and recited that the trustee would offer for sale, by public auction, on a certain date, "all that lot of ground and premises situate in Baltimore City and described as follows." Then followed a full description of the two tracts by metes and bounds, courses and distances, and showed that the tracts were subject to ground rents of \$60 and \$135, respectively. This was followed by a description of the improvements and the terms of sale. The description by courses and distances, metes and bounds, were the same descriptions as contained in the mortgage.

That this was a reasonable and fair notice of the sale and description of the property to be offered for sale we have not a doubt. It in most particular terms was calculated to let the public know exactly what property

was brought into the market. It expressly located the property at 431 East Oliver street, and the most casual reader could tell that the lots formed one whole tract, and together had a large frontage on both Oliver and Belvedere streets, and formed a corner lot in the junction of those two streets. The appellee has cited several cases to us where sales were set aside for defects in the advertisement; but in all those cases the dissimilarity of the notices there held bad, to the notice in the present case, is plainly apparent. For instance, special reliance is placed by him in the case of *Kauffman v. Walker*, *supra*. In that case there was no number by which the property could have been identified, and one of the witnesses, who had owned the property for ten years, said that he would not have known from the notice what property was to be sold, unless he had known the number of feet the property was from another street. So in all the cases cited some similar defect could be pointed out. The mortgagor saw the advertisement and attended the sale, but made no objection, before the sale or at the sale, of the insufficiency of the advertisement. He testified that the only effort he made to protect the property was to borrow on a mortgage from a national bank, but was told by its officers that they could not lend money on mortgages, and he thereafter made no further effort to pay the mortgage or save the property.

We are of the opinion that the lower court committed error in sustaining exceptions and setting aside the sale, and will therefore reverse the decree and remand the cause, in order that a decree ratifying the sale may be entered.

Decree reversed, with costs, and cause remanded.

O'CONNOR v. RHODE ISLAND CO.
(No. 5035.)

(Supreme Court of Rhode Island. Oct. 8, 1917.)

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by James F. O'Connor against the Rhode Island Company. Verdict for plaintiff, and defendant brings exceptions to the refusal of the trial judge to grant a new trial. Exceptions overruled, and case remitted, with direction to enter judgment for plaintiff upon the verdict.

E. Raymond Walsh, of Providence, for plaintiff. Clifford Whipple and Frederick W. O'Connell, both of Providence, for defendant.

PER CURIAM. The defendant's exceptions in this case raise only the question whether the trial judge erred in his refusal to grant a new trial, after verdict for the plaintiff, on the grounds urged by the defendant that the verdict was against the weight of the evidence, and in any event that the amount of damages awarded by the jury was excessive.

The evidence upon the question of the defendant's negligence and of the plaintiff's contrib-

utory negligence was sharply conflicting. There was ample evidence from which the jury could find in favor of the plaintiff as they have done on both these questions. We find no reason for saying that the damages are excessive. Upon full consideration of all the evidence in the case, a majority of this court is of opinion that the trial judge committed no error in his refusal to grant a new trial.

The defendant's exceptions are overruled, and the case is remitted to the superior court sitting in Providence county, with direction to enter judgment for the plaintiff upon the verdict.

(116 Me. 328)

VIELE et al. v. CURTIS.

(Supreme Judicial Court of Maine. Oct. 3, 1917.)

1. APPEAL AND ERROR ¶1008(2)—FINDINGS OF COURT—CONCLUSIVENESS.

In jury-waived cases, so far as the conclusions reached rest upon facts, the findings of the court are conclusive unless the only inference to be drawn from the evidence is a contrary one.

2. APPEAL AND ERROR ¶849(1)—EXCEPTIONS—QUESTIONS OF LAW.

In a jury-waived case, exceptions are limited to rulings upon questions of law, and the only question of law is whether there was any evidence to support the finding.

3. APPEAL AND ERROR ¶994(3), 1008(2) — CREDIBILITY OF WITNESS—QUESTIONS FOR COURT.

In jury-waived cases, the credibility of witnesses and the weight of the evidence is wholly for the justice presiding.

4. TRUSTS ¶86, 107—BURDEN OF PROOF.

The burden of establishing resulting and constructive trusts is upon the party asserting their existence, and this burden is sustained only by full, clear, and convincing proof.

5. TRUSTS ¶44(1)—EXPRESS TRUST—SUFFICIENCY OF EVIDENCE.

In a partition suit, where petitioners claimed title from defendant's deceased wife, and he claimed that the wife held the premises in trust for him, a letter written by deceased to her daughter, when taken in connection with all the evidence, held not a written declaration of an express trust.

6. TRUSTS ¶21(2) — LETTER ESTABLISHING EXPRESS TRUST.

A letter subscribed by the trustee, whether addressed to or deposited with the cestui que trust, or whether intended to be evidence of the trust, or whether made at the time the legal title was conveyed, or later, will be sufficient to establish the trust when the subject, object, and nature of the trust, and the parties and their relations to it and each other appear with reasonable certainty.

7. TRUSTS ¶373—QUESTIONS OF FACT.

In a jury-waived case, whether a letter when supplemented by oral testimony established an express trust was a question of fact for the justice presiding.

Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Petition for partition by Charles G. Viele and another against C. W. Curtis. From findings and rulings in favor of petitioners, defendant brings exceptions. Exceptions overruled.

Argued before BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Morse & Cook, of Bangor, and F. D. Dearth, of Dexter, for plaintiffs. Carl C. Jones, of Waterville, for defendant.

BIRD, J. This is a petition for partition in which the petitioners allege themselves to be the owners in fee of one-third each of the land sought to be divided and the respondent to be the owner of the remaining third.

The respondent, in answer to the petition, denied that the petitioners were each seised in fee of one-third of the premises and claimed under a double brief statement, by way of equitable defense, "an undefeasible title to the whole premises," alleging that his wife, from whom the petitioners claimed to have title by descent, held the premises in trust for him should she predecease him and in trust for his children by a former marriage should he predecease her. The first brief statement sets up a constructive trust, the second an express trust.

The cause was heard by the justice presiding without a jury and, after hearing the evidence, he found and ruled:

(1) That each of the petitioners is the owner in fee of one-third in common and undivided of the premises described in the petition and, as claimed therein, that the respondent, Charles W. Curtis, is the owner of the other one-third undivided of said premises; and

(2) That the petitioners are entitled to judgment for partition of the premises described in their petition and as therein prayed for.

To these findings and rulings the defendant excepted. The petition, pleadings, and evidence are part of the bill of exceptions.

[1] In jury-waived cases, so far as the conclusion reached rests upon facts, the finding of the court is conclusive, unless the only inference to be drawn from the evidence is a contrary one. *Maine Water Co. v. Steam Towage Co.*, 99 Me. 473, 475, 59 Atl. 953. It has been held that the exception here noted presents a question of law. *Morey v. Milliken*, 88 Me. 464, 481, 30 Atl. 102. If so, we must hold, as such, in the present case that the only inference to be drawn from the evidence is not contrary to that found by the court.

[2-4] Exceptions in such cases, it is said in *Prescott v. Winthrop*, 101 Me. 236, 239, 63 Atl. 923, are limited to rulings upon questions of law, and the only question of law is whether there was any evidence to support the finding. If there was, the decision of the court must stand even if there was a large preponderance of the evidence the other way. We think there was evidence to support the finding. The credibility of the witnesses and the weight of the evidence was wholly for the

justice presiding. The burden of proof of establishing resulting and constructive trusts is upon the party asserting their existence, and this burden is sustained only by full, clear, and convincing proof. *Prevost v. Gratz*, 6 Wheat. 481, 494, 5 L. Ed. 311; *Culver v. Guyer*, 129 Ala. 602, 29 South. 779; *Whitmore v. Learned*, 70 Me. 276, 285; *Fall v. Fall*, 107 Me. 539, 81 Atl. 865; *Coombs et al., Appellants*, 112 Me. 445, 446, 92 Atl. 515. We hesitate to conclude that the court erred in finding no satisfactory proof of a constructive trust or trust *ex maleficio*.

[5] The express trust alleged is claimed to be proved by a letter written by the wife of defendant to her daughter. It is urged that the letter "taken in connection with all the evidence is a written declaration of an expressed trust." The letter is as follows:

"My Dear Ada: You know that some years ago Mr. Curtis gave me a deed of our Dexter to me in accordance with a promise made before we were married, should he outlive me, he will naturally desire to have you and Charlie sign off your claims to the property as my heirs. This I should wish you do on proper considerations. Mr. Curtis owes me two thousand dollars of which he has had the use nearly ever since we were married. This I wish him to pay to you and Charlie each one thousand, keep this paper in case you should ever need it as a proof of the desire of your affectionate mother,
"Annie Viele Curtis.
"Dexter, Maine, Jan. 22, 1900."

[6] It is undoubtedly law that a letter subscribed by the trustee, whether addressed to, or deposited with, the cestui que trust or not, or whether intended when made to be evidence of the trust or not, or whether made at the time the legal title was conveyed or later, will be sufficient to establish the trust when the subject, object, and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty. *Bates v. Hurd*, 65 Me. 180, 181; *McClellan v. McClellan*, 65 Me. 500, 506. But the letter relied upon by plaintiff measures up to requirements no better than that considered in *Lane v. Lane*, 80 Me. 570, 577, 16 Atl. 323, which was held, as between husband and wife, to be insufficient.

[7] Assume, however, what we by no means hold, that the letter was admissible as indirect evidence of a trust, and that the statements of the letter may be supplemented by oral testimony, the question is one for a jury, and in this case for the presiding justice, and, as already seen, to his findings of fact, no question of law arising, no exceptions lie. *State v. Patterson*, 68 Me. 473, 475, 476; *Pettengill v. Shoenbar*, 84 Me. 104, 106, 24 Atl. 584; *Fuller v. Smith*, 107 Me. 161, 168, 77 Atl. 706.

The exceptions must be overruled.
So ordered.

(116 Me. 333)

CARVILLE v. LANE.

(Supreme Judicial Court of Maine. Oct. 3, 1917.)

1. FRAUD \Rightarrow 24—CIVIL REMEDIES.

Where plaintiff accepted defendant's note on December 5th for goods theretofore furnished, he could not recover on the ground that defendant falsely represented facts on December 14th.

2. BANKRUPTCY \Rightarrow 426(1)—DISCHARGE—"OBTAINING PROPERTY" BY FRAUD.

Defendant's act in getting plaintiff to accept a note, for goods theretofore furnished, by false representations, is not an obtaining of property within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1916, § 9601), nor Rev. St. c. 128, § 1, defining the crime of obtaining property by false pretenses, so that the discharge of defendant in bankruptcy discharges the liability.

Report from Supreme Judicial Court, Androscoggin County, at Law.

Action by Herbert J. Carville against P. E. Lane. Case reported. Judgment for defendant.

Argued before CORNISH, C. J., and KING, BIRD, HANSON, and MADIGAN, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. Ralph W. Crockett, of Lewiston, for defendant.

BIRD, J. This action on the case is brought by plaintiff to recover damages for the deceit or misrepresentations of the defendant, whereby it is claimed that defendant fraudulently obtained property of plaintiff. The case is before us upon report.

It appears from the evidence that the latter had for many years supplied the defendant with fertilizers, for which, several months after delivery to him, in each year, defendant gave his note to the plaintiff. In the spring of 1913 the defendant purchased fertilizer of plaintiff to the amount of between \$70 and \$80, and on the 21st day of December, 1913, gave to the plaintiff his note to order of the First National Bank of Lewiston for \$80 on six months, with interest after due till paid. This note was indorsed by plaintiff, who discounted it at the payee bank, receiving the proceeds. On the 21st day of June, 1914, it was renewed, indorsed, and discounted as before. Again, on December 21, 1914, it was renewed, indorsed, and discounted as before. In the spring of 1914 plaintiff sold defendant fertilizer to the amount of nearly \$190. The balance of the purchase price of this sale in the fall of 1914 amounted, with interest, less credits, to \$185.65, for which sum defendant gave his note dated December 5, 1914, in other respects of like tenor as the notes already described. This note was discounted by plaintiff at the same bank on the 7th day of December, 1914, and he received the avails. On the 28th day of May, 1915, before either of the notes given in December, 1914, became due, the defendant filed his petition in bankruptcy, and was granted a discharge on the 3d day of Sep-

tember, 1915, which is pleaded by way of brief statement in bar of the action.

The plaintiff alleges that on the 14th day of December, 1914, the defendant made to him certain representations as to the property owned by him, which were false and untrue, relying upon which he took and accepted the notes of December 5 and December 21, 1914, and that both notes are liabilities within the debts excepted from the operation of the discharge in bankruptcy, invoking the exception of the Bankruptcy Act, relating to discharges, of debts such as "(2) are liabilities for obtaining property by false pretenses or false representations. * * *

Act Cong. July 1, 1898, c. 541, § 17, 30 Stat. 550, as amended by Act Cong. Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. 1916, § 9601).

[1] We are unable to perceive how the acceptance by plaintiff of the note of December 5, 1914, which was discounted two days later, could have been induced by or made in reliance upon the statement as to assets made December 14, 1914. As to this note or indebtedness, the plaintiff cannot recover. *State v. Church*, 43 Conn. 471, 473. See *In re McLellan* (D. C.) 204 Fed. 482; *In re Main* (D. C.) 205 Fed. 421, 424.

The note of December 21, 1914, for \$80, was received by plaintiff and by him discounted after the statement of December 14, 1914, was communicated to him. As observed, this note was given and discounted in renewal of a former note of a like amount. The property for which the original note was given was obtained in the spring of 1913. The new note and discount afforded him an extension of credit.

Did the making of the new note of December 21, 1914, by the defendant, and its acceptance by the plaintiff, constitute a liability for obtaining property by false pretenses or false representations? The word "property" is not defined by the Bankruptcy Act of 1898. In *Gleason v. Thaw*, 185 Fed. 345, 347, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894, a petition for review of an order staying an action by which the plaintiff sought to recover for professional services alleged to have been rendered in reliance upon false representations made by defendant, the court in its opinion says:

"While enlarging somewhat the scope of such exceptions, this amendment [substituting for 'judgments in actions for fraud or' the words 'liabilities for'] imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted was or was not such a liability. * * *

"That the word 'property' is nomen generalissimum, as asserted by the petitioner, is not to be denied; but no more is it to be denied that its meaning may be restricted, not only by the application of the maxim, '*nosctur a sociis*,' but by the purpose for which it is used, or by its evident use as a word of art, or by its use in a technical sense. The very generality of the word requires restriction, according to the circumstances in which it is used. In some judg-

ments, as well as in some obiter dicta, the word 'property' has been made to cover, by a sort of rhetorical flourish, everything tangible or intangible of which value may be predicated. * * *

"The language used in the seventeenth section of the Bankruptcy Act, to which we have already referred, by which liabilities for obtaining property by false pretenses are exempted from the provable debts discharged in bankruptcy, are the usual and most general words for describing a specific crime. Their use in this connection dates back as far as the statute of 30 George II, c. 34 (1757), and they have since then, so far as they define the crime, remained unchanged. 19 Cyc. 337. The same language, in substance, has been used in the statutes in this country, and, where departed from, it is only by way of enumeration of certain kinds of property that may be included under the general designation. These enumerations all refer to substantive things—to a res—and in no case to which our attention has been called is anything included in the enumeration which approaches, in its description or definition, services rendered. Certainly under no proper and strict administration of the criminal law could any one be indicted under the general language of obtaining property under false pretenses, on the ground that services, whose performance has been induced by a false pretense, are property, within the meaning of the act."

See, also, *Gleason v. Thaw*, 196 Fed. 359, 116 C. C. A. 179.

[2] It is the conclusion of the court that the acceptance and discount of the note of December 21, 1914, even if induced by false representations, was not an obtaining of property within the meaning of Bankruptcy Act, § 17, nor of our own statute defining the crime of obtaining money, goods, or other property by false pretenses. R. S. c. 128, § 1. The defendant obtained, by the renewal of the note neither money, goods, nor property. The plaintiff obtained the note and used it to replace the former note, while the defendant obtained an extension of the time of payment of his original indebtedness.

Where the plaintiffs were induced by the false statements of defendant to bring no suit upon their claim by reason of the latter representing it to be paid, it was held no exception to the discharge in bankruptcy of defendant, the court remarking that:

"This deceit was after the contract had been created, and formed, of course, no inducement or element of it." *Brown v. Broach*, 52 Miss. 536, 538.

Obtaining the satisfaction of one's debt due to another, by false pretenses, no money passing, has been held not indictable. *Jamison v. State*, 37 Ark. 445, 40 Am. Rep. 103. See, also, *Queen v. Crosby*, 1 Cox, C. C. 10; *Wavell's Case*, 1 Moody, C. C. 224. In *State v. Moore*, 15 Iowa, 412, 413, under a statute practically identical with our own (R. S. p. 128, § 1), it is held that to obtain an indorsement or credit upon a promissory note is not obtaining property, money or goods within the meaning of the statute. Under the Bankruptcy Act of 1867 (Act Cong. March 2, 1867, c. 176, 14 Stat. 517), it is said that:

"The fraud must have been committed in contracting the debt. It is no answer to the discharge that the defendant by fraud induced the plaintiff to forbear an action upon it." *Low. Bankruptcy*, § 433.

And see, under the act of 1896, Id. § 480. See, also, R. S. c. 128, § 3.

Judgment for defendant.

(268 Pa. 148)

HICKS et ux. v. ALTOONA & L. V.
ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. May 7, 1917.)

1. STREET RAILROADS §117(5, 24)—INJURY ON TRACK—QUESTIONS FOR JURY—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

In an action against a street railway to recover for the death of plaintiffs' son, resulting from a collision between his team and a car at a street intersection, *held*, on the evidence, that defendant's negligence and decedent's contributory negligence were questions for the jury.

2. STREET RAILROADS §99(12)—CROSSING TRACK—DUE CARE.

It is the duty of a driver to look in both directions immediately before entering upon the tracks of a street railway, and to exercise due care to get his horses under control.

Appeal from Court of Common Pleas, Blair County.

Trespass by J. H. Hicks and Sarah Hicks against the Altoona & Logan Valley Electric Railway Company to recover for the death of plaintiffs' son. From a judgment refusing to take off a compulsory nonsuit, plaintiffs appeal. Reversed, with a venire facias de novo.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and
MOSCHZISKER, JJ.

A. V. Dively, of Altoona, for appellants.
Thomas H. Greevy, of Altoona, for appellee.

MOSCHZISKER, J. The plaintiffs' son, Arthur A. Hicks, was killed in a right-angle collision between a team which he was driving and a trolley car of the defendant company, about noon, on August 2, 1912, at the junction of two streets in the city of Altoona. The court below entered a compulsory nonsuit, which it subsequently refused to remove; plaintiffs have appealed.

[1] It appears from the testimony that, at the time of the collision, the deceased was just over the age of 18 years, and an experienced horseman; that the defendant's trolley car was running at a speed of from 30 to 35 miles an hour; that it approached the crossing in question without any effort on the part of the motorman to stop or properly to control its speed, and without blowing its whistle or giving any other warning; that in the vicinity of the accident the curb lines of both streets were occupied by trees, and the view of the driver, from his seat on the wagon, was interfered with by their foliage to such an extent that, in all probability, he could not see the approaching car until he

had passed the curb line of the highway upon which it was being operated.

Several witnesses testified that plaintiffs' son was first observed by those on the car when it was about 200 feet distant from the point of the collision, and at that time his horses' heads were within about 12 feet of the track, advancing on a downgrade at "a little jog" or "fast walk"; furthermore, that Hicks was then "pulling up" or "reining in" his team. Another witness said that immediately after the front of the wagon emerged from the house line, or when the horses were about 20 feet from the track, the driver appeared to be endeavoring to stop his team; but his efforts were in vain, for the horses were struck and dragged for a distance of about 130 feet before the car came to a standstill, Hicks, in the meantime, having been thrown from his seat and run over by the car. Those observers who were called to the stand all seem to agree the car was approaching with such rapidity that it was impossible for the driver of the wagon to avoid the accident; but whether or not the latter did all for his own protection which a reasonably careful man should have done were proper issues for the jury—not the witnesses, or the trial judge—to decide.

[2] This court has more than once said that it is the duty of a driver to look in both directions immediately before entering upon the tracks of a street railway; but, on the evidence in this case, the jury might have found that plaintiffs' son made a proper observation, saw the rapidly advancing car, and did all within his power to prevent the accident. We have also said that, when approaching a trolley track, a driver must take due care to get his horses under control; but it is a matter of general knowledge that a team cannot always be effectually managed, even by the best of horsemen. Therefore whether or not Hicks made a reasonable effort to exercise the care required by the peculiar circumstances at bar is an issue of fact, not of law. In other words, both the question of the defendant's negligence and that of the driver's alleged contributory negligence must be determined by a jury.

The assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

(258 Pa. 152)

**PHILADELPHIA TRUST CO. v. NORTH-
UMBERLAND COUNTY TRACTION
CO. et al.
PENNSYLVANIA STEEL CO. v. SUNBURY
& SUSQUEHANNA RY. CO.**

(Supreme Court of Pennsylvania. May 14,
1917. Modification of Decree May 22,
1917.)

**1. CONSTITUTIONAL LAW §149—IMPAIRMENT
OF OBLIGATION OF CONTRACT—REMEDIES BY
MORTGAGE FORECLOSURE—"CONTRACT."**

A first mortgage given by a traction company on all its property and franchises, then

owned or thereafter acquired, to secure an issue of its bonds, covenanting for itself and its successors not to suffer any lien prior thereto, waiving all laws requiring foreclosure by an action or postponing the immediate sale of the mortgaged property, providing that on default in the interest or principal as to any covenant the trustee, on written request of not less than one-half the bondholders, should declare the principal payable and enforce the lien by foreclosure, and permitting the purchaser to use matured and unpaid bonds toward the payment of purchase price, was a "contract," the obligation of which, including the remedies, could not be impaired by subsequent legislation, or by a decree of a court refusing a foreclosure sale and decreeing a sale of the merged roads as a unit, on the ground that it would work an irreparable injury to the bondholders of a corporation with which the traction company had merged and to the bondholders of other merged companies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

**2. CONSTITUTIONAL LAW §116—IMPAIRMENT
OF OBLIGATION OF CONTRACT—LEGISLATIVE
AND JUDICIAL DEPARTMENTS.**

The federal and state Constitutions forbidding the impairment of the obligations of contracts apply to the legislative department and also to the judicial department, and neither the Legislature nor a court can alter or impair the obligation of a contract.

**3. RECEIVERS §155—MERGER OF MORTGAGOR
COMPANY—EFFECT.**

Where street railway companies which had given trust mortgages on their properties to secure their bonds were merged into one company and the merged company was placed in receivership, the indebtedness incurred by the receivers had no priority over the bonds secured by the mortgages of the merged companies, if it could be paid out of funds arising from the receivers' operation of the road.

**4. RECEIVERS §69—TITLE AND INTEREST—
OUTSTANDING LIENS.**

A receiver of an insolvent corporation takes only its interest in the property, subject to all valid liens against it, and can set up no rights against claims which the corporation could not have set up.

**5. RECEIVERS §77—TITLE AND INTEREST—
PRE-EXISTING LIENS.**

The appointment of a receiver for property does not affect pre-existing liens upon it or the vested rights of third persons therein.

**6. STREET RAILROADS §55—MORTGAGE FORE-
CLOSURE—CONSENT OF PUBLIC SERVICE COM-
MISSION.**

The Public Service Company Law (Act July 26, 1913 [P. L. 1374]) does not require the consent of the public service commission before a mortgage trustee can foreclose a street railway company's mortgage and sell the mortgaged property.

Appeal from Court of Common Pleas, Northumberland County.

Bills in equity to foreclose corporate mortgages by the Philadelphia Trust, Safe Deposit & Insurance Company (now Philadelphia Trust Company), trustee, against the Northumberland County Traction Company and Sunbury & Susquehanna Railway Company; and by H. E. Davis and others, receivers of the Sunbury & Susquehanna Railway Company and the Pennsylvania Steel Company against the Sunbury & Susquehanna Railway Company. From the decrees

entered, the Philadelphia Trust Company, trustee, takes two appeals, and the Scranton Trust Company, trustee, appeals. Decrees modified, and a procedendo awarded.

From the record it appeared that the Northumberland County Traction Company, herein called "traction company," was formed in 1911 by the merger of two other companies, and owned and operated an electric railway from the borough of Sunbury to the borough of Northumberland, having a total length of about 6 miles. On November 1, 1911, it executed and delivered a first mortgage or deed of trust on all its property and franchises, then owned or thereafter to be acquired, to the Philadelphia Trust Company, as trustee, to secure an issue of its bonds, of which \$400,000 are outstanding. The covenants bound the successors of the traction company, which agreed that it would suffer no lien to have priority over this first mortgage, and waived all laws requiring foreclosure by an action or postponing the immediate sale of the mortgaged property under the provisions of the mortgage. It was provided that in case default should be made in payment of interest or principal of the bonds or in the performance of any other covenant by the traction company, the trustee, upon the written request of the holders of not less than one-half in amount of the outstanding bonds, should declare the principal of all the bonds to be due and payable and enforce the rights and liens of the bondholders by foreclosure or sale of the mortgaged property, with the right of the purchaser at any sale of the property in execution of the provisions of the mortgage to apply the matured bonds and coupons upon the purchase price.

The Sunbury & Selinsgrove Electric Street Railway Company, herein called "Selinsgrove company," was incorporated in 1904, and owned and operated an electric railway from the borough of Selinsgrove, in Snyder county, to the borough of Sunbury, in Northumberland county, of about 7 miles in length. On August 1, 1907, it executed and delivered a mortgage or deed of trust on all its property and franchises to the Scranton Trust Company, as trustee, to secure an issue of bonds to the amount of \$300,000, which are now outstanding. This mortgage is a first lien on all of the property and franchises of the mortgagor, authorizes the trustee, on request of the holders of the majority of the bonds then outstanding, upon which default in payment of interest or principal has been made, to take possession and operate the road until the debt is paid, to have the profits sequestered by a receiver appointed by a court of equity, to make public sale of the property, or to bring on a judicial sale, and stipulates that the rights and remedies of the holders of the bonds provided in the mortgage shall be exclusive of all others.

The Sunbury, Lewisburg & Milton Railway Company, herein called the "Lewisburg com-

pany," owned and operated an electric railway in Northumberland borough and Point township, Northumberland county, having a total length of about 2 miles. On August 21, 1911, this company executed and delivered a mortgage or deed of trust on all its property and franchises to secure a bond issue of \$1,000,000, of which \$150,000 have been issued and are now outstanding.

The Chillisquaque Connecting Railway Company and the Montandon & Milton Railroad Company were incorporated as street railway companies under the laws of the commonwealth, but have not constructed or operated roads under their charters.

The Sunbury & Susquehanna Railway Company, herein called the "merged company," is a corporation existing under the laws of the commonwealth, and was formed in pursuance of the Act of May 3, 1909, P. L. 408, 5 Purd. 5337, by the consolidation and merger of all the above-named or constituted companies, and since the consolidation has owned and operated as a continuous and connected line the several lines of railway formerly owned and operated by those companies, having a total length of about 16 miles. The merger agreement vested all the property and franchises of the five corporations in the new corporation, subject to all the debts, duties, and liabilities of each of the constituent companies, and provided that all property and franchises afterwards acquired along each line should become a part of it and be primarily subject to the mortgage of the constituent company then operating that line; that all the rights of creditors and liens upon the property of either of the constituent corporations should be preserved unimpaired, and those corporations should be deemed to continue in existence to preserve the same; and that all debts, liabilities, and duties of either of the constituent companies should thenceforth attach to the merged corporation and be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it. The agreement also provided that a refunding mortgage should be created by the new corporation and should contain a clause that any default in respect to the payment of interest, or any other provision contained in the refunding mortgage, should be construed to be, and should immediately operate as, a default with respect to each of the three underlying mortgages of the constituent companies; so that thereupon immediately the respective trustees in the underlying mortgages or the holders of the bonds of those mortgages, should forthwith make use of any remedy given in either or any of those mortgages for the enforcement of the provisions thereof with relation to default, as therein set forth, with like effect to all intents and purposes as if there had been a separate default under each of the underlying mortgages; and no payment of interest under any of the

underlying mortgages should prevent such default, if any default whatever should be made with respect to any of the provisions of the refunding mortgage. The merged company created a bonded indebtedness of \$200,000, which was secured by a mortgage on all of its property and franchises.

At the date of the merger, the lines of the traction company, the Selinsgrove company, and the Lewisburg company were end to end but did not physically connect, and after the merger the consolidated company physically connected the tracks of the three constituent companies and operated them as one line.

The Pennsylvania Steel Company filed a creditors' bill, on November 13, 1913, against the merged company, alleging insolvency, and on December 15, 1913, the court entered a decree adjudging the defendant to be insolvent and appointed three receivers, who forthwith took possession of the street railway system of that company and have since operated it.

Default was made under each of the underlying mortgages of the three constituent companies and also the top mortgage of the merged company, but no bill for foreclosure was filed by the trustee under the Selinsgrove and Lewisburg companies mortgages.

The Philadelphia Trust Company, trustee under the traction company mortgage, presented its petition to the court below averring default on May 1, 1913, and thereafter, in payment of the interest due on the bonds issued by that company and secured by the mortgage; that on December 15, 1913, the court appointed receivers for the merged company who took possession of all its property, including the property on which the traction company mortgage was a lien; and that petitioner had received the written request of more than one-half in amount of the holders of the outstanding bonds to declare the principal of all the bonds to be due and payable immediately and to proceed to enforce the rights and liens of the bondholders under the mortgage, and prayed for leave to file its bill for the foreclosure of the mortgage, naming as defendants in the bill the traction company and the receivers of the merged company. The prayer of the petition was granted on December 7, 1914, and on the same day the bill was filed.

On December 21, 1914, the receivers of the merged company presented a petition to the court below and obtained a rule to show cause why the court should not decree a sale of the corporate rights, franchises, and property of that company by the receivers, freed and discharged from the lien and operation of the several mortgages of the constituent and merged companies, judgments, vendors' liens and paramount liens, specifically mentioned in the petition, and freed and discharged from the lien and operation of all other liens of any nature and character whatsoever. The petition alleged that a separate foreclosure and sale of the road

covered by the traction company's mortgage, now asked for by the trustee under that mortgage, would work irreparable injury to the bondholders of the merged and other constituent companies, by causing the dismemberment of the system of railways operated as a unit by the receivers; that a separate foreclosure and sale of the traction company's road would be to the manifest injustice of creditors of all classes; and that, as no bill had been filed to foreclose the mortgages of the other two constituent companies, the receivers would be left in the embarrassing position of trying to operate as a unit two pieces of disjointed and disconnected railway. The Philadelphia Trust Company, trustee under the traction company mortgage, filed an answer averring that the merger of the constituent companies could not impair, injure, or affect the security for the bonds as established by the traction company mortgage, and denying the materiality of the reasons assigned in the petition for an order for a receiver's sale of the property. The answer also avers that the court was without authority to grant the prayer of the petitioners for an order to sell. A committee of the bondholders of the traction company joined in the answer of the Philadelphia Trust Company. The Scranton Trust Company, trustee for the holders of the bonds secured by the mortgage of the Selinsgrove company, filed an answer in which it denied the material facts alleged in the receivers' petition, and also the jurisdiction of the court to order a sale of the properties as a whole, as prayed for in the petition, divested of all liens, and particularly the lien of the mortgage of the Selinsgrove company. The answer also averred that the holders of the bonds would be deprived of the additional value of the property arising from the statutory right of the purchasers of the property to organize a corporation and to operate the property as a separate and independent street railway.

On January 4, 1915, the president and receivers of the merged company filed an answer to the bill of the Philadelphia Trust Company to foreclose the mortgage given by the traction company. The answer admits all the averments of the bill except that as to the request of more than one-half the bondholders, which was afterwards proved and found by the court, and avers that the receivers had applied to the court for leave to sell the property and franchises of the merged company, and it then sets forth the same reasons for objecting to the foreclosure of the traction company mortgage as are given in the receivers' application to the court for leave to sell the property and franchises of the merged company.

The cases were heard on the pleadings and testimony, and the court granted the prayer of the receivers' petition for an order to sell, and entered a decree authorizing them

to sell, as an entirety, the corporate rights, franchises, and property of the merged corporation and of its constituent corporations at the date of the merger, divested of all liens by mortgage, judgment, decree, or otherwise, upon the merged railway, whether before or subsequent to the merger, and whether against the merged corporation or jointly or severally against its constituent corporations. The decree required a cash deposit of \$10,000 by each bidder, and a cash payment of \$100,000 on acceptance of any bid, and permitted the use of bonds in payment of the amount of the bid above the deposit and the down money, and then allowed a credit for the bonds in "such sums as would be payable on such bonds and coupons out of the purchase price, if the whole amount thereof had been paid in cash." From this decree the Philadelphia Trust Company, trustee, and a committee of bondholders of the traction company mortgage took an appeal, at No. 273, January term, 1916, as did also the Scranton Trust Company, trustee under the Selinsgrove company mortgage, at No. 275, January term, 1916. The court also entered a decree on the bill filed by the Philadelphia Trust Company, trustee, for the foreclosure of the traction company mortgage, that the mortgage was a valid and subsisting mortgage and constituted a first lien, with the exception of certain claims alleged to be preferential, and then undergoing adjudication by the court, on that company's corporate rights, franchises, and property covered thereby, and that there was default in payment of interest due on the mortgage whereby the principal of the mortgage was now due; but denied a separate sale in foreclosure by the trustee under the traction company mortgage, and directed that the corporate rights, franchises, and property covered by that mortgage be sold pursuant to the general order of sale issued under the court's decree to the receivers of the merged company. From this decree the Philadelphia Trust Company, trustee, appealed, at No. 272, January term, 1916.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, MOSCH-ZISKER, FRAZER, and WALLING, JJ.

C. La Rue Munson, of Williamsport, J. Simpson Kline, of Sunbury, and Townsend, Elliott & Munson, for appellant Philadelphia Trust Co. W. L. Hill, of Scranton, for appellant Scranton Trust Co. Ellis Ames Ballard, of Philadelphia, J. Fred Schaffer, of Sunbury, and Boyd Lee Spahr, of Philadelphia, for appellees.

MESTREZAT, J. These three appeals are from two decrees of the court of common pleas of Northumberland county, sitting in equity, and as the questions raised in all the appeals are practically identical, they may be considered and disposed of in one opinion. The facts will be found in detail

in the reporter's notes. They are principally of record and none of them, essential to the decision, is in dispute. The Sunbury & Susquehanna Railway Company, herein called the "merged company," was formed by an agreement, dated January 16, 1912, merging and consolidating the Northumberland County Traction Company, herein called "traction company," the Sunbury & Selinsgrove Electric Street Railway Company, herein called "Selinsgrove company," the Sunbury, Lewisburg & Milton Railway Company, herein called "Lewisburg company," and two other railway companies, the merger being made in pursuance of the act of May 3, 1909 (P. L. 408). Prior to the merger, the three specifically named constituent companies independently owned and operated street railways. They each secured an issue of first mortgage bonds by a mortgage or trust deed to a trustee on all the property and franchises then owned or thereafter to be acquired by them respectively, and the bonds are still outstanding and are due and unpaid. The merged company also secured a bond issued by a top mortgage and those bonds are outstanding and default in payment was made. On December 15, 1913, on a creditors' bill filed by the Pennsylvania Steel Company, the merged company was adjudged insolvent and receivers were appointed by the court below. Subsequently, the court declined to permit the Philadelphia Trust Company, trustee in the traction company mortgage, to foreclose its mortgage and sell the mortgaged premises, and granted the receivers an order to sell, as an entirety, the property and franchises of the merged corporation and its constituent corporations, divested of all liens against the consolidated and constituent companies. From these decrees, the Philadelphia Trust Company and the Scranton Trust Company, trustees in two of the underlying mortgages, have taken appeals.

The principal and controlling questions in the appeals are substantially the same, and may be stated as follows: (1) Can a court of equity deny the trustee under the traction company mortgage the right upon default to foreclose and sell the mortgaged property? (2) Can the court decree a sale of the merged road as a unit by the receivers, divested of the lien of the underlying mortgages of the constituent companies? (3) Does the Public Service Company Law require consent of its commission to foreclose the underlying traction company mortgage?

[1, 2] The learned judge of the court below refused to permit a separate foreclosure and sale under the traction company mortgage, and the reasons assigned are that it would work irreparable injury to the bondholders of the other constituent companies and the merged company; would be to the manifest injustice of all classes of creditors; would result in imposing additional burdens upon the traveling public, and materially

inconvenience the public travel upon the railway; would disconnect the roads of the other two constituent companies and compel the receivers to operate them as a unit without any means of connection; and would greatly impair the value of the rolling stock which is used on the whole system; would prevent marshaling the assets as between the liens and preferential claims and between the units composing the merged company; and the road would sell for a better price as a whole than if sold in parts.

We are not convinced that these or any other reasons brought to our attention are sufficient, under the facts of these cases, to justify the court in refusing to permit the trustee under the traction company mortgage to enforce its rights and those of the bondholders acquired by, and in accordance with, the terms of the mortgage. This obligation was given to secure a bond issue and is the contract between the company and its creditors, the holders of its bonds. The mortgage, in specific terms, imposes the obligation to pay the debt and interest of the bonds according to their tenor, and provides remedies, in case of a default in the performance of any covenant or stipulation of the contract, for enforcing the rights and liens of the bondholders. These remedies, as the mortgage discloses, are by a foreclosure or other appropriate proceeding, or by a sale of the mortgaged property by the trustee, and it is declared that "nothing herein contained shall be construed as abridging the power of the trustee to foreclose this indenture by bill in equity at any time after any default shall have been made and shall have continued as above provided." It is stipulated in the mortgage that, in any foreclosure or other sale of the property and franchises of the company in the execution of its provisions, the purchaser may use any of the matured and unpaid bonds and coupons toward payment of the purchase price. It is conceded, and the court finds, that default was made in payment of interest on the bonds whereby the principal thereof had become due, and that the trustee had been requested to declare all the bonds due and payable and to proceed to enforce the rights and liens of the bondholders, as provided in the mortgage. The parties, therefore, not only stipulated in the mortgage for the payment of the bonds with their interest, but provided therein the remedies to enforce the payment of the indebtedness. The federal and state Constitutions forbid the impairment of the obligation of contracts, and, as a mortgage is a contract, its terms are, therefore, inviolable. This inhibition extends to the remedy specified in the contract which becomes a part of the obligation and, without consent, cannot be altered, defeated or otherwise affected by subsequent legislation or by the judgment or decree of a judicial tribunal. This is settled on principle and authority, and of the numerous decisions in all juris-

dictions enforcing the doctrine we need cite but two of our own cases. In *Billmeyer v. Evans & Rodenbaugh*, 40 Pa. 324, 327, Mr. Justice Woodward, delivering the opinion, said:

"A statute strictly remedial may impair the obligation of a contract, and when this happens the act is unconstitutional. *Bronson v. Kinzie et al.*, 42 U. S. 311 [11 L. Ed. 143]. This always happens where the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the lawmaking power is free; but if they do, they become a law to themselves, and the Legislature must let them alone."

In the subsequent case of *Breitenbach v. Bush*, 44 Pa. 313, 318, 84 Am. Dec. 442, the same learned judge, speaking for the court, restates the doctrine as follows:

"It sometimes happens that the parties contract concerning the remedy—that they stipulate in the body of the contract that, in case of the failure of payment by a certain day, there shall be no stay of execution, or that the mortgagees may enter and sell the mortgaged estate—or that all exemption rights shall be waived. In such cases, the rule is that the remedy becomes a part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional."

The constitutional provision, federal (U. S. Const. art. 1, § 10) and state (Const. art. 1, § 17), forbidding the impairment of the obligation of contracts, lays its hand on the legislative department of the government, but the principle has like force when invoked for a similar purpose in the judicial department. There is no authority, common-law or statutory, in the courts which empowers them to exercise functions expressly under the ban of the constitutional inhibition. In the language of Chief Justice Beasley, in *New Jersey Midland Ry. Co. v. Straitt*, 35 N. J. Law. 322, 324, "neither the court nor the Legislature can alter the bargain between these parties." We have distinctly so held in *Galey v. Guffey*, 248 Pa. 523, 528, 94 Atl. 238, 240, where it is said:

"It is true that what is prohibited is legislative action the effect of which would be the impairment of a contract; but what the Legislature may not do in this regard certainly the courts may not do. The power that is here denied the Legislature was not reserved to the courts."

It is, therefore, clear that the terms of the mortgage contract cannot be altered or impaired by either the Legislature or the courts, and this applies to the remedies, or specific provision for its enforcement, as well as to the obligation to pay the bonded indebtedness. The learned judge found that the traction company mortgage is a valid and subsisting mortgage and constitutes a first lien upon all the real and other estate, property and franchises of that company, with the right of the mortgagee, on default, to sell the mortgaged property, or foreclose the mortgage, and the right of the purchaser to use the bonds in payment of the purchase price, but

refused to permit the mortgagee trust company to enforce the lien and rights of the bondholders in accordance with the specific provisions of the mortgage contract. If, as said by Mr. Justice Woodward in the Billmeyer Case, the court may do this, the constitutional provisions are a vain parade of words, a mere theoretical rule without any practical force or value. This action of the court not only violated the contractual rights of the holders of the bonds secured by their mortgage but also the express provisions of the merger agreement, as well as the provisions of the act of May 3, 1909 (P. L. 408), under which the several constituent companies were consolidated. The merger contract provides, as will be observed, "that all the rights of creditors and all liens upon the property of either of the said corporations, parties hereto, shall be preserved unimpaired, and the said corporations may be deemed to continue in existence to preserve the same." This is the identical language of the third section of the act of 1909, and, therefore, the rights and remedies conferred on the holders of the bonds under the traction company mortgage were protected and assured by agreement of the several constituent companies entering the merger, and by the express mandate of the statute authorizing and legalizing the agreement which unified the several constituent systems of electric railways.

The effect of the decree refusing the trustee of the traction company mortgage the right to foreclose and sell under its mortgage is far-reaching, and deprives the bondholders of contractual rights essential to the full protection of their securities. It is conceded and was found by the court that default was made by the three constituent companies, and hence the principal and interest of the whole bond issue was due and unpaid at the time permission was asked to proceed on the traction company mortgage. By the terms of the mortgage, therefore, the traction company was barred from its equity of redemption in the mortgaged premises and the mortgagee was authorized to foreclose the mortgage and to collect the indebtedness. This, as is apparent, is an important right possessed by the mortgagee, especially as the mortgage provides no other source from which the bonds can be paid. The decree also deprives the bondholders of the valuable right, in case of their being compelled to purchase the property to protect themselves, of applying the bonds in payment of the purchase price, which is permitted, as provided in the mortgage, "in case any foreclosure or any other sale shall be made of the said property and franchises in execution of the provisions of this mortgage." The denial of the right to proceed on the mortgage took away this right, a right which unquestionably enhanced the value of the bonds. It is true, the decree of sale issued to the receivers permitted the use of the bonds in payment of the purchase

price; but it required a cash deposit of \$10,000 by each bidder, and a cash payment of \$100,000 on acceptance of the bid, and imposed other terms different from those provided in the merger agreement, which rendered this contractual right practically valueless. The denial of a foreclosure and sale under the traction company mortgage also seriously affects the bondholding creditors, in that it deprives the purchasers of the property and franchises of that company of the statutory right to organize a corporation and operate the property as an independent railway.

The reasons assigned by the learned court below for refusing to permit the trustee to make a separate sale in foreclosure of the mortgaged property, as will be observed, are, in effect, that it would be detrimental to the interests of the holders of the bonds of the other constituent companies and of the merged company, would result in inconvenience to public travel on the merged railway by disconnecting the roads of the underlying companies, and that the road as a whole would sell for a better price. These reasons are not sufficient to sustain the court's action. They entirely ignore and put aside the conceded rights of the traction company bondholders which are secured by their mortgage, and of which all subsequent creditors had full notice. These creditors are not in a position to insist that their property interests and the convenience of the public will be endangered or sacrificed by a decree permitting the holders of the traction company bonds to enforce payment by availing themselves of the remedies granted them in the mortgage. Such a decree will violate no rights of those creditors, although their interests may be injuriously affected, and hence they cannot successfully invoke the aid of a court to defeat the prior rights of the traction company's creditors, which are sought to be enforced in strict compliance with the company's contractual obligation. The language of the court in *Pairpoint Mfg. Co. et al. v. Philadelphia Optical & Watch Co. et al.*, 161 Pa. 17, 22, 28 Atl. 1003, may well be applied here. In reversing a decree which enjoined a sale by the sheriff at the instance of the receivers of the defendant company, we said:

"The confession of judgment to the appellant being lawful, the only remaining reason presented by the petition for interfering with the writ of execution is that a sale can be more advantageously conducted in the interests of all the creditors by the receivers. This is not a sufficient reason. The appellant is pursuing the regular and orderly course for the collection of a judgment lawfully obtained for a debt admittedly due. This is its right. The interests of other creditors may be affected thereby, but, until it is shown that their rights are violated, no one has a standing to challenge the appellant's right to use the means provided by law for the enforcement of its claim."

[3] We do not agree that the so-called preferential claims take precedence of the bonds secured by the underlying mortgages.

They are debts incurred by the receivers of the merged company, and hence were contracted subsequently to the then existing indebtedness created by the prior mortgages of the constituent companies. They can, and doubtless will, be paid out of the funds arising from the operation of the road by the receivers.

The learned chancellor held that the court had authority to decree the sale of the merged road as an entirety, by its receivers, freed and discharged of all liens, including the mortgages of the underlying companies. In considering this question, it is well to keep in view the fact that the parties objecting to the court's conclusion are the holders of the bonds of the underlying companies, and not the holders of the bonds of the merged company. The reasons assigned for the court's conclusion are the same as those for refusing to permit a separate sale in foreclosure of the traction company mortgage, and that the jurisdiction of the court in equity having attached by virtue of the proceedings resulting in placing the merged road in the hands of receivers, the court had authority to give complete and adequate relief by decreeing a sale of the property discharged of all liens against the merged company and its constituent companies. The chancellor further suggested, as a reason for his action, that a separate sale in foreclosure of the traction company unit would interfere with the administration of the receivership, and consequently with the jurisdiction of the court to administer adequate relief in the initial suit wherein the jurisdiction of the court first attached.

The statutory merger of the constituent companies, as already pointed out, did not affect the liens against those companies nor the rights of their creditors existing at the time of the merger, and the consolidated company took the property of the underlying companies with notice of and subject to such rights and liens. The merger agreement specifically protects the mortgage liens on the property of the constituent companies, and the act of 1909 provides that they shall continue unimpaired after the consolidation. The underlying mortgages were first liens on the mortgaged property and franchises, as found by the court, and, "such being the fact, the bondholders are entitled to the money as against the company and all persons holding under it with notice of their position." *Fidelity Ins. Trust & Safe Deposit Co. v. West Penna. & Shenango Connecting R. R. Co.*, 138 Pa. 494, 504, 21 Atl. 21, 21 Am. St. Rep. 911. The effect of the statutory merger of corporations on the constituent companies is well expressed by Mr. Justice Gray in the matter of *Utica National Brewing Co.*, 154 N. Y. 268, 273, 48 N. E. 521, 522. The learned justice says:

"It is argued * * * that by the terms of the consolidation agreement the new corporation was freed from the debts and liabilities of the

corporations merging into it. If we might assume that such was intended as a result of consolidation under the agreement, nevertheless it would be wholly inoperative to accomplish any such thing as to creditors who were not parties to the agreement. Such creditors were not bound by any of its provisions. The statute protected them, and consolidation pursuant to its permission and provisions, whatever it may mean for the stockholders because of their agreement, leaves the creditors precisely in the situation which the statute defines. If they have not done anything to impair or to release their rights, it is not, and could not be, within the purview of the statute that those rights may be impaired through the action of members of the consolidating corporations."

To the same effect are *Baltimore & Susquehanna R. R. Co. v. Musselman*, 2 Grant (Pa.) 348; *Wabash, St. Louis & Pac. Ry. Co. v. Ham et al.*, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235; *New Jersey Midland Ry. Co. v. Straitt*, 35 N. J. Law, 322; *Smith v. Los Angeles & Pac. Ry. Co.*, 98 Cal. 210, 33 Pac. 53; *State, use of Dodson et al., v. Baltimore & Lehigh R. R. Co.*, 77 Md. 489, 26 Atl. 865.

[4, 5] The receivers were appointed on a creditors' bill filed on the equity side of the court by the Pennsylvania Steel Company against the merged company, averring the insolvency of the latter company and praying for the appointment of receivers to take possession of its property and franchises and operate its railway system. The effect of the receivership was to place the property of the merged company in the hands of the receivers to be administered for the benefit of the insolvent corporation. It did not, and could not, affect or impair the liens or contractual rights of the creditors of the merged company or of any of the constituent companies. *Galey v. Guffey*, 248 Pa. 523, 94 Atl. 238. A receiver of the insolvent corporation stands in the shoes of the owner and takes only his interest in the property subject to all valid liens against it. He can acquire no other, greater, or better interest than the debtor had in the property, and to this extent the receiver has been held to stand in the shoes of the debtor, and he has the same right which the insolvent would have had, and can set up no rights against claims which the debtor could not have set up. 34 Cyc. 191, and cases cited. The appointment of a receiver for property does not affect pre-existing liens upon the property, or vested rights or interests of third persons therein. A receiver, it is held, succeeds only to such right, title, and interest in the property as the individual or corporation for which he is appointed receiver had at the time the appointment was made. 23 Amer. & Eng. Encyc. of Law (2d Ed.) 1091. "The appointment of a receiver," says Mr. Justice Brewer, delivering the opinion in *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950, 953, 34 L. Ed. 379, "vests in the court no absolute control over the property, and no general authority to displace vested contract liens. * * * One holding a mort-

gage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. * * * We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." This language is quoted with approval in *Thomas v. Western Car Co.*, 149 U. S. 95, 111, 13 Sup. Ct. 824, 37 L. Ed. 663, and other federal decisions.

In view of the effect of the consolidation of the several constituent companies and of the appointment of receivers for the merged company, we cannot assent to the conclusion that the court appointing the receivers had jurisdiction to decree a sale of the merged road divested of the liens of the underlying mortgages. Its jurisdiction extended only to the administration of the assets of the insolvent merged company, and those assets, to the extent they had been the property of the underlying companies, were subject to the liens and contractual rights of the creditors of those companies which, by the contract and the statute, were "deemed to continue in existence to preserve the same." The constituent companies were not brought within the jurisdiction of the court by the appointment of receivers for the consolidated company. It was therefore clearly beyond the power of the court by its decree to divest the liens of the underlying companies. The creditors of these companies were not parties to the merger agreement and, so far as appears, could not prevent the consolidation. The bondholders of the respective underlying corporations and their mortgage trustees were not required to give their assent, and did not agree to the merger of the corporations. The rights of the holders of the bonds and other creditors are, as we have seen, expressly preserved by the statute and the merger agreement executed by the constituent companies. If, as already pointed out, the court, in the administration of the assets of the merged corporation, were permitted to decree a sale by the receivers, divesting the liens of the mortgages of the underlying companies, it would be in plain violation of the contractual rights of the holders of the mortgage bonds protected by the federal and state Constitutions. We repeat what is said above: What the Legislature cannot do, the courts are without authority to do. The sacredness of a contract is protected by the fundamental law of the land and cannot be invaded by a court of law or equity.

A decree directing a sale by the receivers discharged of all liens and fixing the terms thereof, not only violates the contractual rights of the bondholders of the constituent companies, as pointed out above, but does them manifest injustice. The mortgage provides that in case of a sale of the mortgaged

property in execution of its provisions the purchaser shall be entitled to apply the bonds in payment of the purchase price. The decree orders a sale of the entire property of the consolidated company. If the bondholders of either of the constituent companies desire to protect their interests by purchasing the property, they must buy the three roads instead of one and, in accordance with the decree, deposit \$10,000 as bidders, pay \$100,000 on acceptance of the bid, and be permitted to use the bonds only in payment of the amount of the bid above the deposit and the down money, and then be allowed a credit for the bonds only in "such sums as would be payable on such bonds and coupons out of the purchase price, if the whole amount thereof had been paid in cash." The decree, therefore, imposes terms on the bondholders of the respective companies, if they become purchasers, which are violative of their contractual obligation and, in effect, compels them to purchase the three roads and thereby pay some part of the bonded indebtedness of the other companies.

The creditors of the merged company have no just ground to complain if a sale of the property to be made by the receivers is subject to the lien of the underlying mortgages. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. 6, 28 L. Ed. 615. The records which they were bound to consult gave them notice of the bonded indebtedness of the underlying companies and the remedies provided for its collection. The holders of the bonds of the merged company, therefore, knew that they were taking the top bonds subject to the contractual rights of the creditors evidenced by the terms of the underlying mortgages, which made the bonds of the constituent companies first liens on the property and franchises of those companies and provided specific remedies for their collection.

[8] The learned court below was clearly in error in holding that the Public Service Company Law requires the consent of its commission before the trustee could foreclose the traction company mortgage and sell the mortgaged property. This is not a proceeding instituted by the merged company or the traction company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges to or with any other corporation, which, under the Public Service Company Law, requires the approval of its commission, but is a bill in equity filed by the trustee to enforce the contractual rights of the bondholders by foreclosing the traction company mortgage by which the bond issue is secured. In other words, it is a proceeding by the trustee, in strict conformity with the contract, to collect the bonded indebtedness of the traction company, and there is no provision in the Public Service Company Law which attempts to or can interfere with or prevent it.

There are other questions of minor im-

portance raised by the assignments, but they do not affect our conclusion and, therefore, need not be considered.

We conclude that the learned court below erred in refusing to permit the mortgagee in the traction company mortgage to enforce the rights of the holders of the bonds under that mortgage by foreclosure and sale of the mortgaged property, one of the remedies stipulated in the contract of the parties, and in decreeing a sale of the merged roads as a unit divested of the lien of the underlying mortgages of the constituent companies.

It is ordered, adjudged, and decreed that the appeals of the Philadelphia Trust Company, trustee, at Nos. 272 and 273, January term, 1916, and of the Scranton Trust Company at No. 275, January term, 1916, be sustained to the extent of modifying the decrees in the respective cases so as to conform to the views herein expressed, and a procedendo is awarded.

Modification of Decree.

PER CURIAM. And now, May 22, 1917, the decree in the above-entitled cases is modified and enlarged as follows: In the case in which the appeal was taken to No. 272, January term, 1916, the receivers of the Sunbury & Susquehanna Railway Company are directed to pay all the costs incurred since the filing of their answer, including the costs of the appeal; and in the cases in which the appeals were taken to Nos. 273 and 275, January term, 1916, the receivers are directed to pay the costs incurred in connection with their petition for an order of sale, including the costs of the appeals.

(258 Pa. 296)

HOPE v. KELLEY et al.

(Supreme Court of Pennsylvania. May 22, 1917.)

WILLS ~~Q~~—\$40 — DEVISE — CONSTRUCTION — CHARGE.

The owner of property subject to a mortgage of \$800 joined with her sister in borrowing \$1,750, and gave as security a joint mortgage covering her own property and other property of her sister, and paid off the \$800 mortgage out of the money so borrowed, and thereafter paid interest on \$800 of the \$1,750 mortgage, and by will devised the property to her brother and his heirs, provided he assume and pay the mortgage. *Held*, that the devisee was required to pay the entire \$1,750 mortgage.

Appeal from Court of Common Pleas, Luzerne County.

Case stated, in case of Charles Hope against Charles Kelley and others to determine the construction of a will. From a judgment for plaintiff, defendant Charles Kelley appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

R. B. Alexander, of Wilkes-Barre, for appellant. Frank P. Slattey, of Wilkes-Barre, for appellee.

BROWN, C. J. In an amicable action instituted in the court below the question for its determination was the effect to be given to a clause in the will of Margaret McDade, deceased, and the judgment from which we have this appeal was entered on facts agreed upon in a case stated.

On April 1, 1908, Mrs. McDade was the owner of a lot of ground—No. 516 Hazel street, in the city of Wilkes-Barre—which was subject to a mortgage executed by her for \$800. At that time her sister, Annie Meighan, wished to purchase a property in Wright township, Luzerne county, and applied to her for financial assistance. That this might be rendered, the two sisters borrowed from Peter Hope \$1,750, giving as security therefor their joint mortgage, dated April 6, 1908, covering Mrs. McDade's property on Hazel street, Wilkes-Barre, and two properties owned by Mrs. Meighan, in the township of Wright. The day after the execution of this mortgage and the receipt of \$1,750 from Hope by the mortgagors the mortgage of \$800 on the McDade property was paid out of moneys so received. The balance was used in the purchase of the property in Wright township by Mrs. Meighan. The mortgage for \$1,750 was subsequently assigned to Charles Hope, the appellee. Mrs. McDade, up to the time of her death, paid interest on \$800 of this mortgage, and Mrs. Meighan paid interest on the balance and \$200 of the principal. Mrs. McDade died September 13, 1915, and by her will, executed June 9th of the same year, devised her Hazel street property to her brother, Charles Kelley. The question before the court below was whether he took it subject to the mortgage of \$1,750, or only to \$800 thereof, under the following clause in her will:

"Seventh. I give, devise and bequeath to my brother, Charles Kelley of North Main street, Wilkes-Barre, Pa., my house and lot situated at No. 516 Hazel avenue, Wilkes-Barre, Pa., adjoining property of Peter Conlon, the same to go to and is hereby devised to said Charles Kelley, and his heirs forever, provided my said brother assume and pay the mortgage given by me and entered against said property."

When Mrs. McDade died there was but one mortgage on her Hazel street property, and it was the one given by her and her sister to Peter Hope for \$1,750, now held by the appellee. Seven years before her death her mortgage for \$800 on that property had been paid and marked satisfied on the record. It could not, therefore, have been assumed by Charles Kelley, the devisee, upon the death of his sister, for it no longer existed. Her words in the devise to him clearly and unmistakably direct that, if he takes the property,

he must assume and pay her mortgage upon it. What that mortgage was was not open to dispute, for at the time the will of the testatrix was written, and up to the day she died, the only mortgage against the property was the one given to Peter Hope. When this appeared to the court, the judgment that the appellant must pay and assume it, if he would take the devise, was so manifestly correct that nothing need be added in vindication of it. No fact in the case stated would have warranted any other conclusion. If the testatrix intended that her brother should pay but \$800 of the mortgage, she could have so stated in a single line. Her intention as expressed in her will is controlling.

Judgment affirmed.

(258 Pa. 272)

FOX CHASE BANK v. WAYNE JUNCTION TRUST CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. INSURANCE — 646(6) — TITLE INSURANCE — RECOVERY.

To recover on a policy of title insurance conditioned to indemnify and keep insured harmless from loss sustained by reason of the filing mechanics' liens, etc., insured must establish a loss covered by its provisions.

2. INSURANCE — 514 — TITLE INSURANCE — BREACH — LIABILITY.

Under a policy of title insurance conditioned to indemnify a mortgagee from damage by reason of the filing of mechanics' liens, etc., the insurer was liable where such liens were filed and where a final judgment awarded the lienors the fund which otherwise would have paid the mortgage.

3. INSURANCE — 661 — TITLE INSURANCE — ACTION — EVIDENCE.

In an action on such policy opinion evidence tending to show that the market value of the insured's mortgage was less than its face value or that the mortgaged property would have been worth less when finished than when sold at a sheriff's sale was inadmissible.

4. INSURANCE — 648(1) — TITLE INSURANCE — EVIDENCE.

In such action, an offer to show that there was an agreement among the mechanic lienors that one should bid for all without any showing that the purchase by such party was not bona fide or that such agreement affected amount of the bid was irrelevant especially where there was no offer to show that the insured mortgagee knew of such agreement.

5. INSURANCE — 539 — TITLE INSURANCE.

Under a policy of title insurance indemnifying a mortgagee from damages by reason of the filing of mechanics' liens, etc., a provision requiring the insured to notify the insurer of any action or proceeding founded upon any lien did not refer to the filing of such lien, but to the proceedings for its enforcement.

6. INSURANCE — 513 — TITLE INSURANCE — FAILURE TO MAKE DEFENSE — LIABILITY FOR EXPENSES.

In such case, the insurer declining to defend against mechanics' liens and insisting that the insured must do so was liable for the expenses thereby incurred by the insured.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on a policy of title insurance by the Fox Chase Bank against the Wayne Junction Trust Company. Verdict for plaintiff for \$10,432.92, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Wayne P. Rambo, Robert Mair, and Ormond Rambo, all of Philadelphia, for appellant. Abraham M. Beitler and George W. Harkins, Jr., both of Philadelphia, for appellee.

WALLING, J. This action is on a special policy of indemnity against liens and the non-completion of a building operation. In 1911 Seward L. Bowser undertook to build 17 houses on Duncannon avenue, Philadelphia, and placed a first mortgage of about \$15,000 upon the land. At the same time and seemingly for the same indebtedness he also gave mortgages upon the individual lots. Thereafter, and while the houses were in process of construction, he secured a loan of \$10,000 from plaintiff, for which he gave his individual note, and as collateral thereto a second mortgage upon said property, and, as additional security, defendant at the same time gave plaintiff its special policy of insurance in \$10,000, conditioned in effect to indemnify and keep harmless the said Fox Chase Bank (the insured) from all loss or damage it might sustain by reason only of the filing of any mechanics and municipal claims against or the noncompletion of the buildings to be erected within six months from the date thereof, upon the property in question. Bowser failed financially and never completed the houses or any of them. However, one house was sold for \$600 subject to the first mortgage, and it was released from plaintiff's mortgage and the amount credited on the \$10,000 indebtedness, which reduced the same and also the liability on the policy to \$9,400.

Mechanics' liens amounting to about \$22,000 were filed against the houses and their respective lots. These liens had priority over plaintiff's mortgage, on which mortgage foreclosure proceedings were instituted and thirteen of the houses and lots sold by the sheriff on September 16, 1912. On the same day the sheriff also sold the three remaining houses by virtue of writs issued on mortgages prior to the mechanics' liens, of which proceedings and sales defendant had due notice. Plaintiff became the purchaser of six of the houses so sold, and the other ten were bought by a representative of the mechanics' lien creditors. The sales, made subject to prior mortgages, realized more than sufficient to pay plaintiff's claim in full, except for the mechanics' liens. The amount was paid to the sheriff and an auditor appointed to

make distribution. The policy made it the duty of the Wayne Junction Trust Company, at its own cost, on notice to defend the insured in all actions and proceedings founded on a claim of title or lien, etc., insured against. Pursuant to this, plaintiff notified defendant of the liens and proceedings before the auditor; the trust company declined to appear and defend against such liens, but warned plaintiff to do so, and the latter employed counsel, who succeeded in reducing the amount of such liens by about \$10,000. According to the auditor's report, after payment of all valid liens and other legitimate expenses, a balance of \$177.55 was left, which was awarded to plaintiff's mortgage. The auditor's report was confirmed by the proper court, and no appeal was taken therefrom. The plaintiff brought this suit on the policy to recover the balance of the Bowser claim, and also \$750 paid counsel for services before the auditor. Plaintiff limited its claim to alleged loss on account of the liens, and made no claim because of failure to complete the houses. Among the matters interposed in defense was the allegation that the houses were not worth the amount they brought at the sheriff's sales. The trial judge admitted evidence as to the market value of the six houses bought by plaintiff, but rejected that offered as to the other ten. The jury found for the plaintiff for the full amount of the claim, which implied a finding that the six houses were bought at their fair value. This appeal is from the judgment entered on the verdict. We have examined the 35 assignments of error, but find nothing that calls for a reversal.

[1-4] True, this being a contract of indemnity, it is incumbent on the insured to establish a loss covered by its provisions. *Moving Picture Co. of America v. Scottish Union & National Ins. Co. of Edinburgh*, 244 Pa. 358, 90 Atl. 642; *Wheeler v. Equitable Trust Company*, 221 Pa. 276, 70 Atl. 750; *Central Trust & Savings Co. v. Henry Kraan Furniture Co.*, 57 Pa. Super. Ct. 221. But defendant did undertake to indemnify plaintiff against mechanics' liens, and such liens were filed, and to them was awarded by final judicial decree the funds that otherwise would have paid plaintiff's claim. Thereby it sustained the very loss insured against; and, in the face of the fact that such fund was realized by bona fide judicial sales and actually paid to the sheriff for distribution, it is vain to offer opinion evidence tending to show that the market value of plaintiff's mortgage was less than its face value, or that the houses in question would have been worth less finished than they sold for at the sheriff's sales. Plaintiff's loss was the fund it failed to receive because of the liens, and not what someone might estimate the market value of the mortgage or property. It is not neces-

sary to estimate the value of property when the rights of the parties have been determined by its actual value as shown by a judicial sale. In such case the rights of the parties are determined by the amount realized from the sale of the property. *Wheeler v. Equitable Trust Company*, supra. There was no offer or attempt to prove plaintiff was a party to any fraud or collusion at the sheriff's sales. In fact, as above stated, the trial judge admitted evidence tending to show the value of the houses bought by plaintiff; and the offer to show that there was an agreement among the mechanics' lien creditors that one should bid for all was irrelevant, as it did not tend to prove that the purchase by such party was not bona fide or that such fact affected the amount of the bid; and, in any event, there was no offer to show that plaintiff had knowledge of such alleged agreement.

[5, 6] In our opinion the provision in the policy, requiring plaintiff to notify defendant of any action or proceeding founded upon any lien, does not refer to the filing of such lien but to proceedings taken for its enforcement. As the Wayne Junction Trust Company declined to make defense against the mechanics' liens, but insisted that plaintiff must do so, we see no reason why the latter should not recover the expense thereby incurred. Complaint is made as to alleged inconsistencies in rulings of the trial court. If so they do not seem to refer to any matter affecting the result of the case, or to be material. As plaintiff's claim is still unpaid no question of subrogation has arisen. The authorities relied on by appellant do not seem to sustain its contention.

The assignments of error are overruled, and the judgment is affirmed.

(258 Pa. 290)

STETLER v. NORTH BRANCH TRANSIT CO. et al.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. LANDLORD AND TENANT §86(1)—PROVISION FOR RENEWAL—CONSTRUCTION—"FIRST PRIVILEGE."

Under a lease of a park to a transit company contemplating its use and improvement as a place of public amusement and providing that if, at its expiration, the lessee should desire to re-lease the premises for an additional ten years, it should have the first privilege of re-leasing at a rental and upon the terms therein contained, the lessee had an absolute right to renew the lease for another term, irrespective of the wishes of the lessor.

2. LANDLORD AND TENANT §86(1)—RENEWAL PROVISION—CONSTRUCTION.

Where the provisions of a lease relating to its renewal are uncertain the tenant is favored and not the landlord, for the reason that the latter, having the power of stipulating in his own favor, has neglected to do so, and that every man's grant is to be taken most strongly against himself.

3. LANDLORD AND TENANT —91—RENEWAL OF LEASE—POSSESSION.

Where a lessee having the right to renew the lease for a second term exercised its right, after giving the landlord reasonable notice of its desire to do so, it was entitled to retain possession of the property.

Appeal from Court of Common Pleas, Columbia County.

Ejectment by Edward J. Stetler against the North Branch Transit Company and another. From a judgment for defendants, on case stated to determine the construction of a lease, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

John G. Harman, of Bloomsburg, for appel-
lant. Fred Ikeler, of Bloomsburg, for appel-
lees.

POTTER, J. This is an appeal from a judgment entered upon a case stated, in an action of ejectment, in which Edward J. Stetler is plaintiff and the North Branch Transit Company and A. W. Duy, receiver of the North Branch Transit Company, are defend-
ants.

[1] From the case stated, it appears that the transit company, as successor to the lessee, was in possession of a tract of land in Center township, Columbia county, known as "Columbia Park." The lease contemplated the use and improvement of the land as a place of entertainment and amusement for the public, and it contained the following clause:

"It is further agreed and understood that if at the expiration of this lease the party of the second part, its successors and assigns shall desire to re-lease the said premises for a further period of ten years it or they shall have the first privilege of re-leasing the same at the rental and upon the terms herein contained."

The controversy turns upon the construction to be given to the words "first privilege" in the above clause. Counsel for plaintiff contends the words mean that at the end of the ten-year term, the lessee has nothing more than the first right to re-lease the premises for another term, provided the lessor was willing at that time to lease to any one. The court below, however, held that it was apparent from the provisions of the lease that the parties contemplated the use of the land for a park for the entertainment of the public, and that considerable expenditure for improvements would be necessary. Under these circumstances, when the lease was executed the parties evidently felt that a renewal or extension would probably be desired, otherwise the clause in question would not have been inserted. It was clearly intended for the benefit of the lessee, and it should be so construed as to preserve that benefit, if it be possible to do so. But as the court below well says:

"If the plaintiff's theory as to the meaning of the paragraph is to be accepted, it would, so far as the lessee is concerned, become wholly meaningless, and might as well have been omitted."

[2] We are not to suppose that the parties intended such a result. An inspection of the clause shows that if the word "first" had not been used in connection with the word "privilege," the right of the lessee to a renewal could not be questioned. Did the privilege of renewal then become any the less a privilege by being termed a "first" privilege? The expression is awkward and perplexing, but we think it is more consistent with the expressed purpose of the lease to hold that the renewal was dependent upon the desire of the lessee, and that the expression of that desire was to give to it the first privilege of re-leasing, that is, priority of privilege over any one else. The thought was not well expressed, but we feel that the words "first privilege" in this connection should not be so construed as to nullify a valuable right in the hands of the lessee, which, under the paragraph as a whole, was evidently intended to be created. It was of no possible use to make provision merely that one party should enjoy a certain right, if the other party should consent thereto. The settled rule of construction is that any uncertainty as to the meaning of a clause in a lease is to be determined in favor of the lessee. The principle was stated in *Kaufmann v. Liggett*, 209 Pa. 87, page 97, 58 Atl. 129, page 132 [67 L. R. A. 353, 103 Am. St. Rep. 988], where we said:

"As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter having the power of stipulating in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself."

A case involving the same question was before the Superior Court in *McDonald v. Karpel*, 61 Pa. Super. Ct. 496. The lease there under construction was for a term of two years, and provided that the lessee should have "the first privilege to rent the building for a further term of three years." It was held that the lessee was entitled to remain in possession, under the same terms and conditions, for the additional three years, if he so desired and gave due notice of his intention. *Henderson, J.*, said 61 Pa. Super. Ct. 498:

"The use of the word 'first' does not, we think, change the significance of the option. If the word were omitted, it is necessarily implied that the tenant was to have the first privilege allowed by the clause in the lease, that is, he had the option to the exclusion of everybody else to rent the building for the further term of three years. It will be observed, too, that by the proviso he is to exercise the privilege three months before the expiration of two years. What privilege was he to exercise? Certainly the right to the extended term. This could hardly be called a privilege to be exercised if it were at the option of the landlord to increase the rent to an

amount which would be prohibitive to the tenant."

In the case at bar, every contingency was provided for, in the event that the lessee should desire an extension of the lease. The length of the additional term was fixed, and the amount of the rental and the other conditions were to be the same as during the first period.

[3] We agree with the conclusion reached by the court below, that the lessee had the right to re-lease the premises for a second term of ten years, and that it exercised its right after giving to the owner of the land reasonable notice of its desire to do so. Having complied with the terms providing for the re-leasing of the premises, the defendant was entitled to retain possession of the property.

The judgment is affirmed.

(258 Pa. 282)

SHAFFER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

RAILROADS — 350(13) — INJURY ON TRACK — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY.

In an action against a railroad to recover for the death of plaintiff's husband killed by a train while driving an automobile over a grade crossing, *held*, on the evidence, that decedent stopped before crossing the track and looked makes his contributory negligence a question for the jury.

Appeal from Court of Common Pleas, Columbia County.

Trespass by Lydia J. Shaffer against the Pennsylvania Railroad Company, to recover damages for the death of her husband. Verdict for plaintiff for \$8,500, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

H. M. Hinckley, of Danville, and C. B. Waller and L. E. Waller, both of Wilkes-Barre, for appellant. Fred Ikeler, of Bloomsburg, E. C. Ammerman and C. A. Small, of Bloomsburg, for appellee.

POTTER, J. One question only is raised by this appeal: Was the evidence of contributory negligence upon the part of the decedent so clear that the court should have directed a verdict in favor of the defendant? It appears from the testimony that Isaac Shaffer, the plaintiff's husband, drove an automobile truck up to a public crossing of the defendant's railway and stopped with the front of the truck about 6 feet distant from the rail. His seat was some 7 feet from the front of the truck, so that the point at which he was sitting was about 13 feet from the rail, or a little over 15 feet from the middle of the track. These distances were

not accurate measurements, but were careful estimates. Mr. Shaffer's brother, who stood on the running board of the machine beside him, testified that at that point he had a view up the track of about 300 feet, and that he looked, but saw no train in sight. The automobile was then started ahead, but, before it cleared the track, it was struck by a locomotive running at high speed, and Isaac Shaffer was killed. The testimony showed that in approaching the crossing from the south, as did Mr. Shaffer, the view up the track was obstructed by the station building, so that, at a point 15 feet from the center of the track, there was a view of the track in the direction from which the engine came, for a distance of about 306 feet; while, from any point in the highway less than 15 feet from the center of the track, a view of over 1,600 feet could be had. When the automobile came to a stop, its front end was advanced 6 or 7 feet within the 15-foot space, and presumably was as near to the rail as the driver of the car thought it prudent to go. Counsel for appellant do not contend that the automobile should have been driven any nearer to the track, but they earnestly argue that Mr. Shaffer had reached a point where, by leaning forward in his seat, he could have very much extended his view of the track, and could have seen the oncoming engine. This contention is based upon close arithmetical calculation as to the precise position in which the car stood, and upon accurate measurements made after the accident. But the points were not marked upon the ground at the time, and it does not appear that Mr. Shaffer knew the exact position of his car with respect to the enlarging of his view up the track, and we do not feel that the trial judge could have held, as a matter of law, that Mr. Shaffer knew the precise distance at which the front of his car stood from the track, or that by leaning forward at that instant he could have had the longer view. The evidence shows that he came as near to the track, before stopping his car, as was reasonably safe. This is not questioned by counsel for appellant. According to the testimony of the brother, no engine was in sight from that point, and Mr. Shaffer started his automobile, which had less than 6 feet to move forward, before coming within the line of danger in case of an approaching train. As the automobile advanced, almost immediately the locomotive was discovered, bearing down upon it, and a witness testified that Shaffer then threw his brakes on and tried to stop. Whether he did this, intending to back off, or whether he stalled his engine by applying his brakes too suddenly to a slowly moving car, the result was that the automobile remained on the track, and was struck with terrific force by the locomotive. We feel that the circum-

stances attending this accident, and the conduct of Mr. Shaffer with reference to them, afforded plausible ground for a variety of inferences, so that the verdict of a jury was the only proper means of determining whether Mr. Shaffer exercised the degree of care which a reasonable and prudent man would have exercised under the circumstances. The conclusions to be drawn from the evidence are not free from doubt, and in such case the court should not decide the question as one of law. It may be that, when the driver stopped his automobile at a point where he had a view of but little more than 300 feet up the track, he should have leaned forward, or gone forward, to get a more extended view, but we do not feel that, under the circumstances, the court would have been justified in pronouncing upon his conduct in that respect as matter of law. "Where a driver has stopped at the usual place for stopping, whether he should go forward in advance of his team to a better place to look is a question to be determined by the circumstances of the particular case." *Calhoun v. Penna. R. R. Co.*, 223 Pa. 208, 300, 72 Atl. 556, 557. In the same opinion there appears a citation from *Ely v. Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.*, 158 Pa. 233, 27 Atl. 970, as follows:

"Stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clearly that no other inference can * * * be drawn from it, the court cannot draw that inference as a conclusion of law, but [it] must send the case to the jury."

This principle is applicable to the present case, and justifies the action of the court below in submitting to the jury the question of contributory negligence upon the part of the decedent.

The assignments of error are overruled, and the judgment is affirmed.

(258 Pa. 266)

WILSON TP. v. EASTON TRANSIT CO.
(Supreme Court of Pennsylvania. May 22, 1917.)

1. STREET RAILROADS §7—LOCATION—CONSENT OF TOWNSHIP.

The consent of a township is necessary to the construction of a street railway therein.

2. STREET RAILROADS §40—LOCATION—CONSENT—ESTOPPEL.

Where a street railway in 1914 proceeded to reconstruct its right of way in a township over a route other than that designated by its charter, and obtained from the Public Service Commission a certificate of public convenience, and the township had appeared and approved the general improvement, except as to certain details as to which no appeal was taken, and the railway thereafter expended a large amount on the improvement, the township was estopped from enjoining its completion on the ground that it had not given its consent thereto.

3. STREET RAILROADS §57(6)—LOCATION—CONSENT OF TOWNSHIP—LACHES.

In such case, where the township's bill for an injunction was not filed until about two

years later, its laches precluded it from obtaining an injunction.

4. STREET RAILROADS §40—CONSTRUCTION—REMOVAL.

Township officers who have knowingly and without objection permitted a street railway to be constructed in the township cannot compel its removal.

Appeal from Court of Common Pleas, Northampton County.

Bill in equity for an injunction by Wilson Township against the Easton Transit Company. From a decree on final hearing refusing an injunction, plaintiff appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

J. W. Fox, E. J. Fox, and Albert F. Kahn, all of Easton, for appellant. H. J. Steele and Asher Seip, both of Easton, for appellee.

WALLING, J. This bill was filed to restrain defendant from relocating its railway in plaintiff township. The Easton, Palmer & Bethlehem Street Railway Company (now merged in the defendant company) was chartered in 1897, and in 1898 constructed and has since operated a street railway extending westerly from Easton through the adjoining township of Palmer and thence to Bethlehem. The township gave its written consent providing, *inter alia*, that the railway company "may construct and maintain its railway upon private land and private rights of way along such portions of its charter route and along such portions of its extended changed and modified route where said railway company may deem it necessary and convenient to avoid sharp curves, steep grades, irregularities of surface, dangerous construction, dangerous crossings or damage to private property." At the place here in question the railway was constructed on private property, along and immediately adjoining a public road, and intersecting the Easton & Northern Railroad by an overgrade crossing. In 1913 that part of the township adjoining the city and extending west to the east line of a public highway, known as the "Glendon road," was duly constituted a township of the first class, under the name of "Wilson township." The railway as originally constructed was circuitous and the overgrade crossing unsightly and deemed unsafe. In 1914 defendant, to shorten and improve its line, took steps to reconstruct the same for a distance of about 4500 feet, on a new right of way over private property and to the north of its former location, a part of the new right of way being in Wilson township, but not there extending over or upon any public road; and to be so reconstructed as to cross the railroad by a subway or undergrade crossing, located 440 feet north of the old overgrade crossing. This improvement would be a great advantage to the defendant and the public, and to secure the same defendant

sought and obtained from the Public Service Commission a certificate of public convenience, permitting the undergrade crossing, which is intended to carry the railroad over the Glendon road and the street car tracks at the same point; the eastern approach of the latter being in Wilson township. Before granting the certificate, the commission gave a full hearing to the parties in interest, at which plaintiff appeared and joined with all present in a stipulation stating, in effect, that it was desirable that the present overgrade crossing should be abolished, and that the proper point of crossing the railroad track was the place mentioned in the petition of the street railway company as above stated, and that the only question in controversy was the method of the proposed eastern approach. No appeal was taken from the order of the commission, made May 4, 1916, granting the certificate; and defendant relying thereon expended over \$40,000 in the purchase of right of way and for material and work on said improvement, of which plaintiff had knowledge and made no objection until the filing of this bill, August 17, 1916, and therein for the first time alleged that its consent for defendant's improvement had not been granted. The court below awarded a preliminary injunction, but after a full hearing entered a decree dissolving the same, from which this appeal was taken.

[1-3] The opinion of the chancellor embraces requests of the respective parties for findings of law and facts, and answers thereto, and also his independent findings and discussion, and in substance treats the case as on final hearing. His conclusion was that plaintiff had waived its right to successfully interpose the objection that the township had not formally given its consent to the relocation of the street railway. We agree with that conclusion. Plaintiff deliberately stipulated before the Public Service Commission that its only objection to defendant's change of location was as to the method of constructing the eastern approach to the new subway. In that entire proceeding nothing was said about lack of municipal consent; and thereafter defendant was permitted to incur large expenditures on the faith of its right to make the improvement, and now plaintiff's belated attempt to prevent the completion of the work, to the damage of the defendant and the public, comes too late. The consent of a township is necessary to the construction of a street railway therein and was here given about 20 years ago. We

deem it unnecessary to decide whether that consent would justify such a deviation from the original location as is now in question, for in our opinion plaintiff's laches and the position taken before the Public Service Commission constitute such an implied assent to the new location as precludes the township from obtaining the aid of a court of equity to prevent it. In 16 Am. & Eng. Ency. of Law (2d Ed.) page 356, the rule is stated thus:

"A suitor who by laches has made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy. This rule is especially applicable where the object of the injunction is to restrain the completion or use of public works, and where the granting of the injunction would operate injuriously to the public as well as to the party against whom the injunction is sought."

This is quoted with approval by present Chief Justice Brown in delivering the opinion of this court in *Stewart Wire Company v. Lehigh Coal & Navigation Company*, 203 Pa. 474, 478, 53 Atl. 352.

[4] Township officers, who have knowingly and without objection permitted a street railway to be constructed in their municipality, cannot compel its removal. *Penna. R. R. Co. v. Montgomery County Pass. Ry.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; *Maust v. Penna. & Maryland Street Ry. Co.*, 219 Pa. 568, 69 Atl. 80. Plaintiff, at the hearing before the Public Service Commission, having conceded the propriety of defendant's change of location and stipulated that the only question was as to the method of construction of the approach to the subway, cannot in this proceeding set up its own alleged lack of consent to such change, especially after defendant has acted upon the faith of the position taken by plaintiff before the commission. One who has assumed a position in a legal proceeding, which has been acted upon by the opposing party, may not thereafter in another proceeding assume a different position to the prejudice of such party. *Clear Springs Water Co. v. Catasauqua Borough*, 231 Pa. 290, 80 Atl. 566; *Thomas v. Heger*, 174 Pa. 345, 34 Atl. 568. We have followed the court below in considering this case as on final hearing; however, it would have been better practice had counsel filed with the chancellor a stipulation to that effect, so that a decree nisi might have been entered and the case disposed of by the court in banc.

The assignments of error are overruled, and the decree is affirmed at the costs of appellant.

(258 Pa. 345)

HARROUN et al. v. GRAHAM et al.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. DEEDS ~~208~~(2) — VALIDITY — DELIVERY — EVIDENCE.

On a bill in equity to have deeds declared void and for a reconveyance, evidence *held* to show that there had been no actual delivery of the deeds to the grantees in the grantor's lifetime, but that they had been retained in his possession and under his control.

2. CANCELLATION OF INSTRUMENTS ~~4~~ — DEEDS — VALIDITY.

Plaintiffs in a bill in equity to have deeds declared void and for a reconveyance to them as the grantor's heirs were entitled to such relief, where the evidence did not show a delivery of the deeds to the grantees in the grantor's lifetime.

Appeal from Court of Common Pleas, Erie County.

Bill in equity by Hattie Harroun, suing for herself and others, against William E. Graham and others, to have two deeds declared void and for a reconveyance. From a decree for plaintiffs, defendant Graham appeals. Affirmed.

Bill in equity to have two deeds declared null and void and for a reconveyance. The facts, as found from the evidence, were as follows:

1. Warren Graham died in the city of Erie on the 12th day of August, 1914, leaving surviving him as his only heirs at law, William E. Graham, a son; Rhea McElldowney and Carl Campbell, children of Catherine Campbell, daughter of the said Warren Graham, who died prior to the death of the said Warren Graham; Hattie Harroun, Helen Knapp, Joseph Otto, and George Otto, children of Elizabeth Otto, daughter of the said Warren Graham, who died prior to the death of the said Warren Graham.

2. That on the 6th day of August, 1914, Warren Graham signed and acknowledged a deed, conveying to William E. Graham, the land in Waterford township, described in the third paragraph of plaintiffs' bill, the consideration named therein being \$1 and love and affection, and on the same date signed and acknowledged another deed to William E. Graham and Joseph Otto for the lot in the city of Erie, also described in the third paragraph of plaintiffs' bill, the consideration named in said deed being \$1 and other valuable considerations. So far as it appears no consideration was paid for the execution of either of said deeds. Both of these deeds were prepared by Louis B. Jones, Esq., attorney for the said Warren Graham, and were acknowledged by the said Warren Graham before the said Louis B. Jones, who was a notary public in the presence of Mr. E. J. Grace, who had been called in to witness the signature of Warren Graham thereto, the said Louis B. Jones and E. J. Grace being the subscribing witnesses to the said deeds.

3. That at the time the deeds were executed, Warren Graham, the grantor therein, was upwards of 80 years of age, seriously sick, confined to his bed, and scarcely able to talk, and from that time gradually grew worse until his death on the 12th day of August, 1914, six days afterwards. That from the time the deeds were executed until he died, he was not out of the room where the deeds were executed.

4. That at the time the deeds were executed

the said Warren Graham was of sound and disposing mind, memory, and understanding.

5. That neither the said William E. Graham, nor Joseph Otto, the grantees were present at the time of the execution of the said deeds and knew nothing of the transaction until after the death of the said Warren Graham.

6. That there was no actual delivery of the deeds in question by the grantor to the grantees named therein in the lifetime of the grantor, but they were retained in the possession and under the control of the grantor.

7. That on August 18, 1914, letters of administration on the estate of the said Warren Graham were duly issued to the said William E. Graham, and on the same date the deeds were left for record in the recorder's office.

8. From the weight of the evidence it appears that after the said deeds had been signed and acknowledged, they were, by direction of the said Warren Graham, the grantor, placed in a tin box, in which he kept his papers, which was at the time on a dresser in his bedroom and the box was locked and the key given to his housekeeper Mrs. Robbins. That the box remained in the bedroom in the possession of the said Warren Graham until after his death, when it was carried to the home of Mrs. Minnie Grace, and kept until the day of the funeral, when the box was opened by William E. Graham, in the presence of Carl Campbell, and the two deeds in question were then and there found in the box and the box was locked and left in the possession of Mrs. Grace.

[1, 2] The court accordingly found the following conclusions of law:

1. That the deed of Warren Graham to William E. Graham, dated August 6, 1914, recorded in Deed Book No. 208, page 248, and the deed from Warren Graham to William E. Graham and Joseph Otto, dated August 6, 1914, and recorded in Deed Book No. 208, page 249, in the recorder's office of Erie county, Pa., are null and void for want of delivery.

2. That the plaintiffs are entitled to a decree setting aside the said deeds so made by Warren Graham and ordering the said William E. Graham to reconvey the land described in the deed recorded in Deed Book No. 208, page 248, to the heirs at law of Warren Graham, deceased, and ordering the said William E. Graham and Joseph Otto to reconvey the property described in the deed recorded in Deed Book No. 208, page 249, to the heirs at law of the said Warren Graham, deceased, and that the defendant William E. Graham be ordered to pay the costs.

A decree was filed in accordance with the findings, exceptions thereto dismissed, and a final decree entered. The defendant William E. Graham appealed. Errors assigned were in dismissing exceptions and the decree of the court.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER and WAL-LING, JJ.

John B. Brooks and Charles H. English, both of Erie, for appellant. L. R. Torrey, of Erie, for appellees.

PER CURIAM. There was sufficient evidence to warrant the learned chancellor in finding, as he did, "that there was no actual delivery of the deeds in question by the grantor to the grantees named therein in the lifetime of the grantor, but they were retained in the possession and under the con-

trol of the grantor." This was the controlling question in the case, and, having been found in favor of the plaintiffs, a decree was properly entered against the defendants.

Decree affirmed.

(288 Pa. 308)

FEUSSNER v. WILKES-BARRE & H. RY. CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. MASTER AND SERVANT \S 286(18)—ACTION FOR INJURY — SAFE APPLIANCES QUESTION FOR JURY.

In an action against a railroad for the death of plaintiff's husband while employed in shifting freight between cars by means of a skid with the ends overlapping the floors of the cars from 3 to 5 inches, *held* on the evidence that whether the skid was a reasonably safe and proper one for such purpose was for the jury.

2. MASTER AND SERVANT \S 288(2)—ACTION FOR INJURY—ASSUMPTION OF RISK—QUESTION FOR JURY.

On evidence in such action *held*, that whether the risk of injury from its use was assumed by the employé was for the jury.

3. MASTER AND SERVANT \S 222(5)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

A servant is justified in obeying the master's instructions, unless the method of performance thereby required renders the work obviously and imminently dangerous.

4. MASTER AND SERVANT \S 222(3)—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.

A skid which had been used for a long time between cars without fastenings to hold its ends to the car floors could not be said to be so imminently dangerous as to require an employé to set off his judgment against that of his superior and refuse to obey an order to place and use the skid in the ordinary way.

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Margaret Feussner against the Wilkes-Barre & Hazleton Railway Company to recover damages for the death of her husband. Verdict for plaintiff for \$5,095 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALLING, JJ.

John H. Bigelow, of Hazleton, and John T. Lenahan and R. B. Sheridan, both of Wilkes-Barre, for appellant. Abram Salsburg, Nathaniel Jacobs, and Mose H. Salsburg, all of Wilkes-Barre, for appellee.

FRAZER, J. Defendant appealed from a judgment entered on a verdict in favor of the widow and children of Adam Feussner for his death resulting from injuries sustained while in defendant's employ. At the time of the accident, Feussner was engaged as an extra brakeman on a freight car operated over defendant's electric railway between Wilkes-Barre and Hazleton. Between the terminals is located a station known as the George-

town Freight Transfer, at which place defendant's tracks connect with tracks of the New Jersey Central Railroad. At this point is a switch or siding for the transfer of freight to and from the two lines. In receiving freight, the car of the New Jersey Central road is at times coupled to defendant's train; if, however, the amount of freight for transfer is not large removal is made directly from the car of one company to that of the other. In making transfers in the latter manner, the cars to and from which goods are to be removed are placed alongside of each other and a wooden platform, generally referred to as a "bridge" or "skid," laid from the door of one to the door of the other, over which the trainmen either carry or haul the freight on a two-wheeled hand truck. The skid is made of planks 5 feet long, 30 inches wide, and an inch and a half thick, bolted together, and has been in use at that station for at least five years, and is without cleats or catches at the ends to prevent slipping. When in use for transfer purposes the bridge is from 4 to 4½ feet above the ground, and owing to the distance between the cars as they stand on adjoining tracks its ends overlap the sides of the cars to the extent of 3 to 5 inches, one end resting about 4 inches higher than the other on account of difference in elevation of the tracks of the two companies. On the day of the accident defendant's train was in charge of the conductor, who directed its operation and gave orders to the brakeman. Upon reaching the Georgetown transfer a central railroad car containing freight to be transferred to defendant's car for shipment to Hazleton was standing on the switch. The conductor having placed the bridge in position directed Feussner to transfer the merchandise consisting in part of a barrel of whisky weighing about 450 pounds. The conductor assisted in loading the barrel on the truck and instructed Feussner to walk backwards over the bridge, for the purpose of holding it in place by his weight and prevent slipping as the wheels of the truck came in contact with the end of the plank. In complying with these instructions and while attempting to pull the truck onto the skid the end slipped from the edge of the car and fell to the ground carrying Feussner, the truck, and the whisky with it, and inflicting injuries upon him, which subsequently resulted in his death.

The several assignments of error raise the same question, namely, whether the trial judge erred in submitting the case to the jury. Although the statement of claim charged negligence in several respects, the case finally resolved itself into the questions whether the platform furnished deceased was a reasonably safe and proper one for the purpose used, and whether the risk was one assumed by deceased.

[1, 2] Defendant argues the evidence shows the skid furnished was the usual and customary appliance in use for such work, and that the testimony to the contrary was a mere scintilla, not warranting submission of the question of defendant's negligence to the jury. A number of witnesses on behalf of defendant testified the skid was identical with those in general use, and that the use of cleats or other attachments to prevent slipping when being used as in this case was not customary. One witness, however, stated on cross-examination, in answer to a question as to the usual manner of securing skids to prevent sliding, that "there are a dozen and one different ways, but we don't use any," and admitted that around transfer stations he had seen skids with claws or hooks attached to prevent slipping. Another witness for defendant testified that at Ashley station, on defendant's road, freight was transferred by use of a platform with a claw or hook attachments at the ends. A witness for plaintiff, with long experience in handling freight, said in transferring freight from car to car the general practice was to fasten the skids at each end by attaching to them either spikes or cleats. The testimony of another witness, an expert, was to the same effect, and that to use the platform as was done in the present case without its being made secure was dangerous. True, this witness admitted on cross-examination to an experience confined to terminal stations and that he was without knowledge of the practice or custom at way stations. On the whole there was sufficient evidence bearing upon this question to warrant submission to the jury, and this was done in a fair charge in which defendant's rights were fully protected.

[3] The finding of the jury that defendant failed to furnish deceased with a reasonably safe appliance in accordance with the usual and customary practice in connection with the transfer of freight from car to car under similar conditions constituted a finding of defendant's negligence, and the remaining question is whether, notwithstanding such evidence, the risk was an obvious and apparent

one assumed by plaintiff as incident to the performance of his work. Deceased was at the time directly under and subject to the orders of the conductor in charge of the train, who was therefore the person to whose instructions he was bound to conform within the meaning of the act of June 10, 1907 (P. L. 523); *Ainsley v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 243 Pa. 437, 90 Atl. 129. The skid was put in place by the conductor, who also assisted deceased in loading the barrel on the hand truck and directed him to walk backward that his weight might hold the skid in place, and while engaged in performing the work assigned to him in the manner directed by his superior the accident happened. Deceased was justified in obeying the instructions received, unless the method of performance required by the order rendered the work obviously and imminently dangerous. The rule in such case was stated in *Williams v. Clark*, 204 Pa. 416, 418, 54 Atl. 315, 316, as follows:

"If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous."

[4] In view of the testimony that the bridge in question had been used for the same purpose without fastenings for a considerable period of time, it cannot be said that its use on this occasion was so imminently dangerous as to require the servant to set up his judgment against that of his superior and refuse to obey the order given; the question was accordingly a proper one for the jury. *Collins v. Philadelphia & Reading Ry. Co.*, 244 Pa. 210, 90 Atl. 575.

The judgment is affirmed.

(258 Pa. 293)

McHALE v. TOOLE et al.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. GIFTS ⇐82(1)—GIFT CAUSA MORTIS—DELIVERY—SUFFICIENCY OF EVIDENCE.

On a bill in equity to require defendant to pay over money claimed by her as a gift causa mortis from plaintiff's decedent, evidence *held* to show decedent's intention to retain control of the fund during her lifetime, and no complete delivery.

2. GIFTS ⇐59—GIFTS CAUSA MORTIS—CONTEMPLATION OF DEATH.

It is essential to a gift causa mortis that it should have been made in contemplation of death.

3. GIFTS ⇐62(1)—GIFTS CAUSA MORTIS—DELIVERY.

It is essential to a gift causa mortis that there be a complete delivery of the property or fund given.

4. GIFTS ⇐11, 41, 57—GIFTS INTER VIVOS—DELIVERY.

To constitute a valid gift a present title must vest in the donee, which in the case of a gift inter vivos is irrevocable.

5. GIFTS ⇐75—GIFTS CAUSA MORTIS—TITLE—REVOCATION.

To constitute a gift a present title must vest in the donee, which in the case of a gift causa mortis is revocable only upon a recovery of the donor.

Appeal from Court of Common Pleas, Luzerne County.

Bill in equity by Mary McHale, administratrix, against Margaret Toole and another to require the payment of a sum of money alleged to be held for the use of plaintiff's decedent. From a decree for plaintiff, defendants appeal. Appeal dismissed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, FRAZER, and WALSH, JJ.

William S. McLean, Jr., and William S. McLean, both of Wilkes-Barre, for appellants. John McGahren and R. B. Alexander, both of Wilkes-Barre, for appellee.

POTTER, J. [1] This is an appeal from the decree of the court below awarding to the plaintiff, as administratrix of the estate of Beezle McHale, a sum of money which had been deposited by Beezle McHale in the Miners' Savings Bank of Wilkes-Barre, but which, shortly prior to her death, had been transferred to an account in the name of Margaret Toole. The latter claimed the fund as a gift causa mortis. From the facts found by the court below it appears that Beezle McHale was in failing health and decided to go to a hospital. Desiring to provide for her expenses there from the money in bank, and contemplating also a gift to her friend, she, on January 28, 1916, accompanied by Margaret Toole, went to the bank with the bank book. She said to the bank officer that she wished to have the name of Margaret Toole added to the account, so

that in the future if she wished to draw any money or send her for any money she would have no trouble in getting it, and she added that she wished the money to go to Margaret Toole after her death. She then signed a paper directing the name of Margaret Toole to be added to the savings account and gave her the same right to withdraw the money which she herself possessed. She did not, however, assign the fund to Miss Toole, nor did she relinquish her own right to withdraw the money. The trial judge says:

"She realized that she might never get well, and that she might soon die, but we cannot find that she had any certain expectation of death on account of her then existing illness. Her thought was to make the money accessible at any time during her life for her own uses, particularly for hospital expenses, without the necessity of personally presenting the book herself at the bank. If she recovered from the illness, the entire purpose of the transaction would be fulfilled and no pecuniary benefit would accrue to her friend. If she died in that illness, it was the intention that the friend should enjoy whatever remained at the time of her death after deduction of her expenses."

No intention was apparent that any specific amount of money should then be surrendered to Miss Toole. After the transaction at the bank, Beezle McHale went immediately to the hospital, where she remained until her death, which occurred April 9, 1916. It appears, from the evidence, that on March 31, 1916, Margaret Toole took the passbook to the bank, and transferred to a new account in her own name the entire balance, then amounting to \$1,878.47. It does not appear that Beezle McHale had any knowledge of this transaction.

[2, 3] The court below held that, if any gift was made, it must have been upon January 28, 1916, and, with respect to that, it found that two essential elements of a gift causa mortis were lacking, namely, it was not made in contemplation at the time of death, nor was there complete delivery. The evidence shows that Beezle McHale retained the right to draw the whole of the money, up to the time of her death, and, that being the case, the title to the fund remained in her.

[4, 5] "In every valid gift a present title must vest in the donee, irrevocable in the ordinary case of a gift inter vivos, revocable only upon the recovery of the donor in gifts mortis causa." Walsh's Appeal, 122 Pa. 177, 187, 15 Atl. 470, 471 (9 Am. St. Rep. 83, 1 L. R. A. 535), and cases there cited. The statement given to the bank, that either might draw the money, or that the survivor might draw, did not in itself convey any title to the defendant as owner of the fund. There was nothing to indicate that, if defendant did draw the money, she could lawfully keep it as her own, and, without such authorization, no title by way of gift would pass. Upon the facts as found, the conclusions reached by the court below were fully justified.

The assignments of error are overruled, the decree is affirmed, and this appeal is dismissed at the cost of appellant.

(258 Pa. 250)

TUTHILL et al. v. SWEETING.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. JUDGMENT \S 743(2) — RES ADJUDICATA — DECREE IN EQUITY.

A decree in a proceeding in equity, not appealed from, is res adjudicata in a subsequent action of ejectment relating to the same subject-matter and involving the same cause of action.

2. JUDGMENT \S 682(1) — RES ADJUDICATA — DECREE IN EQUITY.

In ejectment for an interest in certain oil lands, where it appeared that defendant was in possession of the rights claimed by plaintiffs under an agreement with plaintiffs' predecessor in title, a former decree in equity for such defendant against plaintiffs' predecessor as to all questions raised in the ejectment action was conclusive against plaintiffs, so that judgment was properly directed for defendant.

Appeal from Court of Common Pleas, Warren County.

Ejectment by William E. Tuthill and others against George Sweeting to recover an interest claimed by plaintiffs in certain oil lands. Directed verdict for defendant, and from a judgment discharging plaintiffs' rule for judgment n. o. v., they appeal. Affirmed.

Defendant had been in possession under an agreement between him and plaintiffs' predecessor in title, Lucinda Sweeting. Plaintiffs' predecessor in title had undertaken to terminate the agreement and to oust defendant from the premises. Defendant thereupon filed a bill against the said Lucinda Sweeting, praying, inter alia, that Lucinda Sweeting be restrained from interfering with him in producing oil under the said agreement. In the said proceeding the rights of the parties under the agreement were adjudicated. Plaintiffs sought to raise the same questions that had been decided in the suit in equity.

Argued before BROWN, C. J., and MESTREZAT, MOSCHISKER, FRAZER, and WALLING, JJ.

D. I. Ball and D. U. Arird, both of Warren, for appellants. C. E. Bordwell and A. G. Eldred, both of Warren, for appellee.

PER CURIAM. [1, 2] From the decree in the equity proceeding instituted by the appellee the defendant took no appeal. In this proceeding there is the same subject-matter, involving the same cause of action, and the correct conclusion of the court below was that the issue is res adjudicata. The judgment is affirmed on the following from the opinion overruling plaintiffs' motion for judgment n. o. v.:

"We are of the opinion that the previous adjudication established the fact that as between the parties to that adjudication, Lucinda Sweet-

ing and George Sweeting, the makers of the agreement in question, their rights had been fixed, and the defendant had acquired a vested title to produce oil and have the one-half thereof so long as the said oil wells produced oil in paying quantities. * * * These parties by their original agreement contemplated that the agreement should continue 'so long as the said wells produce oil in paying quantities,' and that the said George Sweeting, who is now defendant here, should invest money and furnish certain fixtures for the property. The findings of fact in the former case determined that money had been expended by him in fitting up the oil wells with necessary derricks, materials and machinery. The agreement had become executed and irrevocable in any event. It is unnecessary now to inquire into the amount or character of the investment. It was made upon the faith of the agreement. The former adjudication settled that, so far as the agreement in question is concerned, it had become executed and irrevocable between the parties. If so it is not an agreement in our opinion that is affected by the death of the grantor."

Judgment affirmed.

(258 Pa. 309)

BURGESSES, ETC., OF BOROUGH OF HUNTINGDON et al. v. HUNTINGDON WATER SUPPLY CO. et al.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. MUNICIPAL CORPORATIONS \S 109—VALIDITY OF ORDINANCE—TRANSCRIPTION IN ORDINANCE BOOK.

Where a contract between a borough and a water company executed pursuant to an ordinance provided that after ten years the borough might purchase the company's plant at a price to be agreed upon or to be fixed by a board of arbitrators appointed to determine its value, the company and the borough each to choose two arbitrators and they to choose a fifth, a borough ordinance reciting its election to purchase and selecting two arbitrators was ministerial and valid, though not transcribed in the ordinance book.

2. WATERS AND WATER COURSES \S 183(5) — PURCHASE OF WATERWORKS — VALIDITY OF ORDINANCE—APPOINTMENT OF ARBITRATORS — WAIVER.

Where a borough passed an ordinance reciting the exercise of its option to take over a water plant, and the company, without objecting to the ordinance because not transcribed in the ordinance book, submitted its selling price, as requested, it in effect conceded that the ordinance legally authorized a demand for the appointment of arbitrators.

3. WATERS AND WATER COURSES \S 183(5) — BOROUGH'S PURCHASE OF WATERWORKS — AGREEMENT AS TO PRICE.

Where a contract executed pursuant to an ordinance gave a borough the option to take over the plant of a water company at a valuation to be agreed upon by the parties or to be fixed by arbitrators, and a borough ordinance recited an intention to take over the plant and requested the company to name its selling price, which was refused, the borough had made an effort to agree as to the price of the plant, and was under no duty to continue negotiations to that end.

4. WATERS AND WATER COURSES \S 183(5)—BOROUGH'S PURCHASE OF WATERWORKS — AGREEMENT AS TO PRICE—EVIDENCE.

Where the finding that such parties to such contract had not been able to agree was justified by the evidence, the borough's suit in equity to

require the water company to appoint arbitrators to fix the price was properly granted.

5. WATERS AND WATER COURSES \S 183(5) —
BOROUGH'S PURCHASE OF WATER PLANT —
CONSENT OF PUBLIC SERVICE COMMISSION.

Where the borough which had not elected under such contract to take over the plant, but had only appointed arbitrators to fix its value, there was no merit in a contention that the company was not required to appoint arbitrators until the borough had obtained the consent of the Public Service Commission to acquire the plant.

Moschzisker, J., dissenting.

Appeal from Court of Common Pleas, Huntingdon County.

Proceeding by the Burgesses and Town Council of the Borough of Huntingdon, in the County of Huntingdon, and others, against the Huntingdon Water Supply Company and others. From a decree in equity directing the defendant company to appoint arbitrators, it appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, MOSCHZISKER, FRAZER, and WALLING, JJ.

John G. Johnson, of Wilkes-Barre, and Samuel I. Spyker and John D. Dorris, both of Huntingdon, for appellant. W. M. Henderson, H. W. Petrikin, and H. H. Waite, all of Huntingdon, for appellees.

MESTREZAT, J. This is an appeal by the defendant, the Huntingdon Water Supply Company, from a decree directing it to select two arbitrators to join with two arbitrators selected by the plaintiff, the borough of Huntingdon, in the selection of a fifth arbitrator for the purpose of appraising the value of defendant's water plant with a view to its purchase by the borough as provided by the ordinance and contract of May 5, 1885.

Peter Herdic and certain other persons with whom he was associated, thereafter to be incorporated as the Huntingdon Water Company, Ltd., desired to construct in the borough of Huntingdon waterworks for the purpose of supplying the borough and its inhabitants with water and, on May 5, 1885, the borough passed an ordinance consenting to and authorizing Herdic and his associates to install and maintain a water plant and system upon the conditions set forth in the contract in writing made on the same day between Herdic and the borough. The ordinance and contract contained the following provision:

"At the end of ten years the borough shall have the right to purchase the waterworks, with all their franchises, rights, and property, at a price that may be mutually agreed upon. Should the parties fail to agree on a price and terms, a board of arbitrators shall be appointed to determine the value of the waterworks, and on the value being declared, the borough shall pay the same, but the borough may decline to make the purchase after the value shall have been declared, provided she shall and will pay the expense of said arbitration. If no sale be consummated the contract and right and franchise shall con-

tinue to the said Peter Herdic, his heirs and assigns, or to said company, its successors or assigns, until final purchase, but the right to buy shall inure to the borough every ten years, but the borough shall in every case give twelve months' notice of their intention to purchase. In case of sale, the borough shall assume any liability of the company for waterworks then existing, and the same shall be deducted from the price, as part payment thereof. The proposed corporation, or Herdic, his heirs or assigns, if unincorporated, and the borough shall each choose two of the aforesaid arbitrators, and these four shall choose a fifth, all to be nonresidents of the county of Huntingdon, and disinterested persons, two of whom shall be well known and reputable hydraulic engineers."

The rights of Peter Herdic under the above contract were immediately assigned to the Huntingdon Water Company, Ltd., which constructed and operated the plant until October 15, 1900, when its rights were assigned to the Huntingdon Water Supply Company, the defendant.

The borough council passed a resolution September 2, 1913, directing that defendant be notified that the borough desired to exercise the right to purchase, given it under the contract of 1885, at the end of the ten-year period, expiring May 5, 1915, and such notice was served on defendant on October 25, 1913. On April 6, 1915, the council passed an ordinance, approved April 8, 1915, and transcribed into the ordinance book May 10, 1915, authorizing the president and secretary of the council to enter into a contract to purchase defendant's plant and system at such price as might be mutually agreed upon between them, provided such purchase price should be approved by the council, and provided further that if a purchase price should not be agreed upon and approved by the council, then the council should select two arbitrators for the purpose of appraising and valuing the plant according to the contract of May 5, 1885, and authorizing the service of notice upon the defendant company of such selection, and requiring defendant within ten days thereafter to select its two arbitrators and certify the selection of the same to the council with designation of the time of meeting of the four arbitrators to choose the fifth arbitrator. The ordinance also provided the means for payment to the water company of the purchase price in case the borough elected to purchase its plant and system. Pursuant to this ordinance, the borough, April 10, 1915, made a demand upon the defendant to name a price for which it would be willing to sell its plant. The secretary of the defendant company replied to this demand that, by a resolution of the directors of the company, the latter would sell to the borough its franchises, rights, and property for \$220,000 in cash. This offer was declined and rejected by the unanimous vote of the borough council. The council then, April 24, 1915, adopted a resolution selecting two arbitrators, as provided in the contract of 1885, and notified the defendant

to select two others within ten days and designate a time of meeting of the four to make a selection of the fifth. The defendant refused to appoint arbitrators, and thereupon the plaintiff filed this bill which resulted in a decree against the defendant company, from which this appeal was taken.

[1] The several assignments of error are considered by the appellant under the following propositions, as the questions involved in the case: The ordinance of April 8, 1915, was not a valid ordinance on April 26, 1915, the date when the borough requested the defendant water company to appoint appraisers; the borough made no effort to agree with the water company upon a price at which the water plant should be purchased; and the court did not have jurisdiction in a proceeding to take over a water plant or system before the approval of the Public Service Commission had been obtained.

It will be observed that the ordinance of April 8, 1915, had not been transcribed on April 26, 1915, when the borough demanded that the defendant appoint its arbitrators under the ordinance and agreement of May 5, 1885. It is therefore contended that for this reason the action of the borough in making the demand was without authority. This contention overlooks the fact that the demand for the appointment of arbitrators was only one of the preliminary steps to be taken by the borough in securing such information and data as were necessary in order to enable the borough council to finally decide whether it desired to purchase or not to purchase the defendant's plant. It did not necessarily involve taking over the plant by the borough; that was a matter for further consideration and determination by the borough authorities. The borough had previously given the twelve months' notice of its intention to purchase, as required by the contract and ordinance of May 5, 1885. The parties, as found by the court, failed to agree upon a price and terms for the purchase of the plant, and, as required by that ordinance and contract, the next preliminary step to the purchase of the plant was the giving of notice for the appointment of arbitrators. It is not clear that any ordinance or resolution of council was necessary to authorize the president and secretary of the council to make this demand. It was authorized by the ordinance and contract of 1885, and, at the expiration of the ten-year period, the proper borough officials in giving the notice would be simply carrying out the authority conferred by the franchise ordinance and contract of 1885. If, however, an ordinance or resolution was required as further authority by the borough officials to make the demand of the defendant for the appointment of its arbitrators, such ordinance or resolution would be the exercise of a ministerial and not a legislative or governmental function on the part of the council, and hence the ordinance or resolution would not

be required to be transcribed in the ordinance book to give it validity in authorizing the demand for the appointment of the arbitrators. *Schenck, Howard & Gallagher v. Burgess, Town Council, Borough of Olyphant & Massey*, 181 Pa. 191, 37 Atl. 258; *Seitzinger v. Borough of Tamaqua & Edison Electric Illuminating Co. of Tamaqua*, 187 Pa. 539, 41 Atl. 454; *Kolb v. Tamaqua Borough*, 218 Pa. 126, 67 Atl. 44. The ordinance and contract of 1885 specifically provide the several steps to be taken before the purchase of the water plant by the borough, and therefore fully authorized at least the preliminary steps to be taken prior to the determination by the borough to take over the water plant. The demand for the appointment of arbitrators on the part of the defendant was simply a ministerial act, authorized by the original franchise ordinance and contract, and such demand might have been ordered to be made by a motion or resolution which, under the settled law of this state, is not required to be transcribed into the ordinance book. It is true that the ordinance of April 8, 1915, after authorizing the service of notice on the water company requiring it to choose arbitrators, as provided in the contract of 1885, empowers the president and secretary of the council to enter into an agreement for the purchase of the defendant's plant in the event the council elected to make such purchase, and also designates the manner in which the money for paying the price should be provided. But we are not concerned here with any part of the ordinance except that which authorizes notice requiring the defendant to choose its arbitrators. The legality of the ordinance for any other purpose may be tested when the question arises in an effort to enforce the ordinance for the other purposes for which it was enacted. It may, however, be suggested in passing that the ordinance has been transcribed and advertised, and is therefore now effective for legislative purposes under section 3 of Act May 23, 1893 (P. L. 113).

[2] It may well be doubted whether the defendant by its conduct did not waive its right to attack the validity of the ordinance so far as it relates to the demand for the appointment of arbitrators. After the enactment of the ordinance, a request was made upon the defendant for a price at which it would sell its plant to the borough. The defendant company did not then make any objection to the ordinance, but its board of directors met and passed a resolution fixing the price at which it would sell its plant, and this price was communicated to the borough. This action on the part of the defendant was in compliance with the stipulations of the contract of 1885, and, in effect, conceded that the demand for the appointment of arbitrators had been legally authorized by the ordinance of April 8, 1915.

[3, 4] The learned counsel for the defendant company contend that the borough made

no effort to agree with the company upon a price at which the water plant should be purchased, as required by the contract of May 5, 1885. The court found that "the plaintiff and defendant have not been able to agree upon a sum or price at which the defendant would be willing to sell, and at which the plaintiff would be willing to purchase the defendant's plant and system." We think this finding is sustained by the evidence. Pursuant to a resolution of the borough council, the defendant was requested to name "a price for which you are willing to sell the Huntingdon Water Supply Company's plant, system and property, to the said borough of Huntingdon." In reply to this request, the defendant company, by proper corporate action, offered to sell its plant for \$220,000, and so notified the borough council. The offer was unanimously rejected by the council. No further effort was made by either party to agree upon a price for the water plant. It will be observed that both parties were acting in their corporate capacity, the request being made by the borough council, and the price for the plant fixed by the defendant's board of directors. The contract of 1885 requiring the parties to make an attempt to agree upon a price does not stipulate as to the extent to which the negotiations shall be made to fix the price. We do not see that the borough was required to continue further negotiations and suggest a price after it had received notice of the price fixed by the defendant's board of directors. The borough was justified in concluding that the defendant would not sell its plant for a less sum than that already named, and that further negotiations would be fruitless. It is idle to expect the two corporate bodies to act as individuals might act in negotiating for the purchase and sale of the plant. There is nothing in the record to show that had the negotiations proceeded on the part of the borough, the defendant would have accepted any less sum than that named in the resolution passed by its board of directors and communicated to and promptly rejected by the borough. If, however, the defendant company was willing to sell its plant for a less sum than it had already named, it should have communicated the fact to the borough. The duty to continue further negotiations in an attempt to fix a price for the water plant was as obligatory upon the defendant as upon the borough. *Snodgrass v. Gavit*, 28 Pa. 221. The obligation was mutual, and, if the defendant company had concluded to accept a less sum than that named in its offer, it

should have communicated the fact to the borough, and, failing to do so, it is not in a position to successfully claim that the borough made no effort to agree with the water company upon a price at which the latter would sell its plant. The fact that the defendant company did not receive notice from the borough that the price suggested was acceptable to the latter was notice to the defendant that the price had been rejected, and afforded the defendant an opportunity, if it desired, to name another price at which it would sell its plant.

[8] The third and last question raised by the defendant is as to the right of the borough to enforce the provisions of the ordinance and contract of 1885 without first applying to, and obtaining the consent of, the Public Service Commission under Act July 26, 1913 (P. L. 1874). The learned court below held that the borough was not required to secure the approval by the commission of its proposed purchase until after the value of the plant and system was ascertained and it elected to purchase the same, according to the provisions of the ordinance and agreement of May 5, 1885. This is clearly right. This is not a proceeding to condemn or acquire the water plant; the purpose is simply to have legally determined the value of the plant so that the borough can decide whether or not it will purchase. The Public Service Commission, therefore, has no interest in these proceedings, nor is jurisdiction given it to interfere in any way with them. If the borough had elected to purchase and was proceeding, under the contract, to acquire the water plant, the question whether it should first secure the approval of the commission would require adjudication.

The appellant has cited certain authorities to sustain its contention that the borough must obtain the approval of the Public Service Commission before it takes the preliminary steps, under its contract, to determine whether or not it will purchase the defendant's water plant. It is sufficient to say that they have no application whatever to the facts of this case. As already pointed out, the borough has not yet elected to purchase the plant, nor was this proceeding instituted for the purpose of acquiring it. After the value of the plant has been ascertained, the borough will then determine what it will do in the premises.

The decree is affirmed.

Mr. Justice MOSCHZISKER dissents.

(258 Pa. 245)

ERIE COUNTY POMONA GRANGE, NO. 4,
et al. v. WALES et al.(Supreme Court of Pennsylvania. May 14,
1917.)TRUSTS §375(1)—CONSTRUCTION—ACCOUNT-
ING.

On a bill in equity, filed by a county grange to have defendants declared trustees of a certain fund and for an accounting, where the chancellor found on sufficient evidence that the defendants had accepted the fund for the benefit of county granges, as they should decide, and that it was not a gift to defendants, the relief was properly granted.

Appeal from Court of Common Pleas, Erie County.

Bill in equity by the Erie County Pomona Grange, No. 4, and others, against A. L. Wales and others, to have defendants declared trustees and for an accounting. From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WAL-
LING, JJ.

T. A. Lamb, of Erie, for appellants. Frank J. Thomas, of Meadville, and Joseph M. Force, of Erie, for appellees.

PER CURIAM. This was a bill filed by plaintiffs to have the Keystone Co-operative Association, Limited, declared a trustee for the plaintiffs for a certain fund delivered to the association by Joseph C. Sibley, and that the association be required to account for the same. The learned chancellor found, on sufficient evidence:

"That the defendant the Keystone Co-operative Association, Limited, in accepting the fund that was thereafter turned over to it by the said Joseph C. Sibley, accepted the same subject to the condition that the said fund was to be used by the defendant for the benefit of the granges and grange organizations of Erie and Crawford counties, as those granges should decide, was to be used only for the benefit of those granges, and that it was in no sense a gift or donation to the members of the defendant association, or to the defendant association itself."

This finding was decisive of the question at issue, and justified the decree which was entered against the defendants.

Decree affirmed.

(258 Pa. 277)

MARKEE v. REYBURN.

(Supreme Court of Pennsylvania. May 22,
1917.)1. LIMITATION OF ACTIONS §159 — SELF-
SERVING DECLARATION—ENTRIES IN BOOKS
OF ACCOUNT.

Where plaintiff's books of original entries, showing a credit on an indebtedness sufficient to toll the statute of limitations, were not proved and offered in evidence, the allowance of a credit in a statement of claim against an estate was a mere self-serving declaration, and incompetent against the estate.

2. LIMITATION OF ACTIONS §197(3) — AC-
KNOWLEDGMENT—EVIDENCE.

In an action against an administrator for an indebtedness incurred more than six years before suit, wherein plaintiff contended that the statute of limitations had been tolled by promise to pay made within six years, evidence held insufficient to identify the debt on which an alleged payment was made, so as to toll the statute.

3. LIMITATION OF ACTIONS §148(1)—TOLL-
ING OF STATUTE—EVIDENCE.

To toll the statute of limitations, there must be a clear and unequivocal acknowledgment of the debt, and a specification of the amount, or a reference to something by which the amount can be definitely ascertained, coupled with an express or implied promise to pay.

Brown, C. J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by William T. Markee against William S. Reyburn, administrator of the estate of John E. Reyburn, deceased, for the maintenance and boarding of horses and for money expended by plaintiff for defendant's benefit. Verdict for defendant by direction of the court, and judgment thereon, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and STEW-
ART, MOSCHISKER, FRAZER, and WAL-
LING, JJ.

Joseph S. Goodbread, of Philadelphia, for appellant. Frank A. Moorshead and Howard Burt, both of Philadelphia, for appellee.

FRAZER, J. Plaintiff's action against the administrator of the estate of John E. Reyburn, deceased, is to recover the sum of \$4,036.15, with interest, being the balance claimed to be due on a book account extending over a period of years from 1903 to 1908 for maintenance and boarding of horses and money expended by plaintiff for defendant's benefit. The copy of the account attached to the amended statement of claim showed several credits, none of which was within six years previous to the beginning of suit on July 14, 1914. The original statement of claim showed a credit of \$700 on July 16, 1908, and defendant, believing no defense existed to the claim, omitted filing an affidavit of defense, and permitted plaintiff to take judgment. Subsequently defendant discovered the payment entered as of July 16, 1908, was in fact made in 1907, instead of 1908, and thereupon took a rule to show cause why the judgment should not be opened which was later made absolute. Plaintiff, however, was permitted to file an amended statement, setting up a payment on account under date of December 30, 1911, and an acknowledgment of the debt and promise to pay made December 11, 1908. Defendant in his affidavit of defense denied the alleged payment on account and pleaded the statute of limitations. At the trial of the case plaintiff offered in evidence the statement of claim ad-

mitting receipt of \$100 on account, but gave no further evidence concerning the payment. The trial judge held the evidence of acknowledgment of the debt insufficient to toll the statute of limitations and directed a verdict for defendant. A motion by plaintiff for judgment non obstante veredicto was overruled, and this appeal followed.

[1,2] Plaintiff suggests the statement offered in evidence containing credit for \$100 paid in 1911 was in itself sufficient to take the case to the jury. In answer to this contention it is sufficient to say the payment was denied, and in absence of actual proof on plaintiff's part the mere offer of the statement of claim was without probative effect. The books of original entries, showing the credit, were not proved and offered in evidence within the rules governing the admission of such entries, and in absence of such proof the allowance of credit in the statement was a mere self-serving declaration made by the party in his personal books and not competent evidence against the debtor. *Hottle v. Weaver*, 206 Pa. 87, 55 Atl. 838; *Murphy v. McMullin*, 219 Pa. 508, 69 Atl. 70.

The evidence relied upon as an acknowledgment of the debt is the testimony of a witness, who, at the request of plaintiff, called upon Reyburn at his office in City Hall on December 11, 1908, when the following conversation took place:

"I told him what I wanted. I said Mr. Markee wanted to go West on Saturday to St. Louis, and he needed money. And he got the statement out of the drawer. Q. What statement? A. The statement he had got the 1st of the month. Mr. Markee had sent him a statement. * * * Q. Did you see it? A. Well, I saw him pull it out and look at it. I did not particularly notice it. Q. What did he say? A. Well, he said, 'Tell Bill to come in on Saturday, and I will pay him part of that,' or something to that effect. Q. Do you know the amount that was due by that statement? A. I couldn't tell without looking at the books. It was thirty-nine hundred and something."

On being further questioned as to exactly what was said at the interview the witness testified:

"Well, it was in the mayor's office that I saw him, and I had a statement in my pocket; but I didn't have to use that, for he pulled his out of the drawer. And I explained about Mr. Markee wanting to go West on Saturday. This was on Friday that I was there. And he said, 'Well, you tell Bill the claim is all right, and I will pay.' I went back and told Mr. Markee that I supposed he was going to pay him Saturday morning. So he went to see him."

On cross-examination the witness further testified:

"Q. Who made up this statement of account that you say you took to Mayor Reyburn's office? A. Well, I just took a statement from Mr. Markee. Q. Did he go over that statement? A. He took it out of the drawer and compared it with mine. They were just the same. But he knew exactly what the statement was, for I had seen it before two or three times."

The witness did not present the statement he had in his pocket, nor did he see the one Reyburn took from his desk drawer. The only way the witness was able to fix the amount definitely was by referring to the books, and relying upon his inference that the paper taken from the drawer was the one sent by plaintiff to Reyburn, and that it contained the items and total amount shown by the memoranda in the pocket of the witness. While the witness subsequently testified Reyburn "already had the statement" from plaintiff, which he took from the drawer "and compared it with mine. They were just the same. But he knew exactly what the statement was, for I had seen it before two or three times"—this testimony, when viewed in the light of his previous recital of what was said at that meeting, could not be accepted as proof that the two papers were actually physically compared. The witness was apparently attempting to testify to his personal mental conclusions, as well as those of Mayor Reyburn. On the whole, the evidence of identification and acknowledgment of the debt is not so clear and unequivocal as we have repeatedly held necessary to toll the statute of limitations. The principles governing such proof were stated in the recent case of *Maniatakis's Estate*, 101 Atl. 920. The facts in this case, so far as the identification of the debt is concerned, are no stronger than those in *Lowrey v. Robinson*, Adm'r, 141 Pa. 189, 195, 21 Atl. 513. The language there used, particularly applicable here, is as follows:

"It is noticeable that there is not in the conversation detailed by Townsend any admission by Robinson that he was indebted to Lowrey for borrowed money in any sum whatever, nor any promise to pay him any sum at any time. The bill which was presented to Robinson was not exhibited on the trial, and no attempt was made to account for its nonproduction. The items of it, showing dates and amounts, were not given. The inferences of counsel, though assented to by the witness, are not a satisfactory substitute for the declarations of the party whose estate it is sought to charge, nor is the statement of the witness that 'the bill said \$40' a sufficient identification of the alleged loan."

[3] To toll the statute of limitations, there must be a clear and unequivocal acknowledgment of the debt, and a specification of the amount or a reference to something by which the amount can be definitely ascertained, coupled with an express or implied promise to pay. *Ward v. Jack*, 172 Pa. 416, 33 Atl. 577, 51 Am. St. Rep. 744. These requirements will be strictly enforced. *Shaffer v. Hoffman et al.*, 113 Pa. 1, 4 Atl. 39; *Shaffer's Estate*, 228 Pa. 36, 76 Atl. 716. The evidence in this case, at least so far as the identification of the debt and its amount is concerned, does not meet these requirements.

The judgment is affirmed.

BROWN, C. J., dissents.

(258 Pa. 267)

REIGNER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. RAILROADS ⇐327(2)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

One going in front of a moving train which he has had ample opportunity to see and avoid is guilty of contributory negligence as a matter of law.

2. RAILROADS ⇐346(5)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

When one is killed by a train, the law presumes that before going upon the track he did all that due care for his safety would suggest, and that he stopped, looked and listened as the law requires, which presumption gives way before admitted facts with which it is irreconcilable.

3. RAILROADS ⇐327(8)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

One driving a buggy over a grade crossing was guilty of contributory negligence when, after stopping, looking, and listening when about 90 feet from the track, he did not stop before reaching the track where he could have seen an approaching train for a distance of three-quarters of a mile.

4. RAILROADS ⇐327(8)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The duty of one about to cross a railroad track at grade is not always confined to stopping and listening for the approach of a train, but he must stop at a proper place, and, on proceeding, should continue to look and to observe the precautions which the dangers of the situation require, and should stop again if there is another place nearer the track from which he can better see whether there is danger.

Appeal from Court of Common Pleas, Chester County.

Trespass by Emma K. Reigner against the Pennsylvania Railroad Company to recover damages for the death of plaintiff husband. From an order refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, STEWART, MOSCHZISKER, and
WALLING, JJ.

Truman D. Wade, of West Chester, for ap-
pellant. A. M. Holding, of West Chester, for
appellee.

STEWART, J. [1] We have here again to repeat what we have so often had occasion to say, that when one goes in front of a moving train of cars, which he has had ample opportunity to see and avoid, he is guilty of contributory negligence as a matter of law.

[2] True it is that, when one upon a railroad track is run down and killed by a passing train, the law will presume that before entering upon the track he did all that prudence for his safety would suggest, and what the law requires in all such cases—that he stopped, looked, and listened. But this presumption, like every other, gives way before admitted facts with which it is irreconcilable.

[3] The facts in the present case, as we derive them from the evidence adduced on

the part of the plaintiff, are these: Plaintiff's husband was driving in an open buggy on the afternoon of December 29, 1915. As he approached a grade crossing of the defendant's company's tracks, four in number, and which he had been accustomed to cross and recross daily for at least six weeks prior to the accident, he stopped at a point 90 feet distant from the nearest rail on the track he would encounter first in any attempt to cross over. At this point, had he looked, he could have seen up the track on which the train that struck him was running, that is, the third track, 550 feet. At a point 75 feet beyond and 25 feet from the nearest track he had a clear view of the track along which the train was approaching for 1,550 feet. Just before entering upon the first track, had he looked in the direction of the approaching train, he could have seen for a distance of three-quarters of a mile. Despite these opportunities thus afforded him to avoid the danger incident to the crossing, when upon the third track, in an attempt to cross over, he was struck by the engine of a passing train and instantly killed. Witnesses were called on behalf of the plaintiff who testified that as the train approached the crossing no signal of its approach was given, either by whistle, bell, or otherwise, and for failure in this regard the effort was to charge the defendant with responsibility for the accident. Into the merits of this contention we need not enter. The appeal is from a judgment of nonsuit entered on the ground, as stated by the learned trial judge in refusing to take it off, that it is incomprehensible how the plaintiff's husband could have lost his life had he made even a most casual glance at any point after he started his horse from the 90-foot stopping point. This view meets with our entire concurrence.

[4] It only remains to add that the fact of his having stopped at a point 90 feet from the tracks before entering upon the crossing did not relieve him from the duty of again stopping and looking before he attempted to cross. We have repeatedly held that the whole duty of one about to cross the tracks of a steam road at grade is not in all cases confined to his stopping and listening for the approach of a train. He must stop at a proper place, and, when he proceeds, he should continue to look and to observe the precautions which the dangers of the situation require. He should stop again if there is another place nearer the tracks from which he can better discern whether there is danger. *Muckinhaupt v. Erie R. R. Co.*, 196 Pa. 213, 46 Atl. 364.

"The duty to be observant continues so long as danger threatens. If between * * * where the party stops, and the tracks of a railroad, the situation affords opportunity to discover an approaching train, and injury results because of disregard of such opportunity, the original act of stopping cannot operate to relieve the injured party of contributory negli-

gence." *Walsh v. Penna. R. R. Co.*, 222 Pa. 162, 165, 70 Atl. 1083, 1089.

The nonsuit was properly ordered, and the judgment is affirmed.

(258 Pa. 234)

In re PENNSYLVANIA GAS CO.

Appeal of CITY OF ERIE.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. GAS §11—INSPECTION OF GAS CONDUITS—RECOVERY OF COSTS.

The city of Erie, a city of the third class, may collect the cost of reasonable inspection and regulation of gas conduits in the public streets, but the amount so collected must be limited to the necessary cost of such inspection, and cannot be in fact a tax for revenue for general purposes.

2. GAS §11—MUNICIPAL INSPECTION FEE—REDUCTION BY COURT—CONSTITUTIONALITY OF STATUTE.

Act July 26, 1913 (P. L. 1371, § 1), authorizing common pleas court to reduce the amount of a municipal license fee for inspection of gas company's conduits when the amount of such fee is unreasonable, is constitutional.

3. GAS §11—MUNICIPAL INSPECTION FEE—REDUCTION BY COURT—STATUTE.

Under Act April 17, 1905 (P. L. 183), as amended by Act July 26, 1913 (P. L. 1371), the court may reduce the license fee fixed in a municipal ordinance for the inspection of gas conduits where they are unreasonably excessive, and may fix such license fee as the evidence shows will properly compensate the municipality for necessary inspection.

4. GAS §11—INSPECTION—ORDINANCE—AMOUNT OF LICENSE FEE.

Where an ordinance of a city of the third class required an annual inspection of gas conduits in public streets and imposed an annual license fee of \$30 per mile of pipe, and it appeared that no regular inspection was made by the city, other than that made by the police, fire, engineering, and street departments as incidental to their other duties, and that no extra expenses were incurred for such inspection, and that the cost of such inspection did not exceed \$7.50 per mile, the amount fixed by the ordinance was excessive, and the city would not be permitted to collect more than \$7.50 per mile for inspection.

Appeal from Court of Common Pleas, Erie County.

Petition by the Pennsylvania Gas Company for the reduction of a license fee charged by the City of Erie for the inspection and regulation of conduits. From a decree reducing the inspection license fee, the City of Erie appeals. Affirmed.

The following is opinion of Rossiter, P. J., in the court of common pleas:

The proceedings in this case were had under the act of April 17, 1905 (P. L. 183), as amended by the act of July 26, 1913 (P. L. 1371), to decide a dispute between the petitioner, the Pennsylvania Gas Company, and the respondent, the city of Erie, as to the reasonableness of a license fee charged by the respondent against the petitioner. The case was heard upon petition, answer, and testimony.

The facts are found as follows:

First. That the petitioner is a corporation existing under the laws of the state of Pennsylvania, engaged in the production and transporta-

tion of natural gas; supplies natural gas to the public in the city of Erie; occupies the streets of the city of Erie by virtue of an ordinance approved March 8, 1886, which ordinance was offered in evidence.

Second. That the petitioner owns, maintains, and operates in and upon the streets, lanes, alleys, and other highways of the city of Erie 120.22 miles of pipe and conduits; that 16 or 18 miles of this pipe is high-pressure pipe, and the rest low-pressure.

Third. That the respondent, the city of Erie, is a city of the third class.

Fourth. That on the 8th day of April, 1908, the respondent, the city of Erie, enacted Ordinance Bill No. 2917, of which the following is a copy:

"An ordinance providing for inspection by the police department of the city of Erie, of all pipes and mains of manufactured gas companies, natural gas companies, water companies, steam heating and other companies maintaining or operating such pipes and mains in the streets, avenues and alleys of the city of Erie; imposing an annual license fee for each mile of such pipes and mains; and providing a penalty for the violation of the provisions hereof.

"Be it enacted by the select and common councils of the city of Erie:

"Section 1. That all of the pipes and mains of each and every manufactured gas company, natural gas company, water company, steam heating company and other companies maintaining or operating pipes and mains in the streets, avenues and alleys of the city of Erie, shall be inspected annually, or as often as may be required for proper and adequate supervision and inspection, by the police department of this city. The said inspection shall be carried on as aforesaid by said department, to insure the proper and safe maintenance and operation of all such pipes and mains in the streets, etc., aforesaid.

"Sec. 2. That each mile of such pipes or mains, laid or maintained in the streets, avenues and alleys, within the limits of the city of Erie, shall be liable to an annual license fee of thirty (\$30) dollars.

"Sec. 3. The said license fee shall be paid by each of the said companies to the treasurer of the city of Erie, on or before the first day of June of each year, hereafter, and said officer shall issue his receipt therefor, showing the number of pipes and mains for which the license has been paid.

"Sec. 4. Any person, firm, corporation or company, who shall violate any of the provisions of this ordinance, shall be subject to a penalty of one hundred (\$100) dollars for each and every offense, to be sued for and recovered in the manner now provided by law for the recovery of like penalties.

"Sec. 5. That all ordinances, or parts thereof, conflicting herewith, be and the same are hereby repealed.

"Approved by the mayor April 6, 1908."

Fifth. That the petitioner has continued to use, maintain, and operate the said lines of pipe and conduit in and upon the streets, etc., of the city of Erie, but now refuses payment of the license charges specified in Ordinance No. 2917, averring that the said license is unreasonable, unlawful, and therefore void; that there was due, under the ordinance, June 1, 1914, \$3,606.60; and that the petitioner refuses to pay said sum or any amounts accruing under the ordinance since that time.

Sixth. That the city of Erie employs police, fire, engineering, electrical, and street departments, at a large expense, whose duty it is, in a general way, to inspect the lines, mains, and conduits of the petitioner.

Seventh. That no regular inspection or any inspection at any particular time or in any par-

ticular way was made by the respondent of the mains of the petitioner. The only inspection made is that made by different departments of the city, such as the police, fire, engineering, electrical, and street departments, is incidental only, and while those departments are in the performance of other duties, and consists principally in reporting breaks and leaks in the mains which come under the observation of either of them while performing their other duties, but it does not appear that any extra expense has been or is now occasioned to the respondent by reason of such inspection.

Eighth. That it is no more difficult or expensive to inspect the high than the low pressure mains.

Ninth. That the actual cost to the respondent for the inspection and regulation of the mains and conduits of the petitioner does not exceed the annual expense of \$7.50 per mile for each of the 120.22 miles of pipe.

Tenth. That the amount fixed in the ordinance is excessive and unreasonable.

Eleventh. That the petitioner has a first-class and up-to-date system, and keeps it under inspection and in good repair.

Conclusions of Law.

[1] First. The city of Erie, a city of the third class, may collect the cost of reasonable inspection and regulation of the petitioner's mains in the public street, but the amount so collected must be limited to the necessary cost of such inspection and regulation, and cannot be in fact a tax for revenue for general purposes.

[2] Second. That the first section of the act of July 26, 1913 (P. L. 1371), is constitutional.

[3] Third. That under the act of April 17, 1905 (P. L. 183), as amended by the act of July 26, 1913 (P. L. 1371), the court has power to reduce the license fee named in any ordinance of a municipality for the inspection and regulation of conduits, where the same is unreasonably excessive.

Fourth. That under the act of April 17, 1905 (P. L. 183), and its amendment of July 26, 1913 (P. L. 1371), the court may fix such license fee at what the evidence shows would properly compensate the respondent for necessary regulation and inspection.

[4] Fifth. That the annual cost of the inspection and regulation of the lines and mains of the petitioner in the streets, alleys, and other highways of the city of Erie, as often as may be required, for proper and adequate inspection and regulation, does not exceed the sum of \$7.50 per mile per year; such amount is hereby found to be a reasonable annual compensation for such inspection and regulation as may hereafter be performed under the terms of the ordinance.

The lower court entered a decree fixing \$7.50 per mile as the annual license fee to be collected by the city of Erie from the petitioner for each mile of pipe or conduit located within the city limits.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

H. Bedford Duff and M. O. Cornell, both of Erie, for appellant. J. E. Mullin, of Kane, Alexander & Clark, of Warren, and Gunnison, Fish, Gifford & Chapin, of Erie, for appellee.

PER CURIAM. The decree is affirmed on the findings of fact and conclusions of law by the learned court below.

(253 Pa. 261)

SCANDINAVIA BELTING CO. v. MACAN, JR., CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. TRIAL §60(1)—RECEPTION OF EVIDENCE—SET-OFF.

In an action against a company for goods sold and delivered, the burden was on the company to establish ownership of a sales agency contract made by plaintiff with its president before its alleged breach could be interposed as a set-off.

2. ASSIGNMENTS §138—SALES CONTRACT—QUESTION FOR JURY.

On the evidence whether the contract under which the company's president individually had been appointed plaintiff's sales agent had been assigned to the company and was then owned by it was a question for the jury.

3. SALES §358(2)—ACTION FOR PRICE—EVIDENCE.

The jury might consider the prior contracts and the course of dealing thereunder in so far as they bore upon the new contract, where defendant set up such new contract canceling prior contracts.

4. SALES §54—AGENCY CONTRACT—CONSTRUCTION BY PARTIES.

In an action for goods sold and delivered under a sales agency contract requiring the purchase of \$40,000 worth of goods, defendant's contention that the sales should be computed on the prices received by its president or by it had no merit, where the prior construction of the contract by the parties indicated that the \$40,000 was to be computed on the amount of sales made by plaintiff to its agent.

5. SALES §84—AGENCY CONTRACT—TERM.

A sales agency contract for one year ended on May 1st, which was the date of the contract, although the contract had not been actually signed until May 20th.

6. SALES §363—AGENCY CONTRACT—BREACH—WAIVER.

In an action for goods sold and delivered under a sales agency contract requiring the purchase of \$40,000 worth of goods, where the first year's sales thereunder fell short of that amount, the jury might consider whether plaintiff had waived that provision so as to render cancellation of contract unjustified.

Appeal from Court of Common Pleas, Northampton County.

Assumpsit for goods sold and delivered and upon promissory notes by the Scandinavia Belting Company against Macan, Jr., Company, with counterclaim by defendants. Verdicts for plaintiff and judgments thereon, and defendant appeals. Judgments affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Aaron Goldsmith and Kirkpatrick & Maxwell, all of Easton, for appellant. Robert A. Stotz and F. W. Edgar, both of Easton, for appellee.

WALLING, J. These cases, between the same parties, involving the same questions, one on an account for goods sold and delivered and the other on two promissory notes, were tried together in the court below, and will be so considered here.

Plaintiff is a corporation with principal of-

fice in New York, and as such had charge of the sale in this country of foreign made Scandinavia belting, for which purpose it had various agencies, one of which was that of Macan & Huntington, established in 1901, of which the senior member was George C. Macan, Jr. This agency continued until 1903, when a new contract was made between the plaintiff and Macan individually, which in 1904 was superseded by one with the Macan, Jr., Company, a partnership composed of said Macan and J. M. Driesbach. This contract was for the exclusive agency for sale of the belting in the states of Pennsylvania and New Jersey, and for conveying belting for coal and cement works of the United States. It is therein provided that:

"This agreement to remain in force so long as the annual turn-over reaches the sum of fifteen thousand dollars (\$15,000.00)"

—with the further provision that the Macan, Jr., Company was not to handle any other kind of belting. This contract was canceled January 1, 1907, by virtue of a new agreement embracing largely the same provisions, except that it was made with Mr. Macan individually and not with the firm. In November, 1907, the defendant, Macan, Jr., Company, was chartered as a Pennsylvania corporation with office at Easton; Mr. Macan and Mr. Driesbach were its principal stockholders, the former having 400 and the latter 200 shares. The partnership had business, aside from that under the contract with plaintiff, and its assets seem to have been transferred to the corporation at a valuation of \$60,000 in exchange for capital stock, which assets were described in the resolution of the defendant's board of directors as including, *inter alia*, "exclusive state and United States agencies, good will of established business and surplus earned." The agency for Scandinavia belting, then apparently belonging to Macan, was not specifically mentioned as a part of these assets; but thereafter plaintiff did much of its business directly with defendant, while not formally recognizing it as the owner of the contract of January 1, 1907. Some acts and declarations of Macan, made long after the formation of the corporation, indicate that he still regarded himself as the owner of the contract, and whether it belonged to defendant, or the latter was merely a sub-agent under Macan, was one of the questions in the case.

A new contract bearing date of May 1, 1912, but formally executed on May 20th, was made between plaintiff and Macan individually, in which he is described as "the agent," and wherein it is provided, *inter alia*, that:

"Whereby, in consideration of mutual promises, it is agreed that all previous contracts are hereby annulled, and that from the date above mentioned (May 1, 1912). * * * That the agent shall not sell or offer any textile belt other than Scandinavia belting obtained from the company (plaintiff), unless he obtains the written consent of the company. * * * This

contract shall remain in force while the agent does an annual total of sale of forty thousand dollars."

It made certain other changes from that of January, 1907, including change of territory embraced therein, etc. Macan was defendant's president, and it contends that the making of the new contract in his name was a mistake, and that in fact it was the contract of the Macan, Jr., Company. But the weight of the evidence and all the circumstances justify the conclusion that it was the intention of both plaintiff and Macan that the new agreement should be made in his name, and not in that of the company. However, plaintiff thereafter continued to do business with defendant as it had before, and in the doing thereof the indebtedness was incurred for which these suits were brought. Plaintiff declared the new contract terminated on May 1, 1914, on the allegation that the sales for the preceding year did not amount to \$40,000, and it was also suggested that sales of other belting had been made in violation of the contract. In these suits defendant admitted the correctness of plaintiff's claims but sought to set off damages by reason of said termination of the new contract. The jury found for plaintiff for the full amount of the claims.

[1-3] The contract being in the name of Mr. Macan, the burden was on the defendant to establish ownership thereof before its alleged breach could be interposed as a set-off; and such ownership depended largely on conflicting parol evidence, and was necessarily for the jury. We agree with the trial judge that the real thing (as he expresses it) was the contract of 1912, but that the jury could consider the prior contracts and the course of dealing thereunder, so far as they might throw light upon the new contract. This is so because defendant sets up the new contract and claims under it, and hence is bound by its provisions, one of which is the cancellation of prior contracts; and aside from that defendant makes no claim to damages for breach of a prior contract.

[4] The sales during the year ending May 1, 1914, according to plaintiff's prices, amounted to less than \$35,000, but defendant contends that the sales should be computed on the prices received by Macan or by the Macan, Jr., Company. The language of that clause in the contract might seem to warrant such construction, but, considering the contract as a whole, the prior dealings of the parties and their own apparent construction of that provision, we agree with the conclusion of the learned trial judge that the \$40,000 should be computed on plaintiff's prices. This construction is strengthened by the fact that a schedule of such prices is attached to the contract, and that, as part of the goods were consigned directly to the defendant, the plaintiff had no means of knowing to whom nor for what amount they were resold. Macan's letters seem to justify the conclusion

that he understood the matter was to be adjusted on plaintiff's prices.

[8, 6] As the first year's sales under the new contract also fell short of the \$40,000, the court instructed the jury that they might consider whether or not plaintiff had waived that clause in the contract. It was rightly held that the year ended on May 1st, as that was the date of the contract, and the fact that it was not actually executed until May 20th is not controlling. And the parties construed the contract as taking effect May 1, 1912.

Defendant contended that the failure to sell the required amount resulted from plaintiff's interference, and that was referred to the jury, as was also the question of defendant's damages. We find nothing to justify the criticism that the charge was unfair or inadequate. The controlling questions were largely of fact, and were properly submitted to the jury. The verdicts are sustainable on the ground that the contract was with Macan individually, and that defendant was a subagent, or on the ground that, as the sales for the year ending May 1, 1914, were under the \$40,000, plaintiff was within its rights in declaring the contract canceled.

The assignments of error are overruled and the judgments are affirmed.

(258 Pa. 239)

SAEGER v. COMMONWEALTH.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. HIGHWAYS ⇐76—VACATION—REPEAL OF STATUTE.

General Road Law (Act June 13, 1836; P. L. 558) § 18, conferring upon certain courts power to change or vacate any public road, was not repealed or modified by Act May 31, 1911 (P. L. 468), relating to state highways, and conferring upon the state highway commissioner the power to divert the course of state highways under certain circumstances.

2. EMINENT DOMAIN ⇐100(6)—VACATION OF HIGHWAYS—CONSTITUTIONAL PROVISIONS.

The vacation of a road or street is not an injury to the abutting landowners, within the provisions of the Constitution requiring compensation for private property taken in the exercise of the right of eminent domain, and, in the absence of special legislative provision for damages, none can be recovered.

3. EMINENT DOMAIN ⇐271 — VACATION OF HIGHWAY—STATUTE.

Act May 28, 1913 (P. L. 368), giving a right of action against cities, counties, etc., and Act June 27, 1913 (P. L. 633), relating to damages accruing where the road is formally vacated, gave an abutting owner no remedy against the commonwealth for the diversion of a road by the state highway commissioner.

Appeal from Court of Common Pleas, Crawford County.

Proceeding by C. W. Saeger against the Commonwealth of Pennsylvania. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

The facts appear in the following opinion by Prather, P. J.:

This case arose out of an appeal from the award of viewers assessing damages in favor of plaintiff for the vacation of a certain portion of a public highway in front of plaintiff's dwelling house by the commissioner of highways. The highway in question extends from Meadville to Erie, and is the highway described as route 84 in Act May 31, 1911 (P. L. 468, 482). This public road became a state highway on or before June 1, 1912, by virtue of the provisions of section 5 of said act, and thereafter, according to the provisions of section 6 thereof, came "under the exclusive authority and jurisdiction of the state highway department."

Section 8 of said act provides: "Whenever in the construction, reconstruction, maintenance, and repair of any of the state highways, it shall appear to the commissioner that any part or portion of a state highway, as now defined and described in this act, is dangerous or inconvenient to the traveling public, in its present location, either by reason of grades, dangerous turns, or other local conditions, or that the expense to the commonwealth in the construction, building, rebuilding, maintenance, and repair thereof would be too great or unreasonable, and could be materially reduced or lessened by a divergence from the road or route, the commissioner is hereby empowered to divert the course or direction of same, and he may diverge from the line or route of same as herein described, in such direction or directions as in his discretion may seem best, in order to correct said danger or inconvenience or lessen the cost to the commonwealth."

By stipulation of counsel it was agreed that the state highway commissioner in 1914 and 1915 had diverted from its original course a certain part of said state highway lying wholly within the township of Woodcock, a township of the second class, and passing through plaintiff's farm, by constructing a new road, about one mile in length, along the west side of the Erie Railroad track and west of the right of way of the Northwestern Pennsylvania Railway Company; the termini of said new road connecting with points on the state highway, thereby substituting said new road for that part of the state highway lying between said points and east of said railroad and street railway. The said highway in this vicinity extends in a general north and south direction. The substitution or divergence complained of avoids two railroad crossings at grade.

With these facts conceded upon the trial, we were of the opinion that plaintiff had no cause of action against the commonwealth for the conduct of the state highway commissioner; hence, rejected the offer to prove damages and directed a nonsuit. It is clear that plaintiff's right to recover must rest upon some constitutional or statutory provision. Counsel for plaintiff contend that the recited facts operate as a vacation of said road. But, even if so, the Constitution of 1874 gives no right to damages for the vacation of a public highway.

Let us then inquire: (a) Whether there was in fact a vacation; and, if so, (b) whether any statute provides damages therefor. We are of the opinion that the diversion complained of does not in fact vacate the portion of road now rejected from said state highway.

[1] The general road law of the state is the act of June 13, 1836 (P. L. 551). Section 18 thereof provides: "The courts aforesaid shall * * * have authority, * * * to change or vacate the whole or any part of any * * * public road." With reference to laying out and vacating public highways, this act is still the law of the state. This act is not repealed or modified by the act of 1911. The latter act nei-

ther vests in the state highway commissioner any authority to vacate a public road, nor makes any reference to the subject of vacation. The reasonable inference flowing therefrom is that the Legislature, in granting the commissioner of state highways the authority to divert the course of a state highway for reasons named, intended such act to be a divergence and not a vacation.

[2] If the road through plaintiff's farm has not been vacated, it remains a public highway to all intents and purposes as fully as it was at and prior to the passage of the act of 1911. If this conclusion is correct, plaintiff has no cause of action. But, if we err in this, plaintiff is still confronted with the well-settled rule, stated by the Supreme Court in *Howell v. Morrisville Borough*, 212 Pa. 349, 352, 61 Atl. 932, 933, as follows: "It must therefore be accepted as settled law that the vacation of a highway or street is not an injury to the abutting landowners within the provisions of the Constitution requiring compensation, and in the absence of special legislative provision for damages none can be recovered." See, also, *Ruscomb Street*, 30 Pa. Super. Ct. 476, 478, and cases therein cited; also *Wetherill v. Penna. R. R. Co. et al.*, 195 Pa. 156, 45 Atl. 658; *Snively v. Washington Township*, 213 Pa. 249, 67 Atl. 465, 12 L. R. A. (N. S.) 918; *Winner v. Graner, Kuntz, Baun and Reserve Twps.*, 173 Pa. 43, 33 Atl. 698; *Wagner v. Township of Salzburg*, 132 Pa. 636, 19 Atl. 294.

[3] We find no statute squinting at the liability of the commonwealth for the act complained of in the case before us. Our attention is called to the acts of May 28, 1913 (P. L. 368), and June 27, 1913 (P. L. 633). But the former gives the injured party an action "against cities, counties, boroughs or townships," while the latter applies to damages accruing in a proceeding by viewers to vacate a road, which results in a vacation of the road. Clearly, neither of these acts gives the plaintiff the remedy he is now invoking.

Finally, for illustration, assume the new road constructed by the state highway commissioner to remain its present length, and that the portion diverted from and alleged to have been vacated thereby, instead of being one mile in length, to be a detour of three or four miles, it certainly would not be urged that this old detour highway was vacated by the adoption of a short cut, as expressly allowed by the act creating the state highway in question. It is also to be observed that, of the various state highway routes established by the act of 1911, 14 were changed by the act of July 22, 1913 (P. L. 941), and 9 were changed by the act of June 7, 1915 (P. L. 860), and neither of these acts suggests that such changes were considered as a vacation of any public road, nor does either act recognize any liability upon the part of the commonwealth for so doing.

We are of the opinion that the court committed no error in the rejection of the proposed evidence and the entry of a compulsory nonsuit; therefore the rule to take off said order should be discharged.

The lower court entered a compulsory nonsuit, which it subsequently refused to take off. Plaintiff appealed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Frank J. Thomas and J. P. Colter, both of Meadville, for appellant. William H. Keller, First Deputy Atty. Gen., Francis Shunk Brown, Atty. Gen., and George F. Davenport, of Meadville, for the Commonwealth.

PER CURIAM. The judgment is affirmed, on the opinion of the learned court below discharging the rule to take off the nonsuit.

(258 Pa. 253)

In re PHILADELPHIA PARKWAY.

Appeal of GRAND FRATERNITY.

(Supreme Court of Pennsylvania. May 14, 1917.)

EMINENT DOMAIN §226 — OPENING OF STREET—APPOINTMENT OF VIEWERS—STATUTE.

Act April 21, 1855 (P. L. 266), authorizes councils by ordinance to order any street on the city plan to be opened, whereupon the owners of land taken may petition for viewers to assess damages; and Act May 8, 1876 (P. L. 138), authorizes a city to petition for the appointment of viewers to assess damages, when the proper authorities have directed the opening or widening of any street. A city petitioned for the appointment of a board of viewers to fix damages or benefits to owners within the lines of a parkway, and such viewers held meetings and heard testimony; and thereafter the city passed an ordinance to open another part of the parkway, whereupon the property owners in such part petitioned for the appointment of a board of viewers. Held that, the parkway being one entire improvement, and the city's petition for appointment of viewers being equivalent to a notice that the parkway would be opened, the second appointment of viewers was properly vacated.

Appeal from Court of Quarter Sessions, Philadelphia County.

Petition by the Grand Fraternity for the appointment of viewers in the matter of the opening of the Philadelphia Parkway. From an order vacating the appointment of viewers and quashing the petition, petitioner appeals. Affirmed.

Petition for appointment of viewers. The facts appear in the following opinion by Davis, J., on motion to quash the petition:

This is a motion on behalf of the city of Philadelphia to quash the petition presented by the Grand Fraternity for the appointment of viewers to assess damages for the taking of property on the unopened portions of the Parkway from City Hall to Fairmount Park. On the 29th day of June, 1916, the city of Philadelphia presented a petition for the appointment of viewers to assess damages by reason of the opening of the unopened portions of the Parkway. On July 24, 1916, select and common councils passed an ordinance authorizing the opening of the unopened portions of the Parkway. On the 26th day of January, 1917, upon the petition of the Grand Fraternity, the owner of property on the south side of Arch street, 173 feet 3 inches west of Broad street, viewers were appointed to assess damages under the provisions of this ordinance. The city of Philadelphia moves to quash this last petition, contending that the Grand Fraternity should present its claim before the viewers appointed on June 29, 1916.

By Act April 21, 1855 (P. L. 266), councils by ordinance are authorized to order any street on the city plan to be opened, whereupon the owners whose ground has been taken may petition the court of quarter sessions for viewers to assess damages. Act May 8, 1876 (P. L. 138), gives authority to the city to present a petition for the appointment of viewers to assess damages whenever the proper authorities have di-

rected "in the manner provided for by law" the opening or widening of any street upon the city plan. The Grand Fraternity contends that the petition filed by the city on June 29, 1916, was prior to the ordinance of July 24, 1916, and before notice of an intention to take the property had been served as required by the act of assembly of April 21, 1885. In the case of Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429, the Supreme Court held that by numerous ordinances to open portions of the Parkway as plotted, and by the condemnation and purchase under which the city had acquired title to the various properties within the limits of the Parkway, the city became committed to the improvement. Commenting upon the acts of the city, the court said: "The facts show that appellant has suffered grievous injury and should be compensated. If so, why not now? The only answer is that the city has not formally ordered the opening, and therefore there has been no taking within the meaning of the law. Our reply has already been indicated. What the city has done is equivalent to notice that the Parkway will be opened * * * and that the lands required for this purpose will be appropriated under the power of eminent domain unless otherwise acquired. Indeed, as we view it, the city has committed itself to the opening by a series of acts more expressive of its fixed purpose than could be indicated by a resolution to open without anything more."

It is contended on behalf of the Grand Fraternity that there is no power to appoint a jury upon the petition of the city of Philadelphia, unless the opening has been made in the manner provided by law. This same contention was made on behalf of the city in the case of the Philadelphia Parkway, *supra*. Upon that point the Supreme Court held: "The city has committed itself to this improvement by its acts just as much as if councils had declared their intention of passing an ordinance to open. We consider what has been done as the equivalent of notice to the property owners that their lands would be appropriated for Parkway purposes and that their possession was about to be disturbed." It is also contended that the petitioner in the case of the Philadelphia Parkway, *supra*, set up facts which satisfied the court that the injury it had sustained amounted to a taking. No such allegation was made in this case on behalf of the Grand Fraternity, although its property is within the limits of the Parkway. It is a fact known to this court that since the decision of the Supreme Court a number of petitions have been presented by owners of individual properties, and viewers have been appointed to assess damages.

Counsel for the Grand Fraternity contends that until the property owner elects to assert that he has been damaged there can be no viewers appointed to assess damages; that, the city

of Philadelphia having passed an ordinance in July, 1916, to take the property, the time had then arrived when, willing or unwilling, the owner of the real estate must surrender it, and therefore it was entitled to have a jury appointed, and it was not obliged to present its claims before the viewers appointed upon the petition of the city in June, 1916. If this argument is sound, had there been no ordinance passed in July, 1916, the Grand Fraternity would have been in a position to hold its property and present no claim for damages, if it so elected. Property owners on all sides might have presented claims before viewers appointed under petitions presented by them, and the city might have taken possession of the properties after damages were assessed and paid, and might have opened the avenue on all sides of this particular piece of real estate and would have been powerless to remove it until the adoption of an ordinance to open. Under the decision of the Supreme Court in the Parkway Case, this would have been an absurdity. As we have said, in that case the court held that the municipality had committed itself to the opening, and had done those things which amount to the same as a formal opening by ordinance. It was not an opening as to one property to the exclusion of another.

We are of opinion, therefore, that the municipality in June, 1916, had as much right to present its petition for the assessment of damages as any property owner, and, for the purpose of avoiding a multiplicity of individual proceedings, its petition to assess damages in all cases remaining unsettled was lawful. It follows that the appointment of viewers under the petition of the Grand Fraternity was improvidently made and should be quashed. It is so ordered.

The court accordingly entered a decree quashing the petition. The Grand Fraternity appealed.

Argued before BROWN, C. J., and MESTREZAT, MOSCHZISKER, FRAZER, and WALLING, JJ.

Joseph P. McCullen, of Philadelphia, for appellant. John P. Connelly, City Sol., and O. Charles Brodersen and Louis Hutt, Asst. City Sols., all of Philadelphia, for appellee.

PER CURIAM. Four of the members of the court who heard this appeal being of opinion that the appointment of viewers was properly vacated, under Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429, the order of the court below is affirmed, at appellant's costs.

(258 Pa. 217)

MAYER BROS. CONST. CO. v. AMERICAN STERILIZER CO.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. CONTRACTS §290—BUILDING CONTRACT—CERTIFICATE—WAIVER.

In an action on a building contract, providing that all payments were to be made upon the engineer's certificate, where it appeared that nine of the ten payments had been made without any certificate, the jury would be warranted in finding that the owner had waived such provision of the contract.

2. ESTOPPEL §78(1)—BUILDING CONTRACT—WAIVER IN GENERAL.

The usual manner of waiving a right, as a right under a building contract, is by conduct or acts intimating an intention to relinquish the right, such waiver being a matter of fact to be shown by the evidence, and which may be shown by express declarations or by acts manifesting an intent not to claim the right, or implied from such acts and conduct, or by failure to act inducing a belief that there is an intention to waive the right, or by circumstances or conduct amounting to an estoppel.

3. CONTRACTS §323(3)—BUILDING CONTRACT—DEFECTIVE CONSTRUCTION—QUESTION FOR JURY.

In an action on a building contract requiring defendant to furnish a certain hardening ingredient which the contractor claimed had resulted in defective floors, *held*, on the evidence, that whether the floors had been properly laid and whether the defects resulted from such ingredient were questions for the jury.

4. APPEARANCE §18—JURISDICTION—CAUSE OF ACTION—NECESSITY FOR ARBITRATION.

That a building contract provided that certain disputes would be arbitrated did not deprive the court of jurisdiction in an action thereon, where the parties submitted their cause by a general appearance and by a trial without demurring or questioning the jurisdiction.

5. CONTRACTS §316(2)—BUILDING CONTRACT—BREACH—DAMAGES.

Under a building contract, providing that upon the engineer's certificate of the contractor's failure to prosecute the work diligently the owner, after five days' written notice, might provide labor and materials and proceed with the work and deduct the cost from the money thereafter due, the owner could not recover damages for delay where he had failed to avail himself on such provision of the contract by giving notice, etc.

6. CONTRACTS §284(3)—BUILDING CONTRACT—FINAL PAYMENT.

Where a building contract made an engineer's certificate a condition precedent to the final payment, but the engineer named in the contract had withdrawn and no other had been appointed in his place, the contractor was not required to make an attempt to procure any certificate, as the law does not require a party to do a useless thing or to attempt an unnecessary thing.

7. CONTRACTS §303(5)—BUILDING CONTRACT—DEFECTS.

Under a building contract, permitting the engineer in charge as agent of the owner to change the plans the contractor would not be responsible for defects resulting from work done under the engineer's direction differing from the plans.

8. CONTRACTS §303(5)—BUILDING CONTRACT—GUARANTY.

Where the contractor's work was done and the material furnished under the direction and

to the satisfaction of the owner's agents, the owner was concluded by their acts, and the contract specification did not control, so that no guaranty attached to defects in the work so done.

Appeal from Court of Common Pleas, Erie County.

Assumpsit on a building contract by the Mayer Bros. Construction Company against the American Sterilizer Company. Verdict for plaintiff, judgment thereon, motion for new trial denied, and defendant appeals. Affirmed.

Rossiter, J., in the court of common pleas, filed the following opinion *sur* defendant's motion for a new trial:

The plaintiff brought this action against the defendant to recover the sum of \$5,000.71, with interest from April 17, 1914, for work and labor done, and materials furnished, under a building contract, and for extras. The case was tried before a jury and a verdict was rendered in favor of the plaintiff for the sum of \$5,366.03.

Whereupon the defendant made a motion for a new trial, assigning ten reasons therefor.

The first reason assigned is that the court erred in affirming the plaintiff's points. These points were, in substance, as follows:

First. That if the jury found that the defendant paid nine estimates without requiring a certificate from the engineers, as required by the contract, then they would be warranted in finding that the defendant had waived that requirement of the contract.

Second. That if the jury found that the parties entered into a new or modified agreement, in reference to the laying of the floors and that the material furnished by the defendant and the floors laid under its direction, the plaintiff would not be responsible for their defective condition.

[1, 2] Article 7 of the contract provided "that the plaintiff, or contractor, should be paid in current funds * * * in weekly estimates * * * approved by the engineers * * * the final payment to be made within thirty days after the contract was fulfilled. All payments were to be made upon the written certificate of the engineers to the effect that such payments became due."

We affirmed the first point because we understood that the law was and is that any one may waive anything which has been established in his favor or for his benefit; that the usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right; that waiver is a matter of fact to be shown by the evidence, and may be shown by express declarations or by acts manifesting an intent and purpose not to claim the privilege or advantage; or that a waiver may be implied from acts and conduct; or by such failure and neglect to act, as to induce a belief that there is an intention or purpose to waive; or that it may be shown by circumstances or by a course of action and conduct which amounts to an estoppel. 40 Cyc. 252 et seq.

The evidence was undisputed that there were nine payments made, and that no written certificate of the engineers to the effect that any of these nine payments were due was asked for or required, and we were then of the opinion, and are now, that where nine payments out of a possible ten were promptly made, without complaint, and without insisting upon compliance with the provisions of the contract, relative to the furnishing of the certificate, that that would be some evidence of an intention on the part of the defendant to waive that provision in its favor as to the tenth, and if the jury found that

the defendant intended to do what it did do, viz. waive nine certificates, they would be warranted in concluding that it had wholly waived its rights in this respect, and hence the affirmance of the first point.

[3] As to the second point, the evidence was that, after the engineers had severed their connection with the building operations, the plaintiff and defendant entered into a modification of the contract as originally made, or made a new or supplemental contract. By the new arrangement, the plaintiff was to furnish a kind of gravel, or granite grit, different from that specified in the contract, and the defendant was to furnish a certain ingredient to mix with that gravel to be used as a hardener. The plaintiff claimed that the defective condition of the floors resulted from the use of the hardener and the manner in which the floors were laid; that the floors were laid under the supervision of another agent of the defendant, Mr. Darrow, and the plaintiff was required to lay them as he directed. The defendant contended that the plaintiff did not use the kind of substance exhibited as "M," as agreed, but did use a different substance, exhibited as "N," and that it was by reason of the use of the latter substance that the defective condition of the floors resulted. This was the issue on this subject, and we affirmed plaintiff's second point, because we believed that if the jury found that the defective condition of the floors resulted from the substance furnished by the defendant and from the direction by the defendant of the manner of their laying, then the plaintiff would be in no way responsible, for the defective condition of the floors was the result of what the defendant furnished and directed done, and not on account of what the plaintiff furnished and did, that then the plaintiff could not and ought not to be held responsible therefor. This was purely a question of fact for the jury, and the point was properly answered and put and fully warranted under the evidence.

The second reason for a new trial is that the court erred in refusing to affirm the defendant's points. The defendant's first point was the antithesis of the plaintiff's first point, and therefore could not be affirmed under our views as above expressed, and the same reason applies to defendant's second point.

[4] The defendant's third point we believe was properly answered, and we refused the fourth point, which was to the effect that the court was without jurisdiction, because of a clause in the contract providing that disputes be submitted to arbitrators, as set forth in article 3. It is sufficient to say upon this subject that the parties submitted their cause to this forum by a general appearance and trial of the case, without demurring, or taking, any other steps to question or oust the jurisdiction.

The defendant's fifth point was for binding instructions, which, of course, could not under the evidence be affirmed.

[5] The third reason given for a new trial is that the court erred in holding that the defendant could not recover damages on account of the plaintiff's failure to complete the contract within a reasonable time.

There was no time set in the contract when the building was required to be completed. The contract did, however, set forth in article 5 that if the contractor failed to prosecute the work with promptness and diligence, such refusal, neglect, or failure, being certified by the engineers, the owner should be at liberty, after five days' written notice, to provide such labor and materials, and to deduct the cost from the money due thereafter, and proceed with the work at once. This being the remedy provided in the contract for expediting the work, we are of the opinion that this remedy would first have to be exhausted, and, there being no evidence in the case that defendant availed itself, or attempted to avail itself, of this provision of the contract, we are

of the opinion that it could not recover damages for delay.

The fourth reason for a new trial was as to the covering of the steel work and the reinforcing rods. The contract provided in article 1 that the plaintiff under the direction of, and to the satisfaction of the owner, as expressed by Irvin and Witherow, engineers, acting for the purpose of the contract as the agents of the owner, was to perform the contract. The undisputed evidence was that the whole of the work done by the plaintiff, except the laying of the floors, was done under the direction of, and to the satisfaction of the owner, as expressed by Irvin and Witherow, the engineers, and it being expressly provided in the contract that they were the agents of the defendant, we held that the defendant could not recover damages from the plaintiff for doing the work as it had directed the plaintiff to do it.

The fifth reason for a new trial was our holding the plaintiff could recover without a final certificate, and our reasons for so holding are in part given above.

[6] It was, however, strenuously urged that final payment was of a different character than the other payments which were made as the work progressed, for the reason that the final payment would be in the nature of an accord and satisfaction, or final settlement, between the parties for all work done and material furnished, and that, even though the jury found from the evidence that the defendant did waive the requirements relative to the certificate as to all other payments, that would be no evidence that it intended to waive its right to a certificate as to the final payment, and that, therefore, the absence of final certificate barred the action. To this we cannot accede as a legal proposition. But even if this final certificate was required and the defendant could have relied upon the fact it was not given, still it is conceded that had this certificate been withheld by fraud or for any other wrongful reason, then suit might have been brought to recover without it. Now the undisputed evidence on this subject is that long prior to the bringing of the suit, the engineers, named in the contract, had withdrawn from the job; that there had never been any other engineers appointed in their place, and of this fact both parties were cognizant, so it is clear that there was no engineer to whom the plaintiff could go to obtain such certificate, and, as the law does not require a party to do useless or attempt impossible and unnecessary things, we could see no reason why the plaintiff should be required in this case to make an attempt to procure a certificate from engineers who did not exist, that the plaintiff knew did not exist, and that the defendant knew did not exist prior to the bringing of the action.

The sixth reason for a new trial was practically the same as the fifth, and the same reasoning as applied to the affirmance of the plaintiff's second point applies to the seventh reason for a new trial.

We did hold, and in that holding we think we were right, that defendant could not recover damages for any work that was done under the direction and to the satisfaction of Irvin and Witherow, which holding is assigned as the eighth reason for a new trial, but there was no offer to prove that defects developed subsequently.

[7] As to the ninth reason for a new trial, to the effect that the court erred in holding evidence inadmissible to show that the work was not done according to the plans and specifications, we held that the engineers in charge, being the agents of the owner, had a right to change these plans and specifications, if agreeable to the plaintiff, and that if these plans and specifications were changed and the work done under the direction of the agent of the owner, the plaintiff could not be held responsible for defects which might result. In other words, the only

question was, Did the plaintiff perform the work as Irvin & Witherow directed; if it did, that ended it; if it did not, then the defendant could prove noncompliance with the specifications; but as Mr. Irvin testified: "Q. State whether or not the work which was done on this contract, on this job, up to the time that you severed your connection with it, was done in substantial compliance with the terms of the contract? A. It was done in substantial compliance with the contract"—we think our holding was warranted.

In relation to the tenth assignment of error, we are of the opinion that under the undisputed evidence the whole of the work, with the exception of the laying of the floors, was done under the supervision and direction of the agents of defendant, Irvin, and Witherow, and that, even though the contract did set forth that if defects developed within a year or within any other time after the completion of the contract, if the work was performed as the owner's agents directed, and not according to the plans and specifications, that that relieved the plaintiff of its responsibility relative to the development of future defects. That is, when a contract specifies that work is to be done in a certain way and the owner reserves the right for his designated agent to stand by and direct it to be done in another way, if his designated agent does stand by and see it done, or changes it, and it afterwards appears that the construction was wrongly or defectively done, he cannot be held to say that he has been damaged. It is his duty to insist that it be properly performed at the time.

But in this case there was no offer to prove that any defects developed after the completion of the job. The offers were all to prove faulty construction, and construction not according to the plans and specifications, which, if true, would be the act, or at least the result of the act, of the defendant's agents, and hence defendant could not claim that it had been damaged thereby. It will be observed in this connection that we did permit the defendant to prove its damage on account of the board marks not being removed, and we did this because there was no evidence to show when the frames were removed, which caused the marks, and therefore they might have been removed after Irvin and Witherow severed their connection with the work, but this branch of the case was clearly for the jury, and, they having decided it, we cannot now interfere.

The provisions of article 1 of the contract, appointing Irvin and Witherow as agents of the defendant, and the provisions under the head of guaranty in the plans and specifications, were the provisions around which revolved the difficulties which resulted in this lawsuit.

The theory of the plaintiff was that the parties to the contract had the right to change or alter the contract if they saw fit; that Irvin and Witherow were the parties to the contract, so far as the defendant was concerned; that independent of the contract, in spite of it, and contrary to its provisions, the parties had the right, if they saw fit, to modify, change, or wholly annul it, it being their contract, and having done so, they are bound by what they did, and not by what the contract provided.

The theory of the defendant was that the plaintiff was bound to perform the contract under the direction and to the satisfaction of its agents, also according to the plans and specifications, and guarantee the work for one year after completion.

[8] The court believes that where the work was done and the material furnished under the direction and to the satisfaction of the defendant's agents, they were concluded by their acts, and the contract and plans and specifications do not control; and therefore no guaranty attached, and the evidence was undisputed that all of

the work, except the laying of the floors, was done under the supervision, direction, and to the satisfaction of Irvin & Witherow.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

T. A. Lamb and John B. Brooks, both of Erie, for appellant. P. V. Gifford and Gun-nison, Fish, Gifford & Chapin, all of Erie, for appellee.

PER CURIAM. In the opinion discharging the rule for a new trial, the learned court below has discussed all the questions raised on this appeal, and we concur in his conclusions.

The judgment is affirmed.

(258 Pa. 282)

HARPER et al. v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. APPEAL AND ERROR ¶927(3)—QUESTION OF FACT—INFERENCES.

On appeal from a judgment of nonsuit in an action for personal injury, where defendant submitted no evidence, the appellate court must, for the purpose of the case, assume the truth of plaintiff's evidence and any inferences which may be drawn therefrom.

2. STREET RAILROADS ¶85(3) — USE OF STREET—DUE CARE.

One lawfully driving on the proper side of the street is bound to get out of a street car's way, and those in charge of a street car are bound to afford him a reasonable opportunity to do so.

3. STREET RAILROADS ¶117(11) — NEGLIGENCE—QUESTION FOR JURY.

In an action for damages sustained when plaintiff's team was struck by a street car, held on the evidence that whether the defendant was negligent in respect to improper speed in overtaking the team was for the jury.

4. STREET RAILROADS ¶101—NEGLIGENCE—SIGNALS.

Where the driver of a team saw an approaching street car 300 feet away, the question whether the motorman gave a signal of its approach was unimportant.

5. STREET RAILROADS ¶90(4) — USE OF TRACKS—DUE CARE.

A street railroad is entitled to the right of way, but, as to one lawfully driving a team along its tracks, is bound to exercise such right so as to give the driver a reasonable opportunity to get out of the way, after notice of the car's approach.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Harry Harper, by his next friend and father, William Harper, and by William Harper in his own right, against the Philadelphia Rapid Transit Company, to recover damages for personal injury. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed, and a procedendo awarded.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

William H. Lamb and Wm. H. R. Lukens, both of Philadelphia, for appellants. Sydney Young, of Philadelphia, for appellee.

WALLING, J. This appeal is from an order refusing to set aside a compulsory nonsuit, granted in an action by a father and minor son for personal injuries to the son. There is a bridge about 25 feet in width in Second street, Philadelphia, which spans a creek below Tabor road. Defendant has a double track railway in that street, which crosses the bridge at grade and in fact occupies a large part of its surface, the tracks being parallel and that on the west side being south bound. The bridge is in a valley, and the grade of the street descends toward it from both north and south. To the north the street is straight, and a motorman in charge of a car approaching from that direction has a clear view of the surface of the bridge for at least 300 feet.

On March 20, 1915, the plaintiff, Harry Harper, was driving a horse and wagon for some men engaged in trimming trees. The wagon box was $7\frac{1}{2}$ feet long, and in it was an extension ladder, also some rope and shears. The ladder was adjusted at its minimum length of 15 feet, and one end was under the seat in front and about one-half extended back over the rear end of the box. It was placed parallel to and along the right side of the wagon box. Three workmen were in the wagon, one seated on the ladder and two on the seat with plaintiff. Plaintiff was going south, and approached the bridge on the south-bound track, it being necessary to occupy the track in driving over the bridge. He looked back and saw a trolley car coming behind him about 300 feet away; and immediately reined his horse to the left so as to get on the north-bound track that the car might pass, and succeeded in getting the horse and front wheels of the wagon on that track, but the car overtook him before he could get the rear end of the ladder out of the way, and struck it with such violence as to force it through the front end of the wagon box, and to push the horse, wagon, and load about 150 feet up the grade, throwing plaintiff and his companions from the wagon and causing the injuries here complained of. Plaintiff's efforts to get out of the way were somewhat hindered by the narrow bridge and also by temporary obstructions at the side caused by the work of constructing a sewer. At the time of the collision the wagon was in a diagonal direction, as the rear wheels had not reached the north-bound track, and the rear end of the ladder, on which was a red flag to make it more conspicuous, extended towards the west track. While plaintiff drove about 40 feet in his effort to get out of danger the car ran about 300 feet. The sky was clear, and the accident happened about noonday. It was one of defendant's ordinary green cars, the body of which is

wider than the front end. Windows were broken on the left side of the car, but just what part of it first hit the ladder does not appear.

[1-4] As defendant submitted no evidence, we must, for the purpose of this case, assume the truth of that offered for plaintiff, and also any inferences that might be drawn therefrom. And on that assumption in our opinion the learned court below erred in refusing to strike off the nonsuit. This was a public street where both parties had rights. Plaintiff was lawfully on the street, and was using it for a proper purpose, and nothing appears that as matter of law would convict him of contributory negligence. While he was on the proper side of the street, it was his duty to get out of defendant's way and the duty of the latter to afford him a reasonable opportunity to do so. It was such a place as required care by both parties. And whether defendant performed its duty was, under the circumstances, for the jury. As plaintiff saw the car 300 feet away the question of signals would not seem to be important. But the fact that the car was moving about seven times as fast as the wagon and pushed the horse and wagon along for about 150 feet, under the circumstances, would seem to make the question of improper speed one for the jury. The horse, wagon, and men were in plain view of the motorman for 300 feet; if he did not see them he was at fault, as he also was if he saw them and failed to have his car under control. If the car was approaching the bridge so rapidly that it could not be stopped in the 300 feet, that would certainly be evidence of negligence. That windows were broken on the side of the car indicates that the ladder and car were there in contact, but does not necessarily show that they did collide at some other point. The front end of the car, being of less width than the body, may have cleared or grazed the ladder, but the result shows that the ladder must have come in contact with something more substantial than glass. The evidence would justify a finding that the cause of the accident was the failure of the motorman to afford plaintiff an opportunity to get out of the way; for several witnesses testify that at the time of the collision the wagon was in a diagonal position, with the ladder, as the result showed, not out of range of the approaching car. The theory of appellee's counsel that, because the first and second windows on the side of the car were not broken and others were, therefore the ladder must have been out of range of the car and then suddenly turned back, while plausible, does not necessarily result from that circumstance, and finds no other support in the evidence.

[5] An inference of defendant's negligence can reasonably be drawn from the evidence, and therefore the case is for the jury. The following language of Judge Henderson, in

Friedland v. Altoona & Logan Valley Electric Ry. Co., 59 Pa. Super. Ct. 539, 542, is applicable to this case:

"The plaintiff was in the exercise of a lawful right in driving along the track and although the defendant company was entitled to the right of way, its employees were bound to exercise the right in such a manner as to give those driving along the track a reasonable opportunity to get out of the way when notified of the approach of the car."

So also is the language of Judge Porter in *Davis v. Media, Middletown, Aston & Chester Electric Ry. Co.*, 25 Pa. Super. Ct. 444, 448, that:

"When the tracks are laid in a public highway, the driver of a wagon lawfully using them in front of an approaching car, while it is his duty to give way and not obstruct its progress, is entitled to reasonable warning and reasonable time to get out of the way. The employees of the defendant company were bound to keep the car under control, and had no right to run the plaintiff down either upon the track or while he was in the act of leaving it. They were bound to use every reasonable effort to avoid a collision."

While the street railway company has the right of way it must give the driver of a vehicle an opportunity to clear the track. See *Heuber v. Consolidated Traction Company*, 210 Pa. 70, 59 Atl. 430; *Trumbower v. Lehigh Valley Transit Co.*, 235 Pa. 397, 84 Atl. 408. A case quite like the present is that of *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86, where the earlier authorities are cited and considered by President Judge Rice. It was said by Mr. Justice Potter in the recent case of *Gordon v. Beaver Valley Traction Co.*, 247 Pa. 248, 249, 93 Atl. 334, 335:

"As we have often held in similar cases, it was the right of the plaintiff to drive on any part of the street, subject to the superior right of the defendant to the use of its tracks, and warning of the approach of the car should have been given to plaintiff, and he should have been allowed sufficient time to get off the track in safety. Whether or not such warning was given, or sufficient time was allowed him to get out of the way; or whether the car actually struck the wagon, and caused the injuries to plaintiff for which he sought to recover, were all questions of fact for the jury."

The judgment is reversed, and procedendo awarded.

(258 Pa. 226)

COMMONWEALTH v. MILLER.

(Supreme Court of Pennsylvania. May 14, 1917.)

1. HOMICIDE §253(1) — MURDER IN THE FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

Evidence in a trial for murder held sufficient to sustain a conviction of murder in the first degree.

2. HOMICIDE §237—INSANITY—EVIDENCE.

Evidence in a trial for murder held to negate the defendant's contention that he was insane.

3. HOMICIDE §145 — EVIDENCE — USE OF DEADLY WEAPON.

The inference of an intent to kill may not be drawn solely from the fact that the weapon was deadly and was used upon a vital part, but

the fact that it was such and was so used is to be considered with all the circumstances in determining the intent.

4. HOMICIDE §233—DEGREE—MOTIVE.

A reasonable doubt as to motive does not prevent a conviction of a higher degree of homicide than the second degree.

5. CRIMINAL LAW §762(5)—CHARGE—CONSEQUENCE OF VERDICT.

A charge that the jury were not to be deterred from a true finding by any thought of possible consequences of their verdict was not prejudicial.

6. CRIMINAL LAW §404(3)—EVIDENCE—DUPLICATE OF WEAPON.

Where it appeared that defendant had thrown away or concealed the automatic revolver which he had used, a duplicate, identified as the same as that used by defendant, was admissible as bearing on the character of the weapon used, in connection with the other evidence, going to the question of intent.

7. HOMICIDE §155 — SHOOTING WITHOUT PROVOCATION—EVIDENCE.

Where a homicide was committed by shooting without provocation, the jury might consider that, after the first shot had taken effect and deceased was falling, defendant shot again.

Appeal from Court of Oyer and Terminer, Cumberland County.

Archie Miller was convicted of murder in the first degree, and he appeals. Affirmed.

The following is the opinion of Sadler, P. J., on motion for new trial in the court of Oyer and Terminer:

Archie Miller was indicted for the murder of one Beisser, a railroad officer. He was defended by two of the ablest members of the local bar, assigned by the court under the provisions of the act of March 22, 1907 (P. L. 31), and in addition by counsel from another state selected by his family. The case was carefully presented. The jury rendered a verdict of guilty of murder of the first degree, and in this the court concurs.

Reasons for a new trial and in arrest of judgment have been presented and argued, and are now before us for consideration.

The first three alleged the verdict to be against the law, the evidence, the weight of the evidence, and the charge of the court, and can be considered together. None can be sustained.

[1] The evidence showed that the defendant came from the South and obtained work in Jersey City. While there he determined to return home, and joined with him as a companion, one Jasper Fletcher. Before starting he procured for the latter a 45 Colt revolver in which lead bullets were used. For himself he purchased a new Colt automatic revolver, and steel-jacketed bullets. At that time he declared his purpose to see that no "bull" would get him on his road home. They left Jersey City by freight, finally reaching Highspire. From that point they went by foot to Harrisburg, and thence across the bridge to the Cumberland county side and to the tracks of the Northern Central Railroad. Proceeding to the north, a tramp was met, who told them of being driven off the track, and that if they went on they would be arrested. The defendant used a coarse expression in regard to the "bulls," but proceeded. At that time the officers were not in sight. Miller then put back his cap, removed his revolver from his right pocket—he was left-handed—took it into his left hand, and there held it under the apron of the overalls he was wearing. Thus prepared, he continued on his way until in sight of the officers. Beisser came from the third to the second track in front of Miller, and when from 15 to 20 feet away called, "Where are you going?"

In answer, Miller pulled the prepared revolver, and shot, saying, "That is where I am going." When the officer was falling he shot him a second time, and then shot the second officer who was on the track above. From the evidence, the jury was clearly justified in finding, as it did, that no other words had passed, and that no attempt had been made by Beisser to either arrest or assault the defendant. After falling, Beisser turned on his side, pulled out his revolver, and shot after the fleeing defendant, until he fell back dead. Miller was captured about one-half mile from the scene of the occurrence. In the meantime he had disposed in some way of his revolver. His companion, Fletcher, who had run at the first shot, was likewise found. He had thrown his revolver into the river. It was found with no bullets exploded. Those in his gun were lead, while Miller used steel-jacketed ones, the same as found in the body of Beisser and the leg of Chubb. There was practically no contradiction of any of the facts above narrated. Miller himself did not take the stand.

[2] The defense was insanity. The evidence to support even a suspicion of the same was far from convincing. The mother testified to various acts of badness during the youth of the defendant, and gave it as her opinion that he was insane. And a Dr. Jenkins, keeper of a reformatory in which Miller was confined from the age of 12 to 14, gave a like opinion. Dr. Johnston, a colored physician of Charleston, S. C., and the family doctor, gave it as his opinion that the defendant was suffering from dementia precox, and that he could not distinguish between right and wrong when "he had an expansive moment." He had not seen the defendant for three years before the trial, nor had the mother seen him for months, or Dr. Jenkins for years. The mental condition was described as hereditary, and evidence was offered to show that the grandfather became insane at 66 and that a brother was confined in an asylum. The mother and the doctor stated that as a boy Miller was afraid of things without cause. From this the jury was asked to find that he was insane when he shot Beisser, and that he was suffering from some indefinite delusion when he so acted.

Every act and circumstance proven in the case showing the conduct of Miller immediately prior to and at the time of the murder negated this contention. Two experts for the commonwealth testified that, admitting as true every fact testified to in defense, there was no indication of insanity in their opinion.

The expert for the defendant declared that he (Miller) could distinguish between right and wrong, except during an "expansive moment," but that such a mental condition was existing when the killing occurred was absolutely without support in the evidence. Though this was the view of the court when the case was tried, and still is, yet every possible instruction which could be of benefit to the defendant was given. In answer to the points on delusion, the jury was permitted to find such, from the evidence, if they could, though the court would have been fully justified under the authorities in withdrawing the matter entirely from its consideration. *Commonwealth v. Henderson*, 242 Pa. 372, 89 Atl. 567.

A careful review of all the evidence leads to the conclusion that the jury was fully justified in finding that the killing was willful, deliberate, and premeditated, and was done by defendant while fully conscious of his act, with power to distinguish between right and wrong, and not under the control of any irresistible impulse or delusion.

Complaint is made of the answers to points 3, 11, 12, and 16 presented by the defendant. These were all affirmed as abstract propositions, and the jury told to apply the legal principle therein stated, if the facts upon which the same were predicated were found to be true. All

four were based on the assumption that the evidence justified a finding that the defendant was acting under some delusion that he was in fear of death or great bodily harm. There was nothing in the evidence to justify such a conclusion, though it was left to the jury. The court would have been fully justified in refusing the points. *Commonwealth v. Henderson*, 242 Pa. 372, 89 Atl. 567; *Commonwealth v. Calhoun*, 238 Pa. 474, 86 Atl. 472. Any assumption of delusion would necessarily have been drawn from the proof that Miller as a child was needlessly afraid of things. The testimony as to this covered a period years before the killing. Not a word to show impaired mental condition was offered for a period more than three years before, while the testimony of the acts and conduct of Miller immediately before and at the time of the killing showed him to be fully conscious of his actions and surroundings. In the answers to the points complained of the defendant received more favorable treatment than he had the right to demand.

The sixth point was affirmed as stated. So that the jury might not get the impression from so doing that the fact that the weapon was deadly could not be considered by them we stated that from its use the intention may be inferred. This, in connection with the remainder of the point affirmed, was an introduction [instruction] that it should be considered with all the circumstances of the case in determining the intent. We do not think the jury could have misunderstood this. Later in the charge the weight to be given to the fact that the weapon was deadly was carefully defined. "When death ensues from the use of a deadly weapon, the jury must scan closely the conduct of both parties, taking into consideration the character of the weapon, the manner of its use, and the time of its use, the place of its use, and the circumstances attending it, and by a careful survey of the evidence the jury must endeavor to arrive at the true cause which prompted the fatal shot or shots." And further, in the next paragraph we said: "Again, gentlemen of the jury, the nature of the weapon and the place and character of the wounds are important and should be considered by you. Was the weapon a deadly weapon? The deadliness of the weapon, gentlemen, tends to indicate the intention with which it is used. The place or places where the wound or wounds are inflicted tend also to throw light on the intention with which the shots were fired."

[3] As we understand the authorities, and as we instructed, the inference of the intent to kill may be drawn, not solely from the fact that the weapon was deadly, and used upon a vital part, but the fact that it was such and was so used is to be considered with all the circumstances in reaching a determination as to the intent, and this is what the jury was told.

The eighteenth point was affirmed as stated. The wording of the same was to the mind of the court confusing. So that the jury might not misunderstand, the court repeated in different language the two propositions included, and we think correctly. A mere doubt as to insanity does not justify an acquittal on that ground. *Commonwealth v. Sushinskie*, 242 Pa. 406, 85 Atl. 564; *Commonwealth v. Henderson*, 242 Pa. 372, 89 Atl. 567; *Commonwealth v. Barner*, 199 Pa. 335, 49 Atl. 60.

[4] The answer to the seventh point was as favorable to the defendant as could be demanded. We could not affirm without qualification the statement that a reasonable doubt as to motive prevented a conviction of a higher grade of homicide, than that of second degree. Such is not the law. *Lanahan v. Commonwealth*, 84 Pa. 80; *Commonwealth v. Danz*, 211 Pa. 507, 60 Atl. 1070.

[5] This disposes of such objections to the charge and points as have been specified. An additional error was suggested on the argument,

in that the jury was prejudiced unduly by the charge of the court in saying that it was not to be "deterred from a true finding by any thought of possible consequences of the verdict." The same objection has been passed upon and held to be without merit by the Supreme Court. *Commonwealth v. Webb*, 252 Pa. 187, 97 Atl. 189; *Coyle v. Commonwealth*, 100 Pa. 573, 45 Am. Rep. 397.

[6] We are unable to find that error was committed in passing upon the challenges for cause interposed when jurors were examined on their voir dire. Nor do we see anything prejudicial to the defendant in the rulings upon the evidence. But one point therein is worthy of mention. The defendant used a 45-caliber automatic Colt revolver, but threw the same away in some concealed place after the killing. A duplicate was produced, which was identified by Fletcher as in all respects the same as carried by Miller. This fac simile was offered in evidence so that the jury might consider the character of weapon used, which they had the right to do in connection with the other evidence in the case, in passing upon the question of intent. The duplicate having been proven to be identical, the admission was proper. "In any case where the nature and properties of an article require consideration by the jury, it is proper to submit a duplicate or fac simile conveying a correct impression." 17 Cyc. 293; *Commonwealth v. Fry*, 198 Pa. 379, 48 Atl. 257.

Since the argument of this case, and the preparation of this opinion, additional reasons have been filed by counsel for the defendant. An examination of the same will show the majority to be unsubstantial and trivial. The instructions as to self-defense are the same as those approved by the Supreme Court in *Commonwealth v. De Felippis*, 245 Pa. 612, 91 Atl. 1059, and those as to insanity were approved in *Commonwealth v. Calhoun*, 238 Pa. 474, 86 Atl. 472. It is needless to cite authorities to show the rule in Pennsylvania to be that the prisoner must satisfy the jury by fairly preponderating evidence of his insanity, to entitle him to an acquittal on this ground. The last reported case upon the subject uses the same words that are here complained of. *Commonwealth v. Sushinskie*, 242 Pa. 406, 89 Atl. 564.

[7] Impressed with the importance of the decision to the defendant, we have examined the evidence and charge with care, both as to matters the subject of exception, and those not specifically complained of, and are convinced that no prejudicial error was committed. The conclusion of the presence of an intent to kill from all the circumstances was justified. The delib-

eration and premeditation appeared in the preparation of the gun for use before the deceased was in sight, but after Miller was notified that he was farther up the track. The shooting was without provocation, and the jury properly took into consideration that, after the first shot had taken effect, and the deceased was falling, he shot again. *Commonwealth v. Digeso*, 254 Pa. 296, 98 Atl. 882; *Commonwealth v. West*, 204 Pa. 68, 53 Atl. 542. The defense of insanity was disregarded by the jury, and it was a question for it to determine. That the verdict might have been a different one is no reason for judicial interference, even if the court was so inclined. *Commonwealth v. Danz*, 211 Pa. 507, 60 Atl. 1070; *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275.

The law was fully explained and an opportunity given to the defendant to secure further instructions, if desired. *Commonwealth v. Washington*, 202 Pa. 148, 51 Atl. 759. There was evidence which justified the verdict of murder in the first degree, and no substantial reason has been shown why a new trial should be granted, and the motion, therefore, is overruled. No error apparent upon the face of the record has been averred, or appears, and the same disposition of the motion in arrest of judgment is therefore made.

Verdict of guilty of murder of the first degree, upon which sentence of death was passed. Defendant appealed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Julius L. Mitchell, of Brooklyn, N. Y., and Fillmore Maust and Thos. E. Vale, both of Carlisle, for appellant. William A. Kramer, of Carlisle, George E. Lloyd, Dist. Atty., of Mechanicsburg, and John D. Faller, of Carlisle, for the Commonwealth.

PER CURIAM. The clear and convincing opinion of the learned court below, overruling the motions for a new trial and in arrest of judgment, shows that this record is clear of reversible error, and that the several assignments are without merit.

The judgment is affirmed; and it is ordered that the record be remitted to the court below for the purpose of execution according to law.

VILLA v. THAYER.

(Supreme Court of Vermont. Washington.
Oct. 8, 1917.)

1. GAME \S 6—POWERS OF GAME WARDENS.

A game warden is neither the state nor a general public officer thereof, and his authority in the protection of game is wholly derived from the statutes, and expressly defined by Acts 1912, No. 201, \S 73.

2. ANIMALS \S 84—POWERS OF GAME WARDENS—SHOOTING DOGS.

In view of the repeal of Acts 1898, No. 108, \S 3, which authorized a private person to kill dogs chasing deer, a game warden, having no greater authority in that respect by virtue of his office than a private person, has no right to kill dogs while chasing deer.

3. GAME \S 6—PRESERVATION OF GAME—PUBLIC NUISANCE.

Nothing is to be deemed a public nuisance, solely by reason of its destruction of wild game, unless the statutes so declare it.

4. TRIAL \S 286—SHOOTING DOGS—LIABILITY—INSTRUCTIONS.

Where a game warden shot dogs which were chasing deer, an instruction to find for the owner of the dogs at least nominal damages was merely intended to state defendant's liability as a matter of law.

Exceptions from Montpelier Municipal Court; Erwin M. Harvey, Judge.

Action by Victor Villa against Guy M. Thayer. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Charles B. Adams, of Waterbury, and J. Ward Carver, of Barre, for plaintiff. H. J. Conant and F. L. Laird, both of Montpelier, for defendant.

HASELTON, J. This is an action of tort, in which the plaintiff recovered damages for the shooting of two dogs, duly licensed, registered, and collared. On trial the defendant admitted shooting the dogs, but claimed to justify such shooting on the ground that he was a deputy game warden, and as such shot the dogs while they were chasing a wild deer, and that the defendant could not reasonably protect the deer in any other manner than by shooting the dogs. The court held that evidence to support these claims constituted no defense, and the defendant excepted.

[1] At one time our statutes permitted any person to kill any dog found hunting a deer. Acts 1898, No. 108, \S 3; *Mossman v. Bost-ridge*, 76 Vt. 409, 57 Atl. 995. But this provision of the law was soon repealed, and has never been restored. Acts 1904, No. 130; P. S. 5325; Acts 1912, No. 201, $\S\S$ 13, 17. The defendant, however, claimed and claims that it was within his authority as a deputy game warden to shoot the dogs while chasing a deer. He does not claim that he had that authority by virtue of any express statutory provision, for there is no such provision, and the powers and duties of game wardens are

carefully defined; but he claims that, as wild deer within the state are the common property of the people of the state (*State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656; *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; *Zanetta v. Bolles*, 80 Vt. 345, 67 Atl. 818), the state may do in defense of such property what a private person may do in defense of his private property. But a game warden is not the state, nor a general public officer of the state, and his authority in the protection of game is wholly derived from the statutes, and is expressly defined thereby. Acts 1912, No. 201, \S 73. If it is desirable that game wardens should have authority to do what the defendant here did, it is for the General Assembly, and not for the courts, to confer it. The claim, above stated, was raised by an exception, which, however, is of no avail.

[2] The defendant in his brief says, in substance, that on trial he offered to show that these dogs had before chased deer, and he claims that, as deer-chasing dogs, they were public nuisances, and might lawfully be shot by any one. We do not, however, find in the record any exception that fairly calls for the consideration of this claim. But, if we treat the question as raised by any exception to any ruling, holding, or instruction of the court adverse to this claim of the defendant, the result is the same. Section 3, No. 108, of the Acts of 1898, already referred to, forbade, among other things, the keeping of deer-hunting dogs, but restricted the right of a private person to kill a dog by virtue of that statutory provision to the killing of a dog found in pursuit of a deer. The other provisions of the section related only to the penalty of the statute. *Mossman v. Bost-ridge*, 76 Vt. 409, 57 Atl. 995. It cannot be held that the repeal of the only clause giving a private person the right to kill for the protection of deer is consistent with the right to kill in some circumstances for such protection.

[3, 4] The enforcement of the fish and game law is in most respects by way of visiting penalties, in some cases severe, upon those who violate it. In a few instances forbidden contrivances for taking fish and game are declared to be the public nuisances, which any person may destroy, and nothing is to be deemed a public nuisance solely by reason of its relation to the destruction of wild game, unless the statute law declares it to be so. The court directed the jury to find a verdict for the plaintiff for at least nominal damages, saying:

"The usual rules applicable to causes of this kind, that the burden is upon the plaintiff to make out his case by a fair balance of the evidence, do not apply, because the court charges you, as a matter of law, that you shall find at least nominal damages for the plaintiff."

To this the defendant excepted, and now says that it was error, since the only question left to the jury was the question of the value of the dogs, and that on that question the burden of proof was on the plaintiff. But the court was not talking about damages, but about the making out of a case, that is, the question of the defendant's liability, and was simply explaining to the jury why he did not submit that question to their determination. The charge on the question of damages was not prejudicial.

Judgment affirmed.

(91 Vt. 538)

STEFFANAZZI et al. v. ITALIAN MUT. BEN. SOC.

(Supreme Court of Vermont. Washington. Oct. 2, 1917.)

1. BENEFICIAL ASSOCIATIONS §10(6)—JUDICIAL SUPERVISION—DISSOLUTION—GROUNDS.

Where the plaintiffs' property rights were violated by their wrongful expulsion from defendant benefit society, courts may interfere; but the wrongful expulsion, in and of itself, did not afford grounds for a decree of dissolution.

2. APPEAL AND ERROR §1009(1)—DECREE OF CHANCELLOR—EXTENT OF REVIEW.

In chancery appeals, the Supreme Court takes the record as it finds it, and from that alone determines whether the decree below is right or wrong, and where it does not plainly appear from the record that the chancellor's decision is erroneous, the decision will be affirmed.

Appeal in Chancery, Washington County; Zed S. Stanton, Chancellor.

Bill by Anselmo Steffanazzi and others against the Italian Mutual Benefit Society. From a decree awarding partial relief, plaintiffs appeal. Affirmed and remanded.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

S. Hollister Jackson, of Barre, for appellants. J. Ward Carver, of Barre, for appellee.

POWERS, J. The plaintiffs were wrongfully expelled from the defendant, an unincorporated association organized for moral, benevolent, and social purposes, and brought this bill in chancery, seeking therein reinstatement to membership, a dissolution of the society, and a distribution of its funds. They appeal from a decree in their own favor. This decree provides for their reinstatement as members of the society, and restitution to all rights and privileges incident to such membership, but it does not dissolve the society. Of this omission the plaintiffs complain.

[1] That a court of equity has jurisdiction to supervise to some extent the affairs of associations of this character, and may, on a proper showing, even decree a dissolution, is not here denied. This jurisdiction is not, however, so extensive as in cases of corporations proper, and is limited to the protection

of the property rights of a member. So, if a member is wrongfully expelled, a court of equity is powerless to interfere, unless he is thereby deprived of a right of property. *Rigby v. Connol*, L. R. 14 Ch. D. 482; *Burke v. Roper*, 79 Ala. 138. It is plain enough that these plaintiffs' property rights were violated by their wrongful expulsion, and reinstatement was their legal right. But the question of dissolution is another matter. Courts are reluctant to interfere with the continuance of these associations, and wrongful expulsion does not, in and of itself, afford sufficient ground for a decree of dissolution. *Burke v. Roper*, supra; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. (Pa.) 98; *Fischer v. Raab*, 57 How. Prac. (N. Y.) 87. So far as *Gorman v. Russell*, 14 Cal. 531, and 18 Cal. 688, relied upon by the plaintiffs, is to the contrary, it is unsound.

[2] It is no doubt true that dissensions might become so violent and differences so irreconcilable that dissolution would be decreed. *Lafond v. Deems*, 52 How. Prac. (N. Y.) 41. And it is argued that so much bitterness has been engendered between the majority and minority members of this society that the plaintiffs cannot avail themselves of the decree of reinstatement without danger of disorder and violence. But the findings do not justify this claim and the evidence is not before us. We again remind counsel that in chancery appeals we sit in error, only. We take the record as we find it, and from that alone determine whether the decree below is right or wrong. We cannot say, from the record before us, that it so plainly appears therefrom that the internal troubles of this society are of such a serious and irreconcilable character that it cannot longer carry out the purposes of its organization, or that its offense was of such a flagrant character that it has forfeited its right to exist, that the decree below was, in the respect complained of, erroneous.

The plaintiffs insist that they ought to have damages for being wrongfully deprived of their membership. But the decree is broad enough to restore them to all their rights, and to enable them to share in all the benefits that have accrued during the interval since their expulsion. This is apparently all they are entitled to. If any other benefits, social or otherwise (see *Currier v. Catholic Order of Foresters*, 87 Vt. 83, 88 Atl. 525), have been lost by them, the findings do not show it. If, as they say in the brief, they find themselves out of pocket on account of this suit, and their decree is "una vittoria morale, niente più"—a moral victory, nothing more—they may find some measure of comfort in the suggestion that this is not an infrequent result of a lawsuit.

Decree affirmed, and cause remanded, for such further proceedings, not inconsistent herewith, as may be required.

(92 Vt. 40)

PHELPS v. UTLEY.

(Supreme Court of Vermont. Washington.
Oct. 2, 1917.)1. WITNESSES \S 58(3, 4) — HUSBAND AND WIFE—COMPETENCY.

Under P. S. 1592, providing that husband and wife shall be competent witnesses for or against each other, except that neither shall be allowed to testify against the other as to a statement or other communication to the other or to another person, nor shall either be allowed to testify as to a matter which would lead to a violation of marital confidence, in a husband's action for the alienation of his wife's affections and crim. con., the wife was a competent witness for the husband as to her relations with defendant; she not testifying against the husband, and her testimony involving no breach of marital confidence.

2. WITNESSES \S 251 — EXAMINATION—REASONS FOR RECOLLECTION.

In a husband's action for alienation of his wife's affections and crim. con., where a witness testified that he saw defendant and plaintiff's wife riding together, and that soon afterwards he met the wife and talked with her, his testimony that this conversation was in reference to the whereabouts of her husband should not have been admitted on the ground that it enabled the witness to fix the date of the occurrence, where nothing was said or done that referred to the date or tended in any way to fix it.

3. WITNESSES \S 410 — RIGHT TO CORROBORATE WITNESS—EXTRAJUDICIAL CONDUCT.

In a husband's action for alienation of his wife's affections and crim. con., where the wife testified for the husband, testimony that on the day following one of the meetings with defendant to which she testified she was very pale and nervous and broke down and cried a good deal should not have been admitted, as it had no evidentiary consequence, except as tending to show her guilt and to corroborate her testimony, and a party may not corroborate his own witness by showing extrajudicial acts, conduct, or statements.

4. TRIAL \S 26, 68(1) — REOPENING CASE—POSTPONEMENT OF TRIAL.

In a husband's action for alienation of his wife's affections, the wife testified for the husband concerning a ride with defendant in his automobile on a certain road. Defendant testified that they were away only a few minutes and went on an entirely different road, and that he turned around at a place where he formerly had a millyard. *Held* that after the parties had rested, it was within the court's discretion to reopen the case and admit testimony offered by plaintiff that the millyard was fenced on the roadside, but, having done so, it was error to deny defendant's application for a delay of the trial in order that he might produce witnesses to meet this testimony.

5. NEW TRIAL \S 21—GROUNDS — DENIAL OF POSTPONEMENT.

Where in support of a petition for new trial because of the denial of such application defendant showed that he and plaintiff's witness were talking about different sides of the highway and he produced a photograph making it appear probable that the road ran through the millyard so that one side was as much the millyard as the other, and making it likely that the jury would take this view of the matter, a new trial would be granted.

Exceptions from Washington County Court; Fred M. Butler, Judge.

Action by Frank C. Phelps against Charles

H. Utley. Verdict and judgment for plaintiff, and defendant brings exceptions and a petition for a new trial. Reversed and remanded, and petition for new trial granted.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

J. Ward Carver, of Barre, and Fred L. Laird, of Montpelier, for plaintiff. Dutton & Mulcahy, of Hardwick, for defendant.

POWERS, J. [1] This is an action on the case for alienation and crim. con. Much of the evidence upon which the plaintiff relied to establish his case came from his wife, who was admitted as a witness subject to the defendant's exception. This was not error, for since the passage of P. S. 1592, the competency of the wife as a witness for her husband has been the rule, and her incompetency, the exception. *State v. Muzzy*, 87 Vt. 267, 88 Atl. 895. So, notwithstanding the earnest argument here made that this ought not to be so in a case like this, it is so, since the wife did not here testify against the husband at all, and it certainly cannot be said that the telling of the story of her liaison with the defendant involved a breach of marital confidence.

[2] Emerson Hoyt, a witness for the plaintiff, testified that he saw Mrs. Phelps and the defendant riding together in the latter's automobile on October 20, 1915, and that soon after he met the defendant's wife and talked with her. Subject to the defendant's exception, he was allowed to state that this conversation with Mrs. Utley was in reference to the whereabouts of her husband. This testimony was admitted on the ground that it enabled the witness to fix the date of the occurrence. But it did not aid the witness in this way. There was nothing said or done that referred to the date or tended in any way to fix it. It is not suggested that it was admissible on any other ground, and it should have been excluded.

[3] A. D. Kimball was one of the plaintiff's lawyers and was a witness in his behalf. He testified that he and the plaintiff went to Montpelier to consult a lawyer and have a suit brought; that this was on November 3, 1915, which was the day after one of the clandestine meetings between Mrs. Phelps and the defendant, as testified to by her; and that they had an interview with Mrs. Phelps at her sister's house that day. Subject to defendant's exception, he was allowed to testify that on that occasion Mrs. Phelps was "very pale and nervous, and broke down and cried a good deal." It may be stated broadly that a litigant may prove any act, conduct, or statement on the part of his adversary which tends to corroborate the claim of the former or impeach that of the latter. But he cannot corroborate himself or his own witness by showing extrajudicial acts, conduct, or statements having that tendency.

He cannot show the sayings of his witness out of court to corroborate his testimony given in court. *Munson v. Hastings*, 12 Vt. 346, 36 Am. Dec. 345; *Gibbs v. Linsley*, 13 Vt. 208; *State v. Flint*, 60 Vt. 304, 12 Atl. 526; *Lavigne v. Lee*, 71 Vt. 187, 42 Atl. 1093; *State v. Turley*, 87 Vt. 163, 88 Atl. 562. This rule is subject to an exception as shown by *State v. Flint*, but it does not apply to the case in hand. So it would have been error to allow Kimball to testify that Mrs. Phelps then told her story just as she had in court. No more was it proper to show by the witness an act of Mrs. Phelps consistent with, and so corroborative of, her testimony. *Green v. State*, 96 Ala. 29, 11 South. 478. It was error to receive this testimony. If Mrs. Phelps' agitation on that occasion was of any evidentiary consequence whatever, it tended to show her guilt, and so to corroborate her as a witness. It had no other value as evidence. But under the rule her appearance of guilt was not admissible as evidence to sustain her or condemn the defendant. It was a purely self-serving circumstance.

[4] Mrs. Phelps testified that she went to ride with the defendant in his automobile on the evening of October 16, 1912; that they started from Cabot and drove out on the Walden Depot road some three miles, and did not return for two or three hours, and so forth. The defendant admitted that they went to ride that night, but insisted that they were away only 15 or 20 minutes; that they went on an entirely different road; that they did not stop anywhere, and turned around, without stopping, at a place where he formerly had a millyard. The parties rested, and the evidence closed on Saturday. The court then took a recess until the following Tuesday morning. When the court came in on Tuesday, the plaintiff asked leave to withdraw his rest, and to introduce one Fifield as a witness to show that the millyard above referred to was fenced on the roadside at the time referred to. To this the defendant objected on the ground that, if admitted, this testimony would raise a new issue of fact, that he was taken by surprise, and that, if it was admitted, he should be given an opportunity to meet it. This objection was overruled, and the defendant excepted. Thereupon the witness took the stand and testified that the millyard in question was fenced on the roadside with a wire fence, which had stood there for about 10 years. The defendant then asked for a delay of the trial that he might have time to get witnesses to meet this testimony. This request was denied, and the defendant excepted.

It is perfectly apparent that it was of vital importance, so far as the defendant's version of the incident of October 16th was concerned, for him to show that this millyard was not fenced on that date. For if it was, he could not have turned around there as he stated. Standing uncontradicted, Fifield's

testimony impeached the defendant, and must have affected his standing as a witness. *Goodall v. Drew*, 85 Vt. 408, 82 Atl. 680. Opening the case to let Fifield in as a witness was, of course, a matter of discretion. So far no error was committed. But opening the door to the plaintiff and closing it to the defendant was error. The witness stated a new fact not before in evidence. The first opportunity to meet this fact was when the witness finished. To deny the defendant's application deprived him of a substantial right, and his exception is sustained. 38 Cyc. 1358; *Herrman v. Combs*, 119 Md. 41, 85 Atl. 1044; *Birmingham Ry., L. & Power Co. v. Saxon*, 179 Ala. 136, 59 South. 534; *Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971; *Kent v. Lincoln*, 32 Vt. 591; 1 Chamb. Ev. § 383.

[5] The defendant brings a petition for a new trial predicated the same on the facts and rulings referred to in the discussion of the exception last above treated. In support of this petition he makes it appear that he could have successfully met Fifield's testimony, if he had been given an opportunity so to do. It now sufficiently appears that Fifield was talking about one side of the highway and the defendant the other. When the former spoke of the millyard, he referred to the land on the side where the mill was; when the latter spoke of it, he referred to the space on the opposite side of the road. It seems probable from a photograph before us that the road ran through the millyard, and that one side was as much yard as the other. It is likely that the jury would take this view of the matter. The petition is meritorious and should be granted.

Judgment reversed, and cause remanded. Petition for a new trial granted, with costs to the petitioner.

(92 Vt. 137)

BOSTON & M. R. R. v. UNION MUT. FIRE INS. CO.

(Supreme Court of Vermont. Washington. Oct. 2, 1917.)

1. COMPROMISE AND SETTLEMENT ¶12—CONSTRUCTION OF AGREEMENT—FIRE INSURANCE.

Where the railroad, whose locomotive set the fire, agreed with the insurers of buildings to reimburse them to the extent of 50 per cent. of the loss, not including expenses or discounts, an item, consisting of an assessment due the insurer from the building owner, which the insurer deducted on paying the loss, was not an expense or discount, but a valid debt, half of which was payable by the railroad.

2. COMPROMISE AND SETTLEMENT ¶15(1)—PRESUMPTIONS.

Agreements, fairly entered into, for the compromise and settlement of disputed claims, are favorably regarded in a court of equity, and are supported as beneficial in themselves and conducive to peace and harmony, when this can be done without working injustice, and does not override other principles upon which courts of equity proceed in the specific enforcement of contracts.

3. SPECIFIC PERFORMANCE ¶97(1) — **PERFORMANCE BY PLAINTIFF—TENDER—EXCUSE FOR MAKING.**

Where the railroad whose locomotive set the fire agreed with the insurers of buildings to reimburse them to the extent of 50 per cent. of the loss, and a dispute arose as to the amount to be paid, the act of the insurer in bringing suit on the alleged original liability was notice of attempted rescission of the compromise, so as to obviate necessity of tender by the railroad before suing for specific performance of the agreement.

4. SPECIFIC PERFORMANCE ¶105(1), 114(4)—**COMPROMISE AGREEMENT.**

The insurer having sued on the alleged original liability, and the railroad having been refused permission to plead the compromise agreement, it was proper for it to ask specific performance, in doing which it was enough to aver its readiness and willingness to perform and to offer to do so.

5. COMPROMISE AND SETTLEMENT ¶11—**PERFORMANCE—TIME.**

No time being fixed by a compromise and settlement agreement within which it should be performed, a reasonable time is allowed by law.

6. SPECIFIC PERFORMANCE ¶62 — **RIGHT TO REMEDY—PREVENTION OF FRAUD.**

Where it appears that a compromise and settlement had been fully performed by certain of the parties, so that to permit another party to sue on the original liability would be a fraud on the others, specific performance of the compromise agreement should be granted.

Appeal in Chancery, Washington County;
E. L. Waterman, Chancellor.

Bill by the Boston & Maine Railroad against the Union Mutual Fire Insurance Company. Decree dismissing the bill, and plaintiff appeals. Reversed, and cause remanded, with directions.

Argued before MUNSON, C. J., and WATSON, HASELTON, POWERS, and TAYLOR, JJ.

George B. Young, of Montpelier, and Walter H. Cleary, of Newport, for appellant. Porter, Witters & Harvey, of St. Johnsbury, for appellee.

WATSON, J. When this case was here before, the bill was held sufficient on demurrer, and the cause remanded. 83 Vt. 554, 77 Atl. 874. The cause being then heard before a special master, and exceptions to his report filed by the plaintiff, the chancellor rendered a decree overruling the exceptions and dismissing the bill, with costs to the defendant. Therefrom the plaintiff appealed.

The bill is brought to enjoin the defendant from prosecuting a certain action at law against the plaintiff, and for the specific enforcement of an agreement made between the plaintiff and the defendant and six other insurance companies and Cushman & Rankin Company. It appears from the master's report that on or about May 12, 1905, the factory, machinery, and stock of Cushman & Rankin Company, located at Lyndon, this state, were consumed by fire, and that the defendant company and six other insurance companies were insurers of the property

against such loss. It was claimed by the insurers and the insured that the fire originated from sparks communicated by one of the plaintiff's locomotive engines. This claim was denied by the plaintiff. The loss was entire. The insurers settled with the insured on the basis of a total loss, and by agreement were subrogated to the rights of the insured. On November 22, 1905, the plaintiff made an offer in writing, in the nature of a compromise, in reference to the claims arising out of the burning of the property, as follows:

"We will pay 50 per cent. of the actual amounts paid to Cushman & Rankin by the insurance companies, with no allowance for expenses or discounts. We will pay to Cushman & Rankin 50 per cent. of their actual loss over and above the amount of insurance received by them, such loss to be determined in the following manner, to wit. * * *

This proposition was accepted by the insured, and by all the insurers, including the defendant. Both the plaintiff and the defendant entered into this agreement, contingent upon all the other parties coming into the settlement. The exact amount of the loss had not then been ascertained. Nothing was said, in making the offer or in its acceptance, about any release; but it was understood, expected, and intended by every party that, on the payment to the insurance companies of 50 per cent. of the amount paid by them to the insured, they would release the plaintiff from any claim of liability or damage they might have against the plaintiff by reason of the burning of the property of the insured, and it was understood by all the parties, though not stated, that the settlement would be for cash.

On July 10, 1906, Henry O. Cushman, who represented the insured, wrote from his office in Boston to the defendant that the plaintiff was "ready to pay the portion of the Lyndon fire loss agreed upon," and inclosing a release, which he said had been similarly drawn for each insurance company, asking the defendant to have it signed and returned at the earliest moment possible, further stating that the plaintiff would not deliver a check for any one loss until all receipts had been returned, and therefore it was for the interest of the defendant, as well as of others, that they be returned immediately. The release was returned by the defendant, under date of July 14th, unsigned, for two reasons: (1) That it was not sufficiently specific as to the loss or liability covered; and (2) the amount stated therein was \$741.55, whereas it should be \$750.

Regarding the first reason, it is enough to say that the defendant made and executed a release in terms satisfactory to itself, and forwarded the same to Cushman under date of July 23, 1906, which in this respect was also satisfactory to the plaintiff. This release was, however, rejected by the plaintiff, because the money consideration stated therein was \$750, instead of \$741.55. This

position was taken by the plaintiff, because its offer of compromise (which was accepted) was to pay 50 per cent. of the actual amounts paid to the insured by the insurers, "with no allowance for expenses or discounts," claiming that the latter sum was 50 per cent. of all the defendant paid, and that, if the \$16.90 (mentioned below) came into the matter at all, it was covered by the words "expenses or discounts," used in the offer. The defendant claimed that it paid the face of its policies, \$1,500; that at the time of payment the insured owed the defendant \$16.90, as and for an assessment due it at the time of the fire, and the defendant paid itself, or offset, that sum, giving the insured a check for the balance. The master finds the facts connected with the \$16.90 to be as claimed by defendant.

[1] We think the latter's position in this respect was in accordance with the intended and reasonable meaning of the compromise agreement. That item was not "expenses or discounts." It was a valid debt due from the insured to the defendant, and as such could be and was used in part payment of the sum due from the latter to the former under the terms of settlement; and, when so used, it properly became a part of the actual amount paid. In sending the release last mentioned to Cushman, the defendant accompanied it with a letter stating that the release was made to read \$750, as that was the amount which, by its books, the company actually paid; that the deduction was for assessments which were due defendant up to the date of the fire; that defendant would not, however, insist upon the payment of the sum of \$750, for the reason that it did not desire to delay settlement, and, if the plaintiff still refused to pay that sum, defendant would accept the \$741.55. It appears from the record that thereupon Mr. Rich, the general counsel for the plaintiff railroad company, who had these matters in charge, with full knowledge of the contents of the several letters from defendant to Cushman, and of the claim of the former concerning the \$16.90, performed the agreement of compromise as to the insured and the other insurers, respectively, paying them in the aggregate the sum of \$8,845.91, or \$8,850.91, but took no further steps toward the performance thereof as to the defendant.

Thus the matters stood until the 27th day of August, 1908, when the defendant brought for its benefit, in the name of the insured, an action at law against the plaintiff railroad company to recover for the loss sustained by the fire. Therein the railroad company pleaded the release received by it from the insured under the compromise agreement as a bar to the action, and to the replication filed to such plea, setting up this defendant's rights by subrogation, and that the suit was brought for its benefit, the railroad company interposed a demurrer, and, the same being overruled, took an ex-

ception, and thereon brought the case to this court. The judgment of the lower court, upholding the replication, was affirmed, and the cause remanded, in October, 1909. Within the following month these equity proceedings were instituted to have the prosecution of the suit at law perpetually enjoined, and the compromise agreement specifically enforced. A temporary injunction was issued and is still in force.

The master states that the plaintiff is not, and never has been, ready and willing to pay the defendant 50 per cent. of the amount the latter paid the insured; that it did not pay at the time defendant returned the release duly executed, "and has never since been ready and willing to pay, \$750, which was the amount proposed in the orator's offer, and even now does not place itself on that ground in the bill now pending, but therein alleges the amount to be \$741.55." Fairly understood, this finding is tantamount to saying that the plaintiff is not now and never has been ready and willing to pay defendant \$750—not that plaintiff has not been, and is not now, ready, and willing to pay \$741.55. It is true that in the tenth and eleventh paragraphs of the bill the plaintiff alleges in substance that it has been and now is ready and willing, and has offered, to pay the defendant the sum of \$741.55, in accordance with the terms of the agreement. But its averments and offer in the fifteenth paragraph are broader as to amount, being "that it is now ready and willing to pay, and hereby offers to pay, * * * the one half of all the money which the defendant herein paid to the" insured by reason of the burning of the latter's property, "in compliance with the terms of said agreement." A comparative examination of the facts found by the master, and those alleged in the bill, which, on demurrer, were held sufficient to entitle the plaintiff to the relief sought, show no material difference in matters essential to the plaintiff's case, except the difference of \$16.90 in the sum paid by the defendant to the insured, and except, further, in respect to the plaintiff's willingness, desire, and offer to perform the compromise agreement.

We have already noticed that the said variation of \$16.90 was at most a dispute as to how that item, a mere subordinate matter, should be treated in determining the actual amount paid by defendant to the insured. In view of the phrase in the agreement, "with no allowance for expenses or discounts," and each party acted according to its own view. Whatever the actual amount paid proved to be under the proper interpretation of the agreement, the plaintiff was bound to pay, and the defendant to accept, 50 per cent. thereof in settlement. So the difference in the views of the parties in this respect constituted no real obstacle in the way of executing the agreement within such time as, in the circumstances, would reason-

ably answer the requirements of its provisions. Indeed, by its letter of July 23, 1906, to Cushman, of which the plaintiff's general counsel had knowledge, the defendant offered to accept the smaller sum if the plaintiff still refused to pay the larger. If this difference had previously been such an obstacle, it was no longer so.

[2] The agreement included as parties each and all the insurers, the insured, and the railroad company, as required by the latter and by defendant. It in terms covered all matters between the railroad company and each and all the other parties named, growing out of the burning of the insured's property. The claims being made against the railroad company were doubtful in character. The contract was single and entire, the consideration of which was the mutual promises of the parties. It was fully performed by the insured, by all the insurers, except the defendant, and by the railroad company, except as to the defendant's claim. Nothing remains to be done, to effect a full performance by all the parties interested, except the payment by the plaintiff company to the defendant of the sum due it under the compromise and the giving of a release by the latter. The agreement was without fraud or imposition. It was certain, fair, and just in all its parts. Agreements, fairly entered into, for the compromise and settlement of disputed claims, are favorably regarded in a court of equity, and are supported as beneficial in themselves and conducive to peace and harmony, when this can be done without working injustice, and does not override other principles upon which courts of equity proceed in the specific enforcement of contracts. 5 R. C. L. 901; this same case, 83 Vt. 554, 77 Atl. 874.

[3, 4] The plaintiff's delay in performing the contract as to the defendant since the latter instituted its suit at law is sufficiently accounted for. The bringing of that suit, based upon the alleged original liability of the plaintiff to the insured, was notice to the former of the defendant's attempted rescission of the agreement of compromise, and the necessity of a tender by the plaintiff of the sum due defendant under the terms of that agreement was obviated, if it before existed; for a tender would then have been useless, and was not required. *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103. By pleading in defense of the action at law the release given by the insured in execution of the agreement, the plaintiff undertook to stand upon the agreement as still existing; and when the ruling of this court was had against it on the pleadings in that case, the plaintiff, without unreasonable delay, filed its bill, asking that the agreement, as to the defendant's claim, be specifically enforced. In the circumstances existing, the plaintiff was justified in instituting proceedings at once to compel such enforcement, and in so doing it was enough to aver in the bill the

plaintiff's readiness and willingness to perform in compliance with the terms of the agreement, and an offer so to do. 3 Pom. Eq. § 1407; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495. See *Amsden v. Atwood*, 68 Vt. 322, 35 Atl. 311.

[5] The failure of the plaintiff to perform the contract as to the defendant before the latter brought the suit at law has not been so satisfactorily explained. Time was not essential in the performance of the contract, but it was material. *Burton v. Landon*, 66 Vt. 361, 29 Atl. 374. No time was fixed by the agreement within which it should be performed, and consequently a reasonable time was allowed by law. If the contract were wholly between the plaintiff and the defendant, such a delay, without showing circumstances reasonably excusing the same, would very likely defeat the right to the remedy sought. Mr. Pomeroy says:

"If time is material a failure to comply with the terms of the contract is not necessarily a bar to an enforcement; but it throws upon the defaulting party the burden of explaining his neglect and of satisfying the court that, notwithstanding the failure, a denial of the remedy to him would be inequitable." Pom. Con. 402.

And in *Walker v. Jeffreys*, 1 Hare (23 Eng. Ch.) 341, Vice Chancellor Wigram says:

"The general rule in equity I take to be that a party who asks the court to enforce an agreement in his favor must aver and prove that he has performed, or been ready and willing to perform, an agreement on his part. Where, however, the strict application of that general rule would work injustice, the court will relax it. A breach of an agreement may have been committed, for which a jury would only give a nominal damage. A breach may have been committed, which a jury would consider as waived; and if the party committing those breaches has substantially performed other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a court of equity might fail in doing justice, if it refused to decree a specific performance."

[6] The state of things as they existed before the making of the agreement cannot be restored by returning to the plaintiff what it paid to the several other parties under the compromise. The situation of the defendant and its relations to its claim covered by the agreement have not been so altered that a specific execution would be inequitable. Nothing is due it from the plaintiff under the agreement but money, and for the delay in the payment of that interest thereon is in equity full compensation. Such order can be made as to the costs in the suit at law as to the court seems just and equitable. The agreement having been thus executed in respect to the claims of all the parties except the defendant, it is but common justice that it be carried into execution in respect to the claim of the defendant also. If specific enforcement be refused, and the defendant allowed to repudiate the agreement and prosecute the suit at law to final judgment on its original claim, it would operate as a fraud upon the other insurers and the insured,

whose coming into the settlement the defendant made essential to its own participation therein, and as to whom the agreement was fully executed before the defendant's attempted repudiation. By reason of the special circumstances of the case, and to prevent such fraud and injustice, specific performance would seem to be indispensable to justice; and a denial of such remedy would be inequitable to the plaintiff.

The plaintiff being entitled to relief on the facts reported, none of its exceptions have been considered.

Decree reversed, and cause remanded, with directions that a decree be entered that, upon the payment by the plaintiff to the clerk of the court of chancery within and for the county of Washington, for the benefit of the defendant, the sum of \$750, with simple interest thereon at 6 per cent. from the 1st day of September, 1906, to the day of payment, together with the taxable costs of the plaintiff named in the said suit at law, to the time of the bringing of this suit in equity, less the taxable costs of the plaintiff in this equity suit, and also less this plaintiff's taxable costs as defendant in the said suit at law after the bringing of this suit in equity, both of which are to be paid by the defendant (Union Mutual Fire Insurance Company), then the prosecution of the said suit at law shall be perpetually enjoined, and the defendant in this suit in equity shall immediately execute in due form and deliver to said clerk of court, for the benefit of the plaintiff, a release to the plaintiff, which shall be in compliance with the provisions of the said compromise agreement: Provided that, if the plaintiff shall fail to comply with the foregoing provisions of the decree within 30 days after the entry of the decree by the chancellor, pursuant to this mandate, then the bill in this case shall be dismissed, with costs to the defendant, and the defendant left to prosecute the said action at law as it may be advised.

(32 Vt. 34)

TOWN OF GLOVER v. TOWN OF GREENSBORO.

(Supreme Court of Vermont. Orleans. Oct. 2, 1917.)

1. DOMICILE ⇐4(2)—CHANGE.

A purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile, but the fact and intent must concur.

2. PAUPERS ⇐52(6)—RESIDENCE—SUFFICIENCY OF EVIDENCE.

In assumpsit for support of a pauper, evidence held sufficient to sustain a finding that the pauper had resided and supported himself in defendant town, within P. S. 3667, providing that the last town where a pauper resided and supported himself for three years was liable for his support.

Exceptions from Orleans County Court; Zed S. Stanton, Judge.

Assumpsit by the Town of Glover against the Town of Greensboro for the support of a pauper. Judgment for plaintiff, after overruling of exceptions to findings of a referee, and defendant excepted. Affirmed.

This case was heard below on a referee's report and defendant's exceptions thereto. The exceptions were overruled, and judgment rendered for the plaintiff, to recover the amount found to have been expended by it in the support of the pauper, L. G. Bush, and his wife. Defendant excepted to the judgment.

The evidence taken before the referee, in respect of the intent of the alleged pauper as to residence, is made a part of the report, solely on that question. The ultimate issue was whether the pauper last resided in the defendant town for the space of three years, supporting himself and family, as was necessary by statute (P. S. 3667), in order to the plaintiff's right of recovery for the assistance rendered. The assistance was furnished by the plaintiff town, part in February, 1914, and part in April, 1914, when Bush was a resident therein, was poor, and in need thereof.

At all times mentioned in the findings, Bush had a wife, whose needs and poverty increased or were relieved, according as her husband's poverty and means were increased or relieved, and who shared with him in the benefit of the assistance furnished. Bush and his wife went to defendant town as early as January, 1908, and immediately took up a residence therein, moving upon and occupying a farm, keeping house, supporting themselves, and never received any assistance from the town while either remained therein. In October, 1910, they moved from this farm, taking with them their household goods, storing them in an old building in the town, belonging to one Carl Thompson (whose wife is a cousin of Mrs. Bush), after which Bush and his wife did not keep house in that town. From the time last mentioned until the following April, Mrs. Bush remained with her said cousin for the most part, but visited occasionally among neighbors living in the same town, and continuously resided in that town from January 31, 1908, until April, 1911. Mr. Bush also resided continuously therein from January 31, 1908, except as stated below.

Immediately after leaving the farm as stated above, Mr. Bush made a visit to Derby, remaining about a week, and returning to defendant town, where he and his wife continued to visit with the Thompsons until after the following January, during which time Bush and his wife helped the Thompsons a bit, and during which time Bush worked out to some extent in the town; but otherwise neither he nor his wife paid the Thompsons anything for their support, nor did the Thompsons pay them, or either of

them, anything for their assistance. Mrs. Thompson tired of the presence of Mr. Bush as a guest, and finally told him to get out; that she had had him there as long as she wanted him. The referee states that he is unable to find that Bush left the Thompsons by reason of the inhospitable suggestion of Mrs. Thompson; but thereafter, pursuant to a previous contract of hiring, Bush, on the 1st day of January, 1911, went to the plaintiff town to work for one William Graham, leaving his wife at the Thompsons in the defendant town. Bush remained in Glover in the employ of Graham until February 1, 1911, when he completed his work there, but by reason of a heavy snowstorm remained a few days longer, after which he returned to the Thompsons, where he stayed a day or so with his wife. From that time on, until his final removal from defendant town as mentioned below, the referee states that he is unable to find where Bush kept himself; but he was at the Thompsons only a small portion of the period.

In the following April (1911) Bush and his wife, taking their household effects from the old building, where stored as stated above, moved from defendant town to plaintiff town, and have ever since remained there. After such removal, and prior to March, 1913, the overseer of the poor of the latter town had occasion to help them, and on February 27, 1914, sent notice to the overseer of the poor of defendant town, in accordance with the provisions of section 3667 of the Public Statutes, concerning which no question is made. The assistance for which recovery is here sought was rendered after the giving of such notice.

The referee finds that prior to such removal in April, 1911, Bush had been thinking of so doing, and had been thinking of permanently leaving Greensboro, but was unable to find that he ever definitely determined permanently to abandon that town and take up his residence elsewhere until at the time of his removal with his wife in the month last mentioned. His leaving that town on previous occasions is found to have been at most but temporary absence, and his residence there is found to have continued from the 31st day of January, 1908, until April, 1911.

Defendant excepted to the finding last stated, as not supported by the evidence, and as inconsistent with the other facts found, especially that:

"When he [Bush] left defendant town and went to plaintiff town January 1, 1911, he went under an agreement to work for Graham two months, but, as stated, worked only one month, and while at said Graham's had no home in defendant town, other than with the Thompsons, to whose place he could not return as a matter of right."

Argued before WATSON, C. J., and HAS-ELTON, POWERS, TAYLOR, and MILES, JJ.

Cook & Norton, of Lyndonville, for plaintiff. John W. Redmond, of Newport, for defendant.

WATSON, C. J. There can be no doubt, on the facts found, that the alleged poor person was a resident of the town of Greensboro, from January 31, 1908, to January 1, 1911, supporting himself and family, within the meaning of the law. The real question is whether, on the day last named, when he went to the town of Glover to work for Graham under a contract of hire, he changed his residence to that town. If he did, his continuous residence in Greensboro was 30 days short of 3 years, the time essential to the latter's liability. But, if he did not, then he last resided in that town for the space of 3 years, supporting himself and family, and a recovery can be had for the assistance furnished.

[1] The intention of a person in respect of making a change in his place of residence is important to consider; but it is not alone determinative of the fact of effecting the change. Domicile is not a thing resting wholly in intention, and residence is a fact. *Jamaica v. Townshend*, 19 Vt. 267; *South Burlington v. Worcester*, 67 Vt. 411, 31 Atl. 891. The person's purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove, without the intention of going back. *Mt. Holly v. Plymouth*, 89 Vt. 301, 95 Atl. 572. To constitute domicile, the fact of residence and the intent to make the place of residence the home of the party must concur. *Fulham v. Howe*, 62 Vt. 386, 20 Atl. 101.

[2] The question of the change of residence in the case before us was to be determined on all the evidence as to intent, combined with that bearing on the actual removal. We think the finding of the referee, to which exception was taken, was amply supported by the evidence, and is not justly subject to the criticism made. Nor is such finding inconsistent with the other findings, quoted in the exception, that, while working for Graham in plaintiff town, Bush "had no home in defendant town other than with Thompson, to whose place he could not return as a matter of right." One element of the finding objected to being that the occasions when Bush was away from the latter town previous to moving away with his wife in April, 1911, "were at most but temporary absences," there is not even color of inconsistency between the two findings, for he had not abandoned that town as the place of his residence. *Mt. Holly v. Plymouth*, cited above. The exception is not sustained in either respect.

The exceptions saved in connection with the admission and use of evidence have not been briefed.

Judgment affirmed.

(92 Vt. 47)

HUMPHREY v. WHEELER.

(Supreme Court of Vermont, Orleans, Oct. 2, 1917.)

1. ATTACHMENT \S 322 — DESCRIPTION OF PROPERTY—RETURN—SUFFICIENCY.

Where defendant had more in number of all the articles of personalty than were attached, and the officer's return did not show which were attached, no lien was created.

2. EVIDENCE \S 340(1) — CERTIFIED COPY OF ATTACHMENT—ADMISSIBILITY.

A certified copy of the writ of attachment and the officer's return thereon, filed in the town clerk's office in making the attachment, were admissible in evidence, in view of P. S. 1456, requiring the clerk to make a record thereof.

3. ATTACHMENT \S 53 — PROPERTY SUBJECT — VENDOR'S LIEN.

Articles of defendant, upon which there were vendor's liens for the purchase price equal to or greater than the value thereof, were not subject to attachment.

4. ATTACHMENT \S 322 — RETURN — SUFFICIENCY.

The return, simply naming as attached "one spike tooth harrow," without giving its location more definitely than in a named town, was insufficient to create a lien.

Exceptions from Orleans County Municipal Court; H. B. Cushman, Judge.

Action by George A. Humphrey against O. A. Wheeler for the alleged conversion of certain personal property. Plea, the general issue. Judgment for plaintiff, and defendant brings exceptions. Reversed, with costs.

The plaintiff was a constable, and on the 26th of October, 1915, attached the personal property sued for in this action upon a writ duly issued by the Orleans county municipal court in a suit brought by W. A. Merriam & Son against O. A. Wheeler, the present defendant. In that suit judgment was rendered in favor of Merriam & Son against Wheeler. On the 28th day of October, after the service of the attachment writ, and before the trial in the Merriam suit, the defendant Wheeler conveyed away the property in question to his son, and on a later date, before the issuance of the execution in the Merriam case, the said son deeded the property to a third person, who went into possession of the same. The present suit was brought by the plaintiff, as constable, to recover damages for the alleged conversion of the property by the defendant, after the attachment of it by the plaintiff as above set forth. The findings of fact as to the specific items of the personal property are set forth in the opinion.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

W. W. Reiriden, of Barton, for plaintiff. Frank D. Thompson, of Barton, for defendant.

WATSON, C. J. [1] The findings show that at the time of the attachment the defendant owned, and had on his farm in Glover, 7 cows, 52 bunches of clapboards, sev-

eral bushel baskets, several Fairbanks platform scales, 287 cedar posts, and about 300 bushels of potatoes. The attachment was of 5 cows, 42 bunches of clapboards, one bushel basket, one Fairbanks platform scales, 200 cedar posts, and 150 bushels of potatoes. Applying the officer's return to the actual state of defendant's property, the attachment as to these articles or kinds of property cannot be maintained; for as to each the defendant had more in number than were attached, and there is nothing showing which were attached, and therefore no lien was created thereon. To give the officer constructive possession of the property attached, it was necessary that it be described in the return with reasonable certainty. And such certainty requires that the property be sufficiently pointed out to enable the debtor, and those with whom he may deal, to be informed that it is attached. *Bucklin v. Crampton*, 20 Vt. 261; *Fullam v. Stearns*, 30 Vt. 443; *Pond v. Baker*, 55 Vt. 400; *Barron v. Smith*, 63 Vt. 121, 21 Atl. 269; *Stearns v. Silsby*, 74 Vt. 68, 52 Atl. 115.

[2] The court received in evidence, subject to defendant's exception, a certified copy of the writ in the case of *Merriam & Son v. O. A. Wheeler*, and the officer's return thereon, lodged by the plaintiff in the town clerk's office in Glover, in making the attachment in question. The reception of this evidence was not error. When a copy of a writ of attachment, upon which personal property is attached, is lodged in the office of the town clerk, such clerk is required by law to make a record thereof in a book kept for that purpose. P. S. 1456. The record thus required to be made is public in character, and a duly certified copy is admissible in evidence. *Pond v. Campbell*, 56 Vt. 674; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Ripton v. Brandon*, 80 Vt. 234, 67 Atl. 541.

[3] It is found that the meat cart mentioned in the return effecting the attachment was sold conditionally to the defendant by *Taplin & Rowell*, of Barton, this state, and at the time of the attachment they had, and have ever since had, a valid vendor's lien on the same for unpaid purchase money, more in amount than the value of the meat cart. This shows that the defendant did not have at the time of the attachment, nor has he since had, any attachable interest therein. It is also found that the spring tooth harrow mentioned in the return was sold conditionally to the defendant by *F. S. Whitcher*, of Barton, and at the time of the attachment the latter had, and has ever since had, a valid vendor's lien on the same for the full amount of the purchase price. While this finding is not in terms that the amount of the lien is all the harrow is worth, it is equivalent to that, for it is inconceivable that an implement of agriculture in use on a farm appreciates in value. The defendant, therefore, had no attachable inter-

est in this harrow. Obviously this was the view of the plaintiff and the attaching creditors, for in this instance, as well as in that of the meat cart, neither of them ever paid or tendered to the vendor the amount due on the lien.

[4] The return names as attached "one spike tooth harrow," but it gives no other description of it, nor is its location given more definitely than in the town of Glover. No evidence was offered as to whether the defendant had more than one such harrow in that town at the time of the attachment. In this respect the return was like that relating to the hemlock bark in the case of *West River Bank v. Gorham*, 38 Vt. 649, which was held to be too indefinite as to the location of the property to effect any attachment thereon. Again, in *Stearns v. Silsby*, cited above, it was held that such a return, supplemented by extrinsic evidence showing that the debtor had only the two horses and surrey sued for, in the town in which the attachment was made, was sufficient. There the court discussed the distinction at some length, and made plain the essentiality of such supplemental showing, in order to give reasonable certainty to the description of the property in such a return. It follows that the return as to the spike tooth harrow was not sufficient to create any lien thereon.

The foregoing being determinative of the case, no other question raised by the defendant is considered.

Judgment reversed, and judgment for the defendant to recover his costs.

(130 Md. 661)

BRUNSMAN v. CROOK et al. (No. 2.)

(Court of Appeals of Maryland. May 4, 1917.
Motion for Modification of Opinion as to
Costs Denied Oct. 3, 1917.)

1. JUDGMENT \S 768(1) — LIEN — TRANSCRIPT OF JUDGMENT.

Code Pub. Civ. Laws, art. 26, §§ 19, 20, provide that when a judgment has been rendered in one county or in the city of Baltimore it becomes a lien upon the property of defendant in such county or city, and that upon the transmittal of the record thereof, together with a copy of the docket entries, from the court in which judgment was rendered, it becomes a lien as from time of its record on all defendant's leasehold interests, to the same effect as liens are rendered by judgment upon realty. *Held*, that where a judgment of the superior court of Baltimore was transmitted to the circuit court of one county, the latter court could not treat it as an original judgment therein, and the clerk thereof could not certify the proceedings to another county, so as to create a lien on property in the latter county.

2. JUDGMENT \S 766 — LIEN — COPY OF DOCKET ENTRIES.

A judgment is not a lien on land in another county until a certified copy of the docket entries in the case, taken from the court where judgment was rendered, is recorded in that county, and, until properly certified from the court rendering judgment, an attachment to enforce the judgment against property in another county is unauthorized.

3. APPEAL AND ERROR \S 876 — REVIEW — SCOPE — JUDGMENT — ATTACHMENT — APPEAL FROM ORDER ON MOTION TO QUASH.

Where judgment has been rendered on a note, matters which were for the consideration of the jury cannot be reviewed on appeal from an order on motion to quash an attachment on the judgment, and the inclusion of evidence on such matters in the record is unwarranted.

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

"To be officially reported."

Proceeding by Howard A. Crook and Henry A. Kries, copartners, trading as Crook-Kries Company, use of David G. Steele, against Joseph A. Brunzman, garnishee of James P. Bannon. From an order overruling a motion to quash a writ of attachment, defendant appeals. Judgment reversed, and attachment quashed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Jacob S. New and Julius H. Wyman, both of Baltimore (J. R. Brunzman, on brief), for appellant. James Clark, of Ellicott City, for appellees.

STOCKBRIDGE, J. This case is an appeal from the circuit court for Howard county, rendered in an attachment proceeding under the following circumstances. On the 10th of May, 1910, a judgment was rendered in the superior court of Baltimore city against Francis I. Mooney, trustee, for the sum of \$204.27, and on the 6th of October in the same year a judgment was rendered against James P. Bannon for the sum of \$208.73. The foundation for both of these judgments was a promissory note for \$200, to which the interest between the date of the maturity of the note and the date of the rendition of the judgment as to each defendant was duly entered. In 1916 a writ of attachment was directed to be issued from the superior court of Baltimore city to Anne Arundel county, and accompanying the writ was a copy of the docket entries in the suit in Baltimore city. So far as appears by the record no return was made to the circuit court for Anne Arundel county of the writ issued from the superior court of Baltimore city; but on April 5, 1916, there was filed an order in Anne Arundel county for a writ of *fi. fa.*, and in June of the same year, and without any return having been made apparently to the writ of *fi. fa.*, there was an order to issue an attachment to Howard county from the circuit court for Anne Arundel county.

When the case reached Howard county a motion was made to quash the writ of attachment issued from Anne Arundel county, and, when this motion had been overruled, the judgment from which this appeal was taken was entered. The first question for consideration which the record presents is, there-

fore, the correctness of the action of the circuit court for Howard county in overruling the motion to quash.

[1, 2] The question at issue is, therefore, one of practice under sections 19 and 20 of art. 26 of the Code of 1912, which provides, in effect, that when a judgment has been rendered in one county or in the city of Baltimore it becomes a lien upon the property of the defendant in such county or city, and that upon a transmittal of the record of such judgment, together with a copy of the docket entries, from the court in which the judgment was originally rendered, the same becomes a lien as from the time of its recording upon all leasehold interests and terms of years of the defendant in land, except leases from year to year, and leases for terms of not more than five years and not renewable to the same extent and effect as liens are rendered by judgment upon real estate.

The error into which the appellee fell, and apparently also the circuit court for Howard county, was in interpreting this language as giving to the copy of the docket entries transmitted from the court in which the original judgment was entered the full force and effect of an original judgment in the county to which it had been sent, when, by its express terms, the act simply makes it a lien upon certain enumerated lands and interest in lands in such county. The only docket entries which it was possible for the clerk of the circuit court for Anne Arundel county to send to Howard county were those relating to the proceeding in Anne Arundel county. He could not certify to the proceeding had in the superior court of Baltimore city, in which the judgment was originally rendered; that could only have been done by the clerk of that court. The rule as laid down in 2 Poe on Practice (3d Ed.) § 377, is that "a judgment is not a lien on land in another county until a certified copy of the docket entries in the case, taken from the court where the judgment was rendered, shall be recorded," etc., and no judgment of any character was rendered in the circuit court for Anne Arundel county. The act as embodied in the present Code is a re-enactment with some slight modifications of a very early act in this state which came up for discussion in the case of *Harden v. Moores*, 7 Har. & J. 4, decided in 1825, where the judgment then under review was one which had been rendered in Baltimore city, and was sought to be enforced in Harford county, and in passing upon that case Judge Buchanan said:

"An attachment is not an ordinary process, * * * by which to arrive at the fruits of a judgment, and will only lie, when specially authorized * * * from the court in which the judgment was rendered * * * and from the court of the county in which the defendant may

happen to be, who has fled, removed, or absented himself from the county in which the judgment was rendered upon the production of a transcript of the record."

This case is closely similar to the one now presented, and the reasoning of that case is equally applicable to the questions involved in this appeal. The subject is also considered in *Hodge & McLane on Attachments*, § 254, and the rule laid down is:

"The copy of the docket entries is essential to inform the court having jurisdiction of the writ that the judgment upon which it issued has been rendered and remains unsatisfied."

To the same purport may be added the case of *Randle v. Mellen*, 67 Md. 186, 8 Atl. 573.

The appellee now asks the court to reverse this line of decisions upon the authority of the case of *Parker v. Brattan*, 120 Md. 428, 87 Atl. 756. The decision in that case is very far from sustaining the contention of the appellee. A suit had been instituted in Wicomico county and was subsequently, but before trial, removed to Somerset county. A judgment was rendered in the case in Somerset county, and a copy of the docket entries in the last-named county returned to the circuit court for Wicomico county, where it was sought to be enforced. It will be observed that, the case having originated in Wicomico county, when the return of the proceedings in Somerset county was made, the circuit court for Wicomico county had upon its docket the full record of the proceeding, being the original record of the case prior to the time of its removal to Somerset county, and a duly certified transcript or record of what had taken place in the county where the judgment was entered. That case, therefore, is without any controlling influence upon the one now presented, and it follows from what has been said that the motion to quash should have been granted.

[3] Several other questions were presented in the record which this court deems it unnecessary to consider, as they all arose subsequent to the ruling of the circuit court for Howard county upon the motion to quash. The record is considerably incumbered with evidence relating, or supposed to relate, to the circumstances attending the giving of the note which was the foundation of the action. These circumstances, so far as they were relevant at all, were matters for the consideration of the jury, and are not properly subject-matters for review by this court, and the inclusion of this evidence in the record can find no sufficient warrant.

The judgment appealed from will therefore be reversed, and the writ of attachment issued from the circuit court for Anne Arundel county to Howard county quashed.

Judgment reversed, and attachment quashed, costs to be paid by the appellees.

(116 Me. 331)

McALPINE et al. v. McALPINE.

(Supreme Judicial Court of Maine. Oct. 3, 1917.)

1. ACTION \S 24—EQUITABLE DEFENSES—ANTENUPTIAL AGREEMENTS—EFFECT.

An antenuptial agreement of a wife to accept a sum in lieu of all other interest in her husband's estate, being unexecuted in that it provided that she should execute the necessary papers to complete it, is not a bar to an action at law by the widow to recover her distributive share, but may be enforced in equity.

2. HUSBAND AND WIFE \S 29(7) — ANTENUPTIAL AGREEMENTS—EXECUTION.

An antenuptial contract, though not signed in the presence of two witnesses, as required by Rev. St. 1903, c. 63, § 6, is valid and bars the wife's right by descent to share in the real or personal estate of her husband.

3. DESCENT AND DISTRIBUTION \S 62—ANTENUPTIAL AGREEMENTS—EFFECT.

Such contract further bars the wife from petitioning for an allowance from the estate.

Report from Supreme Judicial Court, Cumberland County, in Equity.

Bill by Edith H. McAlpine and others against Alice C. McAlpine. Case reported. Bill sustained.

Argued before CORNISH, C. J., and KING, BIRD, HALEY, and PHILBROOK, JJ.

Peabody & Peabody, of Portland, for plaintiffs. Coombs & Gould, of Portland, for defendant.

HALEY, J. A bill in equity asking for the specific performance of an antenuptial agreement, and for an injunction restraining the defendant from prosecuting a petition for an allowance filed by her in the probate court for Cumberland county. The defendant filed a general demurrer to the bill, and an answer admitting all the facts alleged in the bill; the case is before this court upon report.

The plaintiffs are the children of Silas H. McAlpine, late of Portland, county of Cumberland, who died intestate March 14, 1916; one of said children being the administratrix of the deceased. The defendant is the widow of the said Silas H. McAlpine. On January 6, 1900, Silas H. McAlpine, then a widower, and the defendant, then Alice C. Moore, both more than 21 years of age, being engaged to be married, executed an antenuptial contract, by the terms whereof in consideration of the mutual promises to marry and of the sum of \$5,000 the defendant "agreed to release and relinquish, and does hereby release and relinquish, any and all claims of every name and nature upon the residue of the estate of said Silas H. McAlpine which, except for this agreement and contract as the widow of said Silas H. McAlpine she would have under the law of the state of Maine, or any other state of the United States or of any foreign country. * * * And she further agrees to sign all papers, and perform all acts, necessary to carry this contract into execution." It was provided that the \$5,000 named in the

agreement should be paid the widow after the decease of said Silas H. McAlpine.

The contract was acknowledged as the free act and deed of both parties the day of its date, January 6, 1900, but was not executed in the presence of two witnesses, as required by section 6, chapter 63, R. S. 1903, which provides how a marriage settlement shall be executed. January 17, 1900, the parties were married and lived together as husband and wife until Mr. McAlpine's decease March 14, 1916.

The inventory filed in the probate court shows that the estate of Mr. McAlpine was appraised, real estate \$3,000, personal estate, \$19,366.77. March 22, 1916, the administratrix of Silas H. McAlpine offered to pay to the defendant the sum of \$5,000, according to the terms of said agreement, which the defendant refused to receive and release the estate from all claims according to said agreement. April 25, 1916, the defendant filed in the probate court for Cumberland county a petition for an allowance as widow out of the personal estate of said deceased, upon which notice was ordered, and this suit is brought to enforce the antenuptial contract dated January 6, 1900, and prays that the defendant be ordered to perform said contract and to execute and deliver to the administratrix a release of all her distributive share of the estate and all claims as widow, including her claim for a widow's allowance, and for other appropriate relief. The \$5,000 tendered to the defendant was paid into court when the bill was filed. The only issue in the case is the validity and construction of the antenuptial agreement above referred to.

The statute under which the defendant claims the agreement was executed was section 6 of chapter 63, Revision of 1903, and so much thereof as is material reads as follows:

"But a husband and wife, by a marriage settlement executed in presence of two witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them."

[1] It is the claim of the defendant that, as the statute above quoted provides that the agreement to bar the widow's right in the real estate of her deceased husband must be executed in the presence of two witnesses, and as the paper executed by the defendant was not executed in the presence of any witness, that it is not a bar; that the widow can be barred only in the manner prescribed by the statute; that the statutes are exclusive and render all other forms of antenuptial agreements void and consequently unenforceable in equity. It is admitted that the agreement was not a statutory marriage settlement, as it does not appear to have been executed in the presence of two witnesses, nor is it claimed to be a jointure in its technical legal sense, and it is not pretended that it is of it-

self a legal bar since it distinctly provides for the further execution of such papers as may be necessary to make its terms effective in law. It is an antenuptial contract, an agreement made by two parties under no disability, both being *sui juris*. The agreement is not a bar to an action at law by the widow to recover her distributive share of her deceased husband's estate as it was not fully executed. It provided that the wife should execute the necessary papers to complete it.

In *Bright v. Chapman*, 105 Me. 62, 72 Atl. 750, the court, in discussing the statute above referred to, said:

"It does not follow that the section quoted covers the whole field of marriage settlements. On the contrary, it is clear that marriage settlements may be made which contain agreements as to matters growing out of the marriage relations other than 'rights' in the estate of one or the other. * * * Equity will enforce such antenuptial settlements."

Practically the same question involved in this case was discussed in 1751 in the case of *Buckinghamshire v. Diury* (2d Ed.) 39, 60, in which Lord Hardwicke said:

"The next thing is the consideration of equity, whether the jointure, or an equivalent to it, will not bind in a court of equity. * * * The general rule is, equity follows the law in the substance, though not in the mode and circumstances of the case. Therefore, if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. * * * This is built on maxims of equity, which regards the substance and not the form. What for good consideration is agreed to be done is considered as done, and allowed all the consequences and effect as if actually done, especially if the condition of the parties is changed, for that cannot be rescinded; so what is fairly done before ought to be established. * * * Equity has therefore held, that where such provision has been made before marriage, out of any of these, she shall be bound by it. * * * If anything can be clear in equity, it is this: If such agreements are fairly entered into, they will be decreed."

It is true, as argued, that the statute upon which the respondent relies is the exclusive way provided by statute for barring the widow's right of inheritance in her husband's estate. That is, it is the only legal defense that can be offered in an action at law brought by her for her share of his estate that is given her by the statute. It was so held in *Littlefield v. Paul*, 69 Me. 527, which was an action of dower, and in *Wentworth v. Wentworth*, 69 Me. 247, which was an action for dower and an appeal from an allowance made by the judge of probate. And the general rule was recognized in *Pinkham v. Pinkham*, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392, which was a writ of entry, where the agreement relied upon was executed during coverture. The court in these cases where it was held that the statute was exclusive was discussing actions at law.

In nearly all the courts of this country where the validity of agreements similar to the agreement in this case has been passed upon, it has been held that the statute was

not exclusive, but simply a statutory declaration that parties about to be married could by executing a contract as prescribed by statute bar the woman's interest in her husband's estate, and that statutes similar to ours do not deprive her of the power to bar her rights in her husband's estate by her antenuptial agreements. That the statute is but a declaration of the effects of the settlement in that class of cases. As said in *Freeland v. Freeland*, 128 Mass. 509, in construing a somewhat similar contract:

"This is a valid contract under the General Statutes, * * * so far as it relates to the interest of either of the parties to the intended marriage in the estate of the other during the coverture. So far as it relates to the rights of the survivor in the estate of the other after the termination of the marriage relation by death, it is valid, independently of the statute."

Jenkins, Adm'r, v. Holt, 109 Mass. 261, was a bill in equity brought to enforce the specific performance of a marriage contract by which the defendant covenanted not to claim dower or any distributive share of her intended husband's estate, and the court said:

"The validity of such a contract, and the power of a court of equity to enforce its specific performance, has been fully recognized by this court."

The defendant in that case claimed the contract was void because it was not recorded as required by the general statutes, and the court said:

"The contract here sought to be enforced relates only to the rights which the survivor may claim in the estate of the other when the marriage * * * is terminated by death. Its validity does not depend on the statute. It is as independent of its provisions as a strict settlement by jointure or a pecuniary provision assented to by her in lieu of dower, and these have long been recognized as valid antenuptial agreements."

1. In *Riegar v. Schalble*, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700, the court reviewed at length the decisions as to the antenuptial contracts, and shows that the great weight of authority in this country is that antenuptial contracts between persons contemplating marriage, settling prospective rights of the wife in the property of the husband, when the marriage is terminated by death, are valid, independently of the statutes, and will be enforced by the equity courts. And in *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756, the contract did not comply with the statute, and the court said:

"No principle seems to be more fully settled at the present time than that an adult woman, before her marriage, may bar her legal rights in her husband's estate by her agreement to accept any other provisions in lieu thereof, and such an agreement will be upheld and enforced by the courts, in the absence of fraud or imposition upon her, and where it may be said, under the particular circumstances, that it is not unconscionable."

Also *Logan v. Philipps*, 18 Mo. 22, and cases cited in *Riegar v. Schalble*, *supra*.

[2, 3] From an examination of the authorities there can be no question but that the contract signed by the plaintiff in this case was a valid contract, and barred her right by descent to share in the real or personal estate of her husband. But it is urged that she is not barred from petitioning for an allowance from the estate. It was held in *Riegar v. Schaible*, supra, that if the antenuptial contract was valid and enforceable, it should be given full effect, and the widow denied any interest in, or any part of, the husband's estate. By the terms of that contract her dower interest was barred by contract prior to marriage, on the same principle the allowance awarded the widow by statute would also be barred, and the same in this case, that, the agreement being valid and enforceable, it bars her right to an allowance as it bars her right to share in the estate by descent. In *Bright v. Chapman*, supra, it was held that a marriage settlement, no broader than the contract in this case, included a claim of the widow for an allowance, and that equity would enjoin the prosecution of the petition for an allowance.

There being no pretense of any fraud or imposition in procuring the contract, the consideration therefor being adequate, its terms not being unreasonable, the parties, at the date of its execution, being competent to contract, and they having partially performed the terms thereof, the death of Silas H. McAlpine fixed the rights of the defendant in his estate according to the terms of the contract, and equity will decree that the defendant execute the necessary instruments to carry out the provisions of the contract. The \$5,000 deposited with the clerk by the administrator should be paid the defendant as the amount due her by the terms of the contract.

Bill sustained, with costs. Decree in accordance with the opinion.

(116 Me. 336)

TIBBETTS v. CURTIS et al.

(Supreme Judicial Court of Maine. Oct. 16, 1917.)

1. WILLS ⚡439—CONSTRUCTION—INTENTION OF TESTATOR.

The intention of a testator, collected from the whole will and all the papers constituting the testamentary act, governs the construction of the will.

2. WILLS ⚡487(3) — CONSTRUCTION — EVIDENCE—DECLARATIONS OF TESTATOR.

The intent of a testator is to be sought in the will as expressed, and his declarations before or after the will was made cannot aid the interpretation.

3. WILLS ⚡656 — CONSTRUCTION — CONDITIONS — "CONTINUE TO CARE FOR HER FATHER."

A testator, who had bequeathed \$3,500 to his brother, S., executed a codicil, revoking such bequest and bequeathing \$2,000 to C., in trust to be used for the benefit of S., thereby giving C. absolute control of such sum in his discretion, not confining him to the income for the

benefit of S., "if the said S. shall survive me," but authorizing him to use the principal, if necessary. The codicil further provided that, if any of the trust fund was unexpended on the death of S., the trustee should give S. a Christian burial and erect a gravestone, and that if there should be any balance remaining it should be paid to S.'s daughter "providing she shall continue to care for her father," or to such person other than the daughter, who should care for S. S. died before the testator, but had not been buried prior to the testator's death. At the date of the codicil, S. was living with the daughter, who was then caring for him, and continued to care for him until his death. Held, that the phrase, "providing she shall continue to care for her father," meant to continue to care for him as she was caring for him when the codicil was made.

4. WILLS ⚡776—LAPSE—DEATH OF BENEFICIARY OF TRUST.

The conditional clause, "if the said S. shall survive me," applied only to the use of the fund for the benefit of S. during his life, and did not affect the remainder of the testator's plan, and the bequest in trust for the burial of S. and the erection of a gravestone, and to the daughter, did not lapse because of the death of S. prior to that of testator.

Exceptions from Supreme Judicial Court, Androscoggin County, in Equity.

Suit by Gertrude Tibbetts against Charles F. Curtis and others. A decree in favor of plaintiff was affirmed by the supreme court of probate, and respondents bring exceptions. Exceptions overruled.

Argued before CORNISH, C. J., and KING, BIRD, HANSON, and MADIGAN, JJ.

White & Carter, of Lewiston, for plaintiff. Tascus Atwood, of Auburn, for respondents.

BIRD, J. The will of George W. Curtis, bearing date the 26th day of October, 1910, among other legacies, gave to his brother Silas Curtis the sum of \$3,500. On the 18th day of November, 1915, he executed a codicil to his will, which, omitting formal parts, is as follows:

"I now revoke item sixth in said will, wherein I bequeathed thirty-five hundred dollars, to my brother Silas Curtis, of Wayne, and I now give and bequeath to Charles F. Curtis of Auburn, Maine, two thousand dollars (\$2,000.00), in trust, to be used by him for the benefit of my said brother Silas Curtis, hereby giving said Charles F. Curtis absolute control of said sum in his discretion, not confining him to the income thereof, for the benefit of my brother Silas, if the said Silas shall survive me, but authorizing him to use from the principal of the same, when in his judgment it shall become necessary.

"Should any of said trust fund be unexpended on the death of my said brother Silas, I direct said trustee to use from said fund to give my said brother a Christian burial and erect a gravestone to his memory and, if after these expenses shall have been incurred there shall be any balance remaining, I direct my said trustee to pay it to my niece, Gertrude Tibbetts, providing she shall continue to care for her father. If some one other than the said Gertrude cares for my brother Silas I direct said trustee to pay what may be left, if any, to that person."

Both the will and codicil were duly proved and allowed in the probate court of Androscoggin county and defendant Charles F. Cur-

tis appointed executor. Silas Curtis, having predeceased the testator, Gertrude Tibbetts, his daughter, brought her bill in equity for the construction of the codicil in the probate court of Androscoggin county. Other facts essential to an understanding of the case will be found in the opinion of the judge of probate, which we quote in full:

"A decision of this case calls for the construction of the codicil to the will of George W. Curtis, late of Auburn, deceased. The codicil in question is dated November 18, 1915. Silas Curtis, therein named, died December 23, 1915. George W. Curtis, the testator, died February 15, 1916. It is admitted that at the date of the codicil the said Silas Curtis was living with the plaintiff, who was then caring for him, and continued to care for him until his death. It is further admitted that at the time of the filing of the bill the remains of said Silas Curtis were in a tomb or receiving vault and had not been buried, nor had a gravestone been erected to his memory; but while the case has been pending in this court the expenses of the burial and of the gravestone have been paid by the respondent Charles F. Curtis, in accordance, as he says, with a request of George W. Curtis.

"The plaintiff contends that by the codicil a trust fund of \$2,000 was created, to be applied, first, for the benefit of Silas Curtis, if Silas survived the testator; second, to provide for a Christian burial of Silas Curtis and for the erection of a gravestone in his memory; and, third, the balance was to be paid to the niece, Gertrude Tibbetts, provided she continued to care for her father.

"The contention is that the clause 'if said Silas shall survive me' applies only to the use of the fund for the benefit of Silas during his life, and that the further provisions indicate an intent on the part of the testator to provide for the burial of his brother and for the erection of a gravestone to his memory, and to recognize the care which the plaintiff, Gertrude Tibbetts, had rendered and should render to her father.

"The defendant Charles F. Curtis, on the other hand, contends that the whole bequest was conditional upon the survivorship of Silas, and that, Silas having died before the testator, the trust never became operative; that there is no obligation on his part to pay from the fund the expenses of his burial or to erect a gravestone to his memory; and that the niece, Gertrude Tibbetts, is not entitled to any portion of the fund.

"The difference in the views of the parties arises from the location of the phrase 'if the said Silas shall survive me,' which it will be noticed is inserted between two clauses of the will relating to the use of the fund. The defendant Charles F. Curtis would construe the will as if the clause 'if the said Silas shall survive me' had been inserted after the words 'two thousand dollars,' so that the codicil would read:

"I now give and bequeath to Charles F. Curtis, of Auburn, Maine, two thousand dollars if my brother Silas Curtis shall survive me, in trust to be used by the said Charles F. Curtis for the benefit of my said brother Silas Curtis, and hereby give said Charles F. Curtis absolute control of said sum in his discretion, not confining him to the income thereof for the benefit of my brother Silas, but authorizing him to use from the principal of the same when in his judgment it shall be necessary."

"The counsel for the several parties have stated their contentions with much positiveness. I have therefore examined the case with much care and given it careful consideration.

[1, 2] "It is familiar law, and not disputed, that the intention of the testator, collected from the whole will and all the papers which constitute the testamentary act, is to govern;

that the intent is to be sought in the will as expressed; and that the declarations of the testator before or after the will was made cannot aid the interpretation.

"It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself." *Clarke v. Johnston* (Miller, J.) 18 Wall. 493, 21 L. Ed. 904, cited and quoted in *Bradbury v. Jackson*, 97 Me. 455, 456, 54 Atl. 1068.

"Citations of adjudicated cases cannot afford much aid. 'No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.'" *Bradbury v. Jackson*, 97 Me. 455, 456, 54 Atl. 1070.

[3, 4] "After considering the will and codicil in all their details, and weighing all portions thereof, I think George W. Curtis had in mind several objects, all parts of one plan, which I would state as follows:

"(1) To reduce an absolute legacy of \$3,500 to the smaller sum of \$2,000, placing the latter sum in trust.

"(2) To provide from this fund for the care of his brother Silas while he lived.

"(3) To provide for his burial and the erection of gravestones, having in mind the contingency, which has happened, that his own death might follow the death of his brother so closely that he could not attend to the burial himself.

"(4) To make provision for the niece, Gertrude Tibbetts, if she continued to care for her father, as she was doing when the codicil was made; and

"(5) If through sickness, death, or other cause, Mrs. Tibbetts could not care for Silas Curtis, to provide for whoever might furnish such care.

"I think that the phrase 'providing she shall continue to care for her father' means to continue to care for him as Mrs. Tibbetts was caring for him when the codicil was made, and as she continued to care for him until the day of his death. If the codicil is construed as the defendant Charles F. Curtis contends, by reading the conditional clause into the instrument immediately following the amount of the legacy and before the declaration of trust, the whole plan has failed; he is under no obligation to pay for the burial of Silas and the erection of gravestones, and there is no recognition of the care rendered by the plaintiff to Silas Curtis. By his action in assuming to pay these expenses he cannot affect the plaintiff's rights. But reading the codicil as it is written, with the conditional clause placed parenthetically between the clause relating to the application of the income and the clause authorizing the use of the principal, the intention of the testator, that the death of Silas is not to affect the remainder of the plan, is emphasized and made clear.

"I cannot think that it was the intention of the testator that the whole plan should fail if he survived his brother, and the language of the codicil, considered in all its parts, does not require such a construction.

"So construing the codicil, the case falls rather under the doctrine of *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880, and similar cases cited in behalf of the plaintiff, than under the doctrine of *Huston v. Dodge*, 111 Me. 246, 251, 88 Atl. 888, and *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259, cited in behalf of the defendant Curtis.

"I therefore rule that the bequest to Charles

F. Curtis of \$2,000 in trust, as made in said codicil, has not lapsed; that the expenses of the burial of Silas Curtis and the erection of a gravestone to his memory are a charge against that fund; and that the plaintiff, Gertrude Tibbetts, is entitled to the balance of the fund after these expenses have been paid."

From the decree entered in accordance with the opinion, and ordering that the costs of complainant, taxed at a sum certain, be paid from the general assets of the estate, the respondents appealed, giving as reasons of appeal: (1) That, it being admitted that Silas died before the testator, the legacy of \$2,000 in trust lapsed; (2) that the only interest of complainant in the estate was contingent upon her father's surviving the testator and her continuing to care for her father in case he survived the testator; (3) that the complainant is entitled to no part of the trust fund, so called, as it never came into being; (4) that the complainant is not entitled to costs.

Upon hearing in the supreme court of probate, it was decreed that the appeal be dismissed, with costs, the decree of the judge of probate affirmed, and the case remanded to the probate court.

To this decree of the supreme court of probate the respondents had exceptions, upon which the case is now before us.

It is the opinion of the court that the exceptions must be overruled, for the reasons set forth in the opinion of the judge of probate, which the justice sitting in the supreme court of probate made part of his rescript. To it we can add nothing, save to call attention to the cases of *Adams v. Legroo*, 111 Me. 302, 307, 89 Atl. 63, and *Prescott v. Prescott*, 7 Metc. (Mass.) 141, 145, which are in harmony with the opinion.

Exceptions overruled.

Costs of complainant in this court to be paid from the general assets of the estate.

Case remanded to the supreme court of probate of Androscoggin county for further proceedings in accordance with this opinion.

(90 N. J. Law, 469)

SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES v. BOARD OF CONSERVATION AND DEVELOPMENT et al.

(Supreme Court of New Jersey. Sept. 14, 1917.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES §190—MUNICIPAL WATER SUPPLY—APPROVAL BY BOARD OF CONSERVATION AND DEVELOPMENT—CONDITIONS.

Upon an application by the district board of water supply commissioners, under the act of March 16, 1916 (P. L. p. 129), to the board of conservation and development, created by Act April 8, 1915 (P. L. p. 426), for its approval and consent to the diversion of water for an additional water supply to the cities of Newark and Paterson, the board of conservation and development has power to attach reasonable terms and

conditions to its approval and consent which are germane to the subject-matter.

2. WATERS AND WATER COURSES §190—MUNICIPAL WATER SUPPLY—CONSENT OF BOARD OF CONSERVATION AND DEVELOPMENT—REASONABLENESS OF CONDITIONS.

For such terms and conditions, in this case, see the opinion.

Certiorari by the Society for Establishing Useful Manufactures to test the legality of the approval and consent by the Board of Conservation and Development, on a petition filed by the North Jersey District Water Supply Commission. Certiorari dismissed.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Humphreys & Sumner, of Paterson, and Gilbert Collins, of Jersey City, for prosecutor. John W. Wescott, Atty. Gen., for the State. Harry Kallsch, of Newark, for City of Newark. Francis Scott, of Paterson, for City of Paterson. Spaulding Frazer, of Newark, for North Jersey Dist. Water Supply Commission.

BLACK, J. Approval of the application of the North Jersey District Water Supply Commission and a consent to the diversion of water from the Wanaque river, as proposed therein, for an additional water supply for the cities of Newark and Paterson was given by the board of conservation and development on the 19th day of December, 1916. This approval was made under a petition filed by the North Jersey District Water Supply Commission on the 9th day of October, 1916. The board of conservation and development was created by an act of the Legislature, approved April 8, 1915 (P. L. 1915, p. 426). The certiorari was issued in this case to test the legality of such approval and consent. The approval and consent was given subject to the following terms and conditions:

(1) The North Jersey District Water Supply Commission shall pay or cause to be paid to the state on behalf of each of the municipalities supplied with water under this approval such annual charge as is now made or may be hereafter authorized by law.

(2) This approval shall not become operative unless said commission shall have filed with this board within 90 days from date hereof its written agreement accepting the terms and conditions hereby imposed.

(3) The North Jersey District Water Supply Commission shall in good faith begin the construction of the storage reservoir mentioned in its application within one year from the date of this approval and shall complete the same within five years.

(4) The maximum diversion from the Wanaque river authorized by this approval is an average of 50,000,000 gallons per diem for any period of thirty consecutive days.

(5) The dry-season flow of the Wanaque river below the dam must at all times be maintained at a minimum of 12,000,000 gallons per diem.

(6) This approval is given subject to the vested rights of all persons, corporations, or municipalities affected by the proposed plan.

(7) In the event that any of the conditions herein imposed are violated and such violation

shall be established to the satisfaction of this board, this assent shall thereby be abrogated.

The prosecutor has valuable water rights in the Passaic river, of which the Wanaque river is a tributary.

[1] The ground of attack is that under section 6 of Act of 1916, p. 131, the jurisdiction of the board of conservation and development is confined to giving or withholding its consent to the proposed diversion and to nothing else; in other words, the terms and conditions, as set forth above, on which the approval and consent were given, renders it illegal. A correct solution of this question involves, of course, a critical examination of the statutes, under which these two boards were created. A short summary or history of such legislation is as follows: A state water supply commission was created by an act of the Legislature, approved June 17, 1907 (P. L. 1907, p. 633). Among other things, it provides for the approval of plans for municipal corporations, obtaining new or an additional source of water supply. It may, by that act, "either approve such application, reject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe." Section 3 of this act was referred to in *Mundy v. Fountain*, 76 N. J. Law, 701, 71 Atl. 693. By the act approved April 8, 1915 (P. L. 1915, p. 426), the board of conservation and development, the defendant in this suit, was created as the successor to the state water supply commission, repealing all acts inconsistent therewith (section 16), but "shall succeed to and exercise all the rights and powers and perform all the duties now exercised and performed by or conferred and charged upon the state water supply commission." Section 5. "The board of conservation and development shall have full control and direction of all state conservation and development projects and of all work in any way relating thereto, except such work as is conferred upon other boards, not included within the provisions of this act." Section 7. By the act approved March 16, 1916 (P. L. 1916, p. 128), the state was divided into two water supply districts, to be known, respectively, as the North Jersey Water Supply District and the South Jersey Water Supply District. The act approved March 16, 1916 (P. L. 1916, p. 129) provides for the appointment of district boards, as provided and authorized by the previous act, and defining their powers. It was under this act that the commissioners of the North Jersey Water Supply District petitioned for the consent, which is the disputed point in this litigation (section 6, which provides "upon the filing of such petition the said district water supply commission, after obtaining the consent of the state water supply commission or its successor, to the diversion of waters for such water supply," shall proceed to formulate plans, etc.). The argu-

ment is: This section provides for a bare consent and nothing more. But this ignores the legislation and the power granted in that legislation to the board of conservation and development above cited. We think it is too plain for argument that under this legislation the board of conservation and development had not only implied, but express, power to attach to its approval and consent the terms and conditions above set forth, as shown in the record. In addition to what seems to us to be the clear expressed intention of the Legislature, these terms and conditions are all strictly germane to the subject-matter that was then before the board for action; they are necessary incidents to make effective, if not efficient, the approval and consent of the board. The construction contended for by the prosecutor is too narrow and artificial; it would strip such approval and consent of its vitality, and, as we think, in direct opposition to the expressed intention of the Legislature, viz. that the board of conservation and development had the power to impose these terms as conditions precedent to its approval and consent.

[2] The only other question is whether such terms and conditions imposed were reasonable. We think there is nothing unreasonable in any of them. There is nothing else mooted in the record which calls for discussion.

The certiorari in this case is dismissed, with costs.

PASSAIC TRUST & SAFE DEPOSIT CO. v. EAST RIDGELAWN CEMETERY et al. (No. 42/356.)

(Court of Chancery of New Jersey. Aug. 6, 1917.)

TRUSTS — 178—EXECUTION—INSTRUCTION OF COURT.

The terms of a trust not being alleged to be in doubt, a bill for the aid and direction of the court to the complainant as trustee of certain express trusts will be dismissed, where it appears therefrom that there is no present duty to be performed by complainant and that no such duty can arise until there is a demand for distribution of the trust fund which complainant controls.

Bill between the Passaic Trust & Safe Deposit Company and the East Ridgelawn Cemetery and others. Bill dismissed.

William F. Gaston, of Passaic, and John Guyton Boston, of New York City, for complainant. Edwards & Smith, Raymond Dawson, and M. T. Rosenberg, all of Jersey City, and Adam Frank, of New York City, for defendants.

FOSTER, V. C. This is a motion to strike out the bill of complainant. Thirty-one reasons have been assigned against the entire bill, and 13 additional reasons against part of it.

The bill seeks a variety of relief, and it is

ostensibly filed for the aid and direction of the court to the complainant, as trustee of certain expressed trusts; actually it is filed to obtain a determination, among other matters, of the validity of certain cemetery promotion schemes which were not approved in this court, in *East Ridgelawn Cemetery v. Frank*, 77 N. J. Eq. 36, 75 Atl. 1006, or in the Court of Errors and Appeals, in *Attorney General v. Linden Cemetery*, 85 N. J. Eq. 501, 96 Atl. 1001. These cases did not pass directly upon the merits of certain so-called curative legislation, viz. chapter 299 of P. L. 1911, and chapter 272 of P. L. 1913, mentioned in this bill.

The bill, in addition to the above matters, propounds a number of questions, some of which relate to the discovery of the persons to whom and their interest in the trusts which it is alleged the *cestui que trust* transferred to them. Some relate to questions now undetermined in causes pending in this court and in the Supreme Court of the state of New York, wherein the validity of the trusts is brought in question; and some relate to the prosecution of actions, or the protection of alleged rights with which the allegations of the bill do not disclose complainant to be in any way concerned.

In regard to the expressed trusts in which complainant is alone directly interested, it appears from the bill that the defendants Adam Frank and George R. Pond caused the defendants East Ridgelawn Cemetery and West Ridgelawn Cemetery to organize in 1905, and that through their "dummy," the defendant Herbert Gruber, they caused certain lands in Passaic county to be conveyed to complainant upon certain expressed trusts, set forth at length in the deeds of conveyance and in two declarations of trust; that subsequently complainant, as trustee, conveyed these lands to the cemetery companies upon the same expressed trusts, among which were that the lands were to be used for cemetery purposes. As a consideration for these conveyances the cemetery companies issued to said Gruber a paper which is termed a "joint ownership certificate," for 13,500 "shares of this association," which were transferable by the holder. Gruber transferred the shares represented by this certificate to Frank and Pond; and subsequently Frank acquired all of Pond's interest in them.

Complainant by its declarations of trust further stipulated that one-half of the proceeds of the sale of lots and plots in each cemetery was to be paid to it as trustee, and to be by it divided among the 13,500 shares represented by ownership certificates, duly authenticated by complainant as trustee. Although it is alleged that Frank has sold a number of the shares represented by the ownership certificate issued to Gruber and assigned to him, none of the purchasers thereof have had the shares transferred to them on the books of the cemetery companies, and caused new ownership certificates

therefor to be issued to them, duly certified, as required, by complainant as trustee. And no offer has been made to complainant by any one to surrender ownership certificates for the trust certificates, as required by the declaration of trust.

Complainant has in hand from the proceeds of the sale of lots and plots in East Ridgelawn Cemetery about \$11,000, and has not received any payments from West Ridgelawn Cemetery. Demands have been made on complainant by purchasers of ownership shares from Frank for a share of this fund, and several actions have been commenced against complainant to compel its distribution, and most of them have been discontinued.

From the situation thus presented it is apparent there is no present exigency in respect to these matters, requiring an answer from complainant or from the court. The terms of the trust are not alleged to be in doubt. It is not claimed that complainant cannot determine from the declarations of trust who are entitled to participate in the distribution of the trust fund, nor is it alleged that more than one claimant, or class of claimants, has qualified under the terms of the trusts whereby they are entitled to participate in the distribution of the fund, and it is not shown that any occasion has yet arisen calling for the performance of any duty on the part of complainant as trustee.

There are a number of matters presented by the bill which it appears can be settled, and are awaiting determination in the other actions now pending in this court and in the Supreme Court of New York. The remaining matters presented by the bill merely call for the court's advice and not for its aid and direction.

It is well settled that:

"Where the duty of a trustee is involved in doubt, it is his right to ask and receive the aid and direction of a court of equity to the extent that his necessities may require." *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222.

"This right does not, however, extend to the solution of propositions which do not present themselves as requiring any action by the trustee, or where the events which must control the rights of the parties and the duties of the trustee have not transpired and are yet uncertain, * * * or which are so clear as to admit of no question. The court should be called on to decide and direct not to counsel and advise." *Merlin v. Blagrove*, 25 Beav. 139; *Vanness Executors v. Jacobus*, 17 N. J. Eq. 153; *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867; *Bonnell v. Bonnell*, 47 N. J. Eq. 540, 20 Atl. 895; *House v. Ewen*, 37 N. J. Eq. 368; *Dillingham v. Martin*, 61 N. J. Eq. 276, 49 Atl. 143; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *Ogden v. McLane*, 73 N. J. Eq. 159, 67 Atl. 605.

From the bill it appears there is no present duty to be performed by the complainant as trustee, and by the terms of the declarations of trust no such duty can arise until ownership certificates, duly authenticated by complainant as trustee, are thereby converted into trust certificates, and until the holders of such trust certificates demand the distribu-

tion among them of the trust fund which complainant controls; consequently complainant is not at present in need of the aid and direction of this court.

In view of the conclusion I have reached on this feature of the bill, I have not considered it necessary to pass upon the other objections urged against it.

A decree will be advised that the bill be dismissed.

DA GAMA v. D'AQUILA.

(Court of Chancery of New Jersey. June 21, 1917.)

COVENANTS — §103(3) — LACHES — WAIVING BREACH OF RESTRICTIVE COVENANT.

Where complainant saw defendant erecting a garage on his lot adjoining hers, but for some time made no objection or protest, and allowed him, in ignorance of a restrictive covenant and of her attitude respecting it, to spend a considerable sum of money in practically finishing the building, and after calling his attention to the restrictive covenant encouraged him to proceed with the completion of the building by expressing her willingness to waive the restriction if an adjoining owner's consent could be obtained, and even after ordering the removal of the garage waited for over a year before filing a bill for a mandatory injunction, she was estopped by her conduct and laches from enforcing the covenant by injunction, regardless of the comparative magnificence or insignificance of the buildings on the two lots, since an application for a mandatory injunction to protect restrictive building covenants must be made promptly.

Suit by Elizabeth Bates Da Gama against Ernest A. D'Aquila. Decree dismissing the bill on conditions.

Benjamin P. Morris, of Long Branch, and Wilbur A. Haisley, of Newark, for complainant. William J. Kearns, of Newark, for defendant.

FOSTER, V. C. Complainant by her bill seeks a mandatory injunction to compel the removal of a garage built on certain property fronting on North Bath avenue in the city of Long Branch, on the ground that the garage was built in violation of a restrictive covenant against the erection of any building on the premises owned by defendant. On June 17, 1901, James R. Booth, who then owned the land now owned by defendant and other lands in the rear of the same, entered into an agreement in writing with Arthur H. Hearn, the former husband of complainant, and the owner of the property adjoining the Booth property on both sides and in the rear, by which Hearn agreed to buy from Booth a portion of the rear of the Booth lot on which was an old stable, for \$500. The agreement contained the following provision:

"It is further agreed, that in consideration of a covenant on the part of the said Hearn that he will restrict the front of his property on North Bath avenue that lies between the property of said Booth and the Jewish Synagogue against any building or nuisance ever being erected or maintained, north of a line where the said Hearn's property would be crossed by the

present front or north line of the Jewish Synagogue building if extended to the property of said Booth, the said Booth shall restrict the remaining portion of his property between the lot hereby sold and North Bath avenue, so that no building of any kind, and no extensions to the present building, or nuisance of any kind shall, at any time hereafter, be erected or maintained thereon, it being understood that no buildings of any kind whatsoever except the dwelling house now thereon or any house hereafter erected on the same site, shall be erected on any part of the premises of said Booth fronting on North Bath avenue at any time hereafter. * * * All the covenants, restrictions and agreements herein contained are to extend to the heirs or assigns of the respective parties hereto, and are to run with the lands."

Booth and his wife, by deed dated July 17, 1901, conveyed the property to Hearn, and in the deed the agreement to restrict quoted above was set forth, but the further agreement that the covenants, etc., were to extend to the heirs and assigns of the respective parties and were to run with the land, was not stated in the deed. The agreement and deed were recorded on July 23, 1901. Both Mr. Booth and Mr. Hearn died some years ago seised of their respective properties, without having taken any further action with respect to the restrictions to be placed thereon. Complainant became the owner of Mr. Hearn's property, and Herbert Booth inherited the property of his father. Some time in the spring of 1914 complainant in contemplation of the sale of part of the Hearn property located on North and South Bath avenues, at public auction on May 14, 1914, communicated with Herbert Booth, the owner of defendant's property, suggesting or proposing the release of the restrictions from their respective properties, and Booth in reply expressed his willingness to release her property and to have his property released therefrom, and expressed the opinion that if complainant desired a formal release executed, she should pay for its preparation. On April 30, 1914, complainant's attorney in Washington wrote Herbert Booth, stating:

"I have been instructed by Madame Da Gama, wife of the Brazilian ambassador at this capital (formerly Mrs. Elizabeth Bates Hearn) to prepare a cancellation of the restrictions affecting certain real estate under an agreement made by Mr. James R. Booth and Mr. Arthur H. Hearn, former husband of Madame Da Gama, but the papers which have been turned over to me do not show clearly what those restrictions are. * * * I should be obliged to you if you would send me a draft of the proposed release, or a copy of the restrictions contained in the deeds."

It does not satisfactorily appear what reply, if any, Mr. Booth sent to this letter, and apparently a formal release was never expected, but he and the members of his family considered the matter closed, and believed that the restrictions had been removed from his and from complainant's property. By deed dated February 11, 1916, Booth and wife conveyed the premises to defendant,

without any reference to or mention of the restrictions.

Defendant is a Catholic priest in charge of a church in Newark. He spends some days of each week during the summer at his home in Long Branch, traveling between Newark and Long Branch in an automobile. Some time in March, about a month after taking title, he began the erection of the garage in question in which to store his car. At the time he commenced the building, and in fact until some time in May, defendant had no actual knowledge of the restrictions. The garage is not a very large or expensive affair, but, if finished as planned, it would compare favorably with other garage buildings in the neighborhood. Complainant saw the garage in the course of erection about April 10th, but made no objection or protest against it, and did not call defendant's attention to the restrictions until her New York attorney wrote him on May 24, 1916. At this time the building was substantially completed, except for the hanging of the doors and windows and the finishing of the roof. On May 29, 1916, defendant wrote complainant, informing her of the receipt of the letter from her attorney and explaining the garage had been erected by him in ignorance of the restrictions, and asking her permission to do the small amount of work necessary to complete it. In reply to this letter complainant's Washington attorney wrote, on June 2d, that she was willing to waive the restrictions, owing to the circumstances under which the garage had been partially erected, if the consent of the owner of the adjoining property could be obtained. The proofs do not show what efforts, if any, were made to obtain this consent, and on June 14th complainant's attorney wrote defendant's attorney, ordering the garage to be removed. No further steps were taken by defendant to complete or to remove the garage, and on July 10th the bill was filed.

If these restrictions or stipulations were in effect after the negotiations for their removal between complainant and Herbert Booth in 1914, so that they affected defendant's property when he began the erection of the garage thereon in March, 1916, I think complainant is estopped by her conduct and laches in having them enforced against defendant now. She saw this garage being erected as early as April 10th; she made no objection or protest; she allowed defendant, in ignorance of the restrictions and of her attitude respecting them, to spend a considerable sum of money in practically finishing the building; and she allowed him to continue these expenditures, without protest, until her attorney wrote him the letter of May 24th, and she encouraged him to proceed with the completion of the building and expressed her willingness to waive the restrictions in the letter written by her attorney on June 2d. Her attitude throughout, apparently, has

been that it was optional with her whether the restrictions should be considered in force or not, and she considered it her privilege to change her mind on the subject as often as she desired; and, while this may be her privilege, she must take the consequences of exercising it too often to the detriment of the defendant.

It was complainant's duty, if she intended to insist upon the enforcement of the restrictions, to have acted promptly after she learned of their actual violation by defendant in April, and before he had expended any considerable sum of money on the building. This she did not do. On the contrary, she allowed defendant to proceed with the building, and expressed her willingness, while the garage was in course of construction, to waive the restrictions, and after changing her mind about the matter in June, she delayed the filing of her bill until July. It was said in *Smith v. Spencer*, 81 N. J. Eq. 389, at page 393, 87 Atl. 158, at page 159, that such rights cannot, in a situation like this, be protected by mere correspondence, and that legal proceedings must be taken before there has been a serious expenditure of money.

It is one of the rules of courts of equity, quite strictly enforced on a bill for a mandatory injunction, to protect restrictive building covenants, that the application must be promptly made. *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153; *Sutcliffe v. Elsele*, 62 N. J. Eq. 222, 50 Atl. 69; *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048; *Sanford v. Keer*, 80 N. J. Eq. 240, 83 Atl. 225; *Goater v. Ely*, 80 N. J. Eq. at page 46, 82 Atl. 611; *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492, affirmed 81 N. J. Eq. 210, 86 Atl. 398; *Smith v. Spencer*, supra. Complainant's delay, under the circumstances, in taking legal proceedings to protect her rights, constitute such laches that I deem it inequitable to grant her the relief she now seeks. In reaching this conclusion I have taken into consideration all that has been said by counsel for complainant at the hearing and on the brief about the magnificence and value of complainant's property and the cheapness and mean appearance of defendant's garage, but the comparative magnificence or insignificance of the respective properties should not, under the situation presented, be influential in determining the rights of the parties.

On the conclusion of the hearing the suggestion was made by me that, in view of the slight benefit complainant would receive if it were found the restrictions were in effect and should be enforced, compared with the serious loss and injury defendant would sustain if compelled to remove the garage, possibly complainant's objections to the garage would be removed if it were completed as originally planned. Complainant felt that she could not accept this suggestion, and that nothing but a strict enforcement of the restrictions by the removal of the garage would satisfy her. The defendant then ex-

pressed his willingness to follow the suggestion, and counsel for defendant has attached to his brief a proposal, which is submitted without prejudice, to the effect:

"That upon the dismissal of complainant's bill, he is willing, at his own expense, to put on the garage a shingle roof and to place the same in place of the present tar-paper roof and to give the structure an additional coat of stucco-plaster and a finishing coat; also to lower roof of the building five feet and generally to improve and embellish the appearance of the garage."

If these changes and improvements are made and completed by defendant by July 30th, I will advise a decree that the bill be dismissed.

(88 N. J. Eq. 222)

ROBT. H. INGERSOLL & BRO. v. HAHNE & CO. (No. 43/384.)

(Court of Chancery of New Jersey. Aug. 14, 1917.)

1. COURTS §97(1)—PRECEDENTS—EFFECT.

Decisions of the Supreme Court of the United States as to the validity of contracts, which may partially destroy competition, are not binding on the state court, though entitled to great weight, unless the contract involves an article of interstate commerce.

2. MONOPOLIES §10—STATUTE—VALIDITY.

Act March 16, 1916 (P. L. p. 235), declaring that it shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in whose product such merchant, etc., deals, or to discriminate against the same by depreciating the value of the products in the public minds by misrepresentation or price inducement, except where the goods do not carry any notice prohibiting such practice, is not in violation of the state or federal constitutions, it being the policy of the law to let people manage their own business in their own way, unless the ground for interference is clear, and hence a notice by a manufacturer of watches that the same should not be sold with its guaranty, etc., for less than a price fixed, is valid and binding on a retailer, the watches being manufactured in large quantities and sold in vast numbers at a small price through the advertising of the manufacturer.

3. PLEADING §214(1)—DEMURRER—EFFECT.

On demurrer the averments of a bill are to be treated as true.

4. COMMERCE §60(1)—INTERSTATE COMMERCE—INTERFERENCE WITH.

A New York manufacturer of cheap watches sold them with a notice forbidding the retailer to dispose of them for less than a price fixed by the factory. A jobber in New York disposed of the watches to a New Jersey retailer, who sold the watches for less than the price fixed by the manufacturer. Under Act March 16, 1916 (P. L. p. 235), the restrictive notice was valid. *Held*, that law which protected the manufacturer was not invalid as casting any burden on interstate commerce nor prohibiting commercial intercourse between people of the various states, or placing burdens thereon.

Bill by Robt. H. Ingersoll & Bro. against Hahne & Co. On motion for preliminary injunction and to strike out the motion to dismiss. Motion to dismiss denied, and temporary preliminary injunction granted.

George L. Record, of Jersey City, for complainant. Stallman, Hoover & Peck, M. M. Stallman, J. F. Hoover, and H. Peck, all of Newark, for defendant.

LANE, V. C. The bill discloses the following facts: That the complainant is a manufacturer of watches sold under the Ingersoll name in conjunction with certain trade-names such as "Yankee Watch," the "Dollar Watch," the "Eclipse Watch," and "Junior Watch"; that the "Yankee Watch" is advertised throughout the country to be sold to the consumer at \$1.35; that the only way the watches can be sold for this low price is to manufacture them in immense quantities, and the only way to produce customers upon a big scale is by extensive advertising; that the name of Ingersoll and the reputation of the firm for fair dealing and reliable products is nation wide; and that it is absolutely necessary as a part of the advertising and building up of the business that a definite fixed price should form a part of the advertising for each of the products; that all the Ingersoll watches are sold subject to a notice, a copy of which is as follows:

"Notice.

"The use of our name, trade-mark, guarantee, reputation, good will, and selling helps is licensed to the dealer for the sole purpose of selling or offering, advertising or displaying for sale this watch, provided this watch is not sold, offered, advertised, or displayed for sale with or as any donation, discount, rebate, premium, or bonus, or to any wholesale or retail dealer at rates different from those specified in our schedules, or at any other retail price than \$1.35, without first removing this notice and our name, trade-mark, and guarantee, and returning to us our selling helps and refraining from the use of our name, trade-mark, guarantee, reputation, good will, and selling helps, and provided the dealer shall, upon our written request (unless he shall have previously sold it), resell to us this watch, if then merchantable, at the rate specified in our schedules for the quantity in which he purchased, or, if then damaged, at such rate as shall then be agreed upon.

"Any violation of any of the above conditions depreciates our name, trade-mark, reputation, and good will, and will act as a revocation of this license. Any use of our name, trade-mark, guarantee, reputation, good will, or selling helps aids the dealer in selling this watch and will act as an acceptance of the above conditions. The dealer may sell or otherwise dispose of this watch as he pleases after first removing this notice and our name, trade-mark, and guarantee, and returning to us our selling helps, and refraining from the use of our name, trade-mark, guarantee, reputation, good will, and selling helps; but he has no right to use any of them in violation of the above conditions or to do anything to depreciate their value. Any dealer who violates any of the above conditions will be liable to suit for damages and an injunction.

"Upon written request of any dealer observing the above conditions, we agreed (1) to repurchase from him this watch, if then merchantable, at the rate specified in our schedules for the quantity in which he purchased, or, if then damaged, at such rate as shall then be agreed

upon; or (2) to leave him free, after first removing this notice and our name, trade-mark, and guarantee, to sell or otherwise dispose of this watch without regard to the above conditions.
Robt. H. Ingersoll & Bro."

That the defendant inserted in the Newark News, a newspaper published in Newark, an advertisement in the following form:

\$1.35 Ingersoll
Watches
\$1.00

Nickel only; every one new
with the usual Ingersoll
guaranty.

That this advertisement appeared on April 20, 1917, and that the defendant sold Ingersoll watches for the sum of \$1; that such sales were made in the regular Ingersoll boxes, which carried the notice heretofore mentioned; that it advertised and declared its intention to again resort to such practice; that it is only possible for complainant to manufacture and sell the large output it does by widespread advertisement, and in such advertisements the fact that the watches are for sale at the low and fixed price of \$1.35 and the word "Ingersoll" are essential features; that there is no profit in the sale by retailers of the watches at a dollar; that the direct effect of the acts of defendant is that other dealers in the neighborhood cannot market, at the rate of \$1.35, the watches which are manufactured by the complainant; that the public is induced to believe that the watches are not worth \$1.35 inasmuch as they are being sold by defendant for a dollar; that the other dealers in the locality will discontinue the sale of the Ingersoll watches; that the business of the complainant will be disorganized, and eventually ruined; that the defendant has no idea of marketing any considerable number of watches at the price of a dollar, but uses this cut rate and the Ingersoll name as bait, at irregular intervals, to get people into its store, depending upon those attracted by the low rate of the Ingersoll watch making purchases of other goods sold by defendant; that for its own purposes, the defendant makes use not only of the article manufactured by the complainant, but also of its trade-name and reputation and guaranty for its, the defendant's, ulterior purposes to the injury of the complainant.

The complainant relies upon the provisions of the statute, chapter 107 of the Laws of 1916, which provides as follows:

"It shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business."

And also complainant further relies upon its right to relief at common law.

There is no question but that the notice prescribed by the statute was affixed to the goods in question. The defendant moves to strike out the bill upon several grounds raising several questions, only two of which I deem it necessary to consider.

First. Whether the statute is in any respect contrary to the constitutional provisions of the state or of the United States.

Second. Whether the watches, if sold, are the subject of interstate commerce to such an extent as that the statute cannot be held to apply.

[1, 2] On the argument there was, and in counsels' brief there is, a long discussion as to whether the contract against price cutting, evidenced by the notice, is contrary to public policy, and defendant relies upon cases in the Supreme Court of the United States as follows: *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; *Straus v. Victor Talking Mach. Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 886 (decided April 9, 1917); *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871 (decided April 9, 1917); *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086.

I am now considering the public policy of the state of New Jersey as distinguished from any public policy of the United States. Unless the article is the subject of interstate commerce, I am not bound by the opinions of the Supreme Court of the United States. They are entitled to great weight and careful consideration, but it must not be overlooked that the effect of the case of *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871 (decided April 9, 1917), is a complete reversal of *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. To consider in detail the reasoning of the court in the very numerous cases which have been decided bearing upon this question would unduly extend this opinion. Suffice it to say that, after careful consideration, I have come to the conclusion that, upon the general proposition, I agree with the dissenting opinion of Mr. Justice Holmes in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. at page 411, 31 Sup. Ct. at page 386, 55 L. Ed. 502. He said:

"I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. * * * I think * * * we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. * * * There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. * * * We must as-

sume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

I agree also with the remarks of the Supreme Court of Washington in *Fisher Flouring Mills Co. v. C. A. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522. There the court says:

"Finally, it seems to us an economic fallacy to assume that the competition, which in the absence of monopoly benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles, at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interests to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement."

I could not use words which would better fit the situation in the case at bar than these. Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes.

It is a legislative function to establish public policy, and the public policy of this state has been, I think, with respect to the matter in question, settled by the statute hereinbefore referred to. I do not find that statute repugnant to the Constitution either of the United States or of this state. There was no

obligation upon Hahne & Co. to purchase the watches in question, nor was there any obligation upon the complainant to manufacture and sell them. If Hahne & Co. chose to purchase the watches with the notice attached, of which I must presume it has notice at the time of purchase, there is no injury done the defendant by compelling it to observe the provisions of the notice. As Mr. Justice Holmes said in the *Dr. Miles Medical Co. Case*:

"I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."

[3] The case is before me as if upon demurrer, and I must assume that the statements of the bill that the effect of the acts of the defendant will be the destruction of complainant's business are true. The contract authorized by the statute is admitted; its breach is admitted; the effect of its breach must be considered as above. Can it be that there is no remedy? I do not find that any public benefit will be subserved by refusing to enforce the provisions of the statute.

[4] The remaining question to determine is whether or not the restriction upon the sale of the watches is such an interference with interstate commerce as to prevent its enforcement. The watches were manufactured in New York; were sold to a jobber in New York and by the jobber sold to a retailer in New Jersey for ultimate distribution to the public. The statute is designed to promote good morals in business. It is an exercise of the police power of the state. That its purpose is within the legislative province, I think, admits of no question. It does not operate to interfere with the trade or exchange of articles between this and other states, but rather touches upon the duties of citizens of this state to citizens of this and other states. I think that the effect of ignoring the restriction would tend to restrain interstate commerce by reducing its volume, and that the effect of enforcement of the restriction will tend to increase the volume of interstate commerce. If the oleomargarine and liquor laws can be maintained, and they have been (*Waterbury v. Newton*, 50 N. J. Eq. 535, 14 Atl. 604), I think there is no objection to an act of the nature under discussion. The result is that the motion to dismiss the bill will be denied, and the restraint continued until final hearing.

If an appeal is taken, and I assume there will be, I desire counsel to notify me at once, as these conclusions have been prepared just before my leaving on my vacation, and I desire to prepare more formal conclusions for the benefit of the Court of Errors and Appeals. The result I have reached has only been arrived at, however, after careful consideration.

(90 N. J. Law, 454)

MAYOR, ETC., OF JERSEY CITY v. BORST.

(Supreme Court of New Jersey. Sept. 14, 1917.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT §=364—WORKMEN'S COMPENSATION ACT—CONSTRUCTION OF STATUTE—INJURY OR DEATH.**

The Supplement to the Workmen's Compensation Act (Act March 27, 1913 [P. L. 1913, p. 230]), § 1, which provides "that no person (i. e. employé of the state, county or municipality) receiving a salary greater than twelve hundred dollars per year" shall be compensated, under section 2 of the original act (Act April 4, 1911 [P. L. 1911, p. 134]), applies only to employés of the class therein mentioned who were injured. It does not apply to cases of death, where dependents of employés are affected.

2. MASTER AND SERVANT §=348—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The workmen's compensation statute is a remedial law of prime import, it should be liberally and broadly construed.

*(Additional Syllabus by Editorial Staff.)***8. WORDS AND PHRASES—"SUPPLEMENT."**

The ordinary meaning of the word "supplement" is a supplying by addition of what is wanting.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supplement.]

Certiorari to Court of Common Pleas, Hudson County; Tennant, Judge.

Proceeding under the Workmen's Compensation Act, by Katherine Lovell Borst, as next friend, of W. Hudson Lovell, deceased employé, to obtain compensation, opposed by Mayor, etc., of Jersey City, employer. Compensation was awarded, and the employer brings certiorari. Judgment awarding compensation affirmed.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

John Bentley, of Jersey City, for prosecutor. R. F. Jones, of Jersey City, for respondent.

BLACK, J. This is a workmen's compensation case. The certiorari was allowed to review the determination of Judge George G. Tennant, in the Hudson county common pleas. An award of \$10 per week for 300 weeks was made, in that court, from May 3, 1914. The facts are not disputed. The point on review and for decision is a pure question of law, involving the correct construction of the supplement, approved March 27, 1913 (P. L. 1913, p. 230), to the Workmen's Compensation Act, which was approved April 4, 1911 (P. L. 1911, p. 134). The first section of that act provides:

Every employé "who shall be in the employ of the state, county, municipality * * * shall be compensated under and by virtue of section two to which this act is a supplement; provided, however, that no person receiving a salary greater than twelve hundred dollars per year, nor any person holding an elective office shall be entitled to compensation."

Section 2:

"When any payment shall be due under the provisions of this supplement or the act to which it is a supplement, the name of the injured employé, or in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll," etc.

It is conceded that the respondent would be entitled to compensation were it not for the proviso in the above supplement. The facts in brief are: W. Hudson Lovell, the deceased, was an employé of the mayor and aldermen of Jersey City as an assistant fire chief or assistant engineer, in the fire department. On May 3, 1914, while responding to a fire call or alarm he was killed in a collision. He was receiving pay at the rate of \$2,850 per year. He left him surviving, an actual dependent, Helen Katharine Borst, a granddaughter. We think the judgment of the court of common pleas is founded upon the correct construction of the statute, and therefore must be affirmed. The reasoning that carries the mind forward to this conclusion may be briefly, indicated as follows:

[1, 3] The original Workmen's Compensation Act (P. L. 1911, p. 134) applies to municipal corporations and their employées. *Allen v. City of Millville*, 87 N. J. Law, 356, 95 Atl. 130, affirmed 88 N. J. Law, 693, 96 Atl. 1101. Paragraph 19 of the original act (P. L. 1911, p. 142) provides for the payment of compensation in cases of death. It is significant, if not important, that the title of the supplement, *supra* (P. L. 1913, p. 230), is identical in terms with the title of the original act, except "a further supplement to an act entitled." As stated, it is a supplement to the original act. Now the ordinary meaning of the word "supplement" doubtless is a supplying by addition of what is wanting. *Rahway Savings Institution v. Mayor, etc., of Rahway*, 53 N. J. Law, 51, 20 Atl. 756. It is a fair argument to say that the supplement applies only to employés of the class therein mentioned, who are injured. It does not apply to cases of death where dependents of employés are affected. This would seem to be clear in view of section 2, *supra*, which provides that the name of the injured employé, "in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll." This construction is not inconsistent, but in harmony, with section 1, p. 230, of the 1913 supplement, *supra*. A reason for this, if it is the true interpretation of the legislative will, may, perhaps, be found in the fact that an injured employé of a municipal corporation usually receives his full wages from the municipality, while incapacitated from personal injuries. It limits the application of section 11 of the original act of 1911 (page 134), so that no injured employé himself, who receives "a salary greater than twelve hundred dollars per year," should be entitled to secure compensation for personal injuries.

[2] In other words, section 1 of the supplement, *supra* (P. L. 1913, p. 230), deals with a designated class of injured employés, but leaves untouched the provisions of the act relating to dependents, when death ensues. What was so aptly said by Judge Vredenburg, speaking for the Court of Errors and Appeals, in the case of *Beagle v. Lehigh, etc., Coal Co.*, 82 N. J. Law, 707, 710, 82 Atl. 890, applies to the construction of the workmen's compensation statute. This law, it will be noted by a reference to its terms, is a remedial law of prime import, and should be liberally construed. It should be broadly construed to a like effect, as the case in the Supreme Court of Errors of Connecticut. *Powers v. Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

The judgment of the Hudson county court of common pleas is affirmed, with costs.

(90 N. J. Law, 450)

FLYNN v. NEW YORK, S. & W. R. CO.

(Supreme Court of New Jersey. Sept. 14, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — 365—WORKMEN'S COMPENSATION ACT — STATE COURT — JURISDICTION.

A crossing flagman employed by a railroad company engaged in interstate and intrastate commerce was struck and killed by the engine of a train engaged in interstate commerce. *Held*, that the court of common pleas of New Jersey is ousted of jurisdiction to award compensation under the New Jersey Workmen's Compensation Act (Act April 4, 1911 [P. L. p. 134]), the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]) is exclusive.

2. MASTER AND SERVANT — 412—WORKMEN'S COMPENSATION ACT — CONCLUSIVENESS OF FINDING.

Although the findings of the court of common pleas, as to the facts in workmen's compensation cases are conclusive on appeal, nevertheless, the law arising upon undisputed facts is a question of law for the court reviewing the decision to decide.

Certiorari to Court of Common Pleas, Passaic County.

Proceeding under Workmen's Compensation Act by Mary Flynn, widow of James Flynn, deceased, employé, for compensation for his death; opposed by the New York, Susquehanna & Western Railroad Company, employer. Compensation was awarded, and the employer brings certiorari. Judgment awarding compensation reversed.

Argued June term, 1917, before SWAYZE, BERGEN, and BLACK, JJ.

Ollins & Corbin, of Jersey City, for prosecutor. Edward F. Merrey, of Paterson, for defendant.

BLACK, J. The writ of certiorari in this case is to review a determination of the court of common pleas of Passaic county, in a proceeding under the New Jersey Work-

men's Compensation Act, brought by Mary Flynn, the widow of James Flynn, deceased.

The trial court determined that the petitioner is entitled to \$5 per week for a period of 300 weeks, beginning on the 30th day of April, 1916. The trial court further found: The prosecutor is a common carrier, and is engaged both in interstate and intrastate commerce; that James Flynn was not employed by the prosecutor in interstate commerce, and thereupon the federal Employers' Liability Act does not apply. It is to review this latter finding that the controversy is brought under review in this court.

[1] The pertinent facts are: The deceased, James Flynn, on March 23, 1916, was employed by the prosecutor, as a crossing flagman, at the Lyon street crossing in the city of Paterson. While thus engaged in the performance of his duties as a flagman, with respect to a passing train, which was carrying passengers and baggage from points in the state of New York to various points in the state of New Jersey, he was struck and killed by the engine of the train in the course of his employment. Flynn crossed over the east-bound tracks of the prosecutor, on the approach of an east-bound train, to flag the crossing, and, while so engaged, was standing near the west-bound tracks, and was struck and killed by the outer edge of the breast piece of an engine drawing a train on the west-bound tracks, which was an interstate train. The question, therefore, for solution, and the only one, is, Was the deceased at the time of his death engaged in an interstate act? If so, it is firmly settled by the recent decisions of our Court of Errors and Appeals, in the case of *Rounsaville v. Central R. R. Co.*, 101 Atl. 182, and by the United States Supreme Court in the case of *Erie R. R. Co. v. Winfield*, decided May 21, 1917, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, reversing *Id.*, 88 N. J. Law, 619, 96 Atl. 394, that the federal Employers' Liability Act of 1908 is exclusive of the state act, and ousts the courts of common pleas of the state of jurisdiction, under the New Jersey Workmen's Compensation Act.

The courts, thus far, apparently have been unable to formulate any rule, sufficiently exact, comprehensive, and exclusive by which to test the quality of an act or series of acts as falling within, or without, the domain of interstate business. Upon reflection, it would seem almost impossible to formulate a rule applicable to the almost endless variety of circumstances and facts springing out of the intricacies of everyday modern life that will be of much practical use or aid. The application of the principle must be made to particular facts, as they arise; and by a process of exclusion and inclusion a rule may perhaps be formulated in time from the decision of such cases. There is already a long line of cases in the federal and state courts

showing the application of the principle to the facts under discussion. It would serve no useful purpose to collate or cite these decisions. The decisions in the United States Supreme Court, the ultimate authority on the point, are quite uniform, when stating the principle, to use such language as this. The employé must be engaged in interstate business, or in an act which is so directly and immediately connected with such business, as substantially to form a part or a necessary incident thereto (New York, etc., *R. R. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; or in work so closely related to it, i. e., interstate transportation, as to be practically a part of it (*Shanks v. Delaware, etc.*, *R. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797). So, Louisville, etc., *R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119.

We have been unable to find any case in the federal courts where this precise question has been passed upon. We are referred to two cases, however, in the California Supreme Court, both of which held that crossing flagman engaged in flagging on a railroad where interstate trains were being operated were engaged in interstate commerce. *Southern Pacific Co. v. Industrial Accident Commission*, 174 Cal. —, 161 Pac. 1139; *Southern Pacific Co. v. Industrial Accident Commission*, 174 Cal. —, 161 Pac. 1142. These cases, of course, are not binding precedents upon this court, but we think these decisions are in harmony and accord with the spirit and principle of the cases, decided by the Supreme Court of the United States.

[2] Notwithstanding this situation, it is now urged by the defendant that the statute makes the judgment of the court of common pleas conclusive and binding as to all questions of fact. *P. L.* 1911, p. 134, § 18; *Nevich v. Delaware, etc.*, *R. R. Co.*, 100 Atl. 234; *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. The judgment of the common pleas must be upheld if there is any evidence in the case to support it. This, of course, must be accepted as the law of the state, but in the case of *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203, it was said by Chancellor Walker, speaking for the Court of Errors and Appeals:

"Although the findings of the court of common pleas as to the facts of the case are conclusive, according to section 18 of the act, and the decision of the Supreme Court, * * * and therefore are conclusive here, yet, nevertheless, the law arising upon ascertained facts is a question for the court reviewing the decision."

The finding of the trial judge that the deceased, James Flynn, was not employed by the prosecutor in interstate commerce is not a finding of fact; it is a statement of law. The facts in the case are entirely undisputed; it is a pure question of law arising upon facts that are not disputed. We think James

Flynn at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business as substantially to form a part or a necessary incident thereto. Under the decision of the Supreme Court of the United States in the *Winfield Case*, *supra*, that fact ousted the common pleas court of Passaic county of jurisdiction.

The judgment, therefore, of the Passaic court of common pleas is reversed, with costs.

(87 N. J. Eq. 403)

PLATT v. JOHNSON et al. (No. 43875.)

(Court of Chancery of New Jersey. Aug. 14, 1917.)

(Syllabus by the Court.)

1. WILLS ¶542(2) — CONSTRUCTION — ABSOLUTE DEVISE—REMAINDER.

Testator devised the remainder of his real estate to his wife for life, or so long as she should remain his widow, and, after her death or remarriage, to his two daughters, to be equally divided between them, share and share alike, and, in case of the decease of either daughter, then to the survivor absolutely, unless the deceased daughter should leave lawful issue, then that such issue should take the share which would have been received by such deceased daughter, had she been living; in case both daughters should die, each leaving lawful issue, then the share of each daughter to be divided equally among such issue surviving, respectively; and in case of the death of both daughters without leaving lawful issue, then the estate to be divided equally among testator's legal representatives (meaning, doubtless, heirs), share and share alike.

These events happened: Testator's wife died in his lifetime; one daughter, having married, also died in her father's lifetime and without issue; the father then died, leaving his other daughter him surviving.

Held, upon the father's death the absolute devise to the surviving daughter took effect, and the remainder to his heirs generally was defeated.

2. JUDGMENT ¶728 — RES JUDICATA — COLLATERAL MATTERS.

The Court of Chancery has power to decide a question beyond its jurisdiction, when it arises incidentally and collaterally in a suit within its jurisdiction, which decision, however, has no force as *res judicata* or by way of estoppel.

3. PARTITION ¶17(2) — LEGAL TITLE TO LANDS—DISMISSAL.

If the legal title to lands is in issue in a suit for partition, the Court of Chancery will either dismiss the bill or retain it to allow the title to be settled in an action at law; and the practice is quite universal to retain it.

Bill for partition of land between Ellen Platt and George M. Johnson and others. On objection to master's report. Objections overruled, and bill dismissed.

William M. Jamieson, of Trenton, for complainant.

WALKER, Ch. The bill in this case was filed for the partition of land in the city of Trenton, of which the late George M. Mitchell died seised. The complainant, Mrs. Platt,

is his surviving sister. The defendants are the children and grandchildren of a deceased brother and sister. An interlocutory decree was entered in which the bill was taken as confessed against the defendants, and it was referred to William J. Backes, Esq., special master, to ascertain and report on the right, title, and interest of the respective parties in the premises, etc., with direction that the report be filed on a certain day therein mentioned, which was done.

The master reported that he was of opinion that Mrs. Overton, one of Mr. Mitchell's daughters, upon the death of her father, took an indefeasible estate in fee simple, under his will, in the lands sought to be partitioned, and that the parties to the suit had no right, title, or interest in the land. In this opinion I concur. The master was guided by the decision of the Court of Errors and Appeals in *Patterson v. Madden*, 54 N. J. Eq. 714, 38 Atl. 273. This case applies, as does also the very recent one of *Michael v. Minchin*, 101 Atl. 283, in the same court.

Counsel for complainant made oral objection to the report at the time it was filed, in pursuance of rule 227 of this court, and claimed that the master's conclusion should be overruled and the matter sent back to the master to report upon the other questions referred, because, as he contended, the devise to Mrs. Overton was defeated by her death without issue, and that the last contingent devise in the testator's will to his legal representatives, meaning heirs, took effect. An examination of the testament will, I think, quite conclusively show that the master is right.

[1] The testator made his will in 1880, and it was proved in 1907, shortly after his death. In it he devises and bequeaths the residue and remainder of his real and personal property to his wife for life or so long as she should remain his widow, and, after her death or remarriage, to his two daughters, Josephine and Harriet, to be equally divided between them, share and share alike. And in case of the decease of either daughter, then to the survivor absolutely, unless the deceased daughter should leave lawful issue, then that such issue take the share which would have been received by such deceased daughter had she been living. In case both daughters should die, each leaving lawful issue, then the share of each daughter to be divided equally among such issue surviving, respectively, and in case of the death of both daughters without leaving lawful issue, then the estate to be divided equally among testator's legal representatives, share and share alike.

These events happened: The testator's wife died in his lifetime. His daughter Harriet, having married a man named Outhouse, also died in her father's lifetime and without issue. The father then died leaving his daughter Josephine him surviving. She was

then married to Frederick C. Overton, and the Overtons, on June 14, 1913, conveyed the premises to an intermediary who reconveyed them to Mr. and Mrs. Overton, thus creating an estate by entirety in them, if the title were good, and I think it was. Mrs. Overton died March 2, 1917, leaving her husband surviving, whereupon he became possessed of the entire estate in the premises.

It is to be observed that on the will taking effect in 1907, upon the death of the testator, the only devisee in esse qualified to take under the will was Mrs. Overton, and the language of the devise, which devolved the property upon her is:

"And in case of the decease of either one of my said daughters, then I give, bequeath and devise the same to the survivor absolutely."

It is apparent that if there was no subsequent provision in the will, the surviving daughter, Josephine Overton, would take the estate in fee simple absolute. Let us see what subsequent contingency might make some other vesting of the whole or any part of the premises.

It is to be borne in mind that the devise of the entire premises was to the surviving daughter absolutely, unless the deceased daughter left issue, in which event the issue would take her share. The daughter Harriet was dead without issue, and, consequently, the whole estate vested in her sister Josephine. Now, it was further provided that in case both daughters should die, each leaving issue, the share of each was to be equally divided among her issue. Because of the death of the daughter Harriet in her father's lifetime without issue, this contingency of one sister surviving and one dying leaving issue could never happen on or after the taking effect of the will. Next and last, in case of the decease of both daughters without issue, then the residuary estate was to be equally divided among testator's legal representatives, meaning, concededly, his heirs and next of kin—heirs in this case, as we are here only dealing with real estate. Complainant claims that this limitation over to the heirs of the testator has not been defeated, and that by the death of his wife and of his two daughters, no issue being left by either of the latter, the limitation over to the heirs of the testator is good and has taken effect.

I cannot be persuaded that the provision of the will that in case of the decease of both daughters without issue the estate of Mrs. Overton who took "absolutely" on her father's death was cut down to an estate for her life and limited over to her father's heirs as mentioned. It must be apparent that if, when the will took effect, both daughters were living both would have taken, and if the deceased daughter Harriet had issue surviving they would have taken her share. That is, one half, while the other half would have gone to the daughter Josephine, in fee simple, and that in either case the limitation over

would have been defeated. It is unreasonable to believe that the testator intended to give his surviving daughter a fee in one-half of his residuary estate if her previously deceased sister had left issue, but if she died without issue, then the whole estate for life only, with remainder over to his heirs generally. I think it clear that the one half which the surviving sister would take in fee if the other died leaving issue was to be increased to a fee in the other half also if her deceased sister left no issue, thus giving the whole estate to the surviving daughter of the testator. That is the natural disposition that a man would make of his property. In my opinion this limitation over to the testator's heirs generally stands, not in opposition to the devise to the daughters, but to the death of both of them prior to the death or remarriage of their mother, the testator's wife. This contingency did not happen as one daughter outlived her mother and sister, both of whom were deceased at the death of the testator and the consequent taking effect of his will. Upon the father's death, therefore, the absolute devise to the surviving daughter took effect, and the remainder to his heirs generally was defeated.

[2] In my opinion Mr. Overton, the surviving husband of testator's deceased daughter Josephine, is now the owner of the premises sought to be partitioned, in right of surviving his wife, because the limitation over to the testator's heirs has been defeated. He is not made a party to the bill. If the decision were to be against his interest, he should be made a party, although, of course, a decree without his being before the court would in no wise bind him. By chancery rule 6 any person may be made a defendant who is alleged to have a claim or interest in the controversy; and by rule 12 the court, at any stage of the proceedings, either upon or without application, may order any party improperly omitted to be added; but, by rule 13, the court may determine the controversy as between the parties before it where it can do so without prejudice to the rights of others. And the court can and does determine this matter without in any wise prejudicing the rights of Mr. Overton. In form the decision is beneficial to him, but in fact it doubtless does not benefit him, because made incidentally in a cause to which he is not a party; and this quite aside from any question of the court's power to decide as to the legal title to the premises, as this court has power to decide a question beyond its jurisdiction when it arises incidentally and collaterally in a suit within its jurisdiction, which decision, however, has no force *res judicata* or by way of estoppel. See *Mullaney v. Mullaney*, 65 N. J. Eq. 384, 387, 54 Atl. 1086.

Counsel asserts that the reason he did not recite in the bill the conveyances from Mrs. Overton and her husband to the intermediary

and from him to them, and why he did not make Mr. Overton a party, was because that would raise an issue of title not triable in this court. If this be so it does not afford a conclusive reason for the course taken. He was obliged to set out a title in the parties, complainant and defendants, or the bill would not lie. The allegations concerning title should have been entirely ingenuous and disclosed all. All was disclosed to the master by the proofs submitted to him on behalf of the complainant. And it is upon proof aliunde the bill that the master finds that the parties have no interest in the premises, the title to which is in a stranger.

[3] If the legal title to lands is in issue in a suit for partition the Court of Chancery will either dismiss the bill or retain it to allow the title to be settled in an action at law. *Slockbower v. Kanouse*, 50 N. J. Eq. 481, 26 Atl. 333; *Havens v. Sea Shore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 755. And the practice is quite universal to retain it.

The objection to the master's report must be overruled, and the bill dismissed.

(87 N. J. Eq. 397)

TRENTON & MERCER COUNTY TRACTION CORP. et al. v. INHABITANTS OF EWING TP. et al. (No. 40/367.)

(Court of Chancery of New Jersey. Aug. 10, 1917.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS — 11(3), 13—ESTOPPEL—PUBLIC RIGHTS—MUNICIPALITIES.

Municipal corporations are not, as respects public rights, within statutes of limitations, but the principle of an estoppel in pais is applicable in exceptional cases, empowering the court to decide the question, not on the mere lapse of time, but upon all the circumstances of the case, and to hold the public estopped or not, as right and justice may require.

2. STREET RAILROADS — 28(1)—INJUNCTION—REMOVAL OF TURNOUT—ESTOPPEL.

A street railway company, having obtained permission to construct, maintain, and operate a street railway upon a township road, by ordinances of the township committee and county board of freeholders, in accordance with a map of its proposed route designating certain turnouts at given points, in constructing its railroad changed the location of one of its turnouts from the point designated on the map to another point a considerable distance away, where, however, its location could have been authorized originally; the railroad and turnout, thus constructed, were maintained and operated for 12 years without any protest from the municipalities, or the landowner in front of whose property the turnout was constructed, the present owner having acquired the property after the turnout had been installed for 10 years, having had actual notice of its location and operation when he purchased and went into possession of the premises. *Held*, that the municipalities, both of which ordered the removal of the turnout, one of which (the township) directed its agent actually to remove it, and that agent should be perpetually enjoined from removing the turnout from its present location; no injunction to go against the individual landowner, who never threatened to remove the turnout, has no intention of doing so, and only urged

upon the municipalities that they take proper steps to remove it.

Bill by the Trenton & Mercer County Traction Corporation and the Trenton, Pennington & Hopewell Street Railway Company against the Inhabitants of the Township of Ewing, the Board of Chosen Freeholders of Mercer County, and Arthur S. Kniffin, to prevent a removal of a railroad turnout. Perpetual injunction granted against the township and the board.

Edward M. Hunt and George W. Macpherson, both of Trenton, for complainants. Willis P. Bainbridge, of Trenton, for defendants Ewing Tp. and Alwyn A. Temple. Samuel C. Kulp, of Trenton, for Board of Chosen Freeholders of Mercer County. James & Malcolm G. Buchanan, of Trenton, for defendants Arthur S. Kniffin and others.

WALKER, Ch. On November 1, 1902, the township of Ewing in the county of Mercer passed an ordinance granting to the Trenton, Pennington & Hopewell Street Railway Company, one of the complainants, permission and right to construct, maintain, and operate a street railway upon the Pennington road in that township, and at or about the same time the Board of Chosen Freeholders of the county of Mercer also passed an ordinance granting permission to the railway company named to construct its railway along the Pennington road in the township of Ewing. These ordinances provided that the railroad should consist of a single track, with three turnouts in the township of Ewing, as shown upon the map of its proposed route. The purpose of the turnouts, or switches as they are otherwise called, was to enable cars to pass each other on the track while going in opposite directions. By the passage of the two ordinances mentioned the statutory right of the company to construct the railroad became complete, and subsequently, in the year 1903, the company constructed its railroad over the route granted, with three turnouts, or switches, in the township of Ewing, one of which was, and is, known as "Green's switch," the one in question in this suit, which, however, was not built at the point shown on the map, but at a distance of some 1,700 feet therefrom.

On or about October 15, 1910, the Trenton, Pennington & Hopewell Street Railway Company leased its railroad and appurtenances, including its rights under the ordinances mentioned, to the Trenton & Mercer County Traction Corporation, the other complainant. In the year 1915 the Ewing township committee and the freeholders of Mercer notified the complainants to remove this switch, and, the demand not being complied with, the township committee ordered its agent, the defendant Alwyn A. Temple, to make the removal. This resulted from complaint and request emanating from Dr. Arthur S. Kniffin, the owner of the land in front of which the switch is located.

Dr. Kniffin in his affidavit says that his house on the Pennington road is immediately opposite Green's switch; that he has lived there for nearly 3 years, and that the switch is an inconvenience to him; that he never had any intention, nor has he any intention, of personally removing the switch or causing it to be removed, nor has he ever threatened to do so, but has urged upon the board of freeholders and the township committee that they take proper legal steps to have it removed. He says in his answer that, on or about August 1, 1915, he first learned that Green's switch was illegally constructed and maintained, that is, without authority for construction and maintenance opposite the dwelling into which he moved a few years ago, which was 10 years after the switch had been constructed; it having been built some 12 years before proceedings were taken looking to its removal.

Very full affidavits were submitted on both sides, and the cause was fully argued on the hearing of the motion for a preliminary injunction, and I asked the parties if they were willing to submit the matter as on final hearing, but this was not assented to; therefore the matter was disposed of on motion for interlocutory injunction, which was granted. After stating the facts substantially as above set forth, I said in my memorandum granting the preliminary injunction:

"Given a switch or turnout which existed in a locality for 12 years without protest from either the owner of abutting land or the proper authorities, and it follows that the status should be preserved pendente lite, especially as it is not shown that any decided inconvenience to the public or the landowner will occur *ad interim*."

After the granting of the interlocutory injunction the parties consented that I should decide the question as on final hearing, on the pleadings, depositions, and exhibits submitted.

[1, 2] After a careful review of the whole case my opinion now is that the complainants are entitled to have the status preserved perpetually. No inconvenience whatever to the public will result from it, and very little, if any, to the landowner in front of whose property the turnout was laid in 1903, and has since been maintained; and especially should the injunction go, as the defendant Dr. Kniffin did not own the premises at the time of the turnout's construction, but acquired the property about 10 years afterwards, with the turnout in front of it.

Although the turnout or switch is not located at the point shown upon the map of the railway line and designated by the ordinances granting permission for the laying of the tracks, and if it had been built at the point designated by the ordinance and map it would not be in front of the property so long afterward acquired by the defendant Dr. Kniffin, I am of opinion that the defendants, or any one of them, are not entitled to insist upon its removal. That this court has power to en-

join the removal, by a municipal corporation, of tracks of a street railway company, in a proper case, has been decided in *Asbury Park & Sea Girt Ry. Co. v. Neptune Township*, 73 N. J. Eq. 323, 67 Atl. 790, affirmed 75 N. J. Eq. 562, 74 Atl. 998. The question is: Is this a proper case? I think it is.

Although consent to the building of the road with the turnouts shown on the map was legally granted, the defendants contend that the turnout in question, not being located at the point designated on the map, consequently was not authorized by the ordinances, and that ratification of the location of the turnout, if any, was given informally, and not by the proper municipal authorities in meeting assembled for that purpose; and they rely largely upon *West Jersey Traction Co. v. Camden Horse Ry. Co.*, 53 N. J. Eq. 163, 35 Atl. 49, wherein it was held that, where a statute requires consent by a township committee to legalize the laying of a street railroad, it is necessary that the consent should be given when the members of the committee, or a majority of them, are assembled in corporate meeting, and that the declarations of individual members are not legal evidence to prove acts of the corporate body, nor is the public estopped by such declarations. That case, however, was one in which an injunction was sought to restrain the alleged improper building of a line of railroad in the first instance; and the doctrine of estoppel against a municipal corporation which had for at least 12 years acquiesced in an actual location of a railroad turnout, which it could have authorized in the first instance, was not presented. That estoppel obtains against an individual defendant in such case I think undoubted.

In *O'Leary v. Street Railway Co.*, 87 Kan. 22, 123 Pac. 746, it was held by the Supreme Court of Kansas that the city of Kansas City should be estopped from questioning the legality of certain completed changes in one of its streets, made by a street railway company under color of ordinances of the city, although such changes were not warranted by the ordinance, but which were to be considered as having been lawfully made, the city having had power in the first instance to authorize them, and that the abutting property owner should not be allowed damages on the theory that the work was unlawful and created a nuisance. The court observed, at page 30 of 87 Kan., at page 749 of 123 Pac. (quoting from *Bridgewater Boro. v. Traction Co.*, 214 Pa. 343, 63 Atl. 796):

"Where a street railway company in laying its track on a borough street has slightly deflected from the line for the track established by the borough and the borough has acquiesced in this location of the track for 10 years, it will be presumed to have ratified the deflected line, and if the railway company in reconstructing its track lays it upon the deflected line, the borough has no standing to object."

The situation before me is quite similar to that in *Bridgewater Boro. v. Traction Company* quoted in *O'Leary v. Street Railway*

Company. There a street railway company laid its tracks, not on the line established by the municipality, but on one deflected therefrom. Here, the railway company has constructed a switch, not at the point located by the ordinance and map, but at some distance therefrom. There is no practical difference, at least none in principle, in deflecting the tracks of a street railway from a line established by municipal authority, and in building a turnout not at an authorized point, but at one somewhat removed therefrom. It is not upon the doctrine of adverse possession, but upon that of estoppel in pais, that the municipality and the private owner should now, under all the circumstances of the case, be enjoined from removing the turnout from the location where it was maintained for 12 years without protest from the municipality or the landowner, the present landowner having acquired his property after the switch had been installed for 10 years, and who, therefore, had actual notice of its location and operation at the time that he purchased and went into possession of the premises in front of which the turnout is laid. Judge Dillon, in his work on *Municipal Corporations* (5th Ed.) vol. 3, p. 1900, § 1194, treating of adverse possession of streets and highways, states his view and suggestions as to the true doctrine as follows:

"Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, are regarded as having, in some respects, a double character, one public and the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

This same doctrine of equitable estoppel against the public arising out of matter in pais was asserted by me, when vice chancellor, in *Mason v. Ross*, 75 N. J. Eq. 136, 143, 71 Atl. 141, reversed 77 N. J. Eq. 527, 77 Atl. 44, but upon other ground.

The views above expressed lead to the conclusion that the defendant municipalities,

both of which ordered the removal of the turnout, one of which (the township) directed its agent actually to remove it, and the agent should be perpetually enjoined from removing the turnout from its present location; no injunction to go against the individual landowner, who never threatened to remove the turnout, has no intention of doing so, and only urged upon the municipalities that they take proper steps to remove it. The only award of costs to be made inter partes will be in favor of the complainants against the defendant municipalities.

(88 N. J. Eq. 48)

LAWRENCE v. PROSSER et al.

(No. 42/187.)

(Court of Chancery of New Jersey. Aug. 15, 1917.)

1. DEEDS \S 211(3) — FRAUD — EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show fraud in act of deceased in securing deed from her nephew of his interest in uncle's estate.

2. SPECIFIC PERFORMANCE \S 86—CONTRACT TO DEVISE.

Where one heir deeded the other his interests in land, for which the grantee orally agreed to make a will amply providing for the grantor, and later the parties made mutual wills, each making the other the sole beneficiary, the contract was sufficiently specific to warrant equitable relief in favor of the grantor, when the grantee subsequently altered her will to his detriment.

3. SPECIFIC PERFORMANCE \S 86—CONTRACT TO DEVISE.

In such case, the mere fact that the agreement was completed at a later date than that on which the oral agreement was made did not prevent consideration of the entire transaction as one contract.

4. WILLS \S 64—CONTRACT TO DEVISE—REVOCABILITY.

The mere fact that the completion of a contract amply to provide for another person was in a will did not make the contract revocable.

5. SPECIFIC PERFORMANCE \S 129 — FRAUD—EVIDENCE—SUFFICIENCY.

One who deeded interest in estate to his aunt, in consideration for her amply providing for him in her will, and who, thereafter sued her husband's estate for the amount which she paid her husband, could not have both such amount and an enforcement of the contract to provide for him in the will.

Suit by Luman W. Lawrence against Judson C. Prosser, executor of Mrs. Dean, and others. Decision reserved.

Scott German and Frank E. Bradner, both of Newark, for complainant. Hugh B. Reed and Theodore D. Gottlieb, both of Newark, for defendant Prosser. Edward Q. Keasbey, of Newark, for town of Bucksport.

STEVENS, V. C. The complainant seeks to have a transfer of an interest in property, made by him to his aunt, Mrs. Dean, annulled, on the ground of fraud. In April, 1911, Luman Warren, a resident of Bucksport, Me., and an uncle of complainant, died intestate, leaving an estate, consisting of personalty

and realty, valued at about \$60,000. His heirs and next of kin were a sister, Mrs. Dean, and three nephews, John, Stevens, and Luman Lawrence. Mrs. Dean was entitled to one-half of his estate, and his three nephews, each, to one-sixth.

The complainant, Luman, who is about 55 years old, had up to March, 1905, lived with his brother John near Boston, but, as he says, being out of work, he, at his aunt's invitation, came to live with her in Newark. The family then consisted of Mr. Dean, who was engaged in the business of keeping a restaurant, and of Mrs. Dean. They had no servant, and Luman, from the time he went there, took the place of one. He did everything that a maid of all work would ordinarily have done. His aunt's health was poor, and she herself could do but little. He lived with her, in this way, up to the time of her death in June, 1916. Mr. Dean predeceased his wife by a few months. She is thus described by Rev. Dr. Waters:

She was a "domineering shrew. She impressed me as a woman in whom there was a struggle going on of unusual strength between the good and the evil in her. At times she was very quiet and of a very gracious personality, and other times she was extremely hard. On one occasion, she ordered Luman out of my presence and her presence, as I don't think I would order a dog away from my premises. * * * There is an old England term that says she was very tight. She had an obsession, I think, as to money affairs, * * * it was her inordinate—well—greed, if I may so call it, that was the controlling impulse in the woman's life, with a certain intense hatred which she exhibited, which she either felt or assumed to feel, toward her relatives."

Of Luman he says that:

He "always impressed me as extremely docile, obedient; as a person who had subordinated his own mind and will to the direction and control of Mrs. Dean."

This description of the two principal characters in the case is borne out by the evidence of the other witnesses. Shortly after the death of Luman Warren, the uncle, at Bucksport, Mrs. Dean and her nephew went there and conferred with Mr. Smith, an attorney, who subsequently became the administrator. A dispute at once arose, as to the administration, between Mrs. Dean and her Massachusetts nephews, which produced a bitter feeling between them. Mrs. Dean wanted what she regarded as a controlling interest in the estate, and proposed to Luman that he assign his one-sixth interest to her. She did this for two reasons: First, to secure control; and, second, to protect Luman against his brothers, who, as she thought, rightly or wrongly, would, if they had the opportunity, play upon Luman's easy-going disposition and strip him of his property. Mr. Smith, who is an intelligent and disinterested witness says:

"I can recall that he [Luman] denounced his brothers in unmeasured terms, and Mrs. Dean was equally as bitter against them as Luman

was at the time. * * * She [Mrs. Dean] stated that she was afraid that if his brothers, Stevens and John, got his share of the Luman Warren estate into their hands, they would turn him out—cast him adrift upon the world. * * * She stated to me [his evidence shows that the statement was made in Luman's hearing and was approved by Luman] that he was possessed of certain infirmities and that his brothers had turned him out, and he went on there [to Newark], and she took him in and made a home for him, provided for him, and intended to provide for him as long as he lived, and make ample provision for him in her will."

Mr. Smith drew a deed from Luman to his aunt, by which he conveyed to her his undivided sixth interest in the land and personal estate derived from his uncle. This deed was executed at Newark on August 2, 1911. I have no doubt whatever, notwithstanding Luman's present denial, that he understood the purport and object of it, and that he agreed to it, on the faith of his aunt's promise to "provide for him at her home as long as he lived," and amply to provide for him by her will "after she was dead and gone." Mr. Smith's statement of the bargain is corroborated by Mrs. Dean's letters and acts, by witnesses in the best position to remember, and, in the end, by Luman himself.

On May 2, 1913, she and Luman executed mutual wills. He gave his property to her, and she, by a codicil to a former will, after giving her husband (who, as I have said, predeceased her) a life interest, devised and bequeathed her estate to Dr. George W. Clement, of Boston, in trust to invest and pay the income periodically to Luman during his natural life and at his death to purchase the necessary land and erect thereon a suitable building to be used as a public hall for the inhabitants of Bucksport. Shortly before, under date of April 20, 1913, she had written to Dr. Clement, telling him that words could not express her gratitude toward him for expressing his willingness to act—

"when the time comes; for it is my duty to provide and protect my sister's son. * * * Luman's inheritance from his uncle will be in the neighborhood of \$14,000." (She apparently overrates the amount, the evidence indicating that it is from \$10,000 to \$12,000.) "Luman has sold to me all his claims, and I shall in return give him all my property during his life, under guardianship, that he will be cared for and not a prey to scheming friends."

This letter appears to me to be conclusive evidence that Mrs. Dean did not regard the transfer in the light of a gift, but as the consideration for a binding promise on her part. To Rev. Dr. Waters she spoke in the same strain:

"She informed me that she and Luman had exchanged wills; Luman had willed his property to her, and she hers to him; that it was her purpose to see that her property reverted to Luman when she passed away, subject to restrictions. She did not think that he was as capable as he might be, on account of his deafness or inexperience, to take charge of the property, and she was going to will it so that he would have the use of it subject to restrictions." "She was afraid some sharp fellows

might get the property away from Luman, and she wanted him to have the benefit of it during his life."

On February 29, 1916, she apparently, from mere caprice, revoked her disposition in Luman's favor, and gave him, instead, a yearly income of \$600 during his life. Luman, when cross-examined at the close of the case, after denying that the deed of August 2, 1911, was read to him before he signed it, testifies as follows:

"Q. But you knew, when you signed it, that you had signed a deed? A. Well, I knew, as you might say, that it was a paper for that purpose. * * * My aunt told me it was to sign that paper to hurry up the sale of the property, and that is all that I know. Q. She [Mrs. Dean] said it was a deed, didn't she? A. A deed, or a paper; whatever you might call it. Q. And you knew as a matter of fact it was a deed? A. I wouldn't say as a matter of fact that I knew it was a deed; but I knew she said it was a paper where that would be done to hurry up the settlement of the property. I didn't know that I was throwing my stuff away. * * * Q. You never questioned the validity of that act until you filed your bill? [August 22, 1916.] A. Never did question it; didn't know anything about it. * * * Q. Didn't you know as a matter of fact that your aunt had provided for you after her death? A. Why—after her death—why, yes, I saw what it said in the will. That is all I see. All I knew. Q. And was that satisfactory to you? A. Good God! No; it wasn't. Q. When did this dissatisfaction on your part first manifest itself? A. When did it? Why the first time I knew it was said in the will. [The witness is here evidently referring to the second will, which cut him down to an income of \$600 a year.] Q. What had you expected? A. I expected I had the whole damn thing. Q. What led you to that expectation? A. That was because the—according to this will that she and I made; by golly, that was what it was. Q. Well, then, you did expect that she had made provision for you; only you expected a better provision than manifested itself. Isn't that so? A. Well, that might be so; and another thing: According to that will there, what she drew—I drew in her favor and my favor. I was to have the whole thing. That is what I supposed I done. Q. And was that your agreement with her; that you were to have the whole thing? A. That was the agreement, right straight down, when that will was made out."

The two wills of May 2, 1913, were drawn by Judge Raymond. Mrs. Dean and her nephew went to his office together, and it is perfectly obvious that their contents were known to both and satisfactory to both. The will of Mrs. Dean was evidently intended to be in fulfillment of her promise made in Mr. Smith's presence, in the summer of 1911, that, in consideration of the transfer of Luman's interest in his uncle's estate, she would amply provide for him. And the bequest in the will of 1913 was an ample provision. It would, in the events that happened, have given him a clear yearly income of over \$2,000—much more than an equivalent for the interest he had turned over. The bequest in the will of 1916 was not an ample provision. What induced Mrs. Dean to change her will just before she died does not appear. Luman continued to be her faithful servitor up to her death. It is true that, between the

time of the making of the mutual wills and her death, her estate had been augmented \$20,000, or thereabout, by what her husband had left her; but, even without this addition, Luman would have received three times as much as she finally gave him.

[1] The complainant has put in evidence letters showing that Mrs. Dean was trying to conceal from her Massachusetts relatives the true character of the transfer, and he has produced witnesses who speak of her casual declarations to the effect that Luman's interest had been turned over "for her to take care of." These do not, as it seems to me, throw any additional light upon the case. The transaction, stated in its simplest form, was obviously this: Mrs. Dean wanted to control as much of her brother's estate as she could, and she wanted to protect Luman against himself; to protect him in the way that she thought best. In point of fact, up to within three months of her death, her plan to provide for him was greatly for his interest. He had no one dependent upon him, was not likely to marry, and would be better off with a large income than a small principal. During the period between August, 1911, and February 29, 1916—the date of the making of the last will—there is no evidence that she had the slightest intention of perpetrating a fraud upon him. The equivalent she intended to give was more than equal in money value to what she had received. The injustice that he had suffered, if it be an injustice, arises from the change in his aunt's provision for him. On these facts, it seems quite impossible to find that the deed was fraudulently obtained.

It is argued that the court should annul the transfer on the principal of *Slack v. Rees*, 21 Dick. 447. This and similar cases do not apply, for the reason that this is not a case of an improvident gift, but of a contract which, in terms, stipulated for a full equivalent. Luman was to be amply provided for. While he was no doubt weak and yielding, and his aunt imperious, there is not the slightest evidence that he did not possess sufficient capacity to make a bargain with her.

This brings me to the question whether this court can give relief, and what that relief ought to be. The question is not whether the wills of May 2, 1913, are binding, because executed on the same day and parts of one transaction, but whether Mrs. Dean's will, made in fulfillment of her promise and based on adequate consideration, is not binding upon her. The evidence justifies the inference that the provision was made in fulfillment of her promise and that it was accepted as such by the promisee. The executor and the town of Bucksport cite *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570, as a controlling authority. As I understand the decision, Justice Dixon made a distinction between a promise, based on valuable consideration, to make a specific provision by

will, and a promise merely to make a will; a promise induced by charitable acts of the promisee performed and to be performed; acts which the promisee had done and contemplated doing, but without legal obligation resting upon her to continue them. He concedes that a promise to make a specific provision by will, supported by consideration, may be binding; and such is the current of authority.

Schouler, in his book on Wills and Administrations, § 454, says that a court of equity will specifically enforce a contract to execute a will after a certain tenor, when the contract is founded upon valuable consideration. It does this by fastening a trust upon the estate of the deceased, not only where fraud is concerned, but personality as well. One of the earliest cases—*Dufour v. Pereira*, Dickens, 420 (A. D. 1769)—was a case of trust declared in respect of certain bequests. In a note to section 746 of Pom. Eq. Jur., the author quotes with approval what is said in *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107. The passage is entirely apposite to the present situation.

"All the authorities agree that one may, for a valuable consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by contract to dispose of his property by will to a particular person, and that such contract may be enforced after his decease, either by an action against the personal representative, or, in a proper case, by a bill in the nature of specific performance against his heirs, devisees, or personal representatives."

This is the doctrine of *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, a leading case on the subject. An action at law for breach of contract would here do violence to the intentions of both parties, and would not do justice to either. The equitable remedy would effectuate the very trust intended. A promise, based on valuable consideration, to do a lawful act, will, if broken, generally, if not always, give rise to some form of action. The only question will be whether the relief to be accorded shall be legal or equitable. I take it that, if the promise made by A. be merely amply to provide for B. by will, B., if the promise be broken, would have to sue at law for damages; but if the promise be to give a particular thing by will—at least such a thing as cannot be adequately compensated for by damages—and the statute of frauds do not prevent (*Maddison v. Alderson* [1883] 8 App. Cas.), B. may sue in equity. As a trust was intended—a trust that would be defeated, if damages were given—the question reduces itself to this:

[2] Was the contract sufficiently specific to warrant equitable relief? In the first instance, perhaps, it was not. As made just before the time of the transfer in August, 1911, it was, merely, "amply to provide." But when Luman made the transfer, and when Mrs. Dean executed her will and specifically defined the ample provision, in terms

satisfactory to both, the contract was completely executed on one side and completely defined on the other, and could, therefore, only be varied by the consent of both. If she had made the will contemporaneously with the transfer of the property and because of the transfer, it is clear under the authorities that a contractual obligation would have been imposed upon her. Because she waited awhile, the obligation all the time resting upon her to do the very thing which she did, it does not seem to me that the effect of the transaction, looked at as one whole, is different.

[3] If it be argued that the agreement at the time of the transfer was not complete in all its parts, that the ample provision was not specifically defined, that after having once defined it she might, within the limits of her contractual obligation, still redefine it, if she made it ample, the answer is that, in view of her circumstances and of what she had received, the second provision was not ample, and so the change was contrary to her obligation. But, further, it must be remembered that Mrs. Dean is dead, and complainant under a disability fully to testify. In view of the evidence, I think it a fair inference that the kind of provision was from the beginning understood between them, and that the will did no more than embody the understanding in a writing. It would be too much to say that, because the papers relating to the two parts of this transaction were executed at different times, we are to apply a rule different from that that would have governed, had they been executed at the same time. The different parts of a complex transaction are frequently reduced to writing at different times; but this does not prevent their being considered as one whole.

[4] Again, it is argued that, because the provision was contained in an instrument in its nature revocable, it was subject to change at the will or caprice of the testatrix. The will was, of course, revocable; but the agreement to make the provision, being founded on valuable consideration, was not. It was the duty of testatrix to embody it in any will she thought fit to make.

[6] There is an unfortunate complication. Luman sued the estate of Mr. Dean while this suit was progressing, and by the verdict of a jury recovered, not only wages for services rendered in the Dean home, but also the amount of a check for \$1,342, part of Luman Warren's estate, that under his nephew's deed of transfer passed to his aunt. The fact that it was handed over to Mr. Dean—it must be assumed with his wife's consent and as her agent—did not make it part of Mr. Dean's estate. If Luman, therefore, claims the money, he to that extent endeavors to repudiate his transfer. He cannot have the consideration on which his aunt's agreement was based, and at the same time claim the

benefit of the trust constituted for his benefit. Counsel have not discussed this phase of the controversy, and I will hear them on it.

(88 N. J. Eq. 52)

IMPROVED BUILDING & LOAN ASS'N v. LARKIN et al. (No. 41/253.)

(Court of Chancery of New Jersey. Aug. 2, 1917.)

1. MECHANICS' LIENS ⇨195—PRIORITIES—CONTRACT.

To protect property against mechanics' liens subsequently filed, a building contract filed must be between parties who in truth, and not in form merely, hold to each other the relation of contracting parties.

2. MORTGAGES ⇨463—FORECLOSURE—EVIDENCE.

In a suit to foreclose a mortgage on land upon which a building was erected, evidence held to show that the building contract, which was duly filed, was not in truth between parties holding to each other the relation of contracting parties, and hence such contract did not protect the property against mechanics' liens.

3. EQUITY ⇨427(1)—DECREE—CONFORMITY TO PLEADINGS.

As a decree with reference to matters outside of the issues raised would be void, even in collateral proceedings, such matters should not be disposed of.

4. MORTGAGES ⇨151(3)—MECHANICS' LIENS—PRIORITIES.

Where mortgages, though preceding lien claims, were made after building was commenced, the mortgagees, the property not being protected from lien claims by contract filed, must, in order to obtain priority under Mechanic's Lien Act, § 15 (3 Comp. St. 1910, p. 3303), show that the moneys secured were actually advanced by them and applied to the erection of the building, and mere proof of payment to the mortgagor is insufficient.

5. MORTGAGES ⇨151(3)—MECHANICS' LIENS—PRIORITY.

Where money obtained on a mortgage given after building operations had commenced was used to discharge a prior incumbrance on the land, the mortgagee is not, as to the amounts used to defray the incumbrance, entitled to priority over lien claimants on the theory that such sum was devoted to building purposes; land being distinguished in Mechanic's Lien Act, § 15, from a building.

6. VENDOR AND PURCHASER ⇨266(8)—VENDOR'S LIEN—LOSS.

A vendor who takes a mortgage for unpaid purchase money loses his vendor's lien.

7. MECHANICS' LIENS ⇨198—MORTGAGES ⇨151(1)—LIENS—PRIORITY.

The vendor, who took a mortgage for the unpaid purchase money, agreed through her attorney to release such mortgage to enable another mortgagee to have a first lien. The vendor's mortgage was released, but the purchaser failed to pay the entire sum due the vendor. Thereupon a deed reconveying the property to the vendor to secure the unpaid purchase money was executed. Held that, though the deed was antedated, yet as it did not take effect until delivery, the lien of the vendor by reason of her first mortgage was waived, and her rights under the deed of reconveyance became junior to those of the mortgagee and other existing lienholders.

8. DEEDS ⇨108—DELIVERY—EFFECT.

A deed takes effect only from the time of delivery.

9. MECHANICS' LIENS \S 198 — PRIORITIES — PAYMENTS.

Payments of freight and for a watchman for a building in the process of construction, made out of the moneys furnished by a mortgagee, will, under Mechanic's Lien Act, \S 15, where the watchman was necessary, take priority to mechanics' liens.

10. MORTGAGES \S 414 — FORECLOSURE — DELAY.

Foreclosure of a mortgage will not be delayed, though the status of the claim of one of the parties to the suit remains to be determined by an action at law.

Bill by the Improved Building & Loan Association against Clara H. Larkin and others. Hearing on bill. Decree for complainant.

Thomas J. Butler, of Newark, for complainant. Mr. Steinhardt and Mr. Clymer, of Newark, for defendants Katchen & Rabinovitz. Mr. Bianchi, of Orange, for defendant Latin-American Const. Co. and others. Perry & Grosso, of Orange, for defendants Larkin and others. Mr. Bernard, of Newark, for defendant Dorfman. Bilder & Bilder, of Newark, for defendant Lum. Mr. Hinrichsen, of Newark, for defendants Cook & Genung.

STEVENS, V. C. This is a suit to foreclose a mortgage. The defendants are subsequent mortgagees and lien claimants.

[1, 2] The first question is whether the filing of the building contract, dated June 24, 1914, made by John T. Kelly, with a partnership known as the Latin-American Construction Company, operates to protect the property built upon against mechanic's lien claims filed subsequently. The insistence is that the contract was made between parties so related as to bring it within the principle of *Young v. Wilson*, 44 N. J. Law, 157. This case holds that the agreement, the filing of which protects against the lien of other creditors, must be between parties who in verity, and not in form merely, hold toward each other the relation of contracting parties.

In April, 1914, David W. Dorfman, Nicholas A. Norelli, and Daniel J. Scrocco formed a partnership, to make and perform contracts for constructing buildings of every sort. They filed with the county clerk a certificate of partnership, which bears date April 11, 1914, and which states their business name to be "the Latin-American Construction Company." Dorfman and Norelli were architects; Scrocco was a clerk. On June 6, 1914, John T. Kelly entered into a written agreement with J. Frank Larkin, husband of Clara H. Larkin, to purchase, for \$2,000, the land covered by complainant's mortgage. Kelly seems to have been a business acquaintance of the partners, and so impecunious that he was unable to pay any money whatever at the time he agreed to buy. He gave instead his note for \$50, indorsed by Norelli. Evidently the agreement that he made with Mrs. Larkin was intended to promote the plans of the partners. It having come to their knowledge that there were judgments against

Kelly, the deed was, with his consent, made to Dorfman, who gave a mortgage of \$2,000 to secure the entire consideration money. This deed bears date June 6, 1914, but it was not acknowledged or delivered until the following August.

Notwithstanding the fact that Kelly was entirely destitute of means, on June 27th he entered into a building contract with the Latin-American Construction Company, by the terms of which he agreed to pay \$28,000 for the erection of a large tenement house on the property in question. This contract was filed June 2, 1914, and work was begun under it before any deed was given. Evidently the cost of construction was to be provided for by the Construction Company, itself possessed of very little money, and by loans to be obtained during the progress of the work. Up to August 6, 1914, the owner, using that word in the sense of the Mechanic's Lien Act, appeared to be Kelly, and the work was apparently being done for him. I say apparently, because it is evident that Kelly's interest was of the slightest. It was so slight that, when Dorfman discovered the judgments, Kelly, at the request of the partners, assigned to him, without consideration, his interest both in the land and in the contract. But this created a complication. Dorfman, as a member of the partnership, became both builder and owner, and it was feared by its counsel that the effect of the filing of the contract would be nullified. Thereupon the company, so called, which seems to have proceeded as if it were a corporation, passed a resolution stating an agreement that, inasmuch as Kelly had assigned his rights to Dorfman, Dorfman would resign his membership and a new construction contract be made between the company and Dorfman, and (I quote its language) "that the amount shall be the same as the one with Mr. John T. Kelly."

At or about the time of the passage of this resolution Dorfman took an assignment of the Kelly contract, and joined in the execution of a new contract between himself and the remaining partners, Norelli and Scrocco. This was an exact copy of the other, except its date. It was never filed. Norelli says: "I kept to the Kelly contract, the original on file." It is not at all unlikely that the parties at first regarded the second contract as the one to be deemed in force, and then, in view of the difficulties of the situation, the first; for it appears that they filed the assignment of the first contract three months after they obtained it. Obviously the persons from whom they hoped to borrow money would be likely to insist that a building contract should be on file. A striking illustration of how lightly the obligations of the contract were held appears in the case of Joseph Del a Fera. The Kelly contract included the carpenter work. But, when it was sought to subcontract this work, Del a Fera, refusing to take a subcontract from

the construction company, was given a contract directly with the owner, Dorfman. Under these circumstances it seems to me to be the unavoidable inference that the parties were contracting parties in form merely; that the case falls within the principle of *Young v. Wilson*, supra, and that the contract does not protect the land against the liens of creditors.

The creditors' liens mentioned in the bill are the following:

Aug. 6, 1914.	Mortgage to Mrs. Larkin....	\$ 2,000 00
" 11, 1914.	" " complainant ...	18,000 00
Oct. 20, 1914.	" " Waldemar Dorfman	5,000 00
May 13, 1915.	" " Amorose	1,000 00
Aug. 25, 1914.	Contract of Iannacone & Ambola.	
April 6, 1915.	Attachment by Cook & Genung for	400 00
Dec. 31, 1914.	Judgment of De Stefano, agent David W. Dorfman for	249 05
June 10, 1915.	Mechanic's lien by Del a Fera for	2,150 00
June 24, 1915.	Mechanic's lien by Katchen & Rabinovitz	1,005 00
" 28, 1915.	Mechanic's lien by Nicholas Norelli	1,695 00
Aug. 4, 1915.	Mechanic's lien by Amorose	1,823 00
" 11, 1915.	Mechanic's lien by Person..	150 00
Sept. 30, 1915.	Mechanic's lien by Katchen & Rabinovitz	855 00
Oct. 8, 1915.	Mechanic's lien by Shapiro..	500 00
" 15, 1915.	Mechanic's lien by Latin-American Construction Company	13,571 00
Feb. 14, 1916.	Mechanic's lien by Amorose	1,825 00

[3] The complainant has taken a decree pro confesso against David W. Dorfman, Frank Larkin, Ernest Lum, as trustee of the Orange Supply Company, Kelly, De Stefano, Cook & Genung Company, Person, Shapiro, and one or two of the other defendants who appear subsequently to have answered. Most of the answers are drawn without regard to the fundamental rule of equity pleading that he who answers must state his case and answer fully. I shall not, in the very complicated situation presented by the proofs, go outside of the issues raised. The court can hardly be expected to decide matters not set up in the pleadings, when a decree made in relation to such matters would be void, even in a collateral proceeding. *Reynolds v. Stockton*, 48 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305, affirmed 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

[4] While the mortgages precede the lien claims in point of date, they are attacked on the ground that the money lent thereon, or part of it, did not go into the building. As I have found that the contract made between Kelly and the Latin-American Construction Company of itself affords no protection against liens, the mortgages must be dealt with as provided for in section 15 of the Mechanic's Lien Act. They were all made after the building was commenced. The mortgagees must therefore prove that the moneys secured were actually advanced and paid by them and applied to the erection of the building built upon the land mortgaged. Since

the decision of the Court of Errors in *Franklin Soc. v. Thornton*, 85 N. J. Eq. 525, 96 Atl. 922, and of the Supreme Court in *Young v. Haight*, 69 N. J. Law, 453, 55 Atl. 100, there can be no doubt as to the rule. Says Gummere, C. J., in the latter case:

"The only test is whether the money has been loaned for the erection of * * * the building and has been actually applied to that purpose."

If labor or material have gone into the building, money lent to pay for such labor or material would, of course, be within the rule, and equally, it seems to me, would be money lent to pay a contractor or subcontractor to whom, under his contract, payment is due for work actually done. But money paid to a person charged with the duty of paying such contractor does not come within the rule, unless it be further proved that such money was actually paid over. In the case in hand, proof of payment by complainant to David Dorfman, or to Norelli, or his partner Scrocco, would not suffice. The proof must go further; it must show that they applied it to the erection of the building, by paying it in one of the ways I have mentioned.

[5] The question then is: Were complainant's and Dorfman's moneys so applied? As far as complainant's mortgage is concerned, I do not find in the briefs handed to me any insistence that it was not, except in that of Katchen & Rabinovitz. The answers or notices of Amorose, Waldemar Dorfman, Lum, Norelli, and Cook & Genung expressly admit the priority of the lien. Under these circumstances the complainant is entitled to have the full amount due on his mortgage paid to him before any other liens are paid, except the lien of Katchen & Rabinovitz, as to whom he must show that the money went into the erection of the building. The principal contention that Katchen & Rabinovitz make on this head is that \$1,200 of the money lent went to pay Mrs. Larkin for the purchase price of her land. The facts are these: Mrs. Larkin, as has been already stated, deeded the property to David Dorfman in August, and took a mortgage of \$2,000 to secure the price. Dorfman applied to complainant for a loan, which was granted only on condition that it should have a first lien. Mrs. Larkin's solicitor, Mr. Grosso, says:

"Mr. Dorfman, and Mr. Norelli, and Mr. Giordano, their attorney, called on me frequently, and asked me to cancel the mortgage, and I told them I wanted some money. However, I was assured by Mr. Norelli, also by Mr. Dorfman, that if I would cancel that mortgage they would pay me as soon as they got the first payment from the Building & Loan Association."

It was canceled on December 3d. On December 5th Mr. Butler, representing complainant, handed to Mr. Norelli, representing the Latin-American Construction Company, a check for \$3,312.80. As soon as Mr. Grosso heard of it, he went to Norelli's office, and, on being told by Norelli that he was unable to give the full amount, accepted a check, dated December 7th, for \$1,200, and took a

deed to Mrs. Larkin, antedated November 24th, reconveying the property, to secure the balance owing, \$360. The money was not applied to the erection of the building, unless the word "building" be stretched to include "land." All through the Mechanic's Lien Act, "land" and "building" are contradistinguished. In the section under consideration, I think the word "building" is used in its ordinary sense, and does not extend to the land built upon.

[8] I will next consider the position of Mrs. Larkin. Under the course of decision in this state there can be no doubt but that her mortgage, being given to secure purchase money, was prior to the mechanics' liens. The real question is whether she lost her lien when she surrendered her mortgage for cancellation. She did so, unless her vendor's lien continued. The law of this state is that the giving of a mortgage for purchase money is a waiver of the vendor's lien. In the note to the leading case of *Macreath v. Symmons*, 1 Lead. Cas. in Eq. 364 (3d Am. Ed.), it is said:

"The lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage on other land, or pledge of goods, or personal responsibility of a third person, and also when a security is taken upon the land, either for the whole or a part of the unpaid purchase money, unless there is an express agreement that the implied lien shall be retained."

Mr. Pomeroy (Eq. Jur. vol. 3, § 1252) says: "The securities which ordinarily produce this effect are the grantee's mortgage on the very land conveyed," etc.

In *Acton v. Waddington*, 46 N. J. Eq. 19, 18 Atl. 356, affirmed 46 N. J. Eq. 611, 22 Atl. 56, Chancellor Runyon said:

"The lien will be considered as waived whenever any distinct and independent security is taken, such as a mortgage on the land, or pledge of things, or personal responsibility of third persons, and the like."

[7, 8] Such being the rule of law, when Mrs. Larkin took her mortgage for the price, she lost her vendor's lien, and what we have to deal with is the mortgage lien, and not the vendor's lien. Now, Mrs. Larkin, at the solicitation of Dorfman or the Construction Company, surrendered this lien, in order that the lien of complainant's mortgage might attach upon the land as a first lien. She did so, as far as appears, without reservation or limitation, and without stipulating for any other lien. Mr. Grosso was content to rely upon the representations that Dorfman, Norelli, and their attorney, Mr. Giordano, made to him. He says:

"I was assured by Mr. Norelli and their attorney, Mr. Giordano, that, if I would cancel that mortgage, they would pay me as soon as they got the first payment from the Building Association."

The mortgage having been surrendered and canceled, it seems to me necessarily to follow that existing liens upon the property fastened themselves upon the mortgage es-

tate thus merged in the equity of redemption. If complainant's lien attached, so did the others. No subsequent act of the parties could revive the mortgage lien of Mrs. Larkin, so as to give it precedence. The antedating of the deed could not have that effect, for a deed takes effect from delivery, and the delivery, as averred in the answer and shown by the evidence, took place when the note for \$360 was given (December 7th). I reluctantly conclude that Mrs. Larkin's security by way of deed must give way, in point of priority, not only to complainant's mortgage, but to Dorfman's and to the mechanics' liens. The Amorose mortgage was not proved.

I next take up the Waldemar Dorfman mortgage. Counsel for Waldemar Dorfman's representatives has prepared a statement claiming that payments amounting to \$4,401.61, made on its security, went into the erection of the building. Other payments, amounting to about \$475, went, he admits, to the partners, and cannot be traced into the building. If these figures are not accepted as correct by other counsel, there will have to be a reference to a special master to state an account.

[9] As to the payments for freight and those made to the watchman, the case of *Davis v. Mial*, 86 N. J. Law, 167, 90 Atl. 315, controls. If a watchman was reasonably necessary for the protection of the building during construction the money paid for his wages went into the erection. The salaries paid Norelli and Scrocco, so far as they were compensation for work done on the building, will be allowed.

The lien claim of Del a Fera was reduced to judgment in a suit at law in the Essex circuit court, in which Del a Fera was plaintiff, and David W. Dorfman, Clara H. Larkin, Waldemar Dorfman, and Joseph E. Amorose were defendants. The judgment was entered May 24, 1916, for \$3,407.44. It adjudges that the lien claim is prior to the mortgages held by defendants Dorfman and Amorose. This judgment, being subsequent to the alleged waiver of priority, must control.

The Latin-American Construction Company's lien claim is based upon the assumption that the contract with Kelly was valid. As against the lien claimants, I have found that it was not. That company must therefore be postponed to the mechanic's lien claimants who have appeared and proved their claims. I do not find in the briefs that the lien claims of Amorose and Katchen & Rabinovitz are disputed. They and any other undisputed claims will be concurrent liens, payable in accordance with section 28 of the Mechanic's Lien Act.

[10] Probably when the property comes to be sold—and perhaps it may be desirable to sell at once—other equities, dependent upon the amount the property may bring, will have to be adjusted. Waldemar Dorfman's

mortgage is or may be good for the whole amount against David Dorfman. The status of the Construction Company's claim against Dorfman may be different from its status as against the lien claimants. It is stated that there is a suit pending on this claim. If so, it ought to be prosecuted to judgment. The question of the amount Dorfman owes the company, and on what basis he owes it, is a legal one. The law courts will determine whether there is a lien, and how much, lien or no lien, is owing; but the pendency of this suit ought not to delay the sale.

If a reference be necessary, the master will report upon the various claims on the principle here laid down, and upon any incidental questions that may arise in the course of this very complicated litigation.

(258 Pa. 333)

LEHIGH VALLEY TRUST CO. v. STRAUSS.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. APPEAL AND ERROR ⇨731(2) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error as to the findings of fact and of law by the trial judge and as to his answers to requests for findings not showing an exception to the findings of which complaint is made are defective.

2. APPEAL AND ERROR ⇨733—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to an interlocutory judgment, merely directing judgment to be entered if no exceptions were filed within 30 days, showing no exception to the order, was defective.

3. APPEAL AND ERROR ⇨733—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the final order of the court dismissing plaintiff's exceptions to the findings and conclusions, not setting out such exceptions, was defective and not self-sustaining.

4. APPEAL AND ERROR ⇨733—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error, complaining of error in entering judgment against plaintiff and in favor of defendant for costs without quoting the judgment verbatim, was defective.

5. BILLS AND NOTES ⇨242 — RELATION OF PARTIES—ORIGINAL PROMISOR OR SURETY.

Where decedent and defendant signed an agreement that in consideration of the discounting or purchasing of certain notes they would pay the notes at maturity, or on their renewals, and decedent deposited stock of his own as collateral security which was sold and the debt paid off from the proceeds and the evidence showed that the loan was in fact made to the decedent, the decedent was the real debtor, and not merely a cosurety with defendant.

6. PRINCIPAL AND SURETY ⇨194(4)—RIGHTS BETWEEN SURETIES—CONTRIBUTION.

A cosurety cannot be called upon for a contribution for the benefit of the other surety if he agreed to become cosurety at the request and for the benefit of the other surety.

Appeal from Court of Common Pleas, Lehigh County.

Assumpsit by the Lehigh Valley Trust Company, administrator d. b. n. c. t. a. of the estate of David R. Kline, deceased, succeeding Frank Jacobs, executor, against Martin

H. Strauss, to enforce contribution by a cosurety. Judgment for defendant, exceptions to findings of fact and conclusions of law dismissed, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, FRAZER, and WAL-
LING, JJ.

M. P. Shantz and Butz & Rupp, all of Allentown, for appellant. Fred B. Gerner, of Allentown, for appellee.

POTTER, J. [1] Of the 22 assignments of error filed in this case, the first 19 are to various findings of fact and of law by the trial judge, and to his answers to requests for findings. Not one of the assignments shows an exception to the finding of which complaint is made; therefore they are all defective. *Streng v. Buck Run Coal Co.*, 241 Pa. 560, 88 Atl. 796; *Brown v. Hughes*, 244 Pa. 397, 90 Atl. 651; *Scull's Est.*, 249 Pa. 57, 94 Atl. 476.

[2] The twentieth assignment is to an interlocutory order of the trial judge, which merely directs judgment to be entered, if no exceptions are filed within 30 days, and the record shows that exceptions were filed. The assignment shows no exception to the order of which complaint is made.

[3] The twenty-first assignment is to the final order of the court dismissing plaintiff's exceptions to the findings and conclusions of the judge. But these exceptions are not set out in the assignment, and it is therefore defective and not self-sustaining. *Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 88 Atl. 439.

[4] The twenty-second assignment raises the question whether there was error in entering judgment against the plaintiff and in favor of the defendant for costs. But the assignment should have quoted the judgment verbatim.

[5] The action was assumpsit, brought by the executor of David R. Kline against Martin H. Strauss, to enforce an alleged right to contribution. The claim was based upon a paper dated May 27, 1908, addressed to the Citizens' Deposit & Trust Company of Allentown, signed by the defendant Martin H. Strauss, and by David R. Kline, in which they agreed that, in consideration of the discounting or purchasing of certain notes of the Lehigh Tungsten Mining & Milling Company, in the total sum of \$5,000, they would pay said notes at maturity, or their renewals. On the same day, the trust company did purchase a note of the milling company for \$5,000, and at the time Kline turned over to Fred H. Lichtenwalner, the treasurer of the trust company, 133 shares, which he owned of the capital stock of the trust company to be held by Lichtenwalner individually, to secure the payment of the note, or its renewal. The note was renewed from time to time,

until on December 3, 1912, after Kline's death, a note for \$4,750, payable 40 days after date, was given to the trust company by the milling company, in renewal of the original note, and made and indorsed in the same manner. When this note matured Kline's stock in the trust company, which was in the hands of the treasurer, was sold, and the note was paid out of the proceeds. This suit was then brought by Kline's executor to recover one-half of the amount paid in satisfaction of the note. The case was tried without a jury, and the trial judge found as a fact that the transaction was a personal loan to Kline by the trust company, and that he placed his own stock in the hands of the treasurer to be held in trust to secure payment of the loan, and that it was paid out of the proceeds of the sale of that stock. The trial judge said:

"Nowhere does it appear that this was an obligation coming within the terms of the paper, dated May 27, 1908; in fact it appears that this was a personal obligation of decedent."

[8] Under the facts as found by the court below, Kline was the real debtor, and was not merely a cosurety with Strauss, and it was properly held that the doctrine of contribution has no application. As between himself and the trust company, Strauss was, no doubt, liable, but there is no reason why he should be called upon to respond for the benefit of the person at whose request, evidently, he agreed to become cosurety. As the record stands it appears merely that the proceeds of Kline's property was applied to the payment of his own debt. That being the case, there could, of course, be no recovery here against the defendant.

The assignments of error are overruled, and the judgment is affirmed.

(258 Pa. 338)

PITTSBURGH & L. E. R. CO. v. CLINTON IRON & STEEL CO.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. CARRIERS ⇐196—DEMURRAGE—AGENCY OF RECEIVING RAILROAD—SUFFICIENCY OF EVIDENCE.

In an action by a railroad against a steel company to recover demurrage charges on cars delivered to the company, defended on the ground that they were delivered to an independent railroad company on an interchange track under an agreement with such company, evidence held to show that such railroad company was either the agent or part of the plant equipment of the steel company, so as to render the company liable for such charges.

2. CARRIERS ⇐196 — DEMURRAGE CHARGES — REASONABLENESS—EVIDENCE.

In an action by a railroad for demurrage charges of \$1 per day on cars delivered to a steel company wherein the defendant denied the reasonableness of such charges but offered no evidence that they were unreasonable and where the railroad submitted no proof of their reasonableness, it was not precluded from recovering, where the reasonableness of such charges was recognized by Act May 24, 1907 (P. L. 229).

Appeal from Court of Common Pleas, Allegheny County.

Assumpsit to recover demurrage charges by the Pittsburgh & Lake Erie Railroad Company against the Clinton Iron & Steel Company. From a judgment on a directed verdict for plaintiff, defendant appeals. Affirmed.

The facts appear in the following opinion by Evans, J., in the court of common pleas, sur defendant's motion for a new trial and for judgment n. o. v.:

The plaintiff brought suit against the defendant to recover demurrage charges on cars delivered loaded to the defendant and received from the defendant loaded and unloaded, for the time the cars were detained by the defendant over the free time allowed. The loaded cars were placed by the railroad company upon what was known as an interchange track in the Point Bridge Yard, and were taken by the South Shore Railroad Company from the interchange track to the track on which they were unloaded, and returned by the South Shore Railroad Company to the interchange track either loaded or unloaded. Originally the Clinton Iron & Steel Company had switching tracks on the land of the furnace company, and in 1892 the South Shore Railroad Company was incorporated and took over most of the switching tracks and enlarged to some extent its trackage, all of which was located upon the land of the Clinton Iron & Steel Company, a part of which land was leased by the steel company to the South Shore Railroad Company. The equipment of the South Shore Railroad Company consists of two locomotives and six flat cars. The flat cars are used exclusively in the plant of the Clinton Iron & Steel Company. The South Shore Railroad Company does all of the Clinton Iron & Steel Company's intramill service, for which it makes no charge. There is no means of access to the South Shore Railroad by the general public, and there is no work done or service performed by the South Shore Railroad Company except in connection with the Clinton Iron & Steel Company and another small allied works on the same land and the Pittsburgh & Lake Erie Railroad Company and the "Pan Handle" Railroad Company. It makes no reports to the Interstate Commerce Commission, issues no bills of lading, and in no way conforms to the requirements of the act of Congress regulating common carriers. Its superintendent, who controls the operation of the road, has also charge of the outside labor of the Clinton Iron & Steel Company in connection with the unloading and loading of cars shipped in and out and in the intramill service, for which he receives no compensation from the Clinton Iron & Steel Company. The employees of the South Shore Railroad Company and the Clinton Iron & Steel Company are both paid at the same time and place and by the same man. The movement of cars made by the South Shore Railroad Company engines are noted on the conductors' reports headed "Clinton Iron & Steel Company." The stock of the Clinton Iron & Steel Company during all this period was owned as follows: F. N. Hoffstott 50 per cent.; J. W. Friend 33⅓ per cent.; C. W. Friend 8⅓ per cent.; and T. W. Friend 8⅓ per cent. C. W. Friend and T. W. Friend were the sons of J. W. Friend. The South Shore Railroad Company during this entire period was owned in equal shares by J. W. Friend and F. N. Hoffstott. I should qualify the above statement to this extent, that J. W. Friend died in 1909, since which time his estate has owned the interest as above. The plaintiff claims demurrage from April 1, 1907, to April 1, 1910, under the following tariff: "Rule 1. (b) When cars are interchanged with

minor railroads or industrial plants who perform their own switching service and who are not members of a car service association, they handling cars for themselves or for other parties, an allowance will be made for the time necessary in their switching service in addition to the regular time allowed for loading or unloading as per paragraph (a), (which provides for forty-eight hours free time)."

"Cars interchanged with minor railroads, etc., are to be recorded as placed at the first 8 a. m. after actual placement on interchange track * * * the free time to be calculated from the first 7 a. m. after the recorded placement.

"If cars are delivered loaded and are unloaded and reloaded and returned to interchange tracks loaded, an additional forty-eight (48) hours for loading will be allowed.

"All cars returned to interchange tracks by 4 p. m. are to be recorded as released at 6 p. m. of the previous day."

From April 1, 1910, through the remainder of the time involved in this suit, tariffs were in effect fixing demurrage charges, providing as follows:

"Rule 3.—Computing Time.—(f) On cars to be delivered on interchange tracks of industrial plants performing their own switching service time will be computed from the first 7 a. m. following actual or constructive placement on such interchange tracks until return thereto."

"Rule 4.—Notification.—(c) Delivery of cars upon private or industrial interchange tracks, or written notice to consignee of readiness to so deliver, will constitute notification thereof to consignee."

[1] There was no dispute as to the facts above stated. The defendant claims that this case should have gone to the jury for the reason that the plaintiff in its statement of claim alleges that the cars were delivered on the interchange track under an agreement with the Clinton Iron & Steel Company, and it was a disputed fact as to whether there was such an agreement with the Clinton Iron & Steel Company. There was no dispute of the fact that the cars in question were placed upon the interchange track and taken from the interchange track by the South Shore Railroad Company, and that this had continued for a great many years, and whether or not this was done under an agreement with the Clinton Iron & Steel Company would depend upon the question whether the South Shore Railroad Company in accepting the delivery of the cars on the interchange track was the agent of the Clinton Iron & Steel Company. In fact every phase of this case, no matter how you view it, raises the one question, Was the South Shore Railroad Company an independent common carrier, or was it merely the agent or plant equipment of the Clinton Iron & Steel Company?

[2] Another question was raised by counsel on the argument for motion for new trial, that the reasonableness of the demurrage charges was denied by the defendant in its affidavit of defense and no evidence offered by the plaintiff as to the reasonableness of those charges. The fact as to the time the cars were detained over the free time, and the number of cars so detained, are not in dispute; they are admitted. The only possible application which the denial of reasonableness could have to this case is that a dollar a day was not a reasonable charge. The act of May 24, 1907 (P. L. 229), recognized the reasonableness of a dollar a day for demurrage charges and 48 hours of free time, and in the absence of any evidence on the part of the defendant that this was not a reasonable charge, there was no question to submit to the jury.

It appears to me that this case is identical with the case of the Penna. R. R. Co. v. Josephine Furnace & Coke Co., 247 Pa. 99, 93 Atl. 22, and in view of that conclusion, any extended

discussion of the law applicable to this case is unnecessary.

Verdict for plaintiff for \$1,931.45 by direction of the court and judgment thereon. Defendant appealed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKE, JJ.

George H. Calvert, Donald Thompson, George B. Berger, and William A. Wilson, all of Pittsburgh, for appellant. Thomas Patterson, of Pittsburgh, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the learned court below overruling the defendant's motions for a new trial and for judgment non obstante verdicto.

(258 Pa. 366)

MANTELL v. ECHARD et al.

(Supreme Court of Pennsylvania. May 22, 1917.)

1. APPEAL AND ERROR \S 305 — FINDING — REVIEW.

In an action on a note, where, notwithstanding strongly persuasive evidence that it was a forgery, the jury found that it was not, and returned a verdict for plaintiff, the Supreme Court, on appeal, would not disturb the finding, where no complaint was made of the court's refusal to grant a new trial.

2. EVIDENCE \S 374(1) — ACTION ON NOTE — EVIDENCE.

In an action on a note, where the defense was that the note was a forgery, it was admissible in evidence, where its execution was testified to by a subscribing witness.

Appeal from Court of Common Pleas, Fayette County.

Assumpsit on a note by Frank Mantell against T. B. Echard and W. A. Bishop, executors of the last will of Alexander B. Morton, deceased. Verdict for plaintiff for \$6,445, and judgment thereon, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, STEWART, FRAZER, and WAL-LING, JJ.

H. L. Robinson, of Uniontown, for appellants. Charles A. Tuit, of Uniontown, for appellee.

PER CURIAM. [1] The defense in this case was that Alexander B. Morton had not signed the note upon which plaintiff brought suit. It was admitted in evidence upon the testimony of G. Mantello, that he had signed it as a subscribing witness to its execution at the request of the decedent. In the face of strongly persuasive evidence that the note was a forgery, the jury found that it was not; but on this appeal we cannot disturb their finding, because no complaint is made of the court's refusal to grant a new trial.

[2] The single assignment of error is to the admission of the note in evidence. Under Mantello's testimony, its execution by the de-

ceased was for the jury, and to them the single issue was submitted as to the genuineness of A. B. Morton's signature. In the light of strong evidence submitted by the defense, followed by a charge directing the attention of the jury to it, the verdict may well be regarded as an untrue finding; but there is no assignment asking us to disturb it, and the judgment on it must therefore be affirmed.

Judgment affirmed.

(258 Pa. 378)

ALEXANDER v. AMERICAN EXPRESS CO.
(Supreme Court of Pennsylvania. May 22, 1917.)

1. MUNICIPAL CORPORATIONS — 705(10)—INJURY ON STREET — CONTRIBUTORY NEGLIGENCE.

A pedestrian attempting to cross a street and who saw and avoided a motor truck, but in doing so stepped backward in front of the street car approaching from the opposite direction, and which he did not see, but could have avoided had he looked, was guilty of contributory negligence.

2. MUNICIPAL CORPORATIONS — 706(5)—OPERATION OF MOTOR TRUCK—NEGLIGENCE—EVIDENCE.

In an action against the owner of an automobile truck to recover for the death of plaintiff's husband, who in avoiding it stepped in front of a street car and was killed, evidence held not to show that the truck was being driven recklessly or at an excessive speed.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Eva Alexander against the American Express Company, to recover damages for the death of plaintiff's husband. Verdict for plaintiff for \$3,500, and judgment thereon, and defendant appeals. Reversed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, and FRAZ-
ER, JJ.

John Lewis Evans and Thomas De Witt Cuyler, both of Philadelphia, for appellant. William A. Carr, W. Horace Hepburn, and Sidney L. Krauss, all of Philadelphia, for appellee.

POTTER, J. Charging that the death of her husband was due to the negligence of a chauffeur in the employ of the defendant, the plaintiff brought this action to recover damages. It appears from the record that on July 28, 1915, John Alexander, the husband of plaintiff, was walking westwardly on the south side of Spring Garden street approaching Fifteenth street. At the time two vehicles on Fifteenth street were approaching the crossing from opposite directions. A south-bound trolley car was crossing Spring Garden street, and defendant's motor truck was coming north. The testimony shows that Alexander stepped from the east curb of Fifteenth street to the crossing, and walked westwardly over the trolley track, and reached a point between the west

rail of the track and the curb. The testimony is conflicting as to whether he stopped and remained at this point for any appreciable length of time. At any event, defendant's motor truck was then approaching, moving northwardly on the left-hand side of Fifteenth street. When it was some ten feet south of the crossing, where he stood, Alexander stepped backward directly in the path of the south-bound trolley car, and was struck by the right-hand corner of the fender, fell under the car, and received the injuries which resulted in his death. Upon the trial, the jury were instructed, by the affirmation of points to which no objection was made, that the defendant's chauffeur had, at the time, the right to drive on the west side of the street, where he was when the accident happened. Binding instructions in favor of defendant were refused, and the case was submitted to the jury, who found a verdict in favor of plaintiff, upon which judgment was duly entered. Defendant has appealed, assigning for error the overruling of its motion for judgment non obstante veredicto.

[1, 2] It must be remembered that the motor truck did not strike Alexander. The immediate cause of his death was his own act in stepping backward directly in the way of the trolley car. The trial judge instructed the jury that there was no evidence in the case that the motor truck was being driven recklessly or at an excessive rate of speed. Alexander saw it approaching him, so that no further warning to him was necessary. Had there been nothing in his way, when he stepped backward, it is likely that he would have had no real cause of complaint against the driver of the motor truck. He evidently did not see or hear the trolley car, although it was within plain sight, and almost within touch. It is difficult to see in the evidence anything from which negligence upon the part of the chauffeur can fairly be inferred. He had his truck under control, and brought it to a stop within a few feet; he did not run against Mr. Alexander, and the inference that he would have done so had Alexander remained standing where he was is not justified. It is quite as probable that he would have been able to stop his machine or turn it to one side. On the other hand, the evidence of contributory negligence upon the part of Alexander is clear. He paid no attention to the approaching trolley car, but stepped backward directly in its path. Had he raised his eyes for an instant and looked to the north, he would have seen the trolley car, and common prudence would then have caused him to pass directly to the curb, or if he thought the motor truck was too near for that, he could have taken a few steps directly to the north, and thus have avoided contact with either motor truck or trolley car. There was no occasion for him to step directly backward into the right-hand corner

of the fender of the car. Nothing but failure to observe its presence can account for his action in that respect. The conclusion is irresistible that failure to look for the approaching trolley car, with which he collided, was the direct cause of the injury. Mr. Alexander attempted to cross the street between two vehicles, both in plain sight, approaching from opposite directions, one of which he saw and avoided, and one of which he evidently did not see, but which he could readily have avoided, if he had looked at it, before stepping directly in its way.

The assignment of error is sustained, the judgment is reversed, and is here entered for the defendant.

(258 Pa. 352)

KORMAN et ux. v. TRAINER et al.
(Supreme Court of Pennsylvania. May 22, 1917.)

1. VENDOR AND PURCHASER ⇨107 — CONSTRUCTION OF CONTRACT—TERMINATION BY PURCHASER.

Where an agreement for the sale of realty covenants that the down deposit shall be forfeited to the vendor as liquidated damages in case of the purchaser's default, but does not clearly provide that the purchaser may terminate it by his own default, such effect will not be given to it.

2. VENDOR AND PURCHASER ⇨314(2)—ACTION FOR PURCHASE PRICE—DEFENSES.

In an action for the balance of the purchase price due under a contract providing for the payment of \$200 at the signing of the agreement, to be forfeited as liquidated damages upon the purchaser's default in payment of the purchase price, and for the payment of the balance at the time of settlement within 30 days, such time to be of the essence of the agreement, an affidavit of defense, alleging that the vendor had no other remedy than the retention of the deposit money, was insufficient.

3. VENDOR AND PURCHASER ⇨314(2) — ACTION FOR PURCHASE PRICE—AFFIDAVIT OF DEFENSE—TIME AS ESSENCE OF CONTRACT.

In such action, an affidavit of defense, alleging that as time was of the essence of the contract, the contract was at an end upon the purchaser's failure to pay the balance of the purchase price and accept a deed, and that the vendor had no other rights under the contract, was insufficient.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Jacob Korman and wife against Joseph C. Trainer and John A. Trainer, trading as Edward Trainer, to recover the balance of the purchase price under an agreement for the sale of realty. From a judgment for plaintiffs for want of a sufficient affidavit of defense, defendants appeal. Affirmed.

The facts appear from the following opinion by Shoemaker, J., in the common pleas:

In response to the request of the Supreme Court, this opinion is filed, giving the reasons upon which the court entered judgment in this case.

This action was brought to recover the balance of the purchase money claimed by plaintiffs to be due to them by the defendants under an agreement for the sale of real estate.

By an agreement dated November 2, 1916, plaintiffs covenanted to sell defendants two lots situated in the city of Philadelphia, for the sum of \$3,000, to be paid, \$200 at the signing of the agreement, "which deposit shall be forfeited to the said party of the first part" (the plaintiffs) "as liquidated damages in case of the default by the party of the second part" (the defendants) "in the performance of this agreement, and the balance of the purchase money as follows: \$2,800 to be paid in cash at the time of settlement." And the parties bound themselves, their heirs, executors, and administrators for the faithful performance of the agreement within 30 days from the date thereof. "Said time to be the essence of this agreement."

The \$200 was paid about November 2, 1916, and on November 28, 1916, the defendants notified plaintiffs that they would not consummate the purchase, and would refuse to accept plaintiffs' deed for the premises. On December 2, 1916, plaintiffs tendered to defendants a sufficient deed in compliance with all the conditions contained in said agreement, and demanded the balance of the purchase money, which defendants refused to accept or pay the purchase money and continued so to do, although plaintiffs were and are ready and willing to perform their part of said agreement, and tendered a deed of the premises at the time the statement was filed.

The defendants in their affidavit of defense averred that the lots mentioned in the agreement were vacant and unimproved, and that the clause in the agreement, "which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the party of the second part in the performance of the terms of this agreement," limited the plaintiffs' rights, so that they had "no other remedy in law or equity than the retention of the said \$200 deposit money;" that the agreement provided a remedy for the vendors in case of breach which was meant to be exclusive, and, time being the essence of the agreement, it was at an end upon failure of vendees to pay the balance of the purchase money and refusal to accept the deed; the forfeiture was by way of liquidated damages; that the effect of said forfeiture clause is a release and discharge of vendees from any and all subsequent liability under the agreement, and the large sum forfeited, \$200, showed such intention of the parties.

In support of a rule for judgment for want of a sufficient affidavit of defense, the plaintiffs assigned the following reasons:

(1) "The clause relating to the forfeiture of deposit is for the benefit of the plaintiffs' vendor."

(2) "The plaintiffs have their choice of resorting to the forfeiture clause or insist upon their right to consummate the sale and receive the purchase money from defendants."

(3) "The defendants, being in default, cannot set up their own wrong to work a forfeiture of their contract."

In our judgment, the questions raised by this record have been determined by *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982, and the long line of cases cited in the opinion of Judge Porter, of the Superior Court, upon which opinion the judgment was affirmed by the Supreme Court.

[1] It is settled by those cases that in a covenant such as contained in the agreement in this case, which does not provide by clear, precise, and unequivocal language, that the purchaser may terminate it by his own default, such effect will not be given it. The presumption is that the forfeiture clause is for the benefit of the grantor and enforceable at his election. Without such election and actions, the purchaser will not be relieved from his obligation to pay.

[2, 3] In *Ruane's Est.*, 25 Pa. Dist. R. 347, the orphans' court of this county, in a case al-

most identical with the one at bar, followed *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982, and held the vendee's estate liable, upon an agreement for the balance of the purchase money.

The argument of the defendants' counsel that the large amount of the deposit showed the intention of the parties to restrict the vendors to that sum is not convincing, and is not so plain as to unavoidably sustain such a construction. On the contrary, it is not an uncommon practice to require a deposit of the proportions made in this case, as appears in *Ruane's estate*.

The lower court made absolute plaintiff's rule for judgment for want of a sufficient affidavit of defense. Defendant appealed.

Argued before BROWN, C. J., and MESTREZAT, MOSCHZISKER, FRAZER, and WALLING, JJ.

Henry A. Hoefler, of Philadelphia, for appellants. Henry Arronson, Frederick J. Shoyer, and Martin Feldman, all of Philadelphia, for appellees.

PER CURIAM. Under *Cape May Real Estate Company v. Henderson*, 231 Pa. 82, 79 Atl. 982, the affidavit of defense was properly regarded as insufficient by the learned court below, and the judgment is therefore affirmed.

(258 Pa. 342)

In re **HOFFMANN.**

Appeal of **COMMONWEALTH.**

(Supreme Court of Pennsylvania. May 22, 1917.)

1. INSANE PERSONS §63—MAINTENANCE BY COMMONWEALTH—REIMBURSEMENT—STATUTE.

Under Act June 1, 1915 (P. L. 661), authorizing the commonwealth to collect the cost of maintenance of persons in institutions supported wholly or partly by the state, the amount paid by the commonwealth for the maintenance of a lunatic is not a mere gratuity, but is based on an implied contract on the part of the lunatic to reimburse those who have supplied his necessities.

2. INSANE PERSONS §70—MAINTENANCE OF LUNATIC—CLAIM.

The commonwealth's claim for support of a lunatic in a state institution may properly be asserted in proceedings before an auditor to distribute a balance in the hands of the lunatic's guardian.

3. INSANE PERSONS §63—MAINTENANCE—REIMBURSEMENT—STATUTE.

Where the cost of maintaining a lunatic in a state institution has been borne partly by the commonwealth and partly by the county poor district, and the district had been reimbursed in full by the lunatic's guardian, and the fund remaining in the hands of the guardian was less than the amount paid by the commonwealth for the lunatic's support, it should be awarded to the commonwealth, and not to the poor district under Acts June 13, 1836 (P. L. 548), § 33, and May 24, 1887 (P. L. 202).

Appeal from Court of Common Pleas, Erie County.

From decree of the common pleas dismissing exceptions to the report of an auditor refusing to allow its claim against a fund in

the hands of the guardian of Frank Hoffmann, a weak-minded person, and awarding the balance to the poor district of Erie county, the Commonwealth appeals. Reversed, and balance of fund awarded to Commonwealth.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

John Hyatt Naylor, Sp. Atty., of Norristown, and Francis Shunk Brown, Atty. Gen., for the Commonwealth.

FRAZER, J. The Commonwealth appeals from a decree of the common pleas, dismissing exceptions to the report of an auditor, refusing to allow its claim against the fund in the hands of the guardian of a weak-minded person.

Upon petition to the court of common pleas of Erie county, Frank Hoffmann was adjudged a weak-minded person, and C. D. Higby, Esq., appointed guardian, and, on April 30, 1906, Hoffmann was entered on the books of the poor district of Erie county as a pauper and committed to the state hospital for the insane at Warren, as an indigent patient, and has since that time been continuously confined in that institution. During the period covered by his confinement in the hospital, the poor district of Erie county paid to the asylum toward his support the sum of \$1.75 per week, and the commonwealth paid a total sum of \$1,092.07. The poor district was reimbursed from time to time out of funds coming into the hands of the guardian, so that, at the time of the audit, there was a balance of only \$37.25 due the district, which sum the attorney for the commonwealth agreed should be first paid out of the fund. In 1914 the guardian filed his first and final account, showing a balance of \$861.88 in his hands for distribution. An auditor, appointed to pass on claims and make distribution of the fund, rejected the commonwealth's claim, and the court, after dismissing exceptions, made absolute a rule on the guardian to show cause why he should not turn over the balance in his hands to the poor district of Erie county, under the provisions of the Acts of June 13, 1836 (P. L. 548) § 33, and May 24, 1887 (P. L. 202) § 1, authorizing the poor directors of any district, upon which a pauper has become a charge, to sue for and recover property of such pauper, and take charge of the same and apply it to his maintenance, and upon his death pay over the unexpended balance to his legal representatives.

[1] The act of June 1, 1915 (P. L. 661), legislation of a considerably later date than the acts above referred to, authorizes the collection by the commonwealth of the cost of maintenance of persons in institutions supported in whole or part by the state, and em-

powers the court of common pleas of the county of the residence of any inmate of a state asylum, upon application of the Attorney General, to make an order for the payment of maintenance against the trustee or guardian in charge of the estate, or against any person responsible for the support of such inmate. Section 6 gives the claims of the commonwealth precedence over general creditors in the distribution of the estate of the person so maintained. Section 7 provides that, where there are claims both on behalf of the commonwealth and a county or poor district, and the funds are insufficient to pay in full, such claims shall be paid pro rata. The act also specifically applies to the collection of claims due at the time of its passage, as well as those to become due thereafter. Upon this latter provision, we held in *Arnold's Est.*, 253 Pa. 517, 98 Atl. 701, the amount paid by the state for the support and maintenance of a lunatic was not a mere gratuity, but based on an implied contract on the part of the inmate to reimburse those who have supplied his necessities, and that the implied obligation arose in favor of the commonwealth, it having paid the cost of maintenance, and not in favor of the hospital whose claim had been fully paid, and there said (253 Pa. 521, 98 Atl. 702):

"If an individual should pay the hospital for the maintenance of a patient, such individual would undoubtedly be entitled to reimbursement from the lunatic's estate. In like manner and for the same reason, in the present case, the state is entitled to reimbursement. As we said above, the hospital has been paid, and can have no claim against the lunatic or his estate. If there is an implied contract to repay the sums expended for the lunatic's benefit, it is a contract with the state, not with the hospital, which had expended nothing except what it had received from the county and state for that purpose."

[2] The court below, beyond question, had jurisdiction under this legislation to make the award, and the proper time and place to present the commonwealth's claim was in the proceedings to distribute the estate of the indigent person.

[3] It was error, however, to award the entire fund to the poor district, whose claim had been paid in full. The provisions of section 6, above referred to, expressly contemplate the presenting of the commonwealth's claim in proceedings to distribute the estate of the person maintained, and by section 7 the claim of the poor district was placed on an equality with that of the commonwealth. In fact, the poor district in this case has no cause to complain, as payment in full has been made of its claim by consent of the commonwealth, whereas, under section 7, it is entitled to share only pro rata in the fund.

The decree of the lower court is reversed, and the balance of the fund in the hands of the guardian, being less than the amount due the commonwealth, is awarded to the com-

monwealth to reimburse it for money paid for maintenance and support of Frank Hoffmann.

MEMORANDUM DECISIONS

SMITH v. DOTEN. (Supreme Judicial Court of Maine. July 21, 1917.) On Motion from Supreme Judicial Court, Androscoggin County, at Law. Action by Winnie B. Smith against Ellen B. Doten. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled. Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, and MADIGAN, JJ. McGillicuddy & Morey, of Lewiston, for plaintiff. Newell & Woodside, of Lewiston, for defendant.

PER CURIAM. This is an action to recover damages for alleged fraudulent representations in the sale of a farm and certain personal property thereon located in South Lewiston. The jury returned a verdict for the plaintiff in the sum of \$1,000. The case is before the court on the defendant's general motion for a new trial. The evidence discloses many details as to the acreage, use and former occupation of the farm in question, the location of its several parts, the amount of hay cut in previous years, the taxes, and the conferences leading up to the sale, further reference to which is unnecessary. It is sufficient to say that a careful reading of the evidence discloses no error in the finding of the jury. The case presented questions to the jury peculiarly within the scope of their duty, and they had the opportunity to see the witnesses and weigh their testimony, and consider its value. No reason appears to justify disturbing the verdict. Motion overruled.

COONEY v. RUSHMORE et al. (No. 117.) (Court of Errors and Appeals of New Jersey. June 18, 1917.) Appeal from Supreme Court. Petition under the Workmen's Compensation Act by Michael J. Cooney against Samuel W. Rushmore and others. Petition dismissed, and petitioner brought certiorari to the Supreme Court, where order and judgment were set aside (see 100 A. 692), and defendants appeal. Affirmed. Kalisch & Kalisch, of Newark, for appellants. Fort & Fort, of Newark, for appellee.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Bergen in the Supreme Court.

DURKIN v. BOARD OF FIRE COM'RS OF CITY OF NEWARK. (No. 107.) (Court of Errors and Appeals of New Jersey. June 18, 1917.) Appeal from Supreme Court. Separate proceedings in certiorari by Michael J. Durkin and others against the Board of Fire Commissioners of the City of Newark. The cases were consolidated and argued together. Writs dismissed (89 N. J. Law, 468, 99 Atl. 432), and plaintiff named appeals. Affirmed. Frank E. Bradner, of Newark, for appellant. Harry Kalisch, of Newark, for appellee.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

FARNUM et al. v. PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES, ETC. (No. 189.) (Court of Errors and Appeals of New

Jersey. July 13, 1917.) Appeal from Court of Chancery. Suit by J. Edward Farnum and others, administrators c. t. a. of Paul Farnum, against the Pennsylvania Company for Insurance on Lives and Granting Annuities. From a decree of the Chancery Court (99 Atl. 145), for complainants, defendant appeals. Affirmed. Grey & Archer, of Camden, for appellant. McDermott & Enright of Jersey City, for appellees.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Backes.

FENNAN v. ATLANTIC CITY et al. (No. 6.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From a judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

FENNAN v. ATLANTIC CITY et al. (No. 7.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From a judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

FENNAN v. ATLANTIC CITY et al. (No. 8.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From a judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

FENNAN v. ATLANTIC CITY et al. (No. 9.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From a judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

FENNAN v. ATLANTIC CITY et al. (No. 10.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From a judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

sey. July 19, 1917.) Appeal from Supreme Court. William H. Fennan was convicted of violations of an ordinance of Atlantic City. From judgment of the Supreme Court, affirming judgment of conviction (see 97 Atl. 150), defendant appeals. Affirmed. Bourgeois & Coulomb, of Atlantic City, for appellant. Harry Wootton, of Atlantic City, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

GRANDI et al. v. BRUNETTI. (Court of Errors and Appeals of New Jersey. April 9, 1917.) Appeal from Supreme Court. Action by Antonio Grandi and others against Nicola Brunetti. Judgment for plaintiffs was affirmed by the Supreme Court, and defendant appeals. Affirmed. In the Supreme Court the following per curiam was filed: "The reasons for appeal present for our determination either matters of fact, which are not brought before us for consideration on a merely appellate proceeding, or matters of law which have long been settled in this state, and settled adversely to the contention of appellant's counsel. The judgment under review will be affirmed." Themistocles M. Ungaro, of Newark, for appellant. Gaetano M. Belfatto, of Newark, for appellees.

PER CURIAM. The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

MERKEL v. MERKEL. (No. 104.) (Court of Errors and Appeals of New Jersey. June 18, 1917.) Appeal from Court of Chancery. Bill by Florence I. Merkel against William Merkel. From an order of the Chancery Court (99 Atl. 924), discharging a restraining order, plaintiff appeals. Affirmed. Herbert C. Gilson and William C. Gebhardt, both of Jersey City, for appellant. Raymond, Mountain, Van Blarcom & Marsh, of Newark, for appellee.

PER CURIAM. This is an appeal from an order of the Court of Chancery, discharging a restraining order that was in effect a preliminary injunction. The categorical denial by the defendant of the misrepresentation on which the bill is founded would of itself justify the order that has been appealed from. The fact that the Vice Chancellor, upon weighing the evidence, found for the respondent, clearly cannot weaken the respondent's case. The correctness of the Vice Chancellor's conclusions as to this is not now under review, as it would be if the appeal were from a decree made upon final hearing. The order is affirmed.

NEW YORK, S. & W. R. CO. v. NEWBAKER. (No. 76.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. Proceeding under the Workmen's Compensation Act by Charles J. Newbaker against the New York, Susquehanna & Western Railroad Company, employer. From a judgment of the Supreme Court, the employer appeals. Reversed. George M. Shipman, of Belvidere, and Collins & Corbin, of Jersey City, for appellant. William H. Morrow, of Belvidere, for appellee.

PER CURIAM. The judgment under review herein should be reversed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the case of George A. Rounsaville v. Central Railroad Co. of New Jersey, 101 Atl. 182, No. 81 of the November term, 1915, recently decided in this court upon the authority of the decision of the Supreme Court of the

United States in the case of Erie Railroad Co. v. Winfield (opinion by Mr. Justice Van Devanter) 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1067.

STATE v. VREELAND. (No. 140.) (Court of Errors and Appeals of New Jersey. June 18, 1917.) Error to Supreme Court. Harry A. Vreeland was convicted of desertion and willful refusal or neglect to provide for and maintain his wife and child. The conviction was affirmed by the Supreme Court on appeal (99 Atl. 57), and defendant brings error. Affirmed. John A. Hartpence, of Trenton, for plaintiff in error. Martin P. Devlin, of Trenton, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

SUBURBAN INV. CO. v. STATE BOARD OF ASSESSORS. (Court of Errors and Appeals of New Jersey. June 18, 1917.) Appeal from Supreme Court. Certiorari by the Suburban Investment Company against the State Board of Assessors to review assessment of taxes. Writ dismissed in Supreme Court, and prosecutor appeals. Judgment affirmed, writ dismissed, and action of Board of Assessors affirmed. Franklin W. Fort, of Newark, for appellant. Francis H. McGee, of Trenton, and Herbert Boggs, Asst. Atty. Gen., for appellee.

PER CURIAM. The judgment is affirmed, for the reasons stated in the following memorandum of the Supreme Court: "The Suburban Water Company was incorporated under the laws of this state in 1912, and subsequently changed its name to the Suburban Investment Company, the prosecutor in this case. The facts are fully set out in the per curiam opinion in New Jersey Water Company against the same defendants, decided at the present term. 88 N. J. Law, 595, 97 Atl. 153. The prosecutor was assessed \$560.80 for state uses on \$560,800, amount of capital stock issued and outstanding January 1, 1914, as reported by the prosecutor. The only specific reason assigned by the prosecutor for setting aside the assessment is that the state board of assessors made and levied the tax upon the prosecutor under the provision of chapter 185 of the Laws of 1896 and the supplements thereto and amendments thereof, instead of under the act of 1900, discussed in the per curiam opinion above referred to. The return made by the prosecutor to the state board of assessors sets forth the amount of its capital stock issued and outstanding on January 1,

1914, under section 3 of the Corporation Franchise Act of April 18, 1884, as said section was amended in 1906 (P. L. p. 31) as above stated. The prosecutor's return reports that its business is 'investment in and managing corporations,' and that it is not engaged in manufacturing or mining within this state. The situation of the prosecutor on December 31, 1913, was that of an inactive corporation holding no special franchise. In harmony with the views expressed in the per curiam opinion filed in No. 225, the tax was properly assessed in the present case. The writ will be dismissed, and the action of the state board of assessors affirmed, with costs."

THOMAS v. THOMAS. (No. 27.) (Court of Errors and Appeals of New Jersey. June 18, 1917.) Appeal from Court of Chancery. Action by Georgina W. Thomas against William J. Thomas. Decree of the Court of Chancery, dismissing petition, advised by Advisory Master Roe, and plaintiff appeals. Affirmed. John H. Sheridan, of West Hoboken, for appellant. William C. Cudlipp, of Jersey City, for appellee.

PER CURIAM. From the testimony taken before the advisory master we reach the same conclusion that he did, viz. that the petition of the appellant should be dismissed. The decree of the Court of Chancery is affirmed.

WEST JERSEY TRUST CO. v. PHILADELPHIA & R. RY. CO. (No. 72.) (Court of Errors and Appeals of New Jersey. July 19, 1917.) Appeal from Supreme Court. Proceeding under the Workmen's Compensation Act by the West Jersey Trust Company, administrator of Amos B. Calloway, deceased, against the Philadelphia & Reading Railway Company. From a judgment of the Supreme Court (88 N. J. Law, 102, 95 Atl. 753), reversing a judgment denying compensation, defendant appeals. Reversed. Edward L. Katzenbach, of Trenton, for appellant. Ott & Carr, of Camden, for appellee.

PER CURIAM. The judgment under review herein should be reversed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the case of George A. Rounsaville v. Central Railroad Co. of New Jersey, 101 Atl. 182, No. 81 of the November term, 1915, recently decided in this court, upon the authority of the decision of the Supreme Court of the United States in the case of Erie Railroad Co. v. Winfield (opinion by Mr. Justice Van Devanter) 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1067.

